William & Mary Law Review

Volume 46 (2004-2005)
Issue 4 Symposium: Dual Enforcement of Constitutional Norms
Article 3

February 2005

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FOREWORD: THE NEW FRONTIER OF STATE CONSTITUTIONAL LAW

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State constitutions have entered into a new interpretive era. Once considered documents of parochial import worthy of little serious study by anyone outside of a state's individual jurisdiction, in the late twentieth century state and federal judges, along with legal academics, began to recognize the potential of state constitutions as important sources of law. A borrowing mentality emerged, as courts looked outside of their jurisdictional territories to state constitutions to fill gaps in constitutional interpretation. This borrowing approach, however, relied heavily on a kind of jurisdictional positivism that conceived of state constitutions as fundamentally free-standing sources of fully independent legal norms.[1] Although this approach satisfied a temporary political need for the legitimation of an independent jurisprudence of state constitutional rights, it was increasingly called into question by judges and scholars who challenged its descriptive accuracy and normative desirability, and who looked instead toward a broader transjurisdictional discourse of constitutional law.[2]

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1. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Hans A. Linde, *First Things First: Rediscovering the States' Bill of Rights*, 9 U. BALT. L. REV. 379 (1980).

2. *See* Honorable Christine M. Durham, *What Goes Around Comes Around: The New Relevancy of State Constitution Religion Clauses*, 38 VAL. U. L. REV. 353 (2004); James A. Gardner, *State Courts as Agents of Federalism: Power and Interpretation in State Constitutional Law*, 44 WM. & MARY L. REV. 1725 (2003); Daniel B. Rodriguez, *State Constitutional Theory and Its Prospects*, 28 N.M. L. REV. 271 (1998).

In the past decade, a new frontier of constitutional discourse has begun to emerge, adding a fresh perspective to state constitutional law. Instead of treating states as jurisdictional islands in a sea under reign of the federal government, this new approach sees states as co-equals among themselves and between them and the federal government in a collective enterprise of democratic self-governance. This symposium, organized around the theme of *Dual Enforcement of Constitutional Norms*, provides the occasion for leading scholars on state constitutional law to take a fresh look at their subject by adopting a vantage point outside of the individualized jurisdictional context. The symposium invited participants to consider directly whether state and federal constitutional law are separate and distinct systems of law, each with its own doctrines, traditions, and dominant norms, or whether state and federal constitutional law may profitably be understood as complementary features of a shared project of elaborating and enforcing shared constitutional norms. The articles in this issue lie along what we hope will prove to be a new frontier that moves courts and scholars closer to a sustainable interpretive theory of state constitutions, shedding important light on the role of state courts, while also addressing the federal judicial role in a system of dual enforcement.

I. STATE CONSTITUTIONS AND THEIR CONCEPTUAL SETTING IN THE LATE TWENTIETH CENTURY

Although as a matter of chronological history state constitutions preceded, and to a significant extent provided models for, the U.S. Constitution, contemporary state constitutionalism was born in the shadow of the federal rights jurisprudence of the Warren Court. During that period, a highly active U.S. Supreme Court not only dramatically expanded the reach and impact of the rights protected by the Federal Bill of Rights, but also, through the incorporation doctrine and the Supremacy Clause, imposed its constraints on state governments.[3] As a result, state constitutional law was seen, not

3. For a recent discussion of this history, see Robert K. Fitzpatrick, Note, *Neither Icarus Nor Ostrich: State Constitutions as an Independent Source of Individual Rights*, 79 N.Y.U. L. REV. 1833, 1836-38 (2004).

illogically, as in some fundamental way subordinate to national constitutional law.

Because the Federal Constitution seemed, in that historical context, to supply a reasonably complete set of constitutional norms, and because these federal norms by law displaced any inconsistent norms contained in state constitutions, state courts often acted as though they need not bother to look any further than the shared national principles embodied in the U.S. Constitution. State courts typically expressed this deference by looking reflexively to the U.S. Supreme Court for the solutions to virtually all problems of constitutional law, treating state and national constitutional law as essentially uniform and thus interchangeable.

