
The
CONSTITUTIONALISM
of
AMERICAN
STATES

Edited by

George E. Connor and
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Foreword by

Donald S. Lutz

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Preface

GEORGE E. CONNOR AND CHRISTOPHER W. HAMMONS

The Constitutionalism of American States



The study of state constitutions, indeed the study of constitutionalism in general, suffers from being caught between the natural preferences of empiricists and theorists. Theorists prefer to discuss the political philosophy and origins of constitutionalism as a concept. Empiricists prefer to analyze the institutions and power arrangements that come out of constitutions. The result is that written constitutions—the actual documents, that is—often receive less attention in terms of design and function. One of the appealing aspects of Donald S. Lutz’s work is his success in blending both halves of the discipline—theoretical and empirical—to create a better understanding of constitutions themselves, or what he often refers to as “constitutional design.”

Lutz has argued that there are actually two constitutional traditions that run through early American history. “The first tradition can be found in the charters, letters-patent, and instructions for the colonists written in England. In certain respects, the United States Constitution favors this tradition. The second tradition is found in the covenants, compacts, agreements, ordinances, codes, and oaths written by the colonists themselves. While the U.S. Constitution embodies aspects of this tradition as well, it is in the early state constitutions that we find the full flowering of this second tradition.” Lutz maintains that these two traditions “were blended to produce a constitutional perspective uniquely American.”¹

One important aspect of constitutionalism in America is the fact that it began very early in the colonial period. For example, the Pilgrim Law Code

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1. Lutz, *Colonial Origins of the American Constitution: A Documentary History* (Indianapolis: Liberty Fund, 1998), xxi.

(1636), Fundamental Orders of Connecticut (1639), Rhode Island Acts and Orders (1647), and Fundamentals of West New Jersey (1681) all contained the basic elements of constitutional design.² One obvious, but often overlooked, component of this aspect of American constitutionalism is the fact that state constitutionalism preceded national constitution-making.³ In other words, the development of state constitutions laid the foundation for the U.S. Constitution, not the reverse, as is often asserted.

Illustrating a second aspect of America's unique constitutionalism, Lutz reminds us that

any essay on this topic must face the fact that those writing state constitutions in the United States do so in a double capacity. First, state constitutions must contain all that is necessary for any true constitution. That is, the framers are called upon to create a document that would be recognized as a workable constitution in any context. Second, the framers of a state constitution operate within the context defined by the United States Constitution. Thus, they must write a document that is appropriate to the federal system created by that national document. This double context results in American state constitutions having a rather complex set of purposes.⁴

Although this double context may be more important for some states than others, the following chapters acknowledge this complexity and, in some cases, use it to demonstrate unique aspects of state constitutionalism.

One final aspect of American constitutionalism that is inextricably tied to the first two is the textual relationship between the national and state constitutions. One could argue that the state constitutions *enable* the federal constitution. John Kincaid notes that "the framers would surely have failed if they had to formulate a complete national constitution settling all matters of fundamental law for 13 diverse states." One could also contend that the state constitutions actually *complete* the national text. Lutz argues that "the [U.S.] constitution is incomplete because a significant number of questions we can bring to it are not answerable using the one document alone."⁵

2. *Ibid.*, 61–67, 210–15, 178–203, 263–65.

3. Lawrence M. Friedman, "State Constitutions in Historical Perspective," *Annals of the American Academy of Political and Social Science* 496 (March 1988): 12–22; Robert F. Williams, "Evolving State Legislative and Executive Power in the Founding Decade," *Annals of the American Academy of Political and Social Science* 496 (March 1988): 43–53.

4. Lutz, "The Purposes of American State Constitutions," *Publius: The Journal of Federalism* 12 (Winter 1982): 3.

5. Kincaid, "State Constitutions in the Federal System," *Annals of the American Academy of Political and Social Science* 496 (March 1988): 15; Lutz, "The United States Constitution as an Incomplete Text," *Annals of the American Academy of Political and Social Science* 496 (March 1988): 32.

