that were meant to reassert white political control, as well as Illinois' "Granger" Constitution of 1870 and Montana's "environmental" Constitution of 1972. Alternatively, a state constitution may be changed to renew original constitutional commitments when political practice departs too much from the original constitutional design. When constitutional reformers do this, they are heeding the admonition of the Virginia Declaration of Rights that "no free government, nor the blessings of liberty, can be preserved to any people but by . . . frequent recurrence to fundamental principles."[7] Finally, a state may adopt a new constitution or substantially alter its old one to respond to new problems or new conditions. In doing so, the states are following the advice of Thomas Jefferson, who claimed that constitution making is a progressive enterprise, that each generation can draw on a broader range of political insight and experience in addressing the changing constitutional challenges confronting it, and that frequent constitutional change is thus desirable.[8] The adoption of the New Jersey Constitution of 1947, the Connecticut Constitution of 1965, and the Florida Constitution of 1968 illustrates this phenomenon.

Although only a few states followed the lead of New Jersey, Connecticut, and Florida in revising their constitutions during the mid-twentieth century, the political, social, and economic changes that promoted constitutional reform were hardly unique to those states. This is true more generally. Many of the problems and concerns that encouraged state constitutional change in the past were common to all the states, rather than idiosyncratic. And this is the case at the beginning of the twenty-first century as well. All the American states are assuming new responsibilities for policy development and implementation as power is devolved from the federal government and as new tasks arise for government at all levels. All the states likewise are seeking to address endemic problems in areas of traditional state responsibility, such as education, economic development, and the environment. All face budget difficulties to a greater or lesser extent. Moreover, all are confronting their responsibilities, new and old, amid rapidly changing political, economic, and social conditions. How effectively individual states respond to the challenges facing them will depend to a significant extent on the quality of their state constitutions, because these constitutions structure and guide the operation of state government.[9]

This, however, is a cause for concern. More than two-thirds of the states now operate under constitutions that are more than a century old, that were designed to meet the problems of another era, and that are riddled with piecemeal amendments that have compromised their coherence as plans of government. In addition, the public disdain for government at all levels, together with the increasing reliance on direct democracy for policy making in the states, suggests a need for constitutional reforms designed to increase the responsiveness of state institutions and to promote popular involvement that does not preclude serious deliberation about policy options. Many state constitutions would benefit from

substantial changes designed to make state governments more effective, equitable, and responsive, and to equip them to deal with the challenges of the twenty-first century.

Previous volumes of *State Constitutions for the Twenty-first Century* have focused on overcoming the political obstacles to state constitutional reform and on drafting state constitutional provisions. The present volume, in contrast, is aimed at the substantive direction of constitutional reform. It is designed to assist scholars, public officials, and members of the general public in identifying the constitutional problems confronting their states, in recognizing the range of alternative responses to those problems, and in choosing among those alternatives. To serve these purposes, the book describes the variety of state constitutions, analyzing their strengths and weaknesses, thus providing an overview of the current state of state constitutions. By identifying those strengths and weaknesses, it encourages officials and citizens to examine whether their particular state constitutions will enable their state governments to meet the challenges that will confront them in the early decades of the twenty-first century. Finally, by identifying alternative approaches devised by the states to deal with common constitutional problems and by assessing the advantages and disadvantages of those approaches, this volume provides guidance for those undertaking the task of constitutional reform.

The volume is organized topically, with chapters focusing on each of the major features common to contemporary state constitutions. The chapter "Rights" by Robert F. Williams considers the protection of rights under state constitutions. Four chapters—"The Legislative Branch" by Michael E. Libonati, "The Executive Branch" by Thad Beyle, "The Judicial Branch" by G. Alan Tarr, and "Local Government" by Michael E. Libonati—examine state constitutional provisions dealing with governmental institutions and their operation. Two chapters—"Voting and Elections" by James A. Gardner and "Constitutional Amendment and Revision" by Gerald Benjamin—look at constitutional provisions dealing with the expression of the popular will. Finally, three chapters—"Education" by Paul Tractenberg, "Environment and Natural Resources" by Barton H. Thompson, Jr., and "Taxing, Spending, and Borrowing" by Richard Briffault—consider constitutional provisions pertaining to fundamental areas of state public policy. In dealing with these topics, the chapters share a common approach. They identify the values that should guide constitution makers and constitutional reformers in dealing with these topics, survey the major issues pertaining to each topic, assess how various state constitutions have dealt with each of those issues, and thus clarify potential approaches to constitutional reform.

