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PROFESSOR WILLIAMS AND THE EDUCATION DEBATES IN STATE CONSTITUTIONAL LAW

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INTRODUCTION

Professor Robert "Bob" Williams, whom The Honorable Jeffrey Sutton once aptly referred to as the "Dean of State Constitutional Law,"[1] has announced a well-earned retirement, leaving the world of state constitutional law teaching and scholarship without its most prominent and influential intellectual voice. Although it is clear based on mere citations to Professor Williams's work that he has influenced nearly every debate—and every scholar—in state constitutional law,[2] this Essay contribution to the Festschrift in Professor Williams's honor outlines two strands of Professor Williams's work that have greatly influenced my own work.

First, Professor Williams's work fleshing out the tendency of state supreme courts to interpret their constitutional provisions to "converge" with or "diverge" from federal constitutional doctrine sets the stage for some of the most important ongoing state constitutional debates on education. State constitutions universally mandate the provision of education to state residents, and most states explicitly require that such provision be "equal," "uniform," or "common."[3] Others implicitly require equality by mandating an "efficient" or "thorough" education, or a "free" one.[4] The temptation to craft state equality doctrine consistent with federal equality doctrine is clear, and most states have given in to that temptation.

Professor Williams was an early critic of that approach, dubbing the most unreflective form of the practice "lockstepping." His ongoing work

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1. Jeffrey S. Sutton, *Foreword: The Enduring Salience of State Constitutional Law*, 70 RUTGERS U. L. REV. 791, 791 (2018).

2. Westlaw's Secondary Sources database yields over 5,000 results to the search term (Robert /3 Williams), and a significant proportion of these citations are to Professor Williams's work.

3. *See infra* note 13 and accompanying text.

4. *See infra* note 13 and accompanying text.

illustrated to budding state constitutional scholars like me that convergence could take many forms, some of which Professor Williams elucidated, and others of which he left for the next generation of scholars to unearth. Professor Williams also paved the way toward understanding what state supreme courts should do when faced with provisions they could not possibly lockstep—those unique to state constitutionalism, such as the affirmative-duty education clauses that form much of the basis of my own state constitutional work.

Second, Professor Williams was among the most prominent state constitutional scholars to focus academic attention on matters of constitutional design and structure. He highlighted areas in which state and federal constitutions appeared to converge, such as bicameralism and presentment, and interrogated why that must, or should, be so. But he also paved the way toward further analyses of constitutional drafting practices important to both state constitutional interpretation and the design of state constitutional amendments and revisions, work that caused me to conceptualize constitutional choice more broadly.

The remainder of this Essay discusses these two strands of Professor Williams's work and their influence on my own.

I. DOCTRINAL CONVERGENCE AND DIVERGENCE

A good bit of Professor Williams's scholarly work has focused over the years on the idea of convergence and divergence in state and federal constitutional norms, and this work has both built on and influenced the work of many other scholars.[5] One strand of this work focuses on state and federal *doctrinal* convergence and divergence. In this context, "convergence" means to describe the development of state constitutional

5. *See, e.g.*, ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 209–24 (2009) (reviewing the idea of doctrinal convergence, and applying it to equality provisions); James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 766 (1992) (holding out the uncritical adoption of federal precedent as evidence of the failure of state constitutional discourse in the states); Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 ROGER WILLIAMS U. L. REV. 79, 80 (1998) (critiquing state presumptive adoption of the federal separation of powers doctrine); G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. L. 329, 331 (2003) (calling into question convergence between state and federal structural constitutional doctrines); Robert F. Williams, *A "Row of Shadows": Pennsylvania's Misguided Lockstep Approach to Its State Constitutional Equality Doctrine*, 3 WIDENER J. PUB. L. 343, 346–48 (1993) (critiquing the lockstep adoption of federal equal protection doctrine in Pennsylvania); 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, 1016–17 (1997) (questioning the legitimacy of lockstepping).

doctrine to imitate, adopt, borrow, or copy federal constitutional doctrine, while "divergence" means to describe an independent state constitutional approach.[6] Due to the orientation of the field toward state constitutional independence,[7] much of the work in this area has focused on doctrinal divergence, attempting to articulate justifications for when state courts should diverge from federal doctrine in cases where both documents regulate similar matters.[8] However, Professor Williams's work has focused as much on doctrinal convergence, attempting to better understand it and ascertain where convergence may and may not be warranted. Much of Professor Williams's work in this area focused heavily on state judicial interpretations of state constitutional provisions with federal analogues, such as state equal protection and uniformity clauses and state search and seizure clauses, the most prominent doctrinal areas in which convergence is generally applied in state courts.[9]