In recognizing the complexity of state constitutionalism, the editors and authors of this work are inspired by Lutz's eight-part theory of constitutional design that provides a unique paradigm for understanding the purposes of American state constitutions. Each chapter of the text illustrates the manner and extent to which each state constitution fulfills Lutz's eight purposes of a written constitution. Within these editorial parameters, however, each chapter remains unique because the constitutional history of each state is unique. Each author was free to apply or utilize the framework as he or she saw fit. Lutz's eight functions of a written constitution are as follows:

1. Define a way of life—the moral values, major principles, and definition of justice toward which a people aims
2. Create and/or define the people of the community so directed
3. Define the political institutions, the process of collective decision making, to be instrumental in achieving the way of life—in other words, define a form of government
4. Define the regime, the public, and citizenship
5. Establish the basis for the authority of the regime
6. Distribute political power
7. Structure conflict so it can be managed
8. Limit governmental power⁶

The Constitutionalism of American States hence presents a comparative and comprehensive discussion of American state constitutions, inspired by Lutz's work. The text offers fifty chapters on the constitutional development and constitutional design of each state. Each chapter addresses the evolution of each state constitution from the perspective of the same theoretical parameters.

The specific utility of this text is that it provides scholars with a unique theoretical framework that can be applied to the comparative study of state constitutions. It also provides an eminently workable framework for comparing individual state constitutions to the U.S. Constitution. Even when a state has a relatively stable constitutional history, Lutz's framework can be utilized to measure the evolving meaning of state constitutions. This evolution is especially noteworthy when discussing how a state constitution defines "a people."

Beyond the specific comparison of state constitutions, the text promises to be useful in other areas as well. Scholars who are interested in comparative state institutions will find a plethora of useful material. Those who are interested in historical and contemporary issues of federalism will be af-

6. Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988), 16.

forded a unique approach to their endeavors. Scholars interested in the concept of political culture and its continued relevance will be able to trace its evolution in a comprehensive fashion. The application of “differentiation” and “self-illumination” in Lutz’s original work and here, specifically applied in the Wisconsin chapter, will be of interest to Voegelin scholars.

STATE CONSTITUTIONAL LITERATURE

Students seeking additional background on state constitutions should consult some of the wonderful works that have been produced in the past few years. An invaluable resource for students seeking a general understanding of the form and function of state constitutions can be found in G. Alan Tarr’s *Understanding State Constitutions*. Tarr’s multidisciplinary approach combines history, law, and political science to provide the reader with a general understanding of the uniqueness, development, and evolution of state constitutions. The book is organized by topic and chronological eras of constitutional development rather than offering a state-by-state analysis. Robert L. Maddex’s *State Constitutions of the United States* offers state-by-state constitutional profiles of the fifty states and three U.S. territories.⁷ In a single volume, Maddex provides a brief constitutional history and a summary of key constitutional provisions as well as some very accessible comparative material.

Students interested in more specific aspects of state constitutionalism should consult some of the insightful empirical studies that attempt to quantify various elements of state-constitutional design. Lutz, for instance, develops and empirically tests a theory of constitutional amendment using the constitutions of the fifty U.S. states. John R. Vile conducts an empirical analysis of constitutional change and argues that the method of change—formal amendment, judicial interpretation, or alteration by the executive or legislative branch—greatly influences the type and magnitude of change in content. Christopher W. Hammons examines constitution length and content to determine whether these aspects of constitutional design affect the longevity of the document itself. Hammons concludes that at the state level, lengthier, more policy-laden constitutions tend to last longer than shorter, framework-oriented documents.⁸

7. Tarr, *Understanding State Constitutions* (Princeton: Princeton University Press, 1998); Maddex, *State Constitutions of the United States* (Washington, D.C.: Congressional Quarterly, 2005).

8. Lutz, “Toward a Theory of Constitutional Amendment,” *American Political Science Review* 88, no. 2 (1994): 355–71; Vile, *Constitutional Change in the United States: A Comparative Study of the Role of Constitutional Amendments, Judicial Interpretations, and Legislative and*

One of the most recent and comprehensive examinations of American state constitutionalism is John J. Dinan's study of state constitutional conventions. Underlying our theoretical argument that state constitutions reflect the unique characteristics of each state, he argues that "state conventions have been a forum for reconsidering, and ultimately revising or rejecting, a number of governing principles and institutions that were adopted by the federal convention of 1787 and that have remained relatively unchanged at the national level." He concludes, echoing the argument of Lutz, that "the principal benefit of examining these state convention debates is that they provide a better expression of the American constitutional tradition than is yielded by a study of the origin and development of the federal constitution alone."⁹

For students looking for data on state constitutions rather than the documents themselves, Professors Albert Sturm and Janice May have provided a wealth of quantitative data on state constitutions in their *Book of the States*.¹⁰ This annual volume on state government provides information on constitutional length, methods and frequency of modification, proposed amendments, dates of adoption, as well as brief constitutional histories of the states. Whereas the collection of data is invaluable in the study of state constitutions, the editors' own analysis is limited primarily to illustrative comparisons and remains largely untapped with respect to studying the empirical regularities of state constitutions.

