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THE RISE OF STATE CONSTITUTIONAL LAW: EQUALITY AND LIBERTY

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For many years, the teaching of constitutional law in American law schools focused primarily—in fact, almost exclusively—on decisions of the United States Supreme Court interpreting the Federal Constitution. For those who believe that equality and liberty are essential to a free society, this had become a disheartening affair as the Supreme Court became increasingly antipathetic, if not hostile, to the recognition of individual rights.[1] A different story, however, was transpiring at the state level where a number of states courts had broken free of federal dominance of constitutional law and were turning to their state constitutions to protect individual rights and liberties.[2] State constitutional law, it became apparent, was where the real action was and where social justice was moving forward, not stagnating as it was in the federal realm.

Robert F. Williams was an early and compelling advocate for state constitutionalism and for what was then called the "New Judicial Federalism."[3] In numerous articles Professor Williams explained that in our federal system of dual sovereignty, state constitutional law is autonomous of federal constitutional law.[4] Sovereign in their own right, the states are empowered to adopt their own constitutions and to interpret them as they see fit, independent of federal constitutional law. As Professor Williams described, state courts are free to "interpret their

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1. *See* JEFFREY M. SHAMAN, EQUALITY AND LIBERTY IN THE GOLDEN AGE OF STATE CONSTITUTIONAL LAW xiii–xvii (2008).

2. *See id.* at xvii–xxii; Robert F. Williams, *Foreword: Looking Back at the New Judicial Federalism's First Generation*, 30 VAL. U. L. REV. vii, xiii (1996).

3. SHAMAN, *supra* note 1, at xvii.

4. *See, e.g.*, Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1196–97 (1985) [hereinafter *Equality Guarantees*]; 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, 354 (1984) [hereinafter *In the Supreme Court's Shadow*]; Robert F. Williams, *Introduction: State Constitutional Law in Ohio and the Nation*, 16 U. TOL. L. REV. 391, 394 (1985).

constitutions to provide different and more extensive rights than those provided by the [F]ederal [C]onstitution."[5]

The New Judicial Federalism arose in the early 1970s and, as Professor Williams noted in the *N.Y.U. Annual Survey of American Law*, by the dawn of the new millennium it hardly could be called "new" anymore.[6] State constitutionalism had been reawakened as a vibrant force responsive to the concerns of an evolving society.

Eventually, the reawakening of state constitutional law would have its greatest impact in the area of basic human rights: equality and liberty. Professor Williams was quick to perceive this. In 1985 he published an article in the *Texas Law Review* examining the history of equality guarantees in state constitutions.[7] In that article, Professor Williams pointed out that state constitutions contain a variety of provisions guaranteeing equality that differ significantly from the federal equal protection clause.[8] Some state constitutions contain provisions declaring that all people are created equal and are entitled to equal rights and opportunity under the law.[9] A number of the state constitutions include prohibitions against the granting of unequal privileges or immunities or banning special entitlements.[10] The civil rights movement of the 1950s and 60s inspired some states to add provisions to their constitutions prohibiting discrimination against persons in the exercise of their civil rights.[11] After the Equal Rights Amendment (ERA) prohibiting discrimination on the basis of sex failed to gain passage at the federal level, some twenty-six states adopted their own versions of

5. *In the Supreme Court's Shadow*, *supra* note 4*; see also Equality Guarantees*, *supra* note 4.

6. Robert F. Williams, *Introduction: The Third Stage of the New Judicial Federalism*, 59 N.Y.U. ANN. SURV. AM. L. 211, 211 (2003) [hereinafter *The Third Stage of the New Judicial Federalism*].

7. *See Equality Guarantees*, *supra* note 4; *see also* Robert F. Williams, *Equality and State Constitutional Law*, Chapter 3 *in* DEVELOPMENTS IN STATE CONSTITUTIONAL LAW: THE WILLIAMSBURG CONFERENCE (B. McGraw ed., 1985) and Chapter 2 *in* Practicing Law Institute, RECENT DEVELOPMENTS IN STATE CONSTITUTIONAL LAW (P. Bamberger ed., 1985).

