
STATE CONSTITUTIONS AND LEGISLATIVE PROCESS: THE ROAD NOT TAKEN

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The topic of this Essay, the comparative study of state and federal legislatures, is doubly marginalized in the legal academy. First, it has to do with the legislative branch of government.¹ Second, it has to do with the legislative branch of state government.²

The current failure of legal scholars to explore the resources of state constitutions is puzzling. Historically, scholars relied on a polyphony of constitutional sources. Aristotle, the founder of Western political theory, compiled and drew upon the constitutions of 158 Greek polities in his comparative work.³ Lord Bryce concisely explained the importance of American state constitutions to its political history: “The State Constitutions are the oldest things in the political history of America, for they are the continuations and representatives of the royal colonial charters, whereby the earliest English settlements in America were created”⁴ He went on to emphasize their enduring salience:

Their interest is all the greater, because the succession of Constitutions and amendments to Constitutions from 1776 till to-day enables the annals

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¹ Elizabeth Garrett, *Teaching Law and Politics*, 7 N.Y.U. J. LEGIS. & PUB. POL’Y 11, 11 (2003) (pointing out the “court-centric” bias of the law school curriculum); *see, e.g.*, 3 THE CAMBRIDGE HISTORY OF LAW IN AMERICA: THE TWENTIETH CENTURY AND AFTER (1920-), at v-vi (Michael Grossberg & Christopher Tomlins eds., 2008) (containing no entry for the legislative branch in the index). *But see* THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE, at xv-xvii (Richard W. Bauman & Tsvi Kahana eds., 2006) (presenting thirty-two contributors who are on law faculties, including six with cross-appointments with the political science faculties).

² As Professor Helen Hershkoff observed: “[S]tate constitutionalism remains intellectually isolated from a great deal of public law scholarship. Constitutional law courses at U.S. law schools not only ignore state constitutions, but also more generally avoid any comparative approach [between federal and state constitutions].” Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1194-95 (1999) (footnotes omitted). Of the ninety-three contributors to ENCYCLOPEDIA OF THE AMERICAN LEGISLATIVE SYSTEM (Joel H. Sibley ed., 1994), including an all-star cast of historians and political scientists, only three were members of law faculties. *But see* THE LEAST EXAMINED BRANCH, *supra* note 1, at xv-xvii.

³ ARISTOTLE, POLITICS, at xxviii (Ernest Barker trans., 1946).

⁴ 1 JAMES BRYCE, THE AMERICAN COMMONWEALTH 413 (London, Macmillan 1889).

of legislation and political sentiment to be read in these documents more easily and succinctly than in any similar series of laws in any other country. They are a mine of instruction for the natural history of democratic communities.⁵

Professor Sanford Levinson's work illustrates the relative neglect of state constitutional design by the academic bar.⁶ If we focus on state government, the democratic deficit that engages his attention largely disappears. State chief executives gain office by direct election unmediated by an electoral college. State senate electoral districts are subject to the equipopulation (one-person, one-vote) principle.⁷ In most states, the judiciary is elected, serves for a defined period, and is subject to age limitations.⁸ Many state constitutions extend the principle of checks and balances by providing for a plural executive branch.⁹ State constitutions are more easily amendable than the Federal Constitution, particularly in states permitting the constitutional initiative.¹⁰ These features of institutional design, if seen in a comparative light, would, of course, bolster the critic's argument that the Federal Constitution is out of sync with the evolutionary thrust of the democratic ideal. Further, existing frameworks for state governance provide benchmarks for evaluation of the federal model that cannot be ascribed to the normative attitudes of the critic, even if the concept of democracy is an "essentially contested" one.¹¹

The entrenchment in state constitutions of rules of legislative practice and procedure is among the most striking features of the evolution of state legislatures.¹² The purpose of these regulatory provisions is more easily understood in light of their history. In early state constitutions, the legislature is typically afforded broad autonomy. Consider the following examples: "The

⁵ *Id.* at 434.