For students of state constitutionalism seeking to conduct original research on their own, Oceana Publications' *Constitutions of the United States: National and State* provides one of the few bound collections of all fifty state constitutions, including constitutions for territorial jurisdictions such as Puerto Rico and American Samoa.¹¹ Although most state constitutions are easily available online, the real value of this collection stems from the separate comprehensive index. The indexes allow students to cross-reference constitutional provisions among states by topic. For example, researchers interested in gubernatorial powers are provided the relevant article and section number for each state constitution.

Perhaps even more valuable is Oceana Publications' companion set of historical state constitutions. Collected in this volume are 145 American state

Executive Actions (Westport, Conn.: Praeger, 1994); Hammons, "Was James Madison Wrong? Rethinking the American Preference for Short, Framework-Oriented Constitutions," *American Political Science Review* 93, no. 4 (1999): 837–49.

9. Dinan, *The American State Constitutional Tradition* (Lawrence: University Press of Kansas, 2006), 4.

10. Sturm and May, "State Constitutions and Constitutional Revision," in *Book of the States* (Lexington, Ky.: Council of State Governments, published annually).

11. *Constitutions of the United States* (Dobbs Ferry, N.Y.: Oceana Publications, 1962–1969).

constitutions written since 1776. Massachusetts has retained a single constitution since 1776, while Louisiana holds the record, currently on its eleventh constitution since entering the Union. *Sources and Documents of United States Constitutions*, edited by William Swindler of the College of William and Mary, provides the definitive reference for constitutions that are no longer in effect.¹² Swindler also includes a cross-referencing index for all the constitutions from each particular state (but not across states) as well as additional historical documents of interest such as various convention records, constitutional drafts, and ratification documents.

In addition to this literature, there are two reference series available to scholars studying state constitutions. First and foremost is the Greenwood Press series Reference Guides to the State Constitutions of the United States. Although different in purpose from the present work, the material available in the texts published thus far is invaluable. Impressed by the scholarship of this series, the editors of this volume recruited a number of authors from the Greenwood series.¹³ Similarly, scholars have benefited greatly by the University of Nebraska Press series Politics and Government of the American States, from which we have also recruited chapter authors.¹⁴

This text attempts to fill in some of the gaps in the comparative reference literature on state constitutions by providing a state-by-state analysis of all fifty state constitutions. Inspired by Lutz's scholarship defining both the common purposes of state constitutions as well as their inherent uniqueness, we hope that this work allows the reader to see not only the similarities among state constitutions but also the unique elements of each document that are reflective of the particular time, place, and people from which it was manifested. In short, we hope that this work will allow the reader to see both the proverbial trees and the forest at the same time.

A SCHOLARLY DISAGREEMENT

As a general rule, one should not step into an academic debate without a certain degree of scholarly trepidation. The scholarly debate in question here regards the value of state constitutionalism. If the debate can be neatly divided into two camps and personified, they would include those such

12. Swindler, *Sources and Documents of United States Constitutions*, 10 vols. (Dobbs Ferry, N.Y.: Oceana Publications, 1973–1988).

13. They include Melvin B. Hill Jr. (Georgia), Anne Feder Lee (Hawaii), Francis H. Heller (Kansas), John V. Orth (North Carolina), Lewis Laska (Tennessee), and Hugh Spitzer (Washington).

14. They are Penny M. Miller (Kentucky), and Kenneth T. Palmer (Maine), and Elmer Cornwell (Rhode Island).

as James A. Gardner who doubt the theoretical value of studying state constitutions and those who embrace the value of state constitutional studies, such as G. Alan Tarr.¹⁵

We would agree with Gardner that “the central premise of state constitutionalism is that a state constitution reflects the fundamental values, and ultimately the character, of the people of the state that adopted it.” However, unlike Gardner, who ultimately rejects the central premise of state constitutionalism, we endorse it and agree with Tarr that state constitutions constitute “a crucial scholarly resource for historians and political scientists, because political disputes in the states often had a constitutional dimension, and the texts of state constitutions record those conflicts and their outcomes.”¹⁶

