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## Fifty More Constitutions

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## Practicing Reference . . .

## Fifty More Constitutions\*

Mary Whisner\*\*

*The U.S. Constitution may get all the attention, but as Ms. Whisner points out, state constitutional law is also important to legal researchers. Unfortunately, the sources for researching state constitutions are more limited and difficult to find. She describes a web site created by the Gallagher Law Library at the University of Washington School of Law that makes available sources of Washington State constitutional history.*

¶1 Ask a person on the street about constitutional law and—assuming you’ve met up with a fairly knowledgeable person<sup>1</sup>—you’re likely to hear about equal protection, the Bill of Rights, or perhaps the separation of powers. He or she might mention some of the great constitutional cases: *Brown v. Board of Education*,<sup>2</sup> *Gideon v. Wainwright*,<sup>3</sup> *Miranda v. Arizona*.<sup>4</sup> (These will also be the main points mentioned if you ask most law students or attorneys.) If you prowl around a large bookstore, you’ll see books about the framers of the Constitution—the “Founding Fathers” or, as one author dubbed them, the “Founding Brothers”<sup>5</sup>—as well as recent works on the role of the Supreme Court in interpreting the Constitution.<sup>6</sup> If you’ve been a tourist in Philadelphia, you might have visited Independence Hall, where the Constitutional Convention met in the summer of 1787. As a member of the audience that reads *Law Library Journal*, you likely know much more than the

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\* © Mary Whisner, 2012. I am grateful to Ron Collins, Penny Hazelton, and Hugh Spitzer for reviewing and commenting on a draft of this piece.

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1. Ignorance of history and government is widespread. See, e.g., *Americans’ Knowledge of the U.S. Constitution*, COLUMBIA LAW SCHOOL (May 2002), [http://www2.law.columbia.edu/news/surveys/survey\\_constitution/introduction.shtml](http://www2.law.columbia.edu/news/surveys/survey_constitution/introduction.shtml); *The Coming Crisis in Citizenship*, INTERCOLLEGIATE STUDIES INSTITUTE (2006), <http://www.americancivilliteracy.org/2006/summary.html>; Max Fisher, *Americans vs. Basic Historical Knowledge*, ATLANTIC WIRE, June 3, 2010, <http://www.theatlanticwire.com/politics/2010/06/americans-vs-basic-historical-knowledge/19596/>.

2. 347 U.S. 483 (1954).

3. 372 U.S. 335 (1963).

4. 384 U.S. 436 (1966).

5. JOSEPH J. ELLIS, *FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION* (2000). Other recent books about the Founders include GLENN BECK, *ORIGINAL ARGUMENT: THE FEDERALISTS’ CASE FOR THE CONSTITUTION, ADAPTED FOR THE 21ST CENTURY* (2011); RICHARD BROOKHISER, *JAMES MADISON* (2011); RON CHERNOW, *WASHINGTON: A LIFE* (2010); WALTER ISAACSON, *BENJAMIN FRANKLIN: AN AMERICAN LIFE* (2003); DAVID McCULLOUGH, *JOHN ADAMS* (2001); PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788* (2010).

6. E.g., STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005); ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (1997).

average person about the drafting and adoption of the Constitution and its amendments, as well as the debates about its interpretation and application in the last 225 years. And of course you can direct researchers to print and online resources for digging deeper.<sup>7</sup>

¶2 But the U.S. Constitution is not the only constitution in our system. Each state has a constitution, and therefore a body of state constitutional law.<sup>8</sup> Yet state constitutional law is largely neglected. I don't have a source to cite, but I think it's a fair bet that the high schools that expose their students to the federal constitution seldom say much (if anything) about their states' constitutions. Even law schools rarely teach state constitutional law.<sup>9</sup> The national press, which plays an important role in educating the public about constitutional issues, focuses on the U.S. Supreme Court, and hence on the federal constitution.<sup>10</sup>

¶3 But despite our general ignorance, state courts have been plugging along, applying their state constitutions to important issues, often providing protections greater than those afforded by the U.S. Constitution as interpreted by the federal courts. A prominent supporter of using state constitutions was Justice William J. Brennan. In an influential article in 1977,<sup>11</sup> he recounted victories for individual rights in the 1960s and early 1970s,<sup>12</sup> and then "a trend in recent opinions of the United States Supreme Court to pull back from, or at least suspend for the time being . . . application of the federal Bill of Rights and the restraints of the due process and equal protection clauses of the fourteenth amendment."<sup>13</sup> Brennan heralded recent state court decisions that interpreted provisions of state constitutions

7. *E.g.*, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION (Johnny H. Killian et al. eds., 2004), available at <http://www.gpoaccess.gov/constitution/browse2002.html#2002>; THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987) as well as annotated codes, treatises, monographs, and law review articles.