⁶ See SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 6 (2006) (expressing despondency "about many structural provisions of the Constitution that place almost insurmountable barriers in the way of any acceptable notion of democracy").

⁷ See *Mahan v. Howell*, 410 U.S. 315, 330 (1973).

⁸ See ROBERT F. WILLIAMS, *STATE CONSTITUTIONAL LAW CASES AND MATERIALS* 639-45 (4th ed. 2006).

⁹ *Id.* at 589-98, 731-36 (discussing "the interpretation of constitutions by state attorneys general" and "the 'constitutionalization' of executive agencies and officers").

¹⁰ *Id.* at 1029-35.

¹¹ W.B. GALLIE, *PHILOSOPHY AND THE HISTORICAL UNDERSTANDING* 178-81 (1964). For a more precise definition of the phrase "essentially contested," see Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CAL. L. REV. 509, 529-34 (1994); and for Gallie's five basic criteria for determining whether a concept is "essentially contested," see *id.* at 530 n.53.

¹² Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 48 U. PITT. L. REV. 797, 798 (1987) [hereinafter Williams, *Legislative Procedure*].

Senate shall . . . determine its own rules of proceedings,”¹³ and “The House of Representatives shall . . . settle the rules and orders of proceeding in their own house.”¹⁴ Despite the promise of autonomy suggested by such language, the incorporation of rules of parliamentary law into state constitutions began early.¹⁵ The constitutional history of Pennsylvania illustrates this tendency. The earliest Pennsylvania Constitution, the “radical” constitution of 1776, contains several provisions designed to assure openness, deliberation, and accountability in governance by the unicameral legislature: a two-thirds quorum requirement for doing business;¹⁶ a provision calling for open sessions;¹⁷ weekly printing of votes and proceedings during session including recording “the yeas and nays on any question, vote or resolution where any two members require it”;¹⁸ and a provision requiring a formal enacting clause for all laws.¹⁹

The distrust of the legislature, seen by Jacksonian democrats as an engine for churning out special privileges for interest groups, produced a wave of constitution-making in half of the states between 1844 and 1853.²⁰ These reformers created “a blueprint for the due process of deliberative, democratically accountable government.”²¹

These process reforms continued through the period 1861-1880, during which more than forty states revised old or created new constitutions.²² Professor G. Alan Tarr summarized these developments:

In 1835 Alexis de Tocqueville observed that “the legislature of each state is faced by no power capable of resisting it.” But beginning in the 1830s, state constitution-makers sought to impose limits on these supreme legislatures. Initially, their restrictions focused on the process of legislation. Some state constitutions required extraordinary majorities to adopt certain types of legislation, under the assumption that it would be more difficult to marshal such majorities for dubious endeavors. . . . Other provisions required that the amendment or revision of laws not proceed by mere reference to their titles, that statutes be phrased in plain

¹³ MASS. CONST. ch. I, § 2, art. VII.

¹⁴ *Id.* § 3, art. X.

¹⁵ See Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and Its Influences on American Constitutionalism*, 62 TEMP. L. REV. 541, 561-74 (1989).

¹⁶ PA. CONST. of 1776, § 10.

¹⁷ *Id.* § 13.

¹⁸ *Id.* § 14.

¹⁹ *Id.* § 16.

²⁰ DANIEL T. RODGERS, CONTESTED TRUTHS: KEYWORDS IN AMERICAN POLITICS SINCE INDEPENDENCE 94 (1998) (citing ALBERT L. STURM, METHODS OF STATE CONSTITUTIONAL REFORM 114-15 (1954)).

²¹ Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 253 (1976).

