

## AMERICAN STATE CONSTITUTIONAL LAW

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The term “state constitutional law” represents an important subfield of American constitutional law. Most references to “constitutional law” by either legal or judicial professionals, or the media, in fact are references to *federal* constitutional law. This is somewhat understandable because of the prominence of the United States Supreme Court as the source of federal constitutional rulings, and the focus on this Court by the national media. State constitutional law, however, is a very important, and increasingly visible, form of constitutional law.

All fifty states have state constitutions. In fact, most of the original states, after the Revolution beginning in 1776, had their own constitutions as much as a decade before the federal constitution was written in Philadelphia in 1787. Several of these even predated the Declaration of Independence. Many of the Founding Fathers, who developed the federal constitution, had extensive experience drafting, debating, and serving in office, under these early state constitutions prior to their historic achievement in 1787. They drew extensively on this experience during the debates at the federal constitutional convention.

State constitutional law has developed on a path distinct from federal constitutional law since the end of the eighteenth century in the United States. Together, federal and state constitutional law work together to comprise American constitutional law. State constitutional law serves to fill in the wide range of matters left to the states in our federal system, and which are therefore not covered by federal constitutional law.

State constitutions concern themselves with the whole range of matters reserved to the states after the specific powers were delegated to the federal government in the federal constitution. Therefore, state constitutional law covers a wide range of subjects that do not arise in federal constitutional law. For example, areas like local government, natural resources, regulation of corporations, public education, and taxation and public finance are extensively covered under state constitutional law. Therefore, there is a much wider range of areas that have been “constitutionalized” under state constitutional law than under federal constitutional law.

State constitutional law can be viewed from either a state-specific perspective (for example, “New Jersey constitutional law”) or a national, more general (“trans-state”) perspective.

State constitutional law, of course, only applies in the particular state where a state court interprets its own state constitution. A state court interpretation of its state constitution can not reach, in a binding manner as “law,” beyond that particular state. One can generalize more broadly about state constitutional law, however, and develop general categories of doctrines based on interpretations from many states on a particular question. Also, judicial interpretations of a state constitution from one state may be urged as “persuasive” precedent in other states (where the provision of the state constitution is the same or similar) but those state courts remain free to reach different conclusions. This broader approach to state constitutional law, reflecting an example of comparative state constitutional law, supports much of the legal scholarship in the field.

The materials of state constitutional law consist of both the textual provisions found in state constitutions themselves and the authoritative judicial interpretations of these provisions

that courts render when they adjudicate controversies. The most authoritative judicial interpretations of state constitutional law are those rendered by the highest court in a state, but decisions by state intermediate appeals courts and even state trial courts contribute to the body of state constitutional law. These judicial decisions then serve as precedents to which the courts will refer in the resolution of future state constitutional interpretation cases. Interestingly, such decisions are more authoritative than federal court interpretations of state constitutions (which result from certain *state-law* cases being brought in *federal* court) because the highest court in a state is the most authoritative interpreter of its state constitution.

State courts utilize a number of interpretation techniques in reaching conclusions about the meaning of state constitutions and thereby adding to the body of state constitutional law. These techniques include, among others, reference to prior precedents; simple reliance on the plain meaning of the text of the state constitution when its meaning is clear on its face; reference to committee reports or debates in the legislature, constitutional commission or constitutional convention, if one of these bodies proposed the constitutional clause the court is interpreting; reliance on various judge-made canons or maxims, drawn from earlier precedents, that guide the courts in interpreting various types of state constitutional language; and reliance on various explanatory materials made available to the voters at the referendum at which the electorate ratified the constitutional provision being interpreted. This last technique, specific to state constitutional law, is based on the view that, because state constitutions, revisions and amendments must be ratified by the voters (in all states except Delaware) before becoming effective, state constitutional provisions reflect the “voice of the people.” Therefore, many state courts attempt to discern the meaning of state constitutional provisions as they would have been

understood by the average, intelligent voter at the referendum. In their attempts to arrive at such an understanding state courts will take into account materials such as ballot summaries presented together with the proposed state constitutional change, official voters' pamphlets provided to the voters, and even newspaper editorials and summaries published before the referendum.

These judicial decisions interpreting state constitutional provisions, as noted, add to the body of state constitutional law. Because the "law" of state constitutions consists of both text and judicial interpretations or precedents, one must be careful to take account of the meaning that courts have attributed to state constitutional provisions before concluding what the state constitutional law is on a particular subject.

It must also be remembered that even seemingly authoritative judicial interpretations of a state constitution, by the state's highest court, are not completely "final" as to the constitution's meaning. First, it is possible, albeit fairly unusual, for such precedents to be overruled by the court at a future point in time. The United States Supreme Court has noted that, as a matter of federal constitutional law, it is more likely to overrule a federal constitutional precedent than other types of precedents, such as those interpreting statutes, because otherwise (given the extreme difficulty of amending the federal constitution) there is no other mechanism to "correct an error" made by the Court. This rationale does not apply with equal force in state constitutional law because state constitutions are, relatively, much easier to amend than the federal constitution. Therefore, it is somewhat easier to "correct an error" made by a state court interpreting a state constitution.

This last point illustrates a second reason why seemingly authoritative interpretations of a state constitution by the state's highest court are not completely "final" as to the constitution's

meaning. If an amendment is proposed to the voters and ratified by them, the text of the state constitution can be changed to “overrule” the judicial interpretation. This is a relatively common occurrence in state constitutional law, while it is exceedingly rare in federal constitutional law.