8. *Equality Guarantees*, *supra* note 4.

9. *See e.g.*, WIS. CONST. art. I, § 1 (1986).

10. *See, e.g.*, ORE. CONST. art. I, § 20 ("No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."); ILL. CONST. of 1870, art. IV, § 22 (1870) ("In all . . . cases where a general law can be made applicable, no special law shall be enacted.")

11. For example, Pennsylvania's Constitution states: "Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right." PA. CONST. art. I, § 26 (1967). The Michigan Constitution provides: "[N]or shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin." MICH. CONST. art. I, § 2.

the ERA.[12] Furthermore, in a number of state constitutions there are provisions that grant specialized protection for various kinds of equality. For instance, a few state constitutions provide for "free and equal elections."[13] There are provisions in three state constitutions that expressly bar segregation.[14] The Alaska Constitution states, "No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State."[15] Some state constitutions expressly prohibit certain forms of discrimination in the private sector as well as the public one.[16] Other state constitutions contain so-called "uniformity clauses" that call for taxes to be uniformly levied within the same class of subjects.[17]

After the Civil War and the enactment in the Federal Constitution of the Fourteenth Amendment guaranteeing equal protection of the laws to all persons, some states were moved to follow suit by adding equal protection clauses to their constitutions when the opportunity arose. For many years, however, a large majority of the states saw no need to add an equal protection clause to their constitutions. Given that the Equal Protection Clause of the Fourteenth Amendment was binding on the states, it was unnecessary to add a duplicative provision to state

12. *See State Equal Rights Amendments*, WIKIPEDIA, https://en.wikipedia.org/wiki/State_equal_rights_amendments (last visited Apr. 5, 2020). For example, Pennsylvania's Constitution states: "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual." PA. CONST. art. I, § 28 (1971). It is worthy of note that in the 1890s, long before the conception of the ERA, both Utah and Wyoming enacted state constitutional provisions guaranteeing equal civil, political, and religious rights and privileges for "male and female citizens." *See* UTAH CONST. of 1896, art. IV, § 1; WYO. CONST. art. I, § 3.

13. *E.g.*, DEL. CONST. art. I, § 3; WYO. CONST. art. I, § 27.

14. CONN. CONST. art. I, § 20; HAW. CONST. art. I, § 9; N.J. CONST. art. I, § 5 (1947).

15. ALASKA CONST. art. VIII, § 15 (1972). The complete provision states:

> No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of the State to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State.

16. *E.g.*, CAL. CONST. art. I, § 8 (amended 1970) ("A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin."); ILL. CONST. art. I, § 17 ("All persons shall have the right to be free from discrimination on the basis of race, color, creed, national ancestry and sex in the hiring and promotion practices of any employer or in the sale or rental of property."); MONT. CONST. art. II, § 4 ("Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.")

17. *E.g.*, DEL. CONST. art. VIII, § 1 ("All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax . . . .").

constitutions.[18] Moreover, as just described, almost all state constitutions already contained some sort of provision guaranteeing equality. So, until 1970, only seven states saw fit to enact an equal protection clause to their constitutions.[19] Even today, the constitutions of but fifteen states include a provision similar in wording to the federal one that prohibits the denial of equal protection of the laws.[20]

Despite the variety of state constitutional provisions guaranteeing equality and their differences from the federal equal protection clause, for many years most state courts, when faced with issues involving equality, submissively followed federal equal protection doctrine. On the other hand, beginning in the 1970s, a growing number of state courts were "rediscover[ing]" their state constitutional equality guarantees and independently interpreting them to provide greater constitutional protection than afforded under the federal document.[21] Professor Williams was a forceful advocate for this emerging trend. In no uncertain terms, he declared:

> The movement toward independent state constitutional interpretation must take account of the existence of equality provisions in state constitutions and their differences from the equal protection clause of the fourteenth amendment. Only then will it be possible to develop true constitutional doctrines of equality under state constitutions.[22]

It was a clarion call to action and one that many states followed. In the ensuing years, state courts across the country interpreted provisions in their state constitutions to expand individual rights well beyond those recognized under the Federal Constitution. State courts re-invigorated constitutional law by developing new doctrine and new lines of analysis in order to fulfill the promise afforded by the constitutions of each of the fifty states.