8. Indian tribes also have constitutions, but Indian law is a topic for another day.

9. State constitutional law is not a part of the academic culture of most American law schools, especially the nation's leading law schools. In the 2007–2008 academic year, no school ranked in the top fifteen offered such a course, and only one of the top twenty law schools offered a course in state constitutional law.

Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1639 (2010) (footnotes omitted).

10. Local papers do cover state constitutional issues, such as cases on motor vehicle fuel tax or education. But state constitutional law doesn't have its Nina Totenberg, let alone the journalists who have written book-length accounts of constitutional struggles, *e.g.*, RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (rev. ed. 2004); ANTHONY LEWIS, GIDEON'S TRUMPET (1964), or biographies of Justices who shaped constitutional law, *e.g.*, LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN (2005).

11. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). Brennan's voice was prominent, but it was not the first to call for the use of state constitutions. See Hugh D. Spitzer, *New Life for the "Criteria Tests" in State Constitutional Jurisprudence: "Gunwall Is Dead—Long Live Gunwall!"*, 37 RUTGERS L.J. 1169, 1172 n.12 (2006). State court judges also advocate for greater use of state constitutions. Notable among them is Justice Hans Linde of the Oregon Supreme Court. See, *e.g.*, INTELLECT AND CRAFT: THE CONTRIBUTIONS OF JUSTICE HANS LINDE TO AMERICAN CONSTITUTIONALISM (Robert F. Nagel ed., 1995) (containing edited versions of seven law review articles and thirteen opinions); see also *State v. Ochoa*, 792 N.W.2d 260, 264–65 n.2 (Iowa 2010) (citing law review articles by Linde and five other state supreme court justices).

12. Brennan, *supra* note 11, at 493–94.

13. *Id.* at 495.

more liberally than the Supreme Court had construed parallel—or sometimes identical—provisions in the federal constitution. For instance, Article I, Paragraph 7, of the New Jersey Constitution was identical to the Fourth Amendment, but in 1975 the New Jersey Supreme Court rejected U.S. Supreme Court precedent in order to provide more protection—in this case, requiring the prosecution to show that consent to a search was voluntary.<sup>14</sup>

¶4 U.S. Supreme Court cases may dominate the headlines, but state supreme court cases outnumber them—by a lot.

State supreme courts decide more than ten thousand cases each year, roughly twenty percent of which involve state constitutional issues. The U.S. Supreme Court, by contrast, now issues around seventy-five decisions a year, around forty percent of which involve constitutional issues. . . . [T]he California Supreme Court now issues more opinions about state constitutional law than the U.S. Supreme Court issues decisions about federal constitutional law.<sup>15</sup>

Some of those constitutional decisions relate to matters unique to state government—for example, whether an initiative’s ballot title is acceptable,<sup>16</sup> whether the governor can compel the attorney general to withdraw an appeal,<sup>17</sup> or whether a particular means of funding public education satisfies the state’s duty “to make ample provision” for the education of all children.<sup>18</sup> Other cases address issues that are common to the federal and state systems. As in the examples discussed by Justice Brennan, state courts have provided protections above the level set by the U.S. Supreme Court on “school finance, disparate impact proofs of discrimination, voter registration laws, abortion funding, religious liberty protections, takings, same-sex sodomy, and a host of criminal procedure protections.”<sup>19</sup>

¶5 It’s worth noting that the increased activity in state constitutional law in the late twentieth century was a rebirth, not a birth. In fact, state constitutional law had been very much alive before that. “Throughout the nineteenth century and until the growth of the national government during and after the New Deal, the focus of American constitutional law was at the state level.”<sup>20</sup> And state courts considered themselves free to differ from the U.S. Supreme Court in interpreting state constitutional provisions similar to those in the federal constitution.<sup>21</sup> Some states were far ahead of the U.S. Supreme Court in certain areas of individual rights. For instance, the Wisconsin Supreme Court ruled that the Wisconsin Constitution required counties to provide lawyers for poor defendants charged with felonies in 1859, over a century before *Gideon v. Wainwright*.<sup>22</sup>

14. *Id.* at 499–500 (citing *State v. Johnson*, 346 A.2d 66 (N.J. 1975)). Because Brennan served on the New Jersey Supreme Court from 1952 to 1956, Stephen J. Wermiel, *William Joseph Brennan, Jr., in BIOGRAPHICAL ENCYCLOPEDIA OF THE SUPREME COURT* 57, 58 (Melvin I. Urofsky ed., 2006), I smiled at his remark: “Enlightenment comes also from the New Jersey Supreme Court.” Brennan, *supra* note 11, at 499.

