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ROBERT F. WILLIAMS: A SCHOLAR OF IMAGINATION AND A TEACHER OF KINDNESS

*Justin R. Long**

I grew up in Hartford, Connecticut and attended public school there during the initiation and prosecution of state constitutional litigation to desegregate the schools.[1] The lawsuit was filed when I was in fourth grade, went to trial when I was in middle school, and was decided in the state supreme court when I was a freshman in college. The plaintiffs went back to court to seek enforcement of their victory when I was in law school, and I wrote about it.[2] So for me, an interest in state constitutionalism has been personal as well as intellectual, and older than my adult teeth.

In law school at Penn, I convinced a group of friends to join me in a group "independent" study of state constitutionalism. I cobbled together some sources and we met every week to discuss. We wrote our final papers, looked around the seminar room, and quickly realized we were entirely inadequate as peer reviewers. So out of the blue, I cold called Bob Williams across the river at Rutgers. We had read several of his pieces, as well as his political science colleague Alan Tarr's outstanding expository book,[3] and the chance to ask for some advice from the nation's leaders in the field (who worked ten minutes away from my downtown apartment) seemed too significant to pass up.

When I reached Professor Williams, he invited our entire group, nearly a dozen Penn Law students, to Rutgers. He greeted us in a lounge near his office, where he and Professor Tarr offered us cookies and asked us to talk over our papers. I felt a bit like what an eighteenth century British naval ensign might have felt if asked to dinner with Lord Nelson.[4] I was acutely conscious of how out-of-bounds it was even to have asked to meet with these luminaries, whose hours were already overflowing

* Associate Professor, Wayne State University Law School.

1. Sheff v. O'Neill, 678 A.2d 1267, 1280 (Conn. 1996) (holding that the state had an affirmative obligation to remedy de facto segregation in public schools). Helen Hershkoff, a contributor to this Festschrift, was crucial in the planning and execution of this lawsuit.

2. *See* Justin R. Long, *Enforcing Affirmative State Constitutional Obligations and* Sheff v. O'Neill, 151 U. PA. L. REV. 277 (2002).

3. G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS (1998).

4. *Cf.* PATRICK O'BRIAN, MASTER AND COMMANDER (1970).

with extraordinary scholarship, leading service to the field, and, not least of all, attention to the students who were paying tuition to learn from them. And yet, we were greeted with cookies and comments as if we were esteemed colleagues.

Since then, Bob has written letters of recommendation for me to get a teaching fellowship, a tenure-track law teaching job, and tenure at my law school. I have turned to him for advice more often than I have cited him, and that's a lot.[5]

While it can't be said that Bob Williams *invented* the modern study of state constitutions—that credit must be awarded to Hans Linde[6]—it remains beyond cavil that the seed planted by Professor Linde would never have grown to bloom without the indefatigable efforts of Professor Williams. He has treated everyone who approaches the field with what can only be described as an embrace. Through prolific scholarship, he has offered innumerable interesting problems to think and write about, each forming its own pathway into the field. Through astonishing generosity of the sort he showed me, he has grown the number of scholars working in this area. And through public advocacy, he has offered the vulnerable a new way to be heard in court.[7]

Of Professor Williams's many intellectual contributions to state constitutionalism, his work on "lockstepping" is, in my view, the most important. Over a long series of articles and across two books, he first carefully defined the term and then built a fair but devastating critique.[8]

5. So far, I have found it necessary to cite Professor Williams in each and every law review article, essay, and comment that I have written.

6. *See* Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 125 (1970) (offering the first academic or judicial call to pay attention to state constitutions of the post-war period, seven years before Justice William Brennan's much-cited essay on the same topic (William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977)).

7. For an example of his public advocacy and work for law reform, refer to Professor Williams's role in successful marriage-equality cases as described in this volume by perhaps the greatest civil rights litigator of our time, Mary Bonauto. Professor Williams's career in state constitutionalism might be said to have started with his work for the Florida Constitution Revision Commission. *See* Robert F. Williams, *The Florida Constitution Revision Commission in Historic and National Context*, 50 FLA. L. REV. 215 (1998) (describing Florida's late twentieth century constitutional reforms).

8. *See* ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 193–95 (2009); ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, STATE CONSTITUTIONAL LAW: CASES AND MATERIALS 316–33 (5th ed. 2015) (describing and critiquing state court constitutional interpretation for its unexamined conformity with federal jurisprudence). *See also* 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, 355 (1984) (same); 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 (1993) (same); Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in*

"Lockstepping," in Professor Williams's own words, occurs in "the circumstances where state courts decide to follow, rather than diverge from, federal constitutional doctrine."[9] Because most state constitutions are younger than the federal Constitution, many of the federal Constitution's most popular clauses have been directly copied into the state texts, especially in the area of civil rights.[10] This regularly leads to state courts' assumption that the state constitution must be interpreted the same way the U.S. Supreme Court interprets the federal Constitution, or else risk merely partisan judging of the sort Justice Brennan begged for in his popular call for state constitutionalism.[11]

Lockstepping can be prospective, as when the Florida constitution says in advance that its state constitutional protection against search and seizure shall wax and wane with the whims of five Justices of the U.S. Supreme Court (none of whom are from Florida).[12] Or it can be contingent, such as when New York followed federal Supreme Court equal protection doctrine to say that its constitutional equal protection clause did not guarantee a right to marriage equality, but left open the possibility that other circumstances might call for a more rights-protective application of the state constitution than the federal Fourteenth Amendment.[13] Lockstepping can be a judicial gloss, as in

Independent State Constitutional Rights Adjudication, 72 NOTRE DAME L. REV. 1015, 1017–18 (1997) (same); Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1502 (2005) [hereinafter Williams, *Prospective Lockstepping*] (same).

