



**BEYOND RIGHTS, COURTS, AND THE U.S. FEDERAL  
CONSTITUTIONAL MODEL: ROBERT F. WILLIAMS AND THE  
STUDY OF STATE AND SUBNATIONAL CONSTITUTIONALISM**

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Bob Williams has been a long-time mentor and supporter for many of us who study state constitutions. Exceptionally gracious in welcoming young scholars to the field, he offers encouragement and assistance to all of us, regardless of the stage of our careers.<sup>1</sup> He has always gone out of his way in publications, conference presentations, and other forums to highlight and boost the work of other scholars who study state constitutions. He also goes to great lengths to put scholars in this area in contact with one another, thereby contributing to the camaraderie and collegiality that characterize the state constitutional law subfield. A wonderful companion at conferences in the United States and around the world, he has enlivened countless meals and gatherings of the growing community of scholars and jurists with an interest in state constitutions.

I will focus in my remarks on Bob's scholarship, with particular attention to four of the many ways he has charted new avenues for studying state constitutions. First, Bob has highlighted the importance of studying the full range of provisions found in state constitutions by encouraging scholars to take account of structural provisions along with the rights provisions that generally attract the most attention. Second, although he has written a number of influential articles examining judicial interpretation of state constitutions, he has been instrumental in directing scholars to study other state constitutional processes, especially amendment processes and constitutional revision commissions. Third, his research has been exceptionally useful in informing and guiding the work of state constitution-makers, especially as they grapple with

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1. It was at Bob's invitation that I submitted and published the first article I wrote on state constitutions. John Dinan, *Framing a "People's Government": State Constitution-Making in the Progressive Era*, 30 RUTGERS L.J. 933 (1999). It was also due to Bob's suggestion and encouragement that I began to embark on several comparative studies of subnational constitutions, leading to publication of my first article analyzing comparative subnational constitutionalism, once again in the *Rutgers Law Journal*. John Dinan, *Patterns of Subnational Constitutionalism in Federal Countries*, 39 RUTGERS L.J. 837 (2008).

whether to revise constitutions and what to include in them. Finally, he has been at the forefront of scholarly efforts to investigate subnational constitutions in other federal countries and to develop the field of comparative subnational constitutionalism.

#### STRUCTURAL PROVISIONS OF STATE CONSTITUTIONS

During the last several decades, as scholarly and public attention has been drawn to state constitutions primarily on account of their capacity to provide greater protection for rights than is available through the U.S. Constitution, Bob has nevertheless stressed the benefits of studying other structural provisions in state constitutions. Certainly, Bob has written widely about state civil rights and liberties guarantees that are in some cases framed similarly to provisions in the U.S. Constitution, but are in other cases worded quite differently, and in still other cases have no counterpart in the federal document.<sup>2</sup> Along with analyzing individual rights, however, Bob has taken important steps to highlight and direct scholars' attention to other state constitutional provisions. As he wrote in an article in the 1983 *William & Mary Law Review*:

The field of state constitutional law, like federal constitutional law, is by no means limited to cases involving individual rights. Numerous other areas of law involve the application of state constitutions. The structure and power of state and local governments, the state judicial system, taxation and public finance, and public education all are affected by the state constitution and its interpretation.<sup>3</sup>

Bob's recommendation that scholars should study the full range of state constitutional provisions has been heeded to a certain extent and turned out to be prescient, but it deserves renewed appreciation in the current era. Scholarly and public interest in state constitutions continues to focus primarily on state court decisions interpreting state bills of rights. Certainly, state courts have relied on rights provisions in issuing notable decisions requiring legal recognition of same-sex marriage, overturning restrictions on access to abortion, and protecting rights of

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2. See, e.g., Robert F. Williams, *Rights*, in 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM 7 (G. Alan Tarr & Robert F. Williams eds., 2006); Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1196 (1985).

3. Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 172 (1983).

criminal defendants. However, when we consider the state constitutional law disputes that are of most pressing interest in recent years, many of them are grounded in structural provisions of state constitutions. State courts are regularly called on to interpret separation of powers provisions and determine the balance of power between the legislative and executive branches<sup>4</sup> or between state and local governments.<sup>5</sup> In recent years, state courts have also issued important rulings interpreting election law provisions, with implications for drawing legislative districts and administering elections.<sup>6</sup> In these and other ways, Bob's counsel from the early 1980s to pay attention to state constitutional rights as well as structural provisions merits continued attention in the 2020s.