15. Devins, *supra* note 9, at 1635 (footnotes omitted).

16. *Crochet v. Priest*, 931 S.W.2d 128 (Ark. 1996).

17. *Perdue v. Baker*, 586 S.E.2d 606 (Ga. 2003).

18. *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71 (Wash. 1978).

19. Devins, *supra* note 9, at 1636. Between 1977 and 1988, there were four hundred state court interpretations giving greater protection to individuals than U.S. Supreme Court cases did. *Id.* at 1638.

20. Spitzer, *supra* note 11, at 1171.

21. *Id.* at 1171–72.

22. See Shirley S. Abrahamson, *Reincarnation of State Courts*, 36 Sw. L.J. 951, 957 (1982) (citing *Carpenter v. Dane Cnty.*, 9 Wis. 274 (1859)).

¶6 When state courts rely on state constitutions, their decisions are generally insulated from reversal by the Supreme Court.<sup>23</sup> As Brennan put it: “the state decisions not only cannot be overturned by, they indeed are not even reviewable by, the Supreme Court of the United States. We are utterly without jurisdiction to review such state decisions.”<sup>24</sup> There’s a slight qualification: the state court must do more than mention the state constitution. For instance, in *Michigan v. Long*, the Supreme Court held that it had jurisdiction despite the state court’s statement, “We hold . . . that the deputies’ search . . . was proscribed by the Fourth Amendment to the United States Constitution and art. 1, § 11 of the Michigan Constitution.”<sup>25</sup> The Michigan court’s opinion had discussed the Fourth Amendment and cited Supreme Court cases on the Fourth Amendment, but cited the state constitution only twice, without analysis.<sup>26</sup> The state court apparently “decided the case the way it did because it believed that federal law required it to do so.”<sup>27</sup> Deciding that it had jurisdiction “in the absence of a plain statement that the decision below rested on an adequate and independent state ground,” the Court could review (and reverse) the *Long* decision.<sup>28</sup> Of course, state courts responded to the Court’s instruction and began making their reliance on state grounds explicit.<sup>29</sup>

¶7 Despite state constitutions’ typically low profile, they do sometimes land in the spotlight. The public might not care much about the fine points of search and seizure law, but when the Hawaii Supreme Court said that the statute defining marriage was subject to strict scrutiny under the state’s constitution,<sup>30</sup> people definitely noticed. Within the state, the reaction was to undo the ruling by amending the constitution to empower the legislature to ban same-sex marriage.<sup>31</sup> And there was a strong reaction beyond the state, too: between 1998 and 2009, thirty-one other states also adopted constitutional amendments limiting same-sex marriage and

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23. Not everyone sees this as a good thing. “Since the early 1970’s, what has troubled the critics of the once ‘new judicial federalism’ is the *strategic* use of state constitutional law in a way that expands the rights domain while insulating such state court decisions from otherwise adverse federal court review.” Ronald K.L. Collins, *Foreword: The Once “New Judicial Federalism” & Its Critics*, 64 WASH. L. REV. 5, 6 (1989).

24. Brennan, *supra* note 11, at 501.

25. 463 U.S. 1032, 1037 n.3 (1983) (quoting *People v. Long*, 320 N.W.2d 866, 870 (Mich. 1982)).

26. *Id.* at 1043.

27. *Id.* at 1041.

28. *Id.* at 1044. For more on the issue of the Supreme Court’s lack of jurisdiction when a state decision rests on “independent and adequate state grounds,” see 16B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §§ 4019–4032 (2d ed. 1996). The sequence of deciding state and federal claims is discussed in 1 JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW, at 1-18 to 1-41 (4th ed. 2006).

29. See Patricia Fahlbusch & Daniel Gonzalez, Case Comment, *Michigan v. Long: The Inadequacies of Independent and Adequate State Grounds*, 42 U. MIAMI L. REV. 159, 188 n.200 (1987) (“At one time or another, all of the state courts surveyed in this study placed in their opinions the declaration that their decisions rested on bona fide, separate, adequate and independent state grounds. And in all cases the Supreme Court denied review.”).

30. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (remanding to trial court for finding whether statute was justified by a compelling state interest). See *Baehr v. Miike*, Civ. No. 91-1394, 1996 WL 694235 (Cir. Ct. Haw. Dec. 3, 1996) (on remand, finding no compelling state interest, and thus that the statute violated Hawaii’s equal protection clause).

31. HAWAII CONST. art. I, § 23 (ratified Nov. 3, 1998).

often other types of same-sex unions.<sup>32</sup> By the later years, the states adopting constitutional amendments were reacting not just to the case from Hawaii, but also to cases from other states, including Vermont,<sup>33</sup> Massachusetts,<sup>34</sup> and California.<sup>35</sup>

¶8 Advocates for same-sex couples made their cases using the distinctive provisions of state constitutions. For example, compare the equality provisions from Connecticut, Iowa, and Massachusetts with the equal protection clause of the Fourteenth Amendment:

Connecticut	All men when they form a social compact are equal in rights; and no man or set of men are entitled to exclusive public emoluments or privileges from the community. <sup>36</sup> No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability. <sup>37</sup>
Iowa	All laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens. <sup>38</sup>
Massachusetts	All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin. <sup>39</sup>
United States	No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. <sup>40</sup>

Clearly, equality provisions are not created equal.<sup>41</sup> The state cases may also involve constitutional provisions that have no parallel in the federal constitution. For

32. PETER NICOLAS & MIKE STRONG, *THE GEOGRAPHY OF LOVE: SAME-SEX MARRIAGE & RELATIONSHIP RECOGNITION IN AMERICA (THE STORY IN MAPS)* 24 (2d ed. 2011) (listing Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Idaho, Kansas, Kentucky, Louisiana, Maine, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wisconsin).

33. *Baker v. State*, 744 A.2d 864 (Vt. 1999).

34. *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941 (Mass. 2003).

35. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

36. CONN. CONST. art. I, § 1.

37. *Id.* § 20.

38. IOWA CONST. art. I, § 6.

39. MASS. CONST. pt. 1, art. I.

40. U.S. CONST. amend. XIV, § 1.

41. "The equality provisions contained in the states' bills of rights are among the most diverse guarantees found in American constitutions." Ronald K.L. Collins, *Bills and Declarations of Rights Digest*, in *THE AMERICAN BENCH: JUDGES OF THE NATION* 2483, 2491 (3d ed. 1985–1986).

instance, in *Andersen v. King County*,<sup>42</sup> the Washington Supreme Court discussed the state constitution's privacy provision<sup>43</sup> and Equal Rights Amendment<sup>44</sup> as well as equal protection and due process.

¶9 The ability of a state's legislature and voters to amend their constitution to undo a court decision with which they disagree illustrates one significant way in which state constitutions differ from the federal constitution: they are much easier to change in response to political mood or changing circumstances.<sup>45</sup> Most states have had at least three constitutions since their founding; altogether the states have adopted more than 7000 constitutional amendments.<sup>46</sup> Marriage is not the only area in which voters have responded to an unpopular ruling by amending the constitution. After the California Supreme Court held that the death penalty was prohibited by the California Constitution's cruel or unusual punishment clause,<sup>47</sup> the state adopted an amendment reinstating the laws that had been struck down.<sup>48</sup> And after the Florida Supreme Court interpreted its constitution's search and seizure protections more liberally than the federal courts interpreted the Fourth Amendment, the legislature and the voters amended the constitution to add explicit instructions to the courts: "This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court."<sup>49</sup>

42. 138 P.3d 963 (Wash. 2006) (upholding statute defining marriage as only between a man and a woman).

43. *Id.* at 986, ¶ 84 (citing WASH. CONST. art. I, § 7: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law.").

44. *Id.* at 988, ¶ 96 (citing WASH. CONST. art. XXXI, § 1: "Equality of rights and responsibility under the law shall not be denied or abridged on account of sex.").

45. G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 23 (1998); ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 29 (2009).

46. Devins, *supra* note 9, at 1640.

47. *People v. Anderson*, 493 P.2d 880 (Cal. 1972) (en banc).

48. CAL. CONST. art. I, § 27 (adopted Nov. 7, 1972). Over a decade later, voters unseated three justices of the California Supreme Court, at least partly because they were perceived as having undercut the death penalty. See Frank Clifford, *Bird Calls Opposition's Attack "Mean-Spirited,"* L.A. TIMES, Nov. 6, 1986, at 3.

49. FLA. CONST. art. I, § 12 (as amended Nov. 2, 1982). A similar provision ensures that Florida will stay in step with the Supreme Court's Eighth Amendment rulings: "The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution." *Id.* § 17.