This highly deferential approach soon provoked considerable criticism from the bench and the academy, leading to a movement to liberate state constitutional law from the overbearing influence of its federal counterpart. A revolution needs an ideology, and the revolutionaries found theirs in a strong form of jurisdictional positivism that conceived of state constitutions as entirely independent sources of legal norms arising from organic and fundamentally local social and political processes, of which state constitutions were both the culmination and the embodiment. State courts were thus urged to interpret state constitutions by looking more or less exclusively to the state document to tease out what were presumed to be homegrown solutions to commonplace constitutional problems. This approach provided a much-needed justification for state courts to deviate from the path charted by the U.S. Supreme Court, a need increasingly felt during the Burger and early Rehnquist years, when the Court adopted an approach to individual rights that was more conservative than some state judges wished to pursue.

Eventually, however, the independent approach to state constitutional interpretation itself began to show its limitations. It could not plausibly account for the striking similarity of most contemporary state constitutions to one another and to the Federal Constitution. Its interpretive methodology sometimes drove state courts to make dubious claims about the social and ideological distinctiveness of their state polities. Furthermore, it has been seriously undermined in practice by state courts themselves, many of which utterly ignore its prescriptions and continue to look primarily to federal constitu-

tional law and the Supreme Court for guidance. These developments compromised the normative and descriptive appeal of the independent approach, prompting scholars to take another look at state constitutional law, this time focusing on its structural role in the American system of federalism.

II. THE EMERGENCE OF THE NEW FRONTIER: TOWARD A REGIME OF DUAL ENFORCEMENT

A new trend is emerging in scholarship about state constitutional law. Although the movement for state constitutional independence is universally and gratefully acknowledged for having taken a necessary step along the road to a conceptually well-founded jurisprudence of state constitutionalism, it is also seen as having adopted a position that, in its reaction against the unreflective linkage of state and federal constitutional law, turned further in the opposite direction than was strictly necessary. In correcting for this understandable overcompensation, scholars have begun to turn away from the suggestion that state judges treat state constitutions as independent documents. Instead, they have turned toward developing more nuanced theories of the interaction of state and federal constitutional law. This new trend allows scholars, as well as courts, to account for and accept some of the common practices of state constitutional adjudication, while still subjecting those practices to meaningful normative critique. It also provides scholars and courts a way of conceptualizing the role of federal courts in interpreting state constitutions.

The articles in this symposium issue represent a wide variety of responses to this emerging new approach. In the first article, James Gardner illustrates why strict constitutional positivism—by which he means an interpretive technique that assumes a unique, determinate and self-constructed polity—provides a weak normative basis for state constitutional interpretation.[4] Gardner observes that state courts are often criticized for failing to heed positivist interpretive techniques: "they ignore subtle (and sometimes not-so-subtle) cues contained in the state constitutional text; they fail to

4. *See* James A. Gardner, *Whose Constitution Is It? Why Federalism and Constitutional Positivism Don't Mix*, 46 WM. & MARY. L. REV. 1245 (2005).

inquire into the views of the state constitution's framers; and they undertake no meaningful investigation into the history of their state or the development of its constitution."[5] Gardner suggests that we look beyond this narrowly positivist interpretive technique, searching for "not only state sources of constitutional meaning but also corresponding national sources."[6] As he observes, the presence of non-autonomous subnational units poses a particular challenge to strict positivism.[7] In addition, political theories that increasingly recognize shared identity, such as occurs when individuals are simultaneously citizens of both a state and a nation, blur the clear political boundaries that jurisdictional positivism demands.[8]

