



## INTRODUCTION

*Robert F. Williams\**

This is the thirty-second Annual State Constitutional Law Lecture and the second since it was named for me. Unfortunately, last year we had to postpone the lecture and Christine Durham was kind enough to delay it until this year. She is the former Chief Justice of Utah, and one of the judges who was among the earliest to take serious account of state constitutional law.<sup>1</sup> In addition to serving first as a trial judge and then for thirty years on the Utah Supreme Court, ten as Chief Justice, she has also contributed academically to the field.<sup>2</sup> She gave her lecture this year, printed here as the Foreword to our Annual Issue. It draws directly from her experience as first a Justice (the first woman), and then Chief Justice, of the Utah Supreme Court. She analyzes the very important, but somewhat lower-visibility nonadjudicatory functions of state high courts.<sup>3</sup> This is one of the many characteristics of state supreme courts that differentiates them from the United States Supreme Court.

In recent years there have been some rumblings in state supreme courts about the use of the “beyond a responsible doubt” standard for assessing the constitutionality of statutes. Now Hugh Spitzer has contributed a thoughtful and complete critique of this use of what is essentially an evidentiary standard.<sup>4</sup> He explores the historical origins of this usage, together with a convincing argument that it is a misused standard.

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1. See André Douglas Pond Cummings, *Chief Justice Christine M. Durham: Trailblazer, Pioneer, Exemplar*, 75 ALB. L. REV. 1657, 1161–62 (2012); see also Steven F. Huefner, *A Champion of State Constitutions*, 75 ALB. L. REV. 1673, 1673 (2012).

2. See, e.g., Christine M. Durham, *What Goes Around Comes Around: The New Relevancy of State Constitution Religion Clauses*, 38 VAL. UNIV. L. REV. 353 (2004); Christine M. Durham, Speech, *The Judicial Branch in State Government: Parables of Law, Politics, and Power*, 76 N.Y.U. L. REV. 1601 (2001).

3. The Honorable Christine Durham, Foreword, *A Great Experiment: State Supreme Courts, Regulatory Reform in the Legal Profession, and Access to Justice*, 74 RUTGERS UNIV. L. REV. 1393 (2022).

4. Hugh D. Spitzer, *Reasoning v. Rhetoric: The Strange Case of “Unconstitutional Beyond a Reasonable Doubt”*, 74 RUTGERS UNIV. L. REV. 1429 (2022).

Next we are pleased to include a very interesting article on new ideas for state constitutional conventions by Kevin Frazier,<sup>5</sup> who graduated from the University of California Law School, Berkeley this year! He draws on initial attempts at crowdsourced state constitutional conventions in this country, together with experiences from Iceland and Ireland. This is particularly interesting because there has been such a long period since any state held a constitutional convention.

Dr. Alan Tarr, my former colleague here at Rutgers, has followed up on my lecture from two years ago<sup>6</sup> with a preliminary assessment of the future of the New Judicial Federalism.<sup>7</sup> He assesses the prospects for independent state constitutional rights interpretation under the Trump Supreme Court in light of what we have learned from the experience under the Burger Supreme Court.

Although activities concerning state constitutional law were hindered by the pandemic, the field continues to expand through interdisciplinary research and publications. For example, Dr. Robinson Woodward-Burns's 2021 book *Hidden Laws: How State Constitutions Stabilize American Politics* contends persuasively that the flexibility of state constitutions to respond and adapt to changing circumstances, in a number of areas, serves to permit our federal Constitution to remain almost unchangeable.<sup>8</sup> This is a very interesting and important contribution and serves to help us further understand the functional differences of our state and federal constitutions.

Dr. Adam Brown's new book *The Dead Hand's Grip: How Long Constitutions Bind States*, makes the important conclusion, based on substantial statistical evidence, that long and detailed state constitutions result in a number of negative effects for states. These effects include restricting state innovation and requiring more amendment, increased judicial invalidation based on detailed provisions, and hindrance of a state's "policy performance, resulting in lower incomes per capita, higher unemployment rates, greater economic inequality, and reduced policy innovativeness generally."<sup>9</sup>

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5. Kevin Frazier, *Crowdsourced State Constitutional Revisions Can Revive Our Democracy*, 74 RUTGERS UNIV. L. REV. 1463 (2022).

6. Robert F. Williams, Foreword, *The State of State Constitutional Law, The New Judicial Federalism and Beyond*, 72 RUTGERS UNIV. L. REV. 949 (2020).

7. G. Alan Tarr, *Does the New Judicial Federalism Have a Future?*, 74 RUTGERS UNIV. L. REV. 1405 (2022).

8. SEE ROBINSON WOODWARD-BURNS, HIDDEN LAWS: HOW STATE CONSTITUTIONS STABILIZE AMERICAN POLITICS 1-2 (2021). See also Dr. Silvana R. Siddali's fresh look at racism in the "Old Northwest" state constitutional conventions in FRONTIER DEMOCRACY: CONSTITUTIONAL CONVENTIONS IN THE OLD NORTHWEST (2016).

9. ADAM R. BROWN, THE DEAD HAND'S GRIP: HOW LONG CONSTITUTIONS BIND STATES 2 (2022).

A long-range, innovative project to digitize state constitutional convention records is underway, interestingly, out of Oxford University. They have completed a number of federal constitutional materials, as well as the Utah constitutional convention. The project is named Quill.<sup>10</sup>

The Oxford University Press Commentaries on State Constitutions of The United States, with single volumes on each state's constitution continues to be updated.<sup>11</sup>

In the field of comparative constitutional law, the study of *subnational* constitutions within federal and quasi-federal countries has been quite a recent phenomenon.<sup>12</sup> The field, however, has literally come of age with the publication of the *Routledge Handbook of Subnational Constitutions and Constitutionalism* in 2022.<sup>13</sup> This deeply researched and analyzed study of the varying subnational constitutions in almost twenty countries tests a number of hypotheses about subnational constitutions and reaches a number of important conclusions about matters such as the strength of their competence to make and change their subnational constitutions, inclusion of subnational symbols, similarity to the federal constitution, inclusion of rights beyond those in the federal constitution, inclusion of policy matters, and inclusion of subnational judicial review. It will set the terms of this field of study for years to come.

Clearly, the study of state constitutionalism, here and abroad, is here to stay. We are proud of our *Law Review's* sustained role in advancing this important field of study.

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10. See *The Quill Project*, OXFORD, <https://www.quillproject.net/quill>.

11. See *Oxford Commentaries on the State Constitutions of the United States*, OXFORD UNIV. PRESS, <https://global.oup.com/academic/content/series/o/oxford-commentaries-on-the-state-constitutions-of-the-us-cotus/?cc=us&lang=en&>.

12. See generally Robert F. Williams, *Teaching and Researching Comparative Subnational Constitutional Law*, 115 PENN ST. L. REV. 1109 (2011).

13. ROUTLEDGE HANDBOOK OF SUBNATIONAL CONSTITUTIONS AND CONSTITUTIONALISM (Patricia Popelier et al. eds., 2021). Full disclosure: I wrote the Foreword.