²² G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 95 (1998).

language, that taxing and spending measures be enacted only by recorded vote, and – most importantly – that no special laws be enacted where a general law was possible. By the end of the nineteenth century, most state constitutions included several of these procedural requirements.²³

The 1873 Pennsylvania Constitutional Convention, where the primary focus was legislative reform, illustrates Tarr's observations. That Convention created an interrelated set of provisions implementing a broad vision of deliberative democracy applicable to each phase of the lawmaking process from drafting legislation to final passage.²⁴

Most state constitutions do not follow the federal model, which has little to say about lawmaking procedures.²⁵ Instead, like Pennsylvania's modern constitution, they incorporate most of the procedural norms that emerged during the nineteenth century. At the drafting phase, each bill must contain a title that "clearly expresses" the subject matter of the body of the proposed law.²⁶ In addition to the title's notice function, each bill, except appropriations, is restricted to "one subject" in order to forestall "log-rolling" and to focus the legislature's attention on discrete policy issues.²⁷ The rule that bills amending or cross-referencing existing laws must include the amended or referenced legislation in their text also furthers values of notice and clarity.²⁸ Particular rules apply to drafting appropriations measures to ensure notice and bar log-rolling.²⁹ An additional safeguard promoting clarity stems from the void-for-vagueness doctrine rooted in the due process clause of state and federal constitutions.³⁰

Constitutional rules of procedure were designed to promote accountability and enhance participation and deliberation. In the Pennsylvania constitutional

²³ *Id.* at 118-19.

²⁴ *See, e.g.*, Mahlon Howard Hellerich, *The Pennsylvania Constitution of 1873*, at 181-198 (1956) (unpublished Ph.D. dissertation, University of Pennsylvania) (on file with author) (discussing various Convention debates over provisions dealing with the legislative body).

²⁵ ABNER J. MIKVA & ERIC LANE, *LEGISLATIVE PROCESS* 177 (2d ed. 2002); *see also* U.S. CONST. art. I, § 5 (requiring a majority for quorum, keeping of a journal, and recording the vote on demand of one-fifth of those present); *id.* § 7, cl. 1 (requiring revenue bills to originate in the House).

²⁶ *See, e.g.*, PA. CONST. art. III, § 3. This paragraph and the subsequent paragraph of the text draw extensively on Michael E. Libonati, *The Legislative Branch*, in 3 *STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM* 37, 37-65 (G. Alan Tarr & Robert F. Williams eds., 2006).

²⁷ Millard H. Ruud, *No Law Shall Embrace More Than One Subject*, 42 *MINN. L. REV.* 389, 390 (1958).

²⁸ *See, e.g.*, PA. CONST. art. III, § 6; Horace Emerson Read, *Is Referential Legislation Worth While?*, 25 *MINN. L. REV.* 261, 277-81 (1941).

²⁹ *See, e.g.*, PA. CONST. art. III, § 11.

³⁰ *See* Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 *U. PA. L. REV.* 67, 67-69 (1960).

model, the state house is directly accountable for originating revenue bills.³¹ The committee system is recognized and strengthened by the requirement that all bills be referred to a committee and printed.³² To prevent surprise and foster public notice, no bill can be altered or amended on its passage through either chamber so as to change its original purpose,³³ and every bill must be read at length and printed before the final vote.³⁴ Principles of accountability and majority rule are embedded in the requirements that a majority of the elected members of each chamber cast a recorded vote on every bill,³⁵ that the presiding officer of each chamber authenticate by signature the fact that the measure was approved, and that the fact of signing must be entered in the journal.³⁶

One can, of course, view these procedural constraints as entrenching the path-dependent result of yesterday's controversies. A case can be made for the proposition that most of these provisions are failed efforts at legislative reform, unworthy of contemporary attention.³⁷ In many states, judges have refused to enforce all but a few of these procedural constraints.³⁸ This is because "a substantial number" of state courts adhere to the "enrolled bill rule,"³⁹ which prevents any evidence outside the text of the enrolled bill itself from being introduced as evidence showing constitutional violations of rules governing the process of enactment.⁴⁰ Thus, rules concerning drafting such as the single subject and clear title rules are reviewable because a violation can be determined from the text of the enactment.⁴¹ But violations of majority vote, referral to committee, printing and reading, limited session, and similar procedural rules are not reviewable in a jurisdiction adhering to the enrolled bill rule.⁴² Even without the enrolled bill rule, a state court can refuse to

³¹ PA. CONST. art. III, § 10.

³² *Id.* § 2.