Gardner's analysis has several implications for the interpretation of state constitutions. First, a national constitution "belongs to" a citizen of the polity in the strongest possible way, calling into question the primacy of state constitutions.[9] Positivism as a technique only makes sense where subnational units are autonomous, as independent nations are.[10] Moreover, it must be recognized that a state constitution is not solely the product of the state polity, "but is rather the outcome of more comprehensive processes in which both the state and national polities participate."[11] Gardner thus argues that state constitutional interpretation "inevitably will require at least some resort to national norms and sources of constitutional meaning."[12] Gardner proceeds to apply this more cosmopolitan approach to two constitutional practices of state courts: consulting the constitutions of other jurisdictions as an aid to interpretation, and constitutional "wormholes," provisions in state constitutions that deliberately incorporate concepts or values developed by other polities. As Gardner suggests, there is a way to construe constitutional positivism to be consistent with these practices, but "we must abandon the idea that the meaning of a

5. *Id.* at 1247.
6. *Id.* at 1270.
7. *Id.* at 1269-71.
8. *Id.* at 1256-59.
9. *Id.* at 1249-53.
10. *See id.* at 1252-53.
11. *Id.* at 1261.
12. *Id.* at 1261.

state constitutional provision is determined solely by reference to sources of meaning associated with that constitution."[13]

Hans Linde, an early and consistent leader in the movement critiquing the deferential approach to state constitutional jurisprudence,[14] sat on the Oregon Supreme Court for more than a dozen years. In his contribution to the symposium, Linde emphasizes that the "[t]he point of federalism ... lies in the scope it leaves for differences."[15] His analysis focuses on structural constitutional issues in state governance, such as standing, ripeness and mootness. Textually,[16] historically,[17] and institutionally,[18] Linde shows that state courts play a very different role in structural governance issues than their federal counterparts.

By focusing on differences between the litigation of state and federal constitutional structure issues in governance, rather than the convergence of constitutional meaning, Linde suggests that we can identify the limits of resort to federal constitutional doctrines as a source for state constitutional interpretation. He concludes "[n]othing in the typical texts, the history, or the institutions of most state governments calls for reading the formulas used by the United States Supreme Court into a state's constitution."[19] While Gardner urges that we expand constitutional positivism to include such a possibility, Linde does not see the resort to federal constitutional doctrine as compelled by state constitutional interpretation.

In the next article, Robert Pushaw addresses the enforcement gaps created when state courts "creatively expand or contract constitutional rights."[20] Pushaw's article focuses on the growing set of precedents state courts are creating on issues of federal constitutional law. Doctrines of judicial restraint, such as justiciability

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13. *Id.* at 1270.

14. *See* Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984); Linde, *supra* note 1.

15. Hans A. Linde, *The State and Federal Courts in Governance:* Vive La Différence*!*, 46 WM. & MARY L. REV. 1273 (2005).

16. *See id.* at 1283.

17. *See id.* at 1278-79.

18. *See id.* at 1276-79.

19. *Id.* at 1288.

20. Robert J. Pushaw, Jr., *Bridging the Enforcement Gap in Constitutional Law: A Critique of the Supreme Court's Theory that Self-Restraint Promotes Federalism*, 46 WM. & MARY L. REV. 1289, 1289 (2005).

(standing, ripeness, and mootness), abstention, and other doctrines increasingly justified by reference to a "states' rights" vision of federalism—including the well-pleaded complaint rule, the adequate and independent state grounds doctrine, and sovereign immunity—have carved out what Pushaw describes as a substantial set of exceptions to federal question jurisdiction in federal courts.[21] Pushaw's concern is not state constitutional provisions per se, but how these exceptions to federal question jurisdiction entrust fundamental issues of federal constitutional rights to state supreme courts.

Pushaw carefully argues that this growing trend of entrustment of federal constitutional law to state courts conflicts with originalist principles of judicial federalism.[22] He characterizes this trend as a device to control federal dockets, arising out of the post-Reconstruction growth in federal law.[23] As Pushaw argues, "Article III courts have an indispensable role in ensuring the supremacy and uniformity of federal law, especially the Constitution."[24] Pushaw warns that, in contrast to federal judges, state judges are motivated by parochial concerns to the extent they "have personal and political incentives to favor their home state parties and interests."[25] In order to guard against such concerns in constitutional interpretation, Pushaw proposes a judicially crafted exception to diversity jurisdiction: that "federal courts should require the party invoking their jurisdiction to make a colorable showing that a state judge or court is likely to be biased against either her personally or out-of-staters generally."[26] He also suggests that the adequate and independent state grounds doctrine be abolished, and recommends some changes to justiciability doctrines, abstention, the well-pleaded complaint rule, and state sovereign immunity,[27] in order "[T]o maintain the supremacy and uniformity of federal law."[28] He concludes with the somewhat radical conclusion that "the Court restructure its