Through this work, Professor Williams helpfully taxonomized four forms of doctrinal convergence.[10] These forms ranged from the "unreflective" adoption of both the meaning of a similarly worded constitutional provision and its application; to the more "reflective adoption," case-by-case, of the meaning and/or application of the federal provision; to what Professor Williams termed "prospective lockstepping," which involves not only adoption of the provision's federal meaning, but also a ruling that the federal test shall apply in all future cases under the relevant provision; to a more nuanced form of convergence, in which a state court "borrows" a test or form of reasoning from the federal courts, but not necessarily the meaning of the provision or its application.[11]

Professor Williams's work has mostly focused on provisions that can be found (at least analogously) in both the Federal Constitution and state

6. *See* James A. Gardner, *The Positivist Revolution That Wasn't: Constitutional Universalism in the States*, 4 ROGER WILLIAMS U. L. REV. 109, 109 (1998) (coining the term "doctrinal convergence"); *see also* Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1502–18 (2005) (reviewing the scholarship of doctrinal divergence and convergence). The more derisive term used to describe some forms of convergence is "lockstepping." *See id.* at 1504.

7. The umbrella term "New Judicial Federalism," which describes the theoretical approach of state constitutional independence initially spurred by the paring back of rights jurisprudence in the federal courts, captures this orientation. *See generally* G. Alan Tarr, *The Past and Future of the New Judicial Federalism*, 24 PUBLIUS 63 (1994).

8. *See* WILLIAMS, *supra* note 5, at 194; Williams, *supra* note 6, at 1501.

9. *See, e.g.*, WILLIAMS, *supra* note 5, at 209–24 (criticizing the lockstepping form of convergence in equal protection cases); Williams, *supra* note 6, at 1511–13 (discussing the prospective lockstep approach taken by some state supreme courts in search and seizure cases).

10. *See* Williams, *supra* note 6, at 1504–18 (defining the forms of convergence).

11. *Id.* at 1505–18.

constitutions, and in these cases, as Professor Williams has pointed out, convergence is the norm.[12] That norm is somewhat understandable, given the path-dependent nature of precedent in common law judicial systems, and the enormous influence that the Federal Constitution has on our civic knowledge. But Professor Williams has ably made the case that convergence—especially the unthinking kind that Professor Williams has dubbed "lockstepping"—is often indefensible, and many state courts have taken this point to heart.

However, some provisions of state constitutions have no federal analogues, and several of these unique provisions touch upon individual rights. The most prominent of these have been the education articles of state constitutions. Each of the fifty state constitutions has an education article, or one or more education clauses,[13] and a large body of scholarship examines these provisions, aiming to develop a states-specific doctrinal approach to them.[14] Some of this work focuses on the justiciability and remediability of the rights and duties these provisions purport to establish, and some of it on the quantitative and qualitative standards these provisions establish.[15] This work elucidates the defining feature of state constitutional education provisions: unlike anything in the Federal Constitution, they are a plausible source for positive rights.[16]

Like many others, I have used my own scholarship to extend the work that Professor Williams did, both in flagging the *sui generis* nature of

12. *See* WILLIAMS, *supra* note 5, at 194.

13. *See* R. CRAIG WOOD, EDUCATIONAL FINANCE LAW: CONSTITUTIONAL CHALLENGES TO STATE AID PLANS—AN ANALYSIS OF STRATEGIES 103–08 (3d ed. 2007) (setting forth the fifty state constitutional education articles/clauses); Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 311 (1991) (defining "education clause").

14. *See, e.g.*, Jonathan Feldman, *Separation of Powers and Judicial Review of Positive Rights Claims: The Role of State Courts in an Era of Positive Government*, 24 RUTGERS L.J. 1057, 1077 (1993); Helen Hershkoff, *Foreword: Positive Rights and the Evolution of State Constitutions*, 33 RUTGERS L.J. 799, 802 (2002); Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1186 (1999); Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1839 (2001); Helen Hershkoff, *Welfare Devolution and State Constitutions*, 67 FORDHAM L. REV. 1403, 1412 (1999); Burt Neuborne, *Foreword: State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 893 (1989).