Though siding with Tarr, the editors and authors of this volume take Gardner’s critique of state constitutional studies seriously. Whereas one could point to recent state votes on school funding and gay marriage in an attempt to refute Gardner’s argument, the chapters that follow offer a conversation rather than a refutation. Rather than simply denying his contention that there is a “poverty of state constitutional discourse,” or “the lack of language in which participants in the legal system can debate the meaning of the state constitution,” we suggest that this volume provides, or at least begins to provide, just such a language. Similarly, Gardner maintains that “you have no sense of the history of the state constitution,” that “you do not know the identity of the founders, their purposes in creating the constitution, or the specific events that may have shaped their thinking,” and that “state constitutions are hard-pressed to generate epics to give them meaning. . . . The stories to which they lend themselves are not stories of principle and integrity, but stories of expediency and compromise at best, foolishness and inconstancy at worst.”¹⁷ This volume provides such a constitutional history. Perhaps not epics, the chapters that follow, though admitting to some “foolishness and inconstancy,” do offer compelling stories, rich with meaning, principle, and integrity.

Finally, and most important, Gardner insists that “you are able to form no conception of the character or fundamental values of the people of the state, and no idea how to mount an argument that certain things are more

15. Gardner, “The Failed Discourse of State Constitutionalism,” *Michigan Law Review* 90, no. 4 (1992): 761–837. One could also certainly include Paul W. Kahn, “Interpretation and Authority in State Constitutionalism,” *Harvard Law Review* 106 (March 1993): 1147–68. On the other side would be Tarr, *Understanding State Constitutions*; and Daniel J. Elazar, “A Response to James Gardner’s ‘The Failed Discourse of State Constitutionalism,’” *Rutgers Law Journal* 24 (Summer 1993): 975–84.

16. Gardner, “Failed Discourse,” 764; Tarr, *Understanding State Constitutions*, 3.

17. Gardner, “Failed Discourse,” 766, 765, 822.

important to the people than others.” We would argue, and the chapters that follow demonstrate, that the character of a state can indeed be found in its constitution. Even in the states that steadfastly follow the federal model—even in the states whose constitutions borrow heavily from their brethren—one can discover the seed of fundamental values. The history and development of state constitutions provide a mirror of fundamental values, but you have to look beyond the texts themselves because “state constitutions are as significant for what they reveal as for what they prescribe.”¹⁸ However, in order to discern these fundamental values, one needs an appropriate methodology. The editors and the chapter authors believe the most appropriate methodology is the one offered by Lutz’s comparative framework.

We are not denying Gardner’s assertion that state constitutions are influenced “by imperatives laid at the feet of the state polity by political groupings that are in some sense external to the state.” This is undoubtedly true and is actually demonstrated in some of the chapters that follow. Moreover, we are not insisting that “the content of a state constitution is dictated *solely* by the desires and self-understandings of a state.”¹⁹ Although we believe that most of the chapters do, in fact, demonstrate such an understanding, we would not extend this argument into a blanket assertion. We observe here that both Lutz and Gardner recognize the double context of state constitutions. We offer Lutz’s framework as a mechanism for measuring and understanding the balance between federal externalities and state self-determination both between states and their respective constitutions and within states and their constitutional evolution.

NOTE ON STYLE AND ORGANIZATION

Given the size and scope of a project such as this, the editors have adopted certain editorial guidelines for the basic format of each chapter. Whereas Lutz’s theoretical framework suggests a template by which authors could approach each state, we have not necessarily encouraged chapter authors to mimic Lutz too closely. Fifty chapters with nearly identical headings and subheadings would severely tax the stamina of even the most diligent reader. On the other hand, each chapter does conform to editorial guidelines with respect to style. We have made one exception to the conventional footnote style, however. Due to the extraordinary number of direct references to state constitutions, we have adopted an in-text format for these citations

18. *Ibid.*, 765; Tarr, *Understanding State Constitutions*, 3.

19. Gardner, *Interpreting State Constitutions: A Jurisprudence of Function in a Federal System* (Chicago: University of Chicago Press, 2005), 121 (emphasis added).

(Article X, Section Y), so as not to add unnecessary length to an already substantial project.

Even after adopting style guidelines and a common theoretical framework, there is still a myriad of approaches to organizing a volume such as this one. However, competing organizational principles presuppose assumptions that the editors wanted chapter authors and, of course, readers to judge for themselves.²⁰ We have, therefore, chosen to organize these chapters by a fairly traditional regional grouping of states and their constitutions. Lutz, organizing colonial predecessors to state constitutions, maintained that the geographic grouping of colonies and states was “universal and essentially invariant.” Although we, here again, follow the lead of Lutz, just “because it’s always been done that way” hardly means that the system is empirical or theoretical. Moreover, there are those, like Gardner, who reject the regional grouping of states, an approach that he labels the “dead end of romantic subnationalism.” We cannot deny his assertion that “every American state contains within its borders a considerable diversity of physical and demographic attributes.”²¹ However, although we acknowledge the problems associated with diversity, we find ample justification for our geographic organizational scheme.

