

BOOK REVIEW: THE NEW JERSEY STATE CONSTITUTION AN ORIGIN STORY, EVOLUTION, AND ANALYSIS

*The Honorable Peter A. Buchsbaum**

In the aftermath of United States Supreme Court's recent decisions regarding abortion, regulation of guns, establishment/freedom of religion, and climate change regulation, we need to remember that the High Court's words are not necessarily final for all of us. The Oxford State Constitution series, and this New Jersey volume by Robert F. Williams and Ronald K. Chen in particular, vitally remind us that state constitutions can provide broad protections for civil rights and liberties that the federal charter does not.

Williams and Chen are highly qualified for this task. Robert F. Williams is a Distinguished Professor of Law Emeritus at Rutgers University School of Law, Camden, and director of the Center for State Constitutional Studies. He has taught state constitutional law, and his numerous publications include a highly regarded textbook on this subject. Chen, a Distinguished Professor of Law and Judge Leonard I. Garth Scholar at Rutgers Law School, Newark, is also a faculty associate at the Eagleton Institute of Politics. He has served as a cabinet officer in New Jersey and litigates constitutional law cases with the Rutgers Constitutional Litigation clinic.

The purpose, importance and direction of this book are clearly charted in the Foreword by the Oxford series editor Lawrence Friedman, the established state constitutional scholar:

Operating in the shadow cast by the U.S. Constitution, State constitutions and the State court decisions interpreting them remain critical sources of governmental authority and restraint.

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It has been the goal of the Oxford Commentaries on the State Constitutions of the United States to illuminate these constitutions for a wide audience—to explain the unique history of each State constitution and explore, in an accessible way, what the various provisions of the American State constitutions in their great variety mean and how they have been interpreted and applied over time.

The book fulfills this purpose admirably for both general audiences and New Jersey lawyers who can use it to both understand and debate our state's legal framework. It provides a wonderful historic background for almost every provision in our state constitution. It gives a comprehensive review of where New Jersey, either through differential text or judicial interpretation, has found broader freedoms in the state constitution than those afforded in the federal one as interpreted by the U.S. Supreme Court. It provides an origin story for many of the provisions now in the state constitution.

The book begins with an historical overview and description. We have had in our state only three actual, fully fleshed out constitutions, those of 1776, 1844, and now, most admirably, 1947. To these three, the authors add a fourth, the reforming provisions adopted in 1875 which led to our thorough and efficient education clause, Art. VIII, Sec. IV, Para. 1, and the restraints on special legislation, general limitation on legislative intervention in municipal government, and prohibiting the giving of gifts or credit to private entities. Art. IV, Sec. VII, Paras. 7 to 10. It is noteworthy that in this era of radical Republicanism in the U.S. Congress, there seems to have been a reforming impulse in our state and possible others, even though Democrats dominated here.

Underneath this history lies a big question. New Jersey, as the authors point out, has had a uniquely small number of major constitutional changes since 1776—three and a half if you count 1875 as a partial reform. Why is this?

They answer that the New Jersey Constitution has generally stuck to framework rather than policy issues. As a result, our constitution is a lot shorter and more general than others. They cite one study which indicated that only 14% of the New Jersey Constitution was devoted to policy issues in contrast to the national average of 40%. So there is less need for constant amendments as policy preferences change. As proof of their thesis, the authors cite the one clearly policy driven choice in the constitution, the regulation of gambling and games of chance. Those provisions have been frequently amended with respect to big issues like

casino gambling, and smaller ones such as non-profit lotteries/raffles and boardwalk games.¹

This paucity of constitutional revisions makes the 1947 constitutional change seem almost miraculous. It is harder to change a framework than to nibble round the edges of issues like gambling policy or lotteries. As the authors point out, the powers of the Judiciary and the executive branches were much enhanced by the new Articles V and VI of the 1947 charter. In Article V, the governor was given real control over the executive departments as the only elected statewide official, a real veto that could only be overridden by a two-thirds vote in both houses, and a four- instead of a three-year term, with the right to succeed themselves for one additional term. So the state went from having one of the nation's weakest governors to one of its strongest.