15. *See* Scott R. Bauries, *Is There an Elephant in the Room?: Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions*, 61 ALA. L. REV. 701, 724 (2010). An early example is McUsic, *supra* note 13, at 326–27 (arguing for the designation of state content standards as a constitutional entitlement). Scholars of school finance use the term "education clause" to refer to the portion of the state constitution that enumerates a goal or obligation to establish and maintain an education system. *See, e.g.*, *id*. at 308–09.

16. *See* Robert F. Williams, *Introduction*, 24 RUTGERS L.J. 907, 909 (1993) ("Many of the persistent questions under state constitutions are concerned with positive rights.").

positive rights and duties provisions in state constitutions, and in laying the groundwork for a critique of state constitutional approaches that converge with or diverge from the approaches to the Federal Constitution.[17] My own approach has been to move away from the doctrinal questions and ask whether state courts are, or should be, conceptualizing rights similarly to their federal counterparts, but much of my thinking has been driven by Professor Williams's work, and by the work of those who have also been influenced by Professor Williams's work.

II. DESIGN DIVERGENCE

Professor Williams has also produced a large body of work on state constitutional design.[18] One important strand of this work deals with drafting practices. Within their covered legislative subjects, state constitutions often contain significant textual specification, both as to the lawmaking function in general and as to the accomplishment of enumerated policy ends.[19] This sort of "statutory detail" has subjected state constitutions to criticism and commentary, but it can be defended from a number of perspectives.[20]

Specification as to the legislative function in general tends to involve process-based limitations. State constitutions nearly ubiquitously include the bicameralism and presentment requirements familiar to federal constitutional law.[21] But there are also numerous other process-

17. A series of my papers tracks these issues to develop an overall theory of enforcement of state constitutional education provisions. *See generally* Scott R. Bauries, *A Common Law Constitutionalism for the Right to Education*, 48 GA. L. REV. 949 (2014); Scott R. Bauries, *The Education Duty*, 47 WAKE FOREST L. REV. 705 (2012); Scott R. Bauries, *State Constitutions and Individual Rights: Conceptual Convergence in School Finance Litigation*, 18 GEO. MASON L. REV. 301 (2011); Bauries, *supra* note 15.

18. *See, e.g.*, Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 173 (1983); *infra* notes 19–21, 23, 25–30.

19. *See* WILLIAMS, *supra* note 5, at 28–29 (introducing the idea of specificity in both procedure and policy requirements).

20. *See* FRANK P. GRAD & ROBERT F. WILLIAMS, 2 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: DRAFTING STATE CONSTITUTIONS, REVISIONS, AND AMENDMENTS 14–15 (2006) (reviewing the many critiques preferring "fundamental" to "legislative" matter in state constitutions).

21. ROBERT L. MADDEX, STATE CONSTITUTIONS OF THE UNITED STATES xxiv–xxvii (2d ed. 2006). Every state except Nebraska specifies that a bill must be approved by both legislative houses and presented to the governor for signature in order to become a law. Michael E. Libonati, *The Legislative Branch*, *in* 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM 37, 52 (G. Alan Tarr & Robert F. Williams eds., 2006). Nebraska has a unicameral legislature. Michael S. Dulaney, *A History and Description of the Nebraska Legislative Process*, NEB. COUNCIL OF SCH.

based limitations that can only be found in state constitutions. Among these are balanced budget requirements;[22] supermajority requirements, especially to pass revenue-raising measures[23] or measures imposing debt on the state;[24] prohibitions against "local" or "special" legislation;[25] single-subject rules for legislation;[26] and rules against altering a bill's purposes during the legislative process.[27]

Such provisions would seem at first blush to present no problems of judicial enforcement—a judge can easily determine whether a piece of legislation has a single subject or whether it was enacted by a supermajority, for example. But as Professor Williams has pointed out, states show different levels of willingness to enforce even specific, process-based limitations like these.[28] Often, these differences come down to whether a particular state's courts follow the "enrolled bill rule," which holds that the text of an enrolled bill, as passed and signed into law, is the only evidence that a court will consider of the legislature's compliance with procedural restrictions in the state constitution.[29] The legislature's adherence to process requirements in the state constitution rarely appears in the text of the enrolled legislation itself, so state courts utilizing the enrolled bill rule render some process-oriented specifications in state constitutions effectively non-justiciable.[30]

Specification may also be more substance-based, requiring or forbidding the pursuit or accomplishment of particular public policy goals. Prominent examples of such substance-based specifications are the

ADM'RS 1 (Sept. 2, 2002), https://legislative.ncsa.org/sites/default/files/media/Legislative-PDF/Neb.Legis.Process.pdf.

22. Typically, these take form as prohibitions against incurring debt. *See* Richard Briffault, *Foreword: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907, 915–16 (2003) (describing debt-limitation provisions).

23. *See* WILLIAMS, *supra* note 5, at 279 (discussing supermajority requirements in general); Briffault, *supra* note 22, at 931–32 (discussing supermajority requirements to pass certain revenue measures).

24. *See* Briffault, *supra* note 22, at 916–17 (discussing supermajority requirements as a means of limiting debt).

25. *See* WILLIAMS, *supra* note 5, at 277–79 (discussing provisions limiting local or special legislation).

26. *See id.* at 261–63 (discussing single-subject rules).

27. *See id.* at 263–67 (discussing alteration rules).

28. *See id.* at 267–77 (discussing enforcement).

29. *See* Williams, *supra* note 18, at 204, 204 n.155 (reviewing the disparate approaches to the enrolled bill rule and its alternatives among the states).

30. *Id.* at 204 n.155. As Professor Williams points out, restrictions on how many subjects a bill can address, the inclusion of a title, and other restrictions apparent in the text of the bill may be enforced, but restrictions on processes, such as prohibitions against changing the purpose of the bill during the legislative process, are outside the reach of courts following the strict enrolled bill rule. *See id.* at 204–05, 204 n.155.

common provisions prohibiting direct or indirect public subsidies to religious educational institutions.[31] These provisions do not require anything of the legislature. Rather, they preempt substantive legislation entangling religion with the state by enshrining an otherwise permissible (but certainly not required) policy choice in the state's foundational law. State constitutions contain many such provisions—some covering important and appropriate subjects, such as the extent to which state sovereign immunity is waived,[32] and others covering the irretrievably prosaic, such as the kinds of nets that one may use to catch fish in state waters.[33]

Another form of substance-based specification exists in state constitutions, however. Unlike the federal document, which largely contains enumerations of powers that Congress may or may not exercise, state constitutions contain provisions requiring state legislatures to legislate on certain subjects, often at a certain level of effort or qualitative sufficiency. Overwhelmingly, these substance-based specifications appear in affirmatively stated social welfare provisions, including state education articles and clauses.[34]

The dominant view of these provisions is as the sources of positive rights. Professor Williams's work in highlighting these provisions, along with the sustained work of several excellent scholars digging very deeply into their enforceability, have yielded a rich literature of positive rights under state constitutions.[35] My own work has been more concerned with the duty side of the right-duty correlative,[36] but this earlier work established the vital importance of positive right/duty provisions in distinguishing state from federal constitutional law, and it set the parameters for my own arguments. In addition, Professor Williams's work teasing out the unique process-based requirements in state legislative articles motivated me to inquire whether such process-based limitations on legislative discretion might work better than the typical

31. *E.g.*, KY. CONST. § 189 ("No portion of any fund or tax now existing, or that may hereafter be raised or levied for educational purposes, shall be appropriated to, or used by, or in aid of, any church, sectarian or denominational school."). More than three-fourths of state constitutions have such provisions. JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, & DEFENSES 4–85 to –86 (4th ed. 2006).

32. GA. CONST. art. I, § 2, para. 9.

33. FLA. CONST. art. X, § 16.

34. For a thoughtful analysis of non-education-related welfare provisions, see Neuborne, *supra* note 14, at 893–95.

35. *See supra* notes 14–16 and accompanying text.

36. *E.g.*, Bauries, *The Education Duty*, *supra* note 17.

vague quality terms of education clauses in providing judicially manageable standards for enforcement.[37]

III. CONCLUSION

My aim here was to review Professor Williams's contributions to my corner of state constitutionalism—the state constitutional law of education—and to show what an effective catalyst that Professor Williams's work was for this field of scholarship—in particular, my own scholarship—as a way of paying homage to a great scholar and citizen of the academic community. Professor Williams's work gave rise to a set of general state constitutional law questions that even now is expanding before our eyes. On the specific topic of education, Professor Williams's work has helped to set the terms for analysis and debate of the most important questions that many state supreme courts will ever consider. It is right and proper to honor this lifelong contribution, and I am honored to be able to do so. Thank you, Bob.

37. *See generally* Scott R. Bauries, *State Constitutional Design and Education Reform: Process Specification in Louisiana*, 40 J.L. & EDUC. 1, 4 (2011).