9. Williams, *Prospective Lockstepping*, *supra* note 8, at 1502.

10. *Compare, e.g.*, U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .") *with* MICH. CONST. art. I, § 17 ("No person shall be . . . deprived of life, liberty or property, without due process of law."). For an argument that state deference to federal interpretation is unnecessary even where the texts are identical, see James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1056–61 (2003) (arguing that state courts should protect liberty to the degree they feel necessary, whether in conformity with federal approaches or not).

11. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

12. FLA. CONST. art. I, § 12 ("Searches and seizures. . . . This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.").

13. *See* Hernandez v. Robles, 855 N.E.2d 1, 9 (N.Y. 2006), *abrogated by* Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (holding that the federal Constitution protects marriage equality for same-sex couples).

Michigan search and seizure doctrine,[14] or explicit in the state constitution's text, like in Florida.[15] In any event, unreflective lockstepping—tying the state constitution's meaning to the federal Constitution without independent consideration of whether that interpretation is best (and albeit sometimes will be)—is, at root, a failure of imagination.

Too many Americans, including judges and lawyers, exercise their considerable talents and powers in the service of the constitutional status quo. Not because they think it best, but because they are trapped by a fifth-grade social-studies notion of law and government. The study of state constitutionalism upends all of those shopworn verities. Is the chief executive in charge of the executive branch? Are there even three branches of government? Does protection of free expression depend on state action? Can courts give advisory opinions and still be courts? Can judges be elected and still be judges? And most important of all—is the American federal structure of government the best possible way of organizing a democratic state?[16]

One of the reasons teaching state constitutionalism is a treat is because it permits students to see that the answers to these questions can—and do—vary from the federal model. We are invited, often by Professor Williams, not just to imagine that a different way of doing things from the federal system is possible, but to recognize that *we are already doing things differently*. For every constitutional truism asserted as self-evident by the federal Supreme Court, there is a state out there doing the opposite. And the sky has not fallen.

Some regard constitutionalized legal pluralism as a sad state of affairs, a second-best option to national consensus on important questions of public values.[17] But state constitutionalism inherently reminds us that the warp and weave of our government(s) are human choices, contingent and mutable. The judges at their benches and the lawyers at their bars have in their own hands, not the dead hand of the past, the task of ordering our society for the public good. And *imagination*

14. *See* People v. Slaughter, 803 N.W.2d 171, 177 (Mich. 2011) ("This Court has ruled that the Michigan Constitution 'is to be construed to provide the same protection as that secured by the Fourth Amendment, absent "compelling reason" to impose a different interpretation.'").

15. *See* FLA. CONST. art. I, § 12.

16. *Cf.* Justin R. Long, *Are State Constitutions Un-American?*, 40 RUTGERS L.J. 793, 793–94 (2009) (book review) (arguing that state courts give short shrift to independent state constitutional analysis because increased reliance on state constitutions implicitly criticizes the federal Constitution as insufficient).

17. *See, e.g.*, Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 951 (1994).

will be essential to that enterprise.[18] The status quo leaves too many vulnerable people behind, too many injustices entrenched. The easy path is to accept the hand we have been dealt and negotiate inside the system, making those marginal advances that serve mostly to ratify the existing allocation of power. But the mere existence of state constitutions, and the legal pluralism they effectuate, inherently stands for the idea that we can make different choices. Even the rules of the game are acts of human agency. We have all been taught that the U.S. Supreme Court is the ultimate interpreter of constitutional text. But it is not! State constitutional interpreters can see difference where most of us have never learned to look.

To me, then, Bob Williams's close attention to lockstepping and his learned criticism of it is, at root, a courageous act of imagination. That is what makes it the most important work of his career. He calls us—his students, his colleagues, and those who wield power—to think beyond the place we have been set and work for a world yet to be. It takes courage to step into the unknown. Professor Williams has that courage. He also has the brilliance necessary to light the way for others to expand their own perception of the possible.

In oral remarks at the Festschrift honoring Bob in Camden, I asked whether Professor Williams is so kind and welcoming to everyone interested in state constitutionalism because he loves state constitutions so much that he wants more people to join him in their study, or whether instead he has devoted so much study to state constitutions because he sees how they can help everyone? Of course, binary questions like that are exactly what Bob has spent a lifetime rejecting. For him, the heart and the head are integrated as much as anyone I have ever known. He plays delightfully in the abstractions of federalism theory and strives earnestly in the pragmatics of law reform—not by doing one in the morning and the other after noon, but all in one go, all running at once, in what might be called polyphony.[19]

And now Bob's students have students. We know his retirement, though a loss to the field, is well earned. And we will continue to stretch our imaginations, to marry theory and practice, and to carry the empathy we deploy in our scholarship into our human relations. Just as he has taught us.

18. *Cf.* ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 1 (1996) (arguing that imagination is the single most important trait necessary to advance social justice under law).

19. *See* ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS 7 (2009).