The use of the plural "approaches" is intentional and important. State constitutions necessarily reflect diverse state constitutional traditions, historical developments within individual states, and the particular political complexion of each state. As a consequence, no single model is appropriate for all states, and this volume eschews the creation of a "model state constitution."[10]

Having said that, one must also emphasize that the constitutional experience of other states is vitally important for state constitutional reformers. State constitutions share a more or less uniform structure, and they deal with a common set of issues (as well as some issues that are distinctive to particular states or groups of states).[11] State constitution makers can therefore learn from the constitutional experience of other states and can draw on their constitutions. In fact, state constitution makers have regularly done so. The history of state constitution making is a history of constitutional borrowing, of drafters looking beyond their borders for how other states have dealt with the problems they share.[12] Judicious consideration of the experience of other states can yield both positive and negative models, as well as helping to identify the range of alternative approaches for addressing common problems. The contributions to this volume have undertaken to facilitate this task of constitutional comparison and borrowing.

The three volumes of *State Constitutions for the Twenty-first Century* represent the culmination of several years of work by a group of scholars and officials dedicated to improving political life in their states. Some of these dedicated individuals have contributed chapters to these volumes. Others too numerous to mention have provided information, encouragement, and critical commentary, and their contributions are likewise reflected in the pages of these volumes. I personally have profited immensely from their efforts and their expertise and want to recognize their importance.

This project would never have gotten off the ground without the generous backing of the Ford Foundation. I would particularly single out the support of Julius Ihonvbere, my grant officer at Ford, whose enthusiasm for the project never flagged. Finally, I would like to thank all those at Rutgers University-Camden who played a crucial role in the completion of the project. Provost Roger Dennis encouraged the formation of the Center for State Constitutional Studies, and he and Dean Margaret Marsh have strongly backed its activities ever since. Robert Williams, my colleague at Rutgers-Camden and Associate Director of the Center for State Constitutional Studies, has made enormous contributions to the project. His breadth of knowledge and his ability to negotiate difficulties have been crucial to the success of the project. Sylvia Somers, the administrative assistant at the Center, has helped keep the project on course with her hard work, her sharp eye for detail, and her eminent good sense.

Notes

1. State governments have historically been understood as possessing plenary legislative powers—that is, all residual powers not ceded to the federal government or prohibited to them by the federal Constitution. This is somewhat oversimplified but largely correct. State constitutions thus operate primarily as documents of limitation

rather than as documents of empowerment. With some notable exceptions, they do not grant powers to the state government but rather impose limits on the exercise of state power, and in the absence of such a constitutional limitation, it is generally assumed that the state government can act. For indications that the situation is somewhat more complicated than the traditional understanding suggests, see Robert F. Williams, *State Constitutional Law Processes,* 24 *Wm. & Mary L. Rev.* 178–79 (1983).

2. For further elaboration of the character of state constitutions and their development, see G. Alan Tarr, *Understanding State Constitutions* (1998).

3. Horizontal federalism refers to interstate relations, the transmission of ideas and policies from one state to another, in contrast with vertical federalism, which involves the relation between the federal government and state governments. See "Editors' Introduction," in *State Supreme Courts in State and Nation* (Mary Cornelia Porter and G. Alan Tarr, eds., 1982), xix–xxii.

4. Donald S. Lutz, "The United States Constitution as an Incomplete Text," 496 *Annals Academy Pol. & Soc. Sciences* 23 (1988).

5. Data on state constitutions and state constitutional amendments are contained in thirty-five *Book of the States* 10, tbl. 1.1 (2003).

6. See Mark E. Brandon, "Constitutionalism and Constitutional Failure," in *Constitutional Politics: Essays on Constitution Making, Maintenance, and Change* (eds. Sotirios A. Barber and Robert P. George, 2001).

7. Virginia Declaration of Rights, sec. 15.

8. Letter to Samuel Kercheval, July 12, 1818, reprinted in *The Portable Thomas Jefferson* (ed. Merrill D. Peterson, 1975).

9. These themes are elaborated in G. Alan Tarr, "The State of State Constitutions," 62 *La. L. Rev.* 3 (2001).

10. The National Municipal League created a "model state constitution" in the early 1920s and periodically revised it over four decades. See *A Model State Constitution,* 6th rev. ed. (1967). For discussion of the political perspective underlying this model and the model's effects on constitutional reform, see Tarr, supra note 2, at pp. 150–57.

11. State constitutions do differ in the level of detail in their treatment of those issues and in the range of other issues they address. Moreover, some problems are so state-specific that no other state's experience is helpful in solving them.

12. For documentation of borrowing during the nineteenth century, see Christian G. Fritz, "The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution Making in the Nineteenth-Century West," 25 *Rutgers L.J.* 945 (1995). More generally, see Tarr, supra note 2, chapters 4–5.

