

## RUTGERS LAW JOURNAL: TWENTY-FIVE YEARS OF STATE CONSTITUTIONALISM

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This year marks the twenty-fifth anniversary of *Rutgers Law Journal's* Annual Issue on State Constitutional Law. Since this first appeared in 1989 we have worked to provide a forum that encourages interdisciplinary scholarship on state constitutionalism by professors, judges, lawyers and students. The idea was originally proposed in 1988 by our colleague, Professor Earl Maltz, responding to a suggestion from Dean John Pittenger that he think of a focus that our Law Journal could develop to carve out a niche for itself. Looking back, we believe that was an exceptionally good idea and we thank them for it. The Introduction to that first issue indicated that “[W]e anticipate that this issue of the Law Journal will fill a major gap in state constitutional law scholarship.”<sup>1</sup> The record will show that we have more than delivered on that prediction.

The tables of contents collected in this booklet provide ample evidence of the development of a substantial body of scholarship, in law, political science,<sup>2</sup> and legal history. Contributions have been made by the top scholars in the field, together with newer scholars, as well as the research and writing of a generation of students at Rutgers Law School in Camden. This range of interdisciplinary coverage has been made possible by the authors’ interaction at the

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<sup>1</sup> Robert F. Williams & Earl M. Maltz, *Introduction*, 20 RUTGERS L.J. 887, 889 (1989). Our Law Journal had, even prior to 1989, included an admirable list of publications in the newly-recognized area of state constitutional law. *Id.* at 878 n.5.

<sup>2</sup> John Kincaid, *The New Federalism Context of the New Judicial Federalism*, 26 RUTGERS L.J. 913 (1995) ; Gary L. McDowell, *Rediscovering Federalism? State Constitutional Law and The Restoration of State Sovereignty*, 21 RUTGERS L.J. 797 (1990); Daniel J. Elazar, *The Moral Compass of State Constitutionalism*, 30 RUTGERS L.J. 849 (1999).

Center for State Constitutional Studies. After we formed the Center in 1997 we have cosponsored each year's Annual State Constitutional Lecture, published as the Foreword to the Annual Issue.

Burt Neuborne's Foreword on positive rights in the first Annual Issue<sup>3</sup> was, interestingly, followed thirteen years later by the Foreword written by his former student, Helen Hershkoff.<sup>4</sup> Now that is a great example of scholarly impact! The Law Journal was also honored to publish a "brother-brother act" of Forewords, the first by Akhil Amar<sup>5</sup> and then, later by his brother Vikram Amar.<sup>6</sup>

Over the span of the Law Journal's focus on state constitutional law, we have published important scholarship not only on New Jersey state constitutional law,<sup>7</sup> but also that of the

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<sup>3</sup> Burt Neuborne, *Foreword: State Constitutions and the Evolution of Positive Rights* 20 RUTGERS L.J. 881 (1989).

<sup>4</sup> Helen Hershkoff, *Foreword: Positive Rights and the Evolution of State Constitutions*, 33 RUTGERS L.J. 799 (2002).

<sup>5</sup> Akhil Reed Amar, *Lord Camden Meets Federalism: Using State Constitutions to Counter Federal Abuses*, 27 RUTGERS L.J. 845 (1996).

<sup>6</sup> Vikram David Amar, *California Constitutional Conundrums—State Constitutional Quirks Exposed By the Same-Sex Marriage Experience*, 40 RUTGERS L.J. 741 (2009).

<sup>7</sup> *Tenth Annual Issue on State Constitutional Law*, 29 RUTGERS L.J. 673 (1998) (commemorating the fiftieth anniversary of the New Jersey Constitution); William F. Cook, *The New Jersey Bill of Rights and a "Similarity Factors" Analysis*, 34 RUTGERS L.J. 1125 (2003); Bernard K. Freamon, *The Origins of the Anti-Segregation Clause in the New Jersey Constitution*, 35 RUTGERS L.J. 1267 (2004); Peter J. Mazzei, *New Light on New Jersey's "Thorough and Efficient" Education Clause*, 38 RUTGERS L.J. 1087 (2007); Peter J. Mazzei & Robert F. Williams, *"Traces of its Labors": The Constitutional Commission, the Legislature, and Their Influence on the New Jersey State Constitution*, 33 RUTGERS L.J. 1059 (2002).

As Professor Richard Kay of the University of Connecticut School of Law has observed:

The transformation of a law school from an institution of vocational competence into one of intellectual excellence is often associated with an increased attention to legal subjects that are national in scope....It is also true, however, that this broadening of interest need not be accompanied by an abandonment of a special concern for the legal issues and problems that are peculiar to a law school's home.

Richard S. Kay, *The Jurisprudence of the Connecticut Constitution*, 16 CONN. L. REV. 667, 667 (1984) (paragraph break omitted).

nation, and, importantly, the newly-emerging area of comparative subnational constitutional law.<sup>8</sup>

In 2001 we published an entire Issue on tort reform and state constitutional law.<sup>9</sup> Over the years, we have solicited and published book reviews on many of the important new books on state constitutional law.<sup>10</sup>

Our broad, interdisciplinary range of subjects has included, for example, an analysis of the first American state constitutions,<sup>11</sup> the Progressive Era state constitutions,<sup>12</sup> positive rights in modern state constitutions,<sup>13</sup> environmental and natural resource provisions,<sup>14</sup> and the current state constitutional litigation and developments concerning same-sex marriage.<sup>15</sup> Additionally, we have published the very important works of state high court justices offering their own views of state constitutional interpretation.<sup>16</sup> Further detailed analysis has included the processes of

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<sup>8</sup> *Twelfth Annual Issue on State Constitutional Law*, 31 RUTGERS L.J. 937 (2000); G. Alan Tarr, *Subnational Constitutions and Minority Rights: A Perspective on Canadian Provincial Constitutionalism*, 40 RUTGERS L.J. 767 (2009); Giacomo Delledonne & Giuseppe Martinico, *Legal Conflicts and Subnational Constitutionalism*, 42 RUTGERS L.J. 881 (2011); Christina Murray & Catherine Maywald, *Subnational Constitution-Making in Southern Sudan*, 37 RUTGERS L.J. 1203 (2006); John Dinan, *Patterns of Subnational Constitutionalism in Federal Countries*, 39 RUTGERS L.J. 837 (2008); Cheryl Saunders, *The Constitutional Credentials of State Constitutions*, 42 RUTGERS L.J. 853 (2011).