21. *See id.* at 1291-1309.
22. *See id.* at 1312-24.
23. *See id.* at 1324-28.
24. *Id.* at 1328.
25. *Id.* at 1330.
26. *Id.* at 1331.
27. *See id.* at 1334-41.
28. *See id.* at 1337-38.

jurisdictional doctrines to ensure that federal judges adjudicate all cases involving federal constitutional rights, and correspondingly eliminate as many state-law controversies as possible."[29]

A foundational premise of the symposium is that reconceiving state constitutions as parts of a single, complex piece of national constitutional architecture can yield both descriptive and conceptual benefits. In his contribution to the symposium, Jim Rossi demonstrates the conceptual payoff by focusing on two recurring problems of cooperative federalism: state implementation of federal programmatic directives and state administrative borrowing of federal regulatory standards.[30] In both of these situations, Rossi observes, the state constitution may constrain the ability of state agencies to administer programs in the way they desire.[31] Most commonly, a strict nondelegation doctrine, rooted in the state constitutional separation of powers, may appear to bar a state legislature from authorizing state agencies to comply with, or even voluntarily to adopt, relevant principles of federal law.[32]

Federal courts, Rossi argues, have "solved" this problem by wielding the sledgehammer of federal preemption, a crude approach that accords no role at all to state constitutions in structuring the internal processes of state self-government.[33] State courts, on the other hand, have attempted to preserve the benefits of inter-governmental programmatic cooperation by minimizing state constitutional constraints on agency behavior. Their strategy, however, as Rossi shows, has been to cut state agencies the necessary constitutional slack by adopting strained and unconvincing justifications for relaxing state constitutional principles of separated powers.[34] Rossi proposes a better and more nuanced approach based on comparative institutional analysis, informed by the dual constitutional model. State constitutions, he argues, should not in general be construed to bar state administrative compliance

29. *Id.* at 1341.

30. *See* Jim Rossi, *Dual Constitutions and Constitutional Duels: Separation of Powers and State Implementation of Federally Inspired Regulatory Programs and Standards*, 46 WM. & MARY L. REV. 1343 (2005).

31. *See id.* at 1345-49.

32. *Id.* at 1359-62.

33. *Id.* at 1353-55.

34. *See id.* at 1363-70.

with, or adoption of, federal legal norms, because state constitutional nondelegation doctrines are better understood as responses to governance failures particular to state-level democracy, failures that have no relevance when a state legislature indirectly delegates power to the national government rather than to an organ of state government.[35]

Following Rossi's tight close-up of a fine detail of the dual constitutional structure, Lawrence Sager pans out to examine the large-scale movements of the mechanism by which dual constitutionalism generates and enfolds moral norms.[36] One of the benefits of a federal system, he argues, is its capacity to accommodate and even to encourage moral progress.[37] Sager envisions this as a continual process in which moral experimentation occurs in a small number of vanguard states, propagates itself within the system through the accumulation of experience and the gradual alteration of public opinion, and finally consolidates itself by migrating to the national level, where formerly cutting-edge moral norms are incorporated, constitutionalized, and then imposed on straggler states to create a new—but only temporary—uniformity.[38]

From this account of the dual constitutional mechanism, Sager goes on to propose how federal constitutional doctrine might best secure its benefits. In particular, Sager argues, premature federal interference with state moral experimentation should be minimized, but national enforcement of newly accepted principles should be robust, two principles that, he contends, need not be in tension.[39] Similarly, Sager defends both a presumption against federal preemption and federal judicial practices that avoid hasty leaps to the constitutional bottom line in order to allow states some breathing space in exploring potential avenues of moral progress.[40]

One of the longstanding attractions of the view that federal and state constitutions are completely independent is its simplicity; reconceptualizing state and federal constitutions as partners in a

35. *See id.* at 1370-83.