#### STATE CONSTITUTIONAL AMENDMENT AND REVISION PROCESSES

Although scholars generally focus on the way that state constitutions are interpreted by courts, and Bob has written influential articles that have informed judicial interpretation,<sup>7</sup> he has also stressed the importance of other processes of state constitutional development, including amendment and revision processes. Scholars studying the U.S. Constitution generally have little occasion to pay attention to the federal amendment process because the U.S. Constitution has been amended only 27 times. The U.S. Constitution is generally updated not through formal amendment processes, but rather through U.S. Supreme Court decisions or informal changes in governing arrangements and behavior.<sup>8</sup>

State constitutions, by contrast, are amended on a regular basis. State constitutional amendment processes are more accessible than the federal process, largely because the barriers to proposing and ratifying amendments are generally lower at the state level. Moreover, employing a device with no counterpart at the federal level, eighteen states permit voters to initiate amendments, generally without any participation of the legislature.<sup>9</sup> The culture of constitutionalism at the state level is also

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4. Miriam Seifter, *Judging Power Plays in the American States*, 97 TEX. L. REV. 1217, 1217 (2019).

5. Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 1998 (2018).

6. See *Cooper v. Berger*, 809 S.E.2d 98, 100 (N.C. 2018); *League of Women Voters v. Commonwealth*, 178 A.3d 737, 741–42 (Pa. 2018).

7. See, e.g., 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).

8. JOHN DINAN, *STATE CONSTITUTIONAL POLITICS: GOVERNING BY AMENDMENT IN THE AMERICAN STATES* 1–2 (2018).

9. 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 (2005) [hereinafter Tarr & Williams, *Foreword: Getting from Here to There*].

more supportive than at the federal level of relying on amendments to update or otherwise make changes to constitutions. As a result, the current constitutions of the fifty states have been amended on average 150 times.<sup>10</sup> Several state constitutions are amended at a particularly high rate. In Alabama (which easily tops the list), Louisiana, South Carolina, California, Texas, Florida, Georgia, and Hawaii, amendments are adopted on average more than twice per year.<sup>11</sup>

Bob has written several articles analyzing the design of state amendment processes and the consequences of various decisions state constitution-makers face in structuring these processes.<sup>12</sup> As Bob has discussed, in an article co-authored with Alan Tarr, the rules and structure of state amendment processes vary in important ways across the 50 states.<sup>13</sup> Among other things,<sup>14</sup> states have to consider whether to require a supermajority or a bare majority of legislators to place an amendment on the ballot. Should an amendment be approved in multiple legislative sessions or just in a single session before going on the ballot? Should ratification of amendments require approval by more than a mere majority of voters? There are additional decisions about whether to permit citizens to initiate amendments, thereby generally bypassing the legislature. If the decision is made to allow citizen-initiated amendments, how many signatures must be collected to place an amendment on the ballot, and should any limits be imposed on the subject matter of citizen-initiated amendments? These choices concerning the design of amendment processes have consequences for groups and officials seeking to enact changes through state constitutional amendment processes. As Tarr and Williams write, “The multiplicity of mechanisms for introducing state constitutional change, each with its own distinct politics, increases the opportunities available to constitutional reformers for pursuing their objectives.”<sup>15</sup>

State constitutions are amended frequently; they are also revised and replaced on a regular basis, though not as regularly today as in prior

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10. DINAN, *supra* note 8, at 23.

11. *Id.* at 25 tbl.1.3.

12. See, e.g., ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 359–99 (2009); Tarr & Williams, *Foreword: Getting from Here to There*, *supra* note 9, at 1078; Robert F. Williams, *Evolving State Constitutional Processes of Adoption, Revision, and Amendment: The Path Ahead*, 69 *ARK. L. REV.* 553, 557 (2016).