The change in the Judiciary was even more sweeping. The book describes how Article VI created a real Supreme Court of last resort, which our state previously never had, and gave that Court and its Chief Justice extraordinary powers over Court rules, administration, judicial assignments, and the practice of law. New Jersey justice went from being a joke to being an exemplar of how a modern court system should be structured. Plus, the court system was unified so that litigants would not be shunted from equity to law and back, and it was made clear that relief from governmental decisions was available as of right, not at the discretion of a judge. The authors not only describe this process, but include a bibliographical essay which contains numerous citations to books describing the revolution of '47.² To go from a court system whose table of organization looked like a snarled fishing line, to one which, as amended, has only two courts, Supreme Court and the Superior Court, was and in retrospect remains, astonishing. Having all this information in one place in one book can only help practitioners and the public understand how we got from there to here, now 75 years after the fact, when much of the history might otherwise be forgotten.

Of course 1947 was not a panacea. The third rail of New Jersey constitutional history remained untouched, namely the one senator per county rule that had existed from the outset. So 11 rural counties could outvote in the Senate far more populous counties elsewhere. Even in 1873, as the authors recount, there were articles like the one in the

1. While the authors also reference the comparative difficulty of amending the New Jersey Constitution, that factor seems not to have been a significant barrier to amendment in recent years. For example, the change in the constitution re judicial salaries was adopted by the legislature and approved by the voters in a few short months.

2. See, e.g., CARLA VIVIAN BELLO & ARTHUR T. VANDERBILT II, *NEW JERSEY'S JUDICIAL REVOLUTION: A POLITICAL MIRACLE* (1997); NELSON JOHNSON, *BATTLEGROUND NEW JERSEY: VANDERBILT, HAGUE, AND THEIR FIGHT FOR JUSTICE* (2014).

“Newark Daily Advertiser” bemoaning the fact that pine barrens region could outvote the populous parts of the state in deciding where a railroad could go:

The pine-barrens have beaten the populace. Ten gentlemen, representing the wealth, power, honour and good sense of the State of New Jersey, representing also the bulk of its population and its true will and purpose, yesterday voted for a competing railroad between New York and Philadelphia. Eleven other men, whose title is Senator, representing an innumerable host of stunted pines, growing on sand-barrens, voted the bill down.... You can't make pine trees vote nor endow them with a conscience.

It took the one person one vote decisions of the United States Supreme Court in the 1960s finally to end this travesty whereby counties, functionally the least powerful level of New Jersey government, each got one Senator no matter what its population.

As the above quote suggests, the earlier constitutional history which the book details so well is not at all dry. This is New Jersey, after all. So some of this history almost gets to be entertaining. Our 1776 Constitution was really a fossil. Our governor also served as chancellor in equity, which meant that all governors elected between 1776 and 1844 were lawyers. There was no veto power and the Legislature elected all the Judges and other officials. This constitution also contained an explosion clause which said that it would be void if the colonies reconciled with England.

The historical background also explains some current provisions which seem downright odd. The opening paragraph in Art. IV, Sec. VII, Laws Prohibited, Para. 1, says the Legislature shall not grant a divorce. It appears from the authors' commentary, that the pre-1844 Legislature spent an inordinate amount of time considering individual petitions for divorce. Judicial divorce is now so ingrained that we easily forget that state legislatures have plenary power to do a lot of things that are restrained solely by state constitutions.

Similarly, the provisions regarding special legislation arose because Legislatures before 1875 could strip local governments in the other party's hands of real power and install special commissions containing favored party members. They also endlessly and supposedly corruptly debated individual railroad and corporate charters.³ An historical

3. See WILLIAM EDGAR SACKETT, *MODERN BATTLES OF TRENTON: BEING A HISTORY OF NEW JERSEY POLITICS AND LEGISLATION FROM THE YEAR 1868 TO THE YEAR 1894* (1895)

marker in Hopewell Borough documents the so-called frog war,⁴ after the Legislature finally granted what became the Jersey Central Railroad the right to lay a track competing with the dominant Pennsylvania Railroad.