The revival of state constitutional law came from all corners of the nation. In California, for example, the state supreme court ruled in *Serrano v. Priest* that the state system of financing public education predominantly through local property taxes, which resulted in disparate

18. *See* SHAMAN, *supra* note 1, at 41.
19. *Id.*
20. *Id.*
21. *Equality Guarantees*, *supra* note 4, at 1219.
22. *Id.* at 1224; *see also* Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 228 (1983) ("The bar, the bench, and legal scholars must give state constitutional law, both comparative and state specific, the attention it merits." (footnote omitted)).

funding from one school district to another, was a violation of the equal protection clause of the California Constitution.[23] In stark contrast to the United States Supreme Court, the California high court ruled that education was a fundamental right and that the state system of funding education was so irrational as to violate the principle of equal protection.[24]

Sheff v. O'Neill, a Connecticut decision involving school desegregation, is a striking example of how state constitutional law can provide more expansive protection than federal constitutional law.[25] In cases involving school desegregation, the United States Supreme Court has drawn a distinction between *de jure* and *de facto* racial segregation, ruling that the latter is a violation of the federal Equal Protection Clause only when shown to be the result of an intent to discriminate on the basis of race.[26] In *Sheff*, however, the Supreme Court of Connecticut extended the state constitutional guarantee of equality beyond the scope of federal equal protection by ruling that, even when unintentional, *de facto* segregation in public schools violated the Connecticut Constitution.[27] *Sheff* is a case in which the language of the state equality provision, which is more extensive than the language of the federal Equal Protection Clause, was important to the court's decision. In the court's view, the express prohibition of "segregation" in the state equality provision had "independent constitutional significance" that "informed and amplified" the state's duty to provide equal educational opportunity to all students.[28]

In Kentucky, the supreme court of that state, emphatically refusing to march in lockstep with the United States Supreme Court, ruled in *Commonwealth v. Wasson* that a statute making it a crime to engage in sexual activity with a person of the same sex violated the rights of individual liberty and equal protection guaranteed by the Kentucky

23. Serrano v. Priest, 557 P.2d 929, 958 (Cal. 1976) [hereinafter *Serrano II*]; Serrano v. Priest, 487 P.2d 1241, 1244 (Cal. 1971) [hereinafter *Serrano I*].

24. *See Serrano II*, 557 P.2d at 958; *Serrano I*, 487 P.2d at 1244. In contrast to the decision of the Supreme Court of California in *Serrano I* and *II*, in *San Antonio Independent School District v. Rodriguez*, the United States Supreme Court ruled that under the Equal Protection Clause of the Fourteenth Amendment of the Federal Constitution, education is not a fundamental right; applying minimal scrutiny, the nation's high court went on to uphold a Texas school financing system, similar to the one struck down in *Serrano*, that resulted in disparate funding from one school district to another. 411 U.S. 1, 35, 46, 55 (1973).

25. 678 A.2d 1267, 1270 (Conn. 1996).

26. *See* Milliken v. Bradley, 418 U.S. 717, 744–45 (1974).

27. *Sheff*, 678 A.2d at 1281–82.

28. *Id.*

Constitution.[29] This landmark decision rejected the then prevailing United States Supreme Court decision in *Bowers v. Hardwick*[30] and was quickly followed by four other state supreme courts, which similarly struck down criminal laws punishing adult consensual same-sex activity.[31] Eleven years after *Wasson*, the United States Supreme Court finally saw the light and overruled *Bowers*.[32]