13. See Tarr & Williams, *Foreword: Getting from Here to There*, *supra* note 9, at 1077.

14. The decisions currently made by state constitution-makers in designing their amendment and revision processes in each of the ways discussed in this paragraph are detailed in John Dinan, *State Constitutions*, in *BOOK OF THE STATES* 3, 8–10 tbls.1.4 & 1.5 (2019), <http://knowledgecenter.csg.org/kc/system/files/1.4.2019.pdf> and <http://knowledgecenter.csg.org/kc/system/files/1.5.2019.pdf> (ebook).

15. Tarr & Williams, *Foreword: Getting from Here to There*, *supra* note 9, at 1077.

years. Bob has focused on analyzing the role of constitutional commissions in making occasionally modest constitutional changes but sometimes undertaking wholesale overhauls of state constitutions. He has traced the history and evolution of state constitutional commissions, focusing particularly on several mid-nineteenth century commissions.<sup>16</sup> He has also shown that by the late-twentieth and early twenty-first century, commissions have come to be viewed as an alternative to conventions, which were at one time held regularly but have not been called for nearly four decades.<sup>17</sup> Bob has taken particular note of a device in the Florida Constitution with no counterpart in any other state constitution.<sup>18</sup> In Florida, a constitutional revision commission is established every twenty years and empowered to submit amendments directly to voters. Still another taxation and budget commission in Florida is established every twenty years (the two commissions are on staggered schedules so that one or the other commission convenes every ten years) and authorized to place tax- and budget-related amendments directly on the ballot. No other state permits constitutional commissions to bypass the legislature and place amendments directly before the voters.<sup>19</sup>

Bob's attention to the design of state amendment and revision processes is particularly welcome in the current era, because voters and officials in a number of states have recently considered making various changes to these processes, generally by making them less accessible. In recent years, several states have made it more difficult to approve amendments in general or secure passage of citizen-initiated amendments in particular.<sup>20</sup> In 2020, voters in several states will consider still other changes intended to make state amendment processes less accessible.<sup>21</sup>

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16. See, e.g., Peter J. Mazzei & Robert F. Williams, "Traces of Its Labors": *The Constitutional Commission, the Legislature, and Their Influence on the New Jersey State Constitution, 1873-1875*, 33 RUTGERS L.J. 1059 (2002).

17. Robert F. Williams, *Are State Constitutional Conventions Things of the Past? The Increasing Role of the Constitutional Commission in State Constitutional Change*, 1 HOFSTRA L. & POL'Y SYMP. 1, 3 (1996) [hereinafter Williams, *Are State Constitutional Conventions Things of the Past?*].

18. See *id.* at 15-17; Robert F. Williams, *Foreword: Is Constitutional Revision Success Worth Its Popular Sovereignty Price?*, 52 FLA. L. REV. 249, 252 (2000).

19. Williams, *Are State Constitutional Conventions Things of the Past?*, *supra* note 17, at 6.

20. John Dinan, *Twenty-First Century Debates and Developments Regarding the Design of State Amendment Processes*, 69 ARK. L. REV. 283, 293-305 (2016).

21. *Arkansas Initiative Process and Legislative Referral Requirements Amendment (2020)*, BALLOTPEdia, [https://ballotpedia.org/Arkansas\\_Initiative\\_Process\\_and\\_Legislative\\_Referral\\_Requirements\\_Amendment\\_\(2020\)](https://ballotpedia.org/Arkansas_Initiative_Process_and_Legislative_Referral_Requirements_Amendment_(2020)) (last visited Mar. 27, 2020); *Florida Amendment 4, Require Constitutional Amendments to Be Passed Twice Initiative (2020)*,

## GUIDANCE FOR STATE CONSTITUTION-MAKERS

In part because state constitutions are changed on a regular basis, governing officials, groups, and citizens routinely seek guidance on whether state constitutions should be revised, or what belongs in their state constitution, or how to craft an effective constitutional provision. Bob has been called on frequently to draw on his research and offer advice and guidance to state constitution-makers in these situations.<sup>22</sup>

A very important point that Bob has made that runs counter to the received wisdom is that state constitutions have their own logic that is distinct from the U.S. Constitution. There is no need, therefore, to view the Federal Constitution as a model to be emulated when evaluating or framing state constitutions. As Bob has written, when evaluating a state constitution and determining if it is “in need of reform or revision, it should definitely not be compared to the United States Constitution.”<sup>23</sup> State constitutions “are substantially longer than the Federal Constitution,” are “called upon to perform different functions,” and, therefore, “there is simply a wider variety of subject matter to be regulated by a state constitution than there is under the United States Constitution.”<sup>24</sup>