Chapter One

Rights

Robert F. Williams

Introduction

State constitutions are, by definition, changeable. The possibility of changes in rights guarantees, though, can be both attractive and forbidding. For example, many people would approve (depending on the topic) of the addition of new, more modern, state constitutional rights.[1] On the other hand, one substantial factor in the recent resistance to the calling of state constitutional conventions is the fear of losing existing rights or the specter of acrimonious debates over controversial areas such as abortion, women's rights, public employees' right to strike, and so on. State constitutional rights are neither liberal nor conservative, at least in a conventional political sense. They range from free speech and the rights of those accused of crime to property rights, victims' rights and the right to bear arms. The words of one of the last generation's commentators on state constitutional rights remain true today:

> The present complex social and economic structure of society, with its new concepts of social and economic democracy, the possible improper use of broadening governmental powers, and the bureaucratic character of the modern state have but increased the importance of and necessity for the inclusion of guarantees of individual rights in state constitutions.[2]

Modern state constitutional rights guarantees can be seen as fitting into two categories: (1) those that are worded identically or similarly to federal constitutional guarantees and therefore share a common constitutional history (although state constitutional rights predated the federal Bill of Rights in the original thirteen states); and (2) those that are not identical or similarly worded and therefore do not share a common constitutional history. State constitutions contain many different rights from those in the federal Constitution. They are differently understood and often differ textually. We will return to this distinction later.

A preliminary point about the *judicial interpretation* of state constitutional rights provisions, although not the focus of this volume, is necessary for an understanding of issues relating to state constitutional rights. For most of the twentieth century, litigation relating to the enforcement of constitutional rights primarily invoked the federal Constitution. Originally, of course, the federal Bill of Rights applied only to the actions of the federal government. Most of the federal Bill of Rights has now been applied by the United States Supreme Court to the actions of state and local government through "selective incorporation."

State constitutional rights guarantees, and their enforcement by state courts, provided the primary fuel for the renewed interest in state constitutions during the last quarter of the twentieth century. This increased interest in state constitutional rights, particularly from the standpoint of state judicial enforcement, has been referred to as the "New Judicial Federalism." This phenomenon, always possible but surfacing dramatically in judicial, political, and legal circles after about 1970, involves states courts interpreting state constitutional rights guarantees to provide more protection than the federal Constitution. These developments, in turn, raised a variety of questions about the legitimacy of state courts interpreting their constitutions in this manner. Opinions about the phenomenon ranged from enthusiastic support by civil liberties and criminal defense lawyers, and a number of members of the state judiciary, to strong condemnation, on the ground that state judges were simply "looking for" excuses to reach more liberal decisions than the United States Supreme Court. These legitimacy concerns continue to be raised today.

It is clear, however, that in a legal and political sense state courts are entirely within their authority in reaching decisions that are more protective than those of the United States Supreme Court, even when they are interpreting provisions that are worded identically to their federal counterparts. It is not the *power* or authority of state courts to reach such results, but rather the *wisdom* and propriety of such outcomes that is in contention.

This discussion so far has related to the *judicial interpretation* of state constitutional rights provisions. The primary focus here is the consideration of modifying existing rights clauses, as well as inserting new rights into, and removing old rights from, state constitutions. Understanding the New Judicial Federalism does provide important background for state constitution drafters.

The development of the New Judicial Federalism also has shown that the exercise of popular sovereignty, or voting by the electorate, can not only be used to add new rights, but also to literally overturn or "overrule" judicial interpretations of state constitutional rights guarantees (or, for that matter, other state constitutional provisions). Such overruling can be accomplished either through legislatively proposed amendments, constitutional convention proposals, or in those states that permit it, popularly initiated constitutional amendments.

There are two different approaches. First, state constitutional decisions can be overruled simply by amending the constitution to say that the judicial interpretation no longer applies. For example, several states have overturned state judicial decisions declaring the death penalty unconstitutional by inserting language in the relevant clauses to say that capital punishment will not be deemed to violate the provision.[3] Illustrating a different approach, after some expansive state judicial interpretations, Florida's search and seizure clause was amended in 1982 to require the state courts to interpret the provision the same way as the United States Supreme Court interprets the federal clause.[4] This also happened in California to eliminate a line of state constitutional interpretations that went beyond the federal requirements in the area of school busing.[5] This Florida and California "lockstep" or "forced linkage" amendment approach can be seen as undesirable because it constitutes a blanket adoption, *in futuro,* of all interpretations of the United States Supreme Court, thereby abdicating a part of a state's sovereignty and judicial autonomy.