In *Goodridge v. Department of Public Health*, a decision that marked a watershed in American law, the Supreme Court of Massachusetts ruled that under the Massachusetts Constitution, the commonwealth could not deny the right to marry to persons of the same sex.[33] As a result of the Court's decision, Massachusetts became the first state to allow same-sex marriage. After *Goodridge*, other state high courts addressed the issue of same-sex marriage, with varying results. Some state high courts, in disagreement with *Goodridge*, found nothing unconstitutional about laws limiting marriage to opposite-sex couples. Others, in agreement with *Goodridge*, struck down laws precluding same-sex marriage.[34] As time progressed, state legislatures enacted laws authorizing same-sex marriage.[35] By the year 2015, thirty-seven states and the District of Columbia, either by court decision or legislation, recognized same-sex marriage.[36] Finally, in 2015, some twelve years after *Goodridge*, the Supreme Court of the United States ruled that the right to marry is a fundamental right inherent in the liberty of the person, and that under the Due Process and Equal Protection Clauses of the Fourteenth Amendment same-sex couples may not be denied the fundamental right to marry.[37]

29. Commonwealth v. Wasson, 842 S.W.2d 487, 488, 491–92 (Ky. 1992).

30. Bowers v. Hardwick, 478 U.S. 186, 196 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

31. Jegley v. Picado, 80 S.W.3d 332, 353–54 (Ark. 2002); Powell v. State, 510 S.E.2d 18, 26 (Ga. 1998); Gryczan v. State, 942 P.2d 112, 126 (Mont. 1997); Campbell v. Sundquist, 926 S.W.2d 250, 266 (Tenn. Ct. App. 1996), *appeal denied* (June 10, 1996), *appeal denied* (Sept. 9, 1996), *and abrogated on other grounds by* Colonial Pipeline Co. v. Morgan, 263 S.W.3d 827 (Tenn. 2008). In addition, a Texas intermediate appellate court rejected *Bowers* in declaring a same-sex sodomy statute unconstitutional. State v. Morales, 826 S.W.2d 201, 202 (Tex. Ct. App. 1992). However, that decision was later vacated for lack of jurisdiction by the Texas Supreme Court. 869 S.W.2d 941, 949 (Tex. 1994).

32. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

33. 798 N.E.2d 941, 948 (Mass. 2003).

34. *See* JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES § 2–106 to –107 n. 435 (4th ed. 2006 & Supp. 56–62 2015).

35. *See Same-Sex Marriage Laws*, NAT'L CONF. ST. LEGISLATURES (June 26, 2015), https://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx.

36. *Id.*

37. Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015).

In more recent times, the march of state constitutionalism has continued and has witnessed some truly momentous cases. In *League of Women Voters of Pennsylvania v. Commonwealth*,[38] decided in 2018, the Supreme Court of Pennsylvania ruled that a voter-redistricting plan adopted in 2011 by the state General Assembly amounted to an unconstitutional partisan gerrymander in violation of the Free and Equal Elections Clause of the Pennsylvania Constitution.[39] The court's opinion in this case is a *tour de force* that traces the history of the Pennsylvania Free and Equal Elections Clause to demonstrate that its purpose was to guarantee state citizens an equal right, on par with every other citizen, to elect their representatives.[40] As the court makes clear, the principle "that an individual's electoral power not be diminished through any law which discriminatorily dilutes the power of his or her vote" is deeply rooted in the state's constitutional history.[41]

The majority opinion also contains a good deal of data showing the extent to which the 2011 redistricting plan skewed voter representation.[42] After reviewing the data, the court concluded that the plan was "corrupted by extensive, sophisticated gerrymandering" that subordinated the traditional redistricting criteria in order to achieve unfair partisan advantage.[43]

It is interesting to observe the contrast between *League of Women Voters of Pennsylvania* and the treatment of gerrymandering in the federal courts. Prior to the Pennsylvania decision, the United States Supreme Court had been unable to agree upon criteria to assess gerrymandering plans, and, as a result, failed to engage in meaningful review of such plans. In 2019, not long after *League of Women Voters*, the United States Supreme Court ruled by a 5-4 vote that "partisan gerrymandering claims present political questions beyond the reach of the federal courts."[44] That decision effectively foreclosed the federal courts from constitutional review of partisan gerrymandering plans, leaving state courts as the sole judicial avenue to challenge partisan gerrymandering.

38. 178 A.3d 737 (Pa. 2018).

39. PA. CONST. art. 1, § 5 ("Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."); *see League of Women Voters*, 178 A.3d at 741.