One very important area, is governed by both federal and state constitutional law, thus providing significant overlap. This is the area of individual rights, or civil liberties, protections. The federal constitution’s well-known Bill of Rights is widely understood to be the most important source of rights protections in the United States. Interestingly, the federal Bill of Rights was added to the federal constitution in 1791 after protests from those who knew that many of the state constitutions of the day had “Bills” or “Declarations” of rights and they saw this as a significant defect in the new federal constitution. The federal Bill of Rights was, in many respects, drawn from the examples provided by the existing state constitutions.

All fifty state constitutions have Declarations of Rights. These contain many of the same or similar rights with which we are familiar under the federal Bill of Rights. Many state constitutions, however, go beyond these familiar rights guarantees and protect rights such as access to court, redress for injuries or death, equality of women and protection of those with disabilities.

One of the most important developments in state constitutional law has taken place since the early 1970s. In areas where both the federal and state constitutions protect similar or identical rights, state courts in many states began, in some cases, to interpret their state constitutions to be more protective, or to provide more rights, than were protected by the federal constitution as interpreted by the United States Supreme Court. This development, commonly known as the “New Judicial Federalism,” was a major turn of events after the 1940s through the

1960s when the United States Supreme Court took the lead in protecting rights under the federal constitution. Therefore state constitutional law often provides *more* rights protections than the analogous, and more familiar, federal constitutional rights. As a practical matter state constitutional law cannot provide *less* rights than are recognized in that particular area under the federal constitution. If a state court interpreted its state constitution to provide less rights than the federal constitution it would still have to enforce the higher federal standards because they are the supreme law of the land.

For example, the United States Supreme Court ruled that despite the well-known *Roe v. Wade* right of women to choose to have an abortion, states and the federal government were not required to provide funding for medically-necessary abortions under their medical assistance programs for the poor. The Court rejected arguments based on the right to equal treatment. Several states, however, ruled that their medical assistance programs for the poor could not refuse to cover medically-necessary abortions if they provided medical services related to childbirth, relying on a more expansive, or protective, view of their state constitutional equal treatment provisions. These cases can be seen as protecting rights *beyond* the national minimum standard. Other states interpreted their state constitutions in the same way as the United States Supreme Court, following the national minimum standard. But no state could go *below* the national minimum standard by, for example, refusing to enforce *Roe v. Wade*. A great deal of controversy has arisen from what are often seen as more “liberal” decisions by state courts, “diverging” (or “evading”) from the teachings of the United States Supreme Court in similar cases under the federal constitution. This is the focus of much of the academic literature on state constitutional law, as well as many state court opinions.

State constitutional law, like the more familiar federal constitutional law, is based on both the texts of constitutional provisions and judicial interpretations of such provisions. Evolution and development in federal constitutional law takes place almost exclusively through judicial interpretations, because the federal constitution is so rarely amended, and it has never been revised. Evolution and development in state constitutional law, by contrast, is much more balanced between textual change and judicial interpretation. This is because, once again, state constitutions are much easier to amend, and are in fact changed much more often, than the federal constitution. All state constitutions are regularly amended and revised. Most states have had many different constitutions. Thus, the greater malleability of state constitutions contributes to the ongoing development of state constitutions.

The content of state constitutional law has changed over time. Until the 1960s and 1970s state courts had a much greater proportion of common-law and statutory cases before them than constitutional law cases. Also, the nature of the state constitutional cases used to concern primarily property rights and government structure claims. After the civil liberties and criminal procedure revolution of the 1950s and 1960s, led by the United States Supreme Court interpreting the federal constitution, the nature of state constitutional law cases began to change to include more individual rights and civil liberties and, particularly, criminal procedure cases. This transition accelerated with the advent of the New Judicial Federalism.

Much of state constitutional law, though, does not involve rights protections but rather is concerned with separation of powers controversies, the relationship of the state to local governments, taxation, education and other fundamental matters of state government. For example, if a governor made a novel use of the item veto power which the legislature viewed as

an intrusion on its powers, litigation would likely ensue, leading to a judicial decision determining the “law” of the state constitution on this matter. In the same way, if a local government concludes that the legislature has interfered with its state constitutionally protected authority, the courts will be asked to resolve the dispute, further adding to the body of state constitutional law. If enough people are dissatisfied with the courts’ resolution of the matter, an amendment may be proposed and ratified, further modifying the state constitutional law on the topic.

Not all the provisions in state constitutions concern either rights protections or fundamental questions of government. Because these are political documents, subject to the influences of interest group politics, there are many provisions reflecting specific policies. Most of these provisions could be covered by ordinary statutory law, but are placed in the state constitution for political reasons. Once this is accomplished, however, these provisions become the “stuff” of state constitutional law and must be treated accordingly.

State constitutional law, both in text and judicial decisions, also covers the matters of amendment and revision of the constitution itself. Various procedural restrictions on these processes are often the basis of litigation among those supporting and opposing the proposed state constitutional changes. This then leads to another body of state constitutional law on questions such as the required explanation and notice of the proposal to the voters, the limitation of an amendment to a “single subject,” the requirement of separate votes on each amendment, etc. Such controversies have led to a deep and recurring involvement of the courts in the processes of state constitutional change, leading to a substantial body of state constitutional law on the topic.

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