If state constitutions need not follow the federal constitutional model, then the key question becomes what principles should guide state constitution-makers, especially as they consider what to put in these documents. On countless occasions, I am asked by groups or officials to offer guidance on what belongs in a state constitution, generally in the course of debates about whether to call a convention, or whether a commission should recommend adding or removing a constitutional provision, or whether a constitutional amendment on the ballot merits approval. Fortunately, in answering these questions, I am able to draw

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BALLOTPEDIA, [https://ballotpedia.org/Florida\\_Amendment\\_4\\_Double\\_Election\\_Requirement\\_for\\_Constitutional\\_Amendments\\_Initiative\\_\(2020\)](https://ballotpedia.org/Florida_Amendment_4_Double_Election_Requirement_for_Constitutional_Amendments_Initiative_(2020)) (last visited Mar. 27, 2020); *North Dakota Require Initiated Constitutional Amendments to Be Approved by the Legislature or Passed Twice Amendment (2020)*, BALLOTPEDIA, [https://ballotpedia.org/North\\_Dakota\\_Double\\_Election\\_or\\_Legislative\\_Approval\\_Requirement\\_for\\_Initiated\\_Amendments\\_Measure\\_\(2020\)](https://ballotpedia.org/North_Dakota_Double_Election_or_Legislative_Approval_Requirement_for_Initiated_Amendments_Measure_(2020)) (last visited Mar. 27, 2020).

22. See, e.g., Robert F. Williams, *Is the Wisconsin State Constitution Obsolete? Toward a Twenty-First Century Functionalist Assessment*, 90 MARQ. L. REV. 425 (2007) [hereinafter Williams, *Is the Wisconsin State Constitution Obsolete?*]; Robert F. Williams, *Should the Oregon Constitution Be Revised, and If So, How Should It Be Accomplished?*, 87 OR. L. REV. 867 (2008).

23. Williams, *Is the Wisconsin State Constitution Obsolete?*, *supra* note 22, at 431 (footnote omitted).

24. *Id.* (footnote omitted).

on a 2006 chapter written by Bob and Frank Grad,<sup>25</sup> an updated version of an article written by Grad in the 1960s in the midst of the last major wave of state constitutional revision in the United States.<sup>26</sup> This chapter by Williams and Grad provides a comprehensive and incisive discussion of criteria to guide decisions about what to include in a state constitution.

It is misguided to conceive of or try to achieve an “ideal” state constitution, Williams and Grad conclude.<sup>27</sup> Nor is it particularly helpful to focus solely on whether a proposed measure is sufficiently “fundamental” to merit inclusion in a constitution or, on the other hand, is by definition “legislative” and therefore ill-suited for a constitution.<sup>28</sup> This sort of exercise can be helpful to some extent, but needs to be supplemented by a richer and more extensive analysis that requires close attention to the context of the adoption or retention of a provision as well as “a balancing of the purposes of the constitution and the needs of government.”<sup>29</sup> As Williams and Grad write, in summing up their discussion:

In the balancing process necessary to reach a final decision, the importance of the provision to the people and to the effective government of the particular state must be weighed against the cost in terms of inflexibility, obsolescence, decreased responsibility of the government, constitutional instability, and the nullification of inconsistent government action. In reaching a decision, consideration should also be given to whether the policy embodied in the proposal is one likely to endure, or whether it is likely to suffer rapid obsolescence by reason of societal or technological changes. A final factor to be considered is whether adequate means other than inclusion in the constitution are available to achieve the particular objective.<sup>30</sup>

#### COMPARATIVE SUBNATIONAL CONSTITUTIONALISM

It is only in recent decades that scholars have begun to engage in systematic study of subnational constitutions in federal countries around the world. Once again, Bob has taken the lead (often working alongside

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25. FRANK P. GRAD & ROBERT F. WILLIAMS, 2 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: DRAFTING STATE CONSTITUTIONS, REVISIONS, AND AMENDMENTS 7 (2006).