36. *See* Lawrence G. Sager, *Cool Federalism and the Life-Cycle of Moral Progress*, 46 WM. & MARY L. REV. 1385, 1387-88 (2005).

37. *See id.* at 1386.

38. *See id.* at 1387-88.

39. *See id.* at 1391-95.

40. *See id.* at 1395-97.

shared enterprise carries a price in conceptual complexity. Robert Schapiro not only embraces this complexity but finds ample grounds to praise it in his article on interjurisdictional enforcement of individual rights.[41] The unusual dual structure of the American judiciary, Schapiro argues, creates a system of "intersystemic adjudication [that] provides a way for state and federal courts to work together to safeguard important liberties."[42]

Building on a model of "polyphonic" judicial federalism that he has previously developed,[43] Schapiro takes issue with several well-established principles of federal adjudication that counsel federal courts to avoid construing state constitutions. In fact, Schapiro argues, federal adjudication of state constitutional claims can in many circumstances yield substantial benefits by multiplying the institutional settings in which such claims are considered, generating intersystemic dialogue on the meaning of constitutional principles, and better utilizing available system redundancy to maximize the effectuation of recognized rights.[44] In defending his account of an expanded federal adjudicatory role, Schapiro rejects the view that *Erie Railroad Co. v. Tompkins*[45] requires a complete separation of the state and federal judicial spheres.[46] Nothing in *Erie*'s account of state and national judicial authority, he argues, impugns the legitimacy of intersystemic judicial dialogue and cooperation, which can go a long way toward reducing error in both systems.[47]

Chief Justice Randall T. Shepard of Indiana is a leading practitioner of another kind of valuable intersystemic dialogue, the kind that links the bench and the academy. In his contribution, Chief Justice Shepard delivers a forthright critique of federal courts for treating state constitutions like "just another piece of paper" rather than

41. Robert A. Schapiro, *Interjurisdictional Enforcement of Rights in a Post-*Erie *World*, 46 WM. & MARY L. REV. 1399 (2005).

42. *Id.* at 1401.

43. *See* Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656 (2000); Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CAL. L. REV. 1409 (1999).

44. Schapiro, *supra* note 41, at 1417-23.

45. 304 U.S. 64 (1938).

46. *See* Schapiro, *supra* note 41, at 1423-31.

47. *Id.* at 1426-31.

important documents that have real significance for structuring state governance.[48]

Turning first to the issue of remedies for federal constitutional violations, Chief Justice Shepard argues that federal courts have too often viewed state constitutional provisions structuring the internal self-governance of the state as literally irrelevant to the crafting of remedial orders.[49] Similarly, he explains, federal courts routinely ignore state constitutional restrictions on the authority of state law enforcement officials by admitting into evidence in federal prosecutions materials that state police have obtained in violation of the state constitution.[50] In these situations, Shepard maintains, federal courts should join in the enforcement of rights protected by the state constitution rather than treat that task as belonging solely to the state judiciary.[51] He concludes by examining the certification of questions of state constitutional law, a federal procedure that he finds in principle more respectful of the role of state constitutions, but that in practice leaves room for improvement.[52]

If many of the symposium participants have stressed the distinct institutional positions of state and federal courts, Michael Solimine turns his attention to a shared function that has long been thought to presuppose equivalence: the enforcement by state courts of federal constitutional rights.[53] Solimine, a leading participant in ongoing debates over the "parity" of state and federal courts[54]—state courts' willingness and ability to effectively enforce federal constitutional rights—reviews the course of those debates and concludes that critics of state judicial parity have reached skeptical conclusions about the abilities of state courts only in consequence of asking the wrong questions.