Some of the history laid out in the book is less than inspiring. The 1776 Constitution, supported by a 1790 statute, gave women and Black people the right to vote, the book reports, although—with a high property qualification of owning property worth 50 pounds—probably very few did. In any case this right was quietly and without challenge eliminated by statute in 1807. The 1844 Constitution definitively limited suffrage to white males, albeit without any property qualification. Only the 15th Amendment to the U.S. Constitution changed that regressive feature. Further, while New Jersey was the first state, the book asserts, to ratify the Bill of Rights in November 1789, its own constitution did not contain a charter of liberties at that time.

However, the 1844 charter did contain our first state bill of rights, now found in Article I of the 1947 Constitution. It begins with broad language about people being free and independent derived from the Virginia Declaration of Rights of 1776, which in some way resembles the shining words of Jefferson's Declaration of Independence of that same year. However, the New Jersey declaration has legal force, as part of the state constitution, and thus has been interpreted broadly in the direction of equality, as in the famous Mt. Laurel zoning cases which held that a person cannot be denied the opportunity to find housing through exclusionary zoning laws. And in concluding this review, there can be no better theme than pointing out (as Williams and Chen do) how New Jersey has led in finding a broader scope for rights from Medicaid-funded abortion to equality in education, to housing, and to fairness in general.

In fact, and this is detailed in the book, New Jersey has developed an extensive state jurisprudence of liberty relying on the 1844 rights charter, plus the requirement for students to receive a thorough and efficient education. While that provision, added as part of the reforms of 1875, may be in Article VIII, Section IV, relating to taxation and finance, it speaks to equality among our state's children. The basic tack taken by the New Jersey Supreme Court in deciding whether the state constitutional charter of liberties should be interpreted more expansively than those of the federal Constitution was laid out by Justice Alan B.

(2009), an invaluable account of New Jersey politics from the civil war to the end of the 19th Century.

4. A frog is a device which allows one railroad track to cross-over another at grade. There was an armed standoff between forces of the two roads over inserting such a frog to allow the competing road to pass on to the Delaware River and connect New York City to Philadelphia.

Handler in a 1982 concurrence in *State v. Hunt*, described in the book as follows:

Justice Handler, [whose concurrence was adopted by the Supreme Court in *State v. Williams*, (1983)] listed seven criteria or standards that would justify a result different from the U.S. Supreme Court's: (1) textual differences in the constitutions; (2) "legislative history" of the provision indicating a broader meaning than the federal provision; (3) state law predating the U.S. Supreme Court decision; (4) differences in federal and state structure; (5) subject matter of particular state or local interest; (6) particular state history or traditions; and (7) public attitudes in the state. He concluded that reliance on such criteria demonstrates that a divergent state constitutional interpretation "does not spring from pure intuition but, rather, from a process that is reasonable and reasoned."

These criteria, especially differences in the state structure and state language have played out over the decades. To take two famous examples, zoning is more of a state than a federal issue, and the thorough and efficient clause is much more specific as to education than a general equal protection mandate. Similarly, the Court's free speech cases on issues like speech on a mall that is on private property are not constrained by the requirement in the federal Fourteenth Amendment which protects citizens only from state actions. Also, with its greater familiarity with state practice, the Court has felt freer to impose a higher standard on law enforcement in the areas of certain telecommunications records and accuracy of search warrants. Thus guided, and with the support of the independent Supreme Court established in 1947, New Jersey has maintained a leadership role in protecting the rights of its citizens, even where the U.S. Constitution does not support their freedom. This lesson from *Williams* and *Chen* may be the most important teaching in their book.

In sum, Williams and Chen have provided a clear, compact, and comprehensive guide to our state constitution and its interesting history. Nowhere else would you be able to find so much packaged so efficiently. Practitioners will benefit from its stories and its insights and as well as from its legal analysis. The book will also provide a firm foundation for both Law School and general political science classes. It should be read and debated by the general public as well.⁵

5. This Book Review first appeared in the October 2022 edition of the *New Jersey Lawyer* and is reprinted with permission from the New Jersey State Bar Association. Footnotes have been altered from original to comply with *The Bluebook: A Uniform System of Citation*.