<sup>9</sup> *Thirteenth Annual Issue on State Constitutional Law*, 32 RUTGERS L.J. 897 (2001); Robert S. Peck, *Tort Reform's Threat to an Independent Judiciary*, 33 RUTGERS L.J. 835 (2002).

<sup>10</sup> See, e.g., Stephen L. Schechter, Book Review: *From State Constitutions to State Constitutionalism*, 32 RUTGERS L.J. 1071 (2001); Justin R. Long, Book Review: *Are State Constitutions Un-American? Jeffrey M. Shaman, Equality and Liberty in the Golden Age of State Constitutional Law* (2009), 40 RUTGERS L.J. 793 (2009); Christian G. Fritz, Book Review: *Rethinking the American Constitutional Tradition: National Dimensions in the Formation of State Constitutions*, 26 RUTGERS L.J. 969 (1995); G. Alan Tarr, Book Review: *Between Authority and Liberty: State Constitutionmaking in Revolutionary America*, 28 RUTGERS L.J. 865 (1997).

<sup>11</sup> Gordon S. Wood, *State Constitution-making in the American Revolution*, 24 RUTGERS L.J. 911 (1993); James A. Henretta, *Rethinking the State Constitutional Tradition*, 22 RUTGERS L.J. 819 (1991).

<sup>12</sup> John Dinan, *Framing a "People's Government": State Constitution-Making in the Progressive Era*, 30 RUTGERS L.J. 933 (1999).

<sup>13</sup> Hershkoff, *supra* note 4; Elizabeth Pascal, *Welfare Rights in State Constitutions*, 39 RUTGERS L.J. 863 (2008).

<sup>14</sup> Barton H. Thompson, *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance*, 27 RUTGERS L.J. 863 (1996).

<sup>15</sup> Amar, *supra* note 6; Amestoy, *infra* note 16.

<sup>16</sup> Judith S. Kaye, *The Common Law and State Constitutional Law as Full Partners in the Protection of Individual Rights*, 23 RUTGERS L.J. 727 (1992); Jeffrey L. Amestoy, *Pragmatic Constitutionalism—Reflections on State Constitutional Theory and Same-Sex Marriage Claims*, 35 RUTGERS L.J. 1249 (2004).

amendment and revision of state constitutions,<sup>17</sup> the fiscal provisions of state constitutions,<sup>18</sup> and the important area of reapportionment and redistricting under state constitutions.<sup>19</sup>

The Introduction to the first Issue noted that a “national survey of judicial interpretations of state constitutions... will be beneficial even to those few who consider themselves experts in the field. Such a survey constitutes a prodigious task of legal research, organization, and analysis, for which the editors and staff of the Rutgers Law Journal should be commended.”<sup>20</sup> Those words of commendation can only be amplified now after more than a generation of Rutgers Law Journal members have read and analyzed virtually every state constitutional law decision by state high courts in the United States. This research and writing task not only informs our readers but also provides an introduction to the field of state constitutional law even for those students who do not take a specific course in the topic. Since 1999, in the Eleventh Annual Issue on State Constitutional Law, we have included detailed case comments where our students have analyzed in detail some of the leading state constitutional decisions in the country every year since.

All of these kinds of important scholarly and practical contributions to the literature on state constitutionalism are what we set out to stimulate and provide twenty-five years ago. We

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<sup>17</sup> Vladimir Kogan, *The Irony of Comprehensive State Constitutional Reform*, 41 RUTGERS L.J. 881 (2010); John Dinan, *Court-Constraining Amendments and the State Constitutional Tradition*, 38 RUTGERS L.J. 983 (2007); G. Alan Tarr & Robert F. Williams, *Getting From Here to There: Twenty-First Century Mechanisms and Opportunities in State Constitutional Reform*, 36 RUTGERS L.J. 1075 (2005); Richard Briffault, *Electing Delegates to a State Constitutional Convention: Some Legal and Policy Issues*, 36 RUTGERS L.J. 1125 (2005); Harry N. Scheiber, *The Direct Ballot and State Constitutionalism*, 28 RUTGERS L.J. 787 (1997).

<sup>18</sup> Richard Briffault, *The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907 (2003); Susan P. Fino, *A Cure Worse than the Disease? Taxation and Finance Provisions in State Constitutions*, 34 RUTGERS L.J. 959 (2003).

<sup>19</sup> James A. Gardner *Representation Without Party: Lessons From State Constitutional Attempts to Control Gerrymandering*, 37 RUTGERS L.J. 881 (2006); David Schultz, *Redistricting and the New Judicial Federalism: Reapportionment Litigation Under State Constitutions*, 37 RUTGERS L.J. 1087 (2006); Richard Gladden, *The Federal Constitutional Prohibition Against “Mid-Decade” Congressional Redistricting: Its State Constitutional Origins, Subsequent Development, and Tenuous Future*, 37 RUTGERS L.J. 1133 (2006).

<sup>20</sup> Williams & Maltz, *supra* note 1 at 878.

are proud of these accomplishments by our authors and Rutgers law students, and we see no reason why this project will not continue successfully in future years.