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on the State Constitutions of the United States

The
DELAWARE



State Constitution

SECOND EDITION

Randy J. Holland

The Delaware State Constitution

Second Edition

Randy J. Holland

Foreword by E. Norman Veasey

THE OXFORD COMMENTARIES ON THE STATE
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G. Alan Tarr, Series Editor

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■ The Delaware State Constitution

The Oxford Commentaries on the State Constitutions of the United States
G. Alan Tarr, Series Editor

Professor G. Alan Tarr, Director of the Center on State Constitutional Studies at Rutgers University, serves as General Editor for this important new series which in its entirety will cover each of the fifty states. Each volume of *The Oxford Commentaries on the State Constitutions of the United States* contains a historical overview of the state's constitutional development, plus a section-by-section analysis of the state's current constitution. Other features included in the volumes are the text of the state's constitution, a bibliographic essay, table of cases, and index. This series provides essential reference tools for those investigating state constitutional development and constitutional law.

*Dedicated to my wife, Dr. Ilona E. Holland
Our son, Ethan, and his wife, Jennifer
Our granddaughters, Aurora (Rori) and Chloe
My brother, Dr. James C. Holland II, and his wife, Nancy
Our niece, Lily, and our nephew, Stephen*

■ SERIES FOREWORD

In 1776, following the declaration of independence from England, the former colonies began to draft their own constitutions. Their handiwork attracted widespread interest, and draft constitutions circulated up and down the Atlantic seaboard, as constitution-makers sought to benefit from the insights of their counterparts in sister states. In Europe, the new constitutions found a ready audience seeking enlightenment from the American experiments in self-government. Even the delegates to the Constitutional Convention of 1787, despite their reservations about the course of political developments in the states during the decade after independence, found much that was useful in the newly adopted constitutions. And when James Madison, fulfilling a pledge given during the ratification debates, drafted the federal Bill of Rights, he found his model in the famous Declaration of Rights of the Virginia Constitution.

By the 1900s, however, few people would have looked to state constitutions for enlightenment. Instead, a familiar litany of complaints was heard whenever state constitutions were mentioned. State constitutions were too long and too detailed, combining basic principles with policy prescriptions and prohibitions that had no place in the fundamental law of a state. By including such provisions, it was argued, state constitutions deprived state governments of the flexibility they needed to respond effectively in changing circumstances. This—among other factors—encouraged political reformers to look to the federal government, which was not plagued by such constitutional constraints, thereby shifting the locus of political initiative away from the states. Meanwhile, civil libertarians concluded that state bills of rights, at least as interpreted by state courts, did not adequately protect rights and therefore looked to the federal courts and the federal Bill of Rights for redress. As power and responsibility shifted from the states to Washington, so too did the attention of scholars, the legal community, and the general public.

During the early 1970s, however, state constitutions were “rediscovered.” The immediate impetus for this rediscovery was former President Richard Nixon’s appointment of Warren Burger to succeed Earl Warren as Chief Justice of the United States Supreme Court. To civil libertarians, this appointment seemed to signal a decisive shift in the Supreme Court’s jurisprudence, because Burger was expected to lead the Court away from the liberal activism that had characterized the Warren Court. They therefore sought ways to safeguard the gains they had achieved for defendants, racial minorities, and the poor during Warren’s tenure from erosion by the Burger Court. In particular, they began to look to state bills of rights to secure the rights of defendants and to support other civil-liberties claims that they advanced in state courts.

The “new judicial federalism,” as it came to be called, quite quickly advanced beyond its initial concern to evade the mandates of the Burger Court. Indeed, less than two decades after it originated, it became a nationwide phenomenon. For when judges and scholars turned their attention to state constitutions, they discovered an unsuspected richness. They found not only provisions that paralleled the federal Bill of Rights but also constitutional guarantees of the right to privacy and of gender equality, for example, that had no analogue in the United States Constitution. Careful examination of the text and history of state guarantees revealed important differences between even those provisions that most resembled federal guarantees and their federal counterparts. Looking beyond state declarations of rights, jurists and scholars discovered affirmative constitutional mandates to state governments to address such important policy concerns as education and housing. Taken altogether, these discoveries underlined the importance for the legal community of developing a better understanding of state constitutions.

Yet the renewed interest in state constitutions has not been limited to judges and lawyers. State constitutional reformers have renewed their efforts with notable success: since 1960, ten states have adopted new constitutions and several others have undertaken major constitutional revisions. These changes have usually resulted in more streamlined constitutions and more effective state governments. Also, in recent years political activists on both the left and the right have pursued their goals through state constitutional amendments, often enacted through the initiative process, under which policy proposals can be placed directly on the ballot for voters to endorse or reject. Scholars too have begun to rediscover how state constitutional history can illuminate changes in political thought and practice, providing a basis for theories about the dynamics of political change in America.

In this second edition, Justice Randy J. Holland of the Delaware Supreme Court updates his original study of the Delaware Constitution as part of *The Oxford Commentaries on the State Constitutions of the United States*, a series which reflects the renewed interest in state constitutions and will contribute to our knowledge about them. Because the constitutional tradition of each state is distinctive, the volume begins with the history and development of constitutionalism in Delaware. It then provides the complete text of the state’s current constitution, with each section accompanied with commentary that explains the provision and traces its origins and its interpretation by the courts and by other governmental bodies. Finally, the book concludes with a bibliography, a table of cases cited in the volume, and a topical index.

G. Alan Tarr

■ FOREWORD

Justice Holland has produced a comprehensive and scholarly account of Delaware's constitutional history and an authoritative, section-by-section analysis of Delaware's current Constitution. This book will be a valuable resource for legal professionals. More important, however, it will promote the general public's confidence in the American system of constitutional democracy.

As the Chief Justice of Delaware, it was my honor to lead the judicial branch of government in accordance with the Delaware Constitution. In that capacity, I was vested with adjudicative responsibility as a member of the state's highest court and with administrative responsibility for all courts, with the concurrence of a majority of the justices. This book provides a logical, chronological account of Delaware's consistent constitutional commitment to an independent judiciary. It also carefully explains Delaware's framework for effectively separating and balancing the powers of sovereignty within all three branches of its government.

The United States Constitution is a grant of enumerated powers to the federal government. State constitutions reflect the methods by which each state decides to exercise and regulate its vast reserve of residuary powers. This book explains how and why Delaware decided to include provisions in the Delaware Constitution that are not only different from the United States Constitution but also different from other state constitutions (e.g., providing the Governor with a line-item veto; requiring political balance within its judiciary; and not providing for constitutional amendments by either initiative or referendum).

The Delaware Constitution has been amended periodically by the General Assembly since 1897. At the same time, the Delaware Constitution has been subjected to frequent interpretation by Delaware's courts. These developments are reflected in Justice Holland's section-by-section examination of each provision, which makes this book essential reading for anyone who is interested in understanding the Delaware Constitution.

E. Norman Veasey
Former Chief Justice
Delaware Supreme Court

■ ACKNOWLEDGMENTS

I wish to thank Mackenzie M. Wrobel, Matthew B. Goeller, and Johanna Peuscher-Funk for their invaluable help with my preparation of this second edition of the reference guide. I wish to thank my distinguished former colleague, retired Chief Justice E. Norman Veasey, for writing the foreword. Finally, I am indebted to the men and women who have created Delaware's rich constitutional heritage by faithfully discharging their responsibilities as either elected or appointed members of Delaware's three branches of government.

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