³³ *Id.* § 1; see Martha J. Dragich, *State Constitutional Restrictions on Legislative Procedure: Rethinking the Analysis of Original Purpose, Single Subject, and Clear Title Challenges*, 38 HARV. J. ON LEGIS. 103, 111-13 (2001).

³⁴ PA. CONST. art. III, § 4.

³⁵ *Id.* §§ 4-5.

³⁶ *Id.* § 8.

³⁷ See, e.g., WILLIAMS, *supra* note 8, at 826 (pointing out that "in controversial matters, legislative attitudes are not always governed by concern for the merits of the procedural point").

³⁸ See 1 NORMAN J. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION 429-31 (4th ed. 1985) (discussing judicial enforcement of legislative procedural rules).

³⁹ *Id.* at 609-11.

⁴⁰ Williams, *Legislative Procedure*, *supra* note 12, at 816-18.

⁴¹ *Id.* at 824-25.

⁴² See *id.* at 822-23 (mentioning a case where a state rejected the enrolled bill rule and adopted the extrinsic evidence rule, which allows for inquiry to determine whether a statute passed with a majority vote).

enforce procedural rules by holding that judicial intervention violates separation of powers doctrine.⁴³

In my view, however, taking *state* constitutional rules of legislative practice and procedure seriously has the potential for enhancing both the theory and the usefulness of scholarship in several ways. First, many provisions mentioned above represent efforts to define and implement the democratic values of impartiality, accountability, transparency, and deliberation that inform Professor Adrian Vermeule's work on institutional design.⁴⁴ Second, the debates, deliberations, and discussions of these procedural mechanisms in state constitutional conventions, as well as contemporaneous newspapers, provide a "thick description"⁴⁵ of the democratic values sought to be entrenched in the states that adopted them.⁴⁶ Notable in this regard is historian John Dinan's use of these materials in his comparative analysis of the bicameralism issue in the states.⁴⁷ Third, the state constitutional experience ought to be of considerable interest to scholars interested in deliberative democratic theory.⁴⁸ For example, one might be able to test whether state legislative performance improves in the aftermath of a state supreme court's rejection of the enrolled bill rule.⁴⁹ Fourth, a theoretical and empirical appraisal of procedural mechanisms in state constitutions could furnish guidance to twenty-first century framers of state constitutions.⁵⁰ All these are important reasons for the closer study of legislative procedure and practice in the states.

⁴³ See, e.g., *Tuck v. Blackmon*, 798 So. 2d 402, 404 (Miss. 2001) (refusing to enforce a provision of the Mississippi Constitution requiring that any law or statute be read in full before final passage on the basis that it is not the proper role of the courts to oversee the legislature's internal actions).

⁴⁴ ADRIAN VERMEULE, *MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN* WRIT SMALL 4-7 (2007). Professor Vermeule focuses on existing small-scale institutional devices and innovations, similar to the state procedural provisions mentioned in this Essay, that promote democratic values of governments. *Id.* at 245-48.

⁴⁵ The term "thick description" is discussed in CLIFFORD GEERTZ, *Thick Description: Toward an Interpretative Theory of Culture*, in *THE INTERPRETATION OF CULTURES* 3, 3-30 (1973).

⁴⁶ See, e.g., Hellerich, *supra* note 24, at 88-91, 157-61, 312-14.

⁴⁷ JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* 137-83 (2006).

⁴⁸ For surveys of the field, see generally Dennis F. Thompson, *Deliberative Democratic Theory and Empirical Political Science*, 11 ANN. REV. POL. SCI. 497 (2008) (arguing that empirical study is an essential component to the study of deliberative democracy); Nadia Urbinati & Mark E. Warren, *The Concept of Representation in Contemporary Democratic Theory*, 11 ANN. REV. POL. SCI. 387 (2008) (reviewing recent innovations within democratic theory, focusing partially on deliberative political judgment).

⁴⁹ Cf. Diana C. Mutz, *Is Deliberative Democracy a Falsifiable Theory?*, 11 ANN. REV. POL. SCI. 521, 535-37 (2008) (discussing potential barriers and difficulties for using empirical research methods on deliberative democracy theories).