40. *League of Women Voters*, 178 A.3d at 806–07.

41. *Id.* at 816.

42. *Id.* at 744–61.

43. *Id.* at 821.

44. Rucho v. Common Cause, 139 S. Ct. 2482, 2493, 2506–07 (2019).

Another momentous state decision occurred not long ago in a case entitled *Hodes & Nauser v. Schmidt*,[45] in which the Supreme Court of Kansas ruled that the right of a woman to have an abortion was protected by section 1 of the Kansas Bill of Rights, which provides, "All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness."[46] Relying upon the historical record underlying the Kansas Bill of Rights, the court found that section 1 embodies a natural rights philosophy, at the heart of which is the principle that individuals should be free to make choices about how to conduct their own lives—in other words, to exercise personal autonomy.[47] This led the court to conclude that the protection afforded by section 1 for personal autonomy includes a judicially enforceable right of a woman to control her own body.[48]

The court also examined decisions from other jurisdictions recognizing a fundamental right to personal autonomy encompassing the right of a woman to control her own body.[49] In fact, as the court observed, a number of courts in other states have used natural right guarantees as well as other state constitutional provisions to safeguard the right of a woman to have an abortion.[50]

The court noted that section 1 of the Kansas Bill of Rights comprehends a nonexhaustive list of natural rights distinct from and broader than those contained in the Fourteenth Amendment of the Federal Constitution.[51] Accordingly, the court construed its state constitution as more protective of individual liberty than the U.S. Constitution, requiring that government restrictions on abortion must satisfy strict judicial scrutiny, rather than the less demanding "undue burden" standard adopted by the United States Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[52] Employing strict scrutiny, the court went on to strike down a Kansas statute prohibiting physicians from performing dilation and evacuation (D & E) abortions.[53]

As concern grows that the United States Supreme Court may overrule *Roe v. Wade*,[54] state decisions concerning abortion like the one

45. 440 P.3d 461 (Kan. 2019) (per curiam).
46. *Id.* at 466 (quoting KAN. CONST. B. OF R. § 1).
47. *Id.* at 466, 473.
48. *Id.* at 466.
49. *Id.* at 485–86.
50. *Id.* at 486.
51. *Id.* at 472.
52. 505 U.S. 833, 874 (1992); *Hodes & Nauser*, 440 P.3d at 497–98.
53. *Hodes & Nauser*, 440 P.3d at 466, 502–03.
54. Roe v. Wade, 410 U.S. 113 (1973).

in *Hodes* become increasingly consequential because they establish a state constitutional right to abortion that would survive should *Roe* be overruled.

The cases discussed here are examples of the direction state constitutional law has taken since the rise of the New Judicial Federalism, some fifty years ago. In that time, constitutional law has moved in two opposite directions in the United States. On the federal side, it has become increasingly conservative and antipathetic to the recognition of new individual rights. On the state side, it has become increasingly progressive and receptive to the recognition of new individual rights. However, the path in the states has not always been smooth. In some instances, advancements in the protection of individual rights have been met with disapproval and backlash.[55] Moreover, not all states have joined the revival of state constitutional law and among those that have joined, there has been varying degrees of commitment. Nonetheless, the renaissance of state constitutional law has been truly historic. Across the nation, numerous state courts have invested the concepts of equality and liberty with new meaning that has made for a more just society by enhancing the lives of countless individuals. In re-invigorating state constitutional law, state courts have surpassed the federal courts as the guardians of equality and liberty. The achievement of the state courts in expanding individual rights represents the highest fulfillment of our federal system, as each state is able to exercise its sovereign prerogative to safeguard equality and liberty according to its own vision. With its course firmly established and progressing steadily to this day, the advancement of equality and liberty will endure as the outstanding attainment of the New Judicial Federalism.

The progress achieved through this movement owes much to Professor Robert F. Williams. As the nation's preeminent scholar of state constitutional law, he has led the way to fulfilling the promise of our state constitutions.

55. *See* SHAMAN, *supra* note 1, at 243–53; *The Third Stage of the New Judicial Federalism*, *supra* note 6, at 215–19.