Some state courts, relying on their state constitution's mechanisms for amendment and revision, have struck down attempts to overrule judicial interpretations of state constitutional rights provisions. For example, the California Supreme Court refused to uphold a blanket "lockstep" amendment for all of the state constitutions criminal procedure clauses, ruling that it was a proposed "revision," and therefore could not be accomplished through the initiative process, which was limited to "amendments."[6] On the other hand, the Florida Supreme Court upheld the search and seizure forced-linkage amendment against a challenge asserting that it was placed on the ballot in a way that misled voters.[7]

Guiding Principles

Several principles should be kept in mind when considering changes to the state declaration of rights, or to rights guarantees in general.

1. *State Constitutional Rights Should Reflect the Fundamental Values and Aspirations of the State:* Although it is primarily the courts that *enforce* state constitutional rights, most other state officials, and even private individuals, *apply* them. State constitutions can reflect ("constitutionalize") the values of the populace.
2. *State Constitutional Rights May Differ from Those Found in the Federal Bill of Rights:* State and federal constitutional rights differ from each other not just quantitatively, but also qualitatively. Federal constitutional rights are intended to apply to the nation as a whole, and some of them, such as the Seventh Amendment right to a jury trial in civil

cases, have not been applied to the states. Further, interpretations by the United States Supreme Court of federal constitutional rights can change over time, or even be judicially overruled or reversed. Thus, how these federal constitutional rights apply within each state can be a matter of some uncertainty.

State constitutional rights, by contrast, are intended to and as a matter of law can only apply within a single state. Therefore, rights debates within a particular state can respond to concerns similar to those reflected in federal constitutional rights, but also to matters of specific local concern. Also, these state constitutional rights can provide either greater or lesser rights than those protected at the federal level, although when there is a lesser level of protection, the federal minimum standards must be enforced. Finally, as will be discussed later, state constitutional rights are much easier to change than federal constitutional rights.

3. *State Constitutional Rights May Include Positive as well as Negative Rights:* Virtually all of federal constitutional rights protect *negative* rights, that is, limits on the power of government to interfere with rights. On the other hand, state constitutions not only provide such negative rights, but also often include *positive* mandates for rights protection or governmental action. These can require very different approaches, particularly from the standpoint of judicial enforcement, to rights protection.
4. *State Constitutional Rights May Be Located Throughout the Constitution, Not Just in the Declaration of Rights:* Most often, state constitutional rights are contained in the first article of a state constitution. This is not always true, however, as some states insert their article on rights within or at the end of the state constitution. In addition, it is important to note that there are a number of enforceable rights guarantees (sometimes through judicial interpretation) included in other parts of state constitutions. For example, a limitation on the Legislature's ability to pass "special laws" (laws creating narrow classifications) is primarily a limitation on legislative power; on the other hand, it provides citizens with equality of rights arguments. The same could be said of state constitutional clauses requiring "uniformity" in taxation and certain other tax limitations. Other examples include provisions requiring a "thorough and efficient," or "uniform" education, and requiring a vote of the public before debt is incurred. These are often seen as providing state citizens with judicially enforceable rights, but they are not contained in the article on rights. Many environmental and natural resource provisions, some of which create rights, also do not appear in the Declarations of Rights.[8]

5. *State Constitutional Rights May Include Restrictions on Private Action as Well as on Government Action:* While virtually all federal constitutional rights guarantees apply only against infringement by *the government* (referred to as the "state action doctrine"), state constitutional guarantees sometimes are applied to private parties, or to quasi-private parties who would not be viewed as government actors for federal constitutional purposes. This is true of state constitutional collective bargaining rights in the private sector such as New Jersey's art. I, par. 19, which expressly provides that "Persons in private employment shall have the right to organize and bargain collectively." On the other hand, California's 1972 state constitutional privacy amendment was applied by the California Supreme Court to the private National Collegiate Athletic Association based on prereferendum information supplied to voters describing invasions of privacy by *business*.[9] There is a tension here, of course, between "constitutionalizing" too many private relationships, on the one hand, and providing significant enforcement of constitutional guarantees against powerful societal actors, on the other hand.[10]
6. *Although State Courts Will Play a Leading Role in Enforcing State Constitutional Rights, These Rights Impose Obligations on All State and Local Officials:* It is well understood in our current time that including rights in a state constitution will virtually always (except where the rights are not "self-executing," because they contain insufficient detail for effective judicial enforcement) result in *judicial* enforcement of such rights. It is often difficult to foresee how the courts will enforce rights in the future. At the state level, courts are often less concerned about rigid standing rules for rights litigants, and may give less deference for "political questions" than the federal courts. Also, state and local government officials other than the courts are also under an obligation to respect, if not to affirmatively enforce, state constitutional rights.
7. *State Electorates Retain the Authority to Change, Add to or Delete State Constitutional Rights by State Constitutional Amendment:* It might initially seem odd that by a mere majority vote of the electorate, a constitutional amendment can be ratified or a new constitution adopted that can change state constitutional rights guarantees. This may well seem to contradict our American notion of constitutional rights guarantees as protecting minorities or the powerless against majority tyranny. Yet this is a fundamental feature of state constitution making.