Solimine begins by reviewing the empirical literature on parity, as well as a corresponding set of critiques that have been leveled at

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48. *See* Randall T. Shepard, *In a Federal Case, Is the State Constitution Something Important or Just Another Piece of Paper?*, 46 WM. & MARY L. REV. 1437, 1437 (2005).

49. *See id.* at 1440-43.

50. *See id.* at 1445-52.

51. *See id.* at 1451-52.

52. *See id.* at 1452-55.

53. *See* Michael E. Solimine, *The Future of Parity*, 46 WM. & MARY L. REV. 1457 (2005).

54. *See* MICHAEL E. SOLIMINE & JAMES L. WALKER, RESPECTING STATE COURTS: THE INEVITABILITY OF JUDICIAL FEDERALISM (1999).

its methods and conclusions. These critiques, Solimine explains, implicitly measure state judicial parity in the enforcement of federal constitutional rights against a criterion of uniformity in result.[55] This criterion, he contends, is inappropriate because it rests on a false assumption. In fact, Solimine argues, the federal structure of dual judicial systems, far from presupposing uniformity, presupposes to some degree its opposite: that state courts will exercise independence in the performance of their national law enforcement functions, and that this space in the system will allow for a useful percolation of ideas.[56] Future attempts to assess parity, he argues, must look not to the results in individual cases, but to broad influences in the institutional environment. For example, state adoption of federal procedural rules and state efforts to contain the politicization of state judicial election campaigns are convergence-inducing influences that may create and maintain the conditions from which parity may result.[57]

In a fitting conclusion to this symposium issue, Robert F. Williams, a trailblazing pioneer in the analysis and critique of state constitutional interpretation, takes a fresh look at the commonplace state constitutional practice of lockstep interpretation.[58] In a series of now-classic articles, Williams argued powerfully that lockstep interpretation constitutes a kind of abdication of state judicial responsibility for construing the state constitution.[59] In his contribution to this symposium, Williams once more places lockstep interpretation under the microscope, but concludes, more sympathetically, that not all lockstepping is equivalent, and that certain varieties of lockstepping might in fact represent logical and reasoned responses to the institutional environment in which state courts find themselves.[60]

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55. *See* Solimine, *supra* note 53, at 1469-72.

56. *See id.* at 1481-86.

57. *See id.* at 1487-94.

58. *See* Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499 (2005).

59. *See* Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S. CAL. L. REV. 353, 402 (1984); Robert F. Williams, *Methodology Problems in Enforcing State Constitutional Rights*, 3 GA. ST. U. L. REV. 143, 171-76 (1987).

60. *See, e.g.*, Williams, *supra* note 58, at 1527-29.

Williams begins his reexamination by disaggregating lockstep interpretation into several varieties: unreflective adoption of federal law,[61] reflective adoption of federal law,[62] and various species of "prospective lockstepping."[63] This more nuanced taxonomy of lockstep practices, Williams argues, allows us to avoid unjustifiably condemning all lockstepping in the mistaken belief that its only possible cause is bad or irresponsible judging.[64] Williams's analysis thus not only acknowledges that lockstepping may in some circumstances be supported by substantial jurisprudential justifications, but it also legitimates lockstep interpretation, in its benign forms, as a potentially valuable mode of interjurisdictional dialogue and positioning within federalism's framework of dual constitutionalism.[65]

CONCLUSION

Although the articles in this symposium explore new trends in state constitutional discourse, many of the issues raised by them remain unsettled. The new trend may not be as robust as past efforts in its ability to account for common interpretive practices in state constitutional adjudication. The normative critique of new scholarship presents many deeper, and more contested, issues with which state constitutionalism must grapple. And courts and scholars will continue to disagree about the role of federal courts in interpreting state constitutions. Although these questions may be unsettling to those who yearn for predictability in constitutional law, we hope that the articles in this issue convey how exciting the challenges and opportunities of a new frontier can be for state constitutionalism.

61. *See id.* at 1505-06.
62. *See id.* at 1506-09.
63. *Id.* at 1509-20.
64. *Id.* at 1527-29.
65. *See id.* at 1527-31.