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STATE CONSTITUTIONAL LAW

THE MODERN EXPERIENCE

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Jeffrey M. Shaman & Jeffrey S. Sutton

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Each of the Co-Authors Dedicates This Book as Follows –

Randy J. Holland

To Ilona E. Holland

Ethan, Jennifer and Aurora (Rori)

Stephen McAllister

To Suzanne Valdez,

Mara, Fiona, Brett, Isabel and Sofia

Jeffrey M. Shaman

To Susan Shaman

Jeffrey Sutton

To Peggy Sutton,

Nathaniel, John and Margaret

FOREWORD

State Constitutional Law – The Modern Experience

Foreword by E. Norman Veasey*

As is the case with the weather, lawyers often talk about the constitutions of the various states, but seldom do anything about that subject. Most of the American cases and literature focus on the United States Constitution. State constitutional law is often neglected, but it is a vibrant and significant feature of our jurisprudence. Justice Randy J. Holland, Judge Jeffrey S. Sutton, Professor Steven R. McAllister and Professor Jeffrey M. Shaman have breathed new life into the subject with this outstanding, scholarly casebook.

Lawyers take an oath upon admission to the bar to support the United States Constitution and the constitution of their states of admission. See, e.g., Rule 54, Rules of the Supreme Court of Delaware ("I ... do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of Delaware ..."). But can a lawyer be true to this solemn oath if she has not studied state constitutional law or been examined on her state constitution? Perhaps she can "catch up" in practice with some "on the job training," as the need arises. But that is not a particularly professional approach. This new, epic work on state constitutional law should become an important basis for law school curricula. Moreover, state constitutional law should be considered as a bar examination topic.

The framers of the United States constitution adopted a "'constitutionally mandated balance of power' between the States and the Federal Government ... to ensure the protection of 'our fundamental liberties.'" *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (Powell, J., dissenting)). The preservation of diversity in the legal and governmental systems of each state was expressly contemplated when the United States constitution was framed and adopted. *See* Randy J. Holland, *State Constitutions: Purpose and Function*, 69 Temp. L.Rev. 989, 998-99 (1996). State constitutions are a source of rights independent of the Federal Constitution and may be applied by state courts to grant more extensive protection for individual rights than is recognized under the Federal Constitution.

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* Chief Justice (Ret.) Delaware Supreme Court (1992-2004).

Under the system of dual sovereignty that exists in this nation, a state court is free to interpret its own state constitution in any way it determines, provided it does not contravene federal law. While the Supremacy Clause of the Federal Constitution makes federal law supreme to state law, so long as state constitutional protection does not fall below the federal floor, a state court may interpret its own state constitution as it chooses, irrespective of federal constitutional law. Although decisions of the United States Supreme Court concerning constitutional issues are entitled to respect and may provide guidance on constitutional matters, they are not binding on a state court as it interprets its own state constitutional guarantees. A state court is free as a matter of its own law to grant more expansive rights than those afforded by federal law. The expansion beyond federally guaranteed individual liberties by a state constitution is attributable to a variety of reasons: differences in textual language, legislative history, pre-existing state law, structural differences, matters of particular concern, and state traditions.

As Judge Sutton, one of the co-authors of this work, has written, "... lawyers and clients have two chances, not one, to invalidate [dubious state or local action]. They may invoke the United States Constitution ... or that State's Constitution to strike the law. Yet ... that is not what most lawyers do." Jeffery S. Sutton, *Why Teach — and Why Study — State Constitutional Law*, 34 OKLAHOMA CITY UNIVERSITY LAW REVIEW 165, 166 (2009). A lawyer challenging police action or a dubious state statute should welcome the leverage of two arrows in her quiver.

Indeed, lawyers *should*, in many cases, frame their attacks on the constitutions of both sovereigns. Why? "State constitutional law not only gives the client two chances to win, it will also give the client a *better* chance to win." *Id.* at 173. There are many reasons cited by Judge Sutton showing this to be true, but one overarching reason is that a state supreme court's decision that rests on its application of the state constitution is the last word in the case and cannot be countermanded by the United States Supreme Court. As the late Supreme Court Justice William Brennan has written, "Moreover, the state decisions not only cannot be overturned by, they indeed are not even reviewable by, the Supreme Court of the United States." William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 501 (1977). This principle is based on the established doctrine that "... if a state ground is independent and adequate to support a judgment, the [U.S. Supreme] Court has no jurisdiction at all over the decision despite the presence of federal issues." *Id.* at 501 n.80.