When, in the 1980s, electorates in a number of states began to "overrule" state constitutional interpretations going beyond national minimum standards,

a number of commentators decried this form of "popular supervision" over rights guarantees.[11] One commentator reported that "Since 1970, at least nineteen important amendments to state bills of rights, designed to curtail criminal procedure rights, have been adopted in some fourteen states."[12] In fact, however, most of the amendment activity was limited to the criminal procedure area.[13] It seems that the fear that state constitutional rights would become the "prisoner of majoritarianism"[14] has not materialized. As Janice May has observed:

> The amendment process has not been used excessively, if measured by the number of civil rights amendments during the past fifteen years . . . Furthermore, the amendments represented modifications rather than radical change . . . One might say that there is a bifurcation of roles. Generally speaking, the role is one of contraction in criminal justice, but one of expansion in other areas of law, with few exceptions. Most of the new rights adopted at the polling place, among them the right of privacy, rights of the disabled, ERAs, and environmental rights, are neither expressly protected by the U.S. Constitution nor fully protected by the federal courts. . . .
>
> In a democracy, support for civil rights must ultimately find an anchor in public opinion. For better or worse, the state constitutional tradition tips the scales toward voter participation in preserving or reducing civil rights. The record of civil rights protection during the past fifteen years, while mixed, holds out hope for the state amendment process.[15]

Another commentator, Harry Witte, concluded that popular discussion and debate about rights, as part of the state constitutional process, was a good thing.

> In general terms, our federalism *permits* vigorous popular democracy to operate in the states because the Federal Constitution places checks on majoritarian excesses. At the same time, it *depends* on that popular democracy as the source of its most creative innovations. In matters of rights, the outcomes of the majoritarian processes also help inform the judiciary, state and federal, regarding the status of the living traditions that define our liberty.[16]

Some people have argued, particularly with the state constitutional initiative, that minorities are left in a very vulnerable position with respect to protecting their rights. To remedy this problem, various proposals have been advanced to make the initiative process more difficult, either in terms of the

number of signatures required to place an amendment on the ballot or in terms of the number of votes required to adopt an amendment. Lynn A. Baker has argued that these changes should not be made, because, given the federal safety net, minority people have as good a chance of achieving new rights through initiative as they do of losing existing rights.[17]

These principles, or key elements in thinking about state constitutional rights, should be kept in mind by those considering changes in the state constitutions that add, modify, or remove rights. They do not, of course, take the place of the policy arguments concerning the adoption or removal of specific rights guarantees.

The Evolution of State Constitutional Rights Guarantees

State declarations of rights were originally adopted during the revolutionary period separately from the structural provisions of state constitutions. Sometimes these compilations of rights were debated and adopted prior to the adoption of the constitution that structured state government. In fact, though, not all state constitutions originally had declarations of rights, but now all do. When the federal Constitution was proposed, part of the Antifederalist criticism of the document was that it did not contain a list of rights guarantees, as had become standard practice in the states. That defect was, of course, remedied several years later by the adoption of the Federal Bill of Rights, to include the first ten amendments to the federal Constitution. The state constitutional declarations of rights served as important and influential models for the federal Bill of Rights.

For most of the history of our country, of course, the federal Bill of Rights did not apply at all to state or local actions. Slowly, however, beginning early in the twentieth century and accelerating in the 1960s, the United States Supreme Court determined that many of the federal Bill of Rights provisions did apply, based on the Fourteenth Amendment, to limit the actions of states and local governments. This "selective incorporation," together with the aggressive judicial enforcement of federal constitutional rights guarantees by the Unites States Supreme Court from the 1950s through the 1970s, led to the domination of rights discussions by the federal constitution.

The state declarations of rights today still contain, primarily, seventeenth- and eighteenth-century ideas about rights. But, importantly, a number of states acted to add new rights to their constitutions in the second half of the twentieth century. Guarantees of the rights to collective bargaining were added in five states, protection of women's rights was added in more than a dozen states,