Although primarily theoretical, it is impossible not to recognize the regionalism inherent in Daniel J. Elazar’s concept of political culture and his patterns of state constitutional development. Similar geographic patterns are revealed in David Hackett Fisher, Joel Garreau, and Frederick Jackson Turner.²² Invariably, state-politics scholars also uncover regional patterns.²³ More detailed analysis of state constitutions reinforces the same geograph-

20. See, for example, Elazar’s concept of political culture or his patterns of state constitutional development in *The Cities of the Prairie: The Metropolitan Frontier and American Politics* (New York: Basic Books, 1970) and *The American Constitutional Tradition* (Lincoln: University of Nebraska Press, 1988), 115–20. One could also use Robert A. Dahl’s effectiveness criteria in “Thinking about Democratic Constitutions: Conclusions from Democratic Experiences,” in *Nomos* 38, ed. Ian Shapiro (New York: New York University Press, 1996), 175–206; or Tarr’s developmental model in “State Constitutional Politics: An Historical Perspective,” in *Constitutional Politics in the States*, ed. Tarr (Westport, Conn.: Greenwood Press, 1996), 5.

21. Lutz, *Colonial Origins*, xxxix; Gardner, *Interpreting State Constitutions*, 53, 68.

22. Fisher, *Albion’s Seed: Four British Folkways in America* (New York: Oxford University Press, 1989); Garreau, *The Nine Nations of North America* (Boston: Houghton Mifflin, 1981); as cited by Gardner, Turner, *The Significance of Sections in American History* (New York: Henry Holt, 1932).

23. John H. Fenton, *Midwest Politics* (New York: Holt, Rinehart, and Winston, 1966) and *Politics in the Border States* (New Orleans: Hauser Press, 1957); Duane Lockard, *New England State Politics* (Princeton: Princeton University Press, 1959); Joel Paddock, *State and National Parties and American Democracy* (New York: Peter Lang Publishing, 2005).

ic groupings.²⁴ Finally, it must be said that the following chapters grouped themselves.

OUR CONTRIBUTORS

Including a state supreme court chief justice, a former state representative, a former university president, and a state parliamentarian, our authors run the gamut of academic career choices. From professors emeritus to graduate students, our authors span the range of academic ranks and career stages. From political science, history, business, and law, our authors come from a wide range of academic backgrounds and disciplines.

For many of our authors there is a direct, personal connection to Don Lutz. Like the editors, many are former students. Current and former colleagues are amply represented as well. For those authors without a personal connection, there is a linkage through the admiration for Don's contributions in the field. It is, in large part, because of these connections that all proceeds from the sale of this book that would ordinarily go to editors and authors will be donated to the Institute for Rehabilitation and Research in Houston, Texas, that provided Don treatment after his stroke and continues to work with him on his rehabilitation.

Inspired by Lutz and guided by his theoretical framework, the authors and editors of this volume are united by a level of "discipline" that is appropriate for the study at hand, united, to again borrow Lutz's terms, in "a joint enterprise engaged in by a number of people who have undergone a certain intellectual formation so that they understand the common questions defining the enterprise, have a comprehensive familiarity with the relevant literature and materials, and know how to use the methodologies appropriate for advancing that literature."²⁵

Although Lutz-inspired, we owe a debt of gratitude to a great number of people who helped us develop the project. Specifically, we would like to thank editor in chief Beverly Jarrett and our editor, Sara Davis, for their support, encouragement, and seemingly endless patience. We are also very grateful for the painstaking editing by our copy editor, Annette Wenda. We

24. Don E. Fehrenbacher, *Sectional Crisis and Southern Constitutionalism* (Baton Rouge: Louisiana State University Press, 1989); John D. Hicks, *The Constitutions of the Northwest States*, University Studies of the University of Nebraska 23 (January–April 1924); Gordon Morris Bakken, *Rocky Mountain Constitution-Making, 1850–1912* (New York: Greenwood Press, 1987); David Alan Johnson, *Founding the Far West: California, Oregon, and Nevada, 1840–1890* (Berkeley and Los Angeles: University of California Press, 1992).

25. Lutz, *A Preface to American Political Theory* (Lawrence: University Press of Kansas, 1992), 2.

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