The Florida Constitution refers to the Supreme Court in another context:

The legislature shall not limit or deny the privacy right guaranteed to a minor under the United States Constitution as interpreted by the United States Supreme Court. Notwithstanding a minor's right of privacy provided in Section 23 of Article I, the Legislature is authorized to require by general law for notification to a parent or guardian of a minor before the termination of the minor's pregnancy. The Legislature shall provide exceptions to such requirement for notification and shall create a process for judicial waiver of the notification.

*Id.* art. X, § 22 (added Nov. 2, 2004). Searching Westlaw's ST-CONST database for **te("united states" /2 "supreme court")**, I found no other state constitution that makes a similar reference to U.S. Supreme Court decisions. I did find an example of a state legislature going the other direction: a concurrent resolution passed by the Louisiana legislature stated that "the citizens of Louisiana have chosen a higher standard of individual liberty than that afforded by the Constitution of the United States of America and the jurisprudence interpreting the federal constitution" and that the Supreme

¶10 State constitutions are important. As Justice Brennan advised, “although in the past it might have been safe for counsel to raise only federal constitutional issues in state courts, plainly it would be most unwise these days not also to raise the state constitutional questions.”<sup>50</sup> Therefore, lawyers, law students, and others interested in the state constitution need to find relevant sources. The first source, of course, is the constitution itself, and that is easily found—in state codes and often on state web sites. Researchers then will want cases interpreting the constitution, and cases are also easily found, using annotated codes, digests, and full-text searching.

¶11 What is more difficult to find is the history of a state constitution, which is often an important source in interpretation.<sup>51</sup> Researchers can often turn to the published proceedings of their state’s constitutional convention. It is not surprising to find good records for recent conventions,<sup>52</sup> but there are published proceedings even for very early conventions—for instance, Maryland’s, from 1776.<sup>53</sup>

¶12 Washington, however, is among the few states whose proceedings have not been published. The members of the convention in 1889 hired court reporters to record debates in shorthand, but Congress did not appropriate the money to pay them—and their notes are lost.<sup>54</sup> In the early 1960s—decades after the convention—the University of Washington’s School of Law (with “the active personal interest” of the law library’s director, Marian Gould Gallagher) and Department of History funded a project to fill this gap.<sup>55</sup> Beverly Paulik Rosenow, then a law student, edited a transcript of the handwritten minute book; an index prepared by a history student provided references from constitutional provisions to the dates in the journal when they were discussed, along with citations to contemporary newspaper articles that reported on the convention.<sup>56</sup> After the project was completed, photostatic copies of the newspaper articles were deposited with the University of Washington law library, where researchers occasionally requested them.

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Court of Louisiana should give careful consideration to the U.S. Supreme Court’s interpretations but “should not allow those decisions to replace its independent judgment” in construing the Louisiana Constitution. S. Con. Res. 39, 1997 Leg. (La. 1997), *reprinted in* LA. REV. STAT. ANN. CONST., art. I (preceding § 1).

50. Brennan, *supra* note 11, at 502. In some circumstances, it might even be malpractice or ineffective assistance of counsel for a lawyer to fail to brief a state constitutional claim. *See, e.g.*, Claudio v. Scully, 982 F.2d 798 (2d Cir. 1992) (finding ineffective assistance of counsel); State v. Lowry, 667 P.2d 996, 1013 (Ore. 1983) (Jones, J., concurring) (“Any defense lawyer who fails to raise an Oregon Constitution violation and relies solely on parallel provisions under the federal constitution, except to exert federal limitations, should be guilty of legal malpractice.”), *overruled on other grounds by* State v. Owens, 729 P.2d 524 (Ore. 1986).

51. *See generally* WILLIAMS, *supra* note 45, at 318–30.

52. *See, e.g.*, PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978 (1980); PROCEEDINGS OF THE CONFERENCE FOR DELEGATES TO THE 1977 TENNESSEE CONSTITUTIONAL CONVENTION, MAY 20–21, 1977 (Bobby N. Corcoran & David H. Grubbs eds., 1977); RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION (1972).

53. THE DECISIVE BLOW IS STRUCK: A FACSIMILE EDITION OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1776 AND THE FIRST MARYLAND CONSTITUTION (1977).

54. Charles M. Gates, *Foreword*, in THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION, 1889, at iii, vii (Beverly Paulik Rosenow ed., 1962).

55. *Id.* at viii.

56. *Id.* at 491–885.

¶13 By the late 1990s, Rosenow's book was out of print, and the sepia-toned photostats were very hard to read