⁵⁰ See G. Alan Tarr, *Introduction to STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY*, *supra* note 26, at 1, 1-5.

Finally, the relative inattention of federal constitutional law scholars (with the notable exception of Professor Vermeule) to the procedural constraints found in state constitutions impoverishes discourse about the American constitutional project.⁵¹ For a counter-example, consider the much more plentiful amount of ink spilled over the under-enforcement of substantive constitutional norms.⁵² But the most glaring example of under-enforced norms is found in the United States Supreme Court's adherence to the procedural "enrolled bill rule."⁵³ The "enrolled bill rule" ought to be anathema to proponents of the process theory according to which courts should invalidate statutes only if they distort the political process.⁵⁴ It is hard to imagine a more egregious case of distortion than the petitioner's claim in *Field v. Clark* that neither the House nor the Senate voted on a section of a statute.⁵⁵ But this important case goes unmentioned in a leading casebook on federal constitutional law.⁵⁶ This affront to any sound notion of majoritarian and deliberative democracy might pass completely unnoticed were it not for a recent student note.⁵⁷

This example shows the restricted ambit of American constitutional scholarship. By way of contrast, professors of German constitutional law have developed an "immense" literature on provisions in the federal and state constitutions entrenching "parliamentary rights."⁵⁸ These provisions are vigorously enforced by both federal and state constitutional courts.⁵⁹

I hope scholarly neglect of state constitutional law in general, and of constitutionally entrenched norms of legislative process and procedure in particular, is the product of oversight and not an epiphenomenon of the struggle for elite dominance of the "symbolic capital" in the juridical sphere so

⁵¹ See *supra* notes 1-2 and accompanying text.

⁵² See, e.g., Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1212-14 (1978).

⁵³ See *Field v. Clark*, 143 U.S. 649, 670-73 (1892).

⁵⁴ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 102-03 (1980).

⁵⁵ *Field*, 143 U.S. at 669 (recounting the claim of appellants that "a bill . . . does not become a law of the United States if it had not in fact been passed by Congress").

⁵⁶ See GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 1649-63 (5th ed. 2005) (omitting the *Field* case from the Table of Cases and anywhere else in the text).

⁵⁷ See generally David Sandler, Note, *Forget What You Learned in Civics Class: The "Enrolled Bill Rule" and Why It's Time to Overrule Field v. Clark*, 41 COLUM. J.L. & SOC. PROBS. 213 (2007) (arguing that the enrolled bill rule is unjustifiable).

⁵⁸ Pascale Cancik, *Making Parliamentary Rights Effective: The Role of the Constitutional Courts in Germany*, in *CONSTITUTIONALISM AND THE ROLE OF PARLIAMENTS* 239, 243 n.18 (Katja S. Zeigler, Denis Baranger & Anthony W. Bradley eds., 2007).

⁵⁹ *Id.* at 241.

aptly described by Bourdieu.⁶⁰ If so, allons, camarados, an open road lies before you full of the promise of democratic vistas.⁶¹

⁶⁰ Richard Terdiman, *Translator's Introduction*, 38 HASTINGS L.J. 805, 812 (1987) (describing Bourdieu's conception of "social capital" which includes "authority, knowledge, prestige, reputation, academic degrees, debts of gratitude" and pointing out that "[t]he relevance of a notion of symbolic capital to the study of an important professional field like the juridical is considerable"); *see also* ALLAN C. HUTCHINSON, *THE PROVINCE OF JURISPRUDENCE DEMOCRATIZED* 143-96 (2008) (arguing for a robust democratic approach to legal theory and to adjudication).

⁶¹ WALT WHITMAN, *Poem of the Road*, in *THE POEMS OF WALT WHITMAN (LEAVES OF GRASS)* 235-44 (Thomas Y. Crowell & Co. 1902) (1860); WALT WHITMAN, *DEMOCRATIC VISTAS AND OTHER PAPERS* 1-83 (1888).