The law concerning unreasonable searches and seizures reflects differing standards between federal and state constitutions and a labyrinth of factual situations. *See United States v. Cortez*, 449 U.S. 411, 417

(1981). A case in point is the 1999 Delaware Supreme Court decision in *Jones v. State*, 745 A.2d 856 (Del. 1999). There the Court held—arguably in the face of contrary federal and Delaware decisions under the United States Constitution adjudicating similarly worded provisions—that the police did not have a reasonable and articulable basis to make a stop of the defendant and the seizure of controlled substances on his person.

In *Jones* the Court framed the issue as "whether the search and seizure language in the Delaware Constitution means the same thing as the United States Supreme Court's construction of *similar* language in the United States Constitution." *Id.* at 495. The Court then analyzed a number of historical references, including those where similar terms had been used, with differing results. *Id.* at 495-506. Noting that the law concerning unreasonable searches and seizures "reflects differing standards between federal and state constitutions and a labyrinth of factual situations," the Court held:

> If an officer attempts to seize someone before possessing reasonable and articulable suspicion, that person's actions stemming from the attempted seizure may not be used to manufacture the suspicion the police lacked initially."

Id. at 855-56.

State constitutional law, like its federal counterpart, is not limited to issues involving the common law or individual rights. Numerous other areas of law involve the application of state constitutions. The structure and power of state and local governments, the state judicial system, taxation, public finance, and public education are all affected by a state's constitutions and its interpretation. "From its inception of the American republic, federal and state constitutional traditions have been distinct." James E. Henretta, *Foreword: Rethinking the State Constitutional Tradition*, 22 Rutgers L.J. 819, 819-26, 836-39 (1991). The United States Constitution has retained its original character as a document that fixed the basic structure of government and allocated power among its three branches. State constitution-making and amending has been a recurring process within the broader political, social, economic, and historical contexts of time and place. A.E. Dick Howard, *The Values of Federalism*, 1 New. Eur. L. Rev. 241, 145-46 (1993); Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 Colum. L. Rev. 847-853-57 (1979). *See also* Robert P. Stoker, Reluctant Partners (1991).

This new, richly documented and superbly-analyzed casebook by such distinguished legal scholars is destined to be the seminal authority in this vitally important field. For some lawyers, a system of dual sovereignty means that litigants will have two opportunities, not than just one, to invalidate a state law or otherwise halt state action. And for others, our federal system makes state courts accountable for properly interpreting

their own constitutions, without regard to whether those interpretations increase or decrease individual liberty and without regard to whether they follow or break from decisions of the U.S. Supreme Court. But for all lawyers, the independence of the sovereignty of the states makes the study and effective use of state constitutional law an imperative in the twenty-first century, as indicated in the following February 2010 resolution that was passed unanimously by the Conference of Chief Justices.

CONFERENCE OF CHIEF JUSTICES RESOLUTION:

State Constitutional Law Courses

RESOLUTION 1

Encouraging the Teaching of State Constitutional Law Courses

WHEREAS, all lawyers take an oath to support the United States Constitution and the constitution of their state; and

WHEREAS, although all law schools offer a course in constitutional law, the overwhelming majority of those courses are taught from the perspective of the federal Constitution; and

WHEREAS, the United States Constitution creates a dual system of government with two sets of sovereigns whereby all powers not delegated to the federal government are reserved to the states; and

WHEREAS, state constitutions contain different structures of government, unique provisions, and substantive provisions or declarations of rights that are often greater than federally guaranteed individual rights and liberties; and

WHEREAS, being a competent and effective lawyer requires an understanding of both the federal Constitution and state constitutional law;

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices encourages all law schools to offer a course on state constitutional law.

Adopted as proposed by the Professionalism and Competence of the Bar Committee at the Conference of Chief Justices 2010 Midyear Meeting.

TABLE OF CASES

Principal cases are in bold type. Non-principal cases are in roman type. References are to Pages.

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