26. Frank P. Grad, *The State Constitution: Its Function and Form for Our Time*, 54 VA. L. REV. 928, 928 (1968).

27. GRAD & WILLIAMS, *supra* note 25, at 13.

28. *Id.* at 14.

29. *Id.* at 15.

30. *Id.* at 29.

Alan Tarr) in developing this field and setting an agenda to guide scholarly inquiry.<sup>31</sup> To this end, in a move that has been instrumental in building an international community of scholars in this field, Bob played the key role in convening a Research Group on Subnational Constitutions as part of the International Association of Constitutional Law.<sup>32</sup>

In a series of articles, Bob (along with Alan) set out a number of research questions to structure scholarly inquiry in this area.<sup>33</sup> As Bob wrote in a 1999 article,

There is a range of general questions to be asked about the constitutions of states within any federal system. The answers to these questions, of course, would vary greatly. Developing a research agenda organized around these questions, however, could greatly facilitate comparative constitutional study. Such comparative study of subnational constitutions should be descriptive as well as analytical and theoretical.<sup>34</sup>

Part of the scholarly task in studying subnational constitutions, as Bob has indicated, is descriptive: to gain a solid understanding of the role played by subnational constitutions in specific federal systems. In the last quarter century, scholars have made significant progress in producing country-specific studies analyzing subnational constitutionalism in most of the countries that feature subnational constitutions in some fashion in at least one subnational polity: Argentina, Australia, Austria, Bosnia and Herzegovina, Brazil, Ethiopia, Germany, India,

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31. See generally, Robert F. Williams, *Comparative Subnational Constitutional Law: South Africa's Provincial Constitutional Experiments*, 40 S. TEX. L. REV. 625, 638 (1999) [hereinafter Williams, *Comparative Subnational Constitutional Law*]; Robert F. Williams & G. Alan Tarr, *Subnational Constitutional Space: A View from the States, Provinces, Regions, Lander, and Cantons*, in FEDERALISM, SUBNATIONAL CONSTITUTIONS, AND MINORITY RIGHTS (G. Alan Tarr, Robert F. Williams, & Josef Marko eds., 2004).

32. *Introduction: IACL Research Group on Subnational Constitutions in Federal and Quasi-Federal States*, INT'L ASS'N CONST. L. (Nov. 14, 2017), <https://blog-iacl-aicd.org/iacl-news/2018/6/3/introduction-iacl-research-group-on-subnational-constitutions-in-federal-and-quasi-federal-states>.

33. Bob was not the first scholar to call for more attention be paid to subnational constitutions in federations around the world. As Bob noted, Daniel J. Elazar was highlighting the lack of scholarly attention to the constitutions of constituent states in federal systems as early as the 1980s and encouraging more comparative study of federal systems in this respect. Williams, *Comparative Subnational Constitutional Law*, *supra* note 31, at 628–30. However, Bob and Alan took the lead in the 1990s in developing the field.

34. *Id.* at 638 (footnote omitted).



Malaysia, Mexico, Russia, South Africa, Sudan, Switzerland, the U.S., and Venezuela.<sup>35</sup>

Other scholarly challenges in developing this field, as Bob has noted, are analytical and theoretical.<sup>36</sup> What theoretical purposes are served by subnational constitutions? And to what extent do subnational constitutions and national constitutions serve similar or different purposes? Analytically, how do federations differ in the degree of autonomy that subnational constitution-makers possess when it comes to crafting and changing these documents and embracing different understandings of provisions concerning rights, governing institutions, and policy commitments? Moreover, in practice, how and why do subnational constitutions feature prominently in the constitutional politics of some federations more so than others?<sup>37</sup>

We are all in Bob Williams's debt for his role in developing the field of comparative subnational constitutionalism, just as he has played a pioneering role in charting a path for the study of U.S. state constitutions and producing numerous influential and insightful studies.

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35. John Dinan, *Subnational Constitutions: A Research Agenda*, in A RESEARCH AGENDA FOR FEDERALISM STUDIES 50 (John Kincaid ed., 2019) [hereinafter Dinan, *Subnational Constitutions*].

36. These challenges and questions are discussed in Williams, *Comparative Subnational Constitutional Law*, *supra* note 31, at 638–41.

37. For a recent summary of the field, see Dinan, *Subnational Constitutions*, *supra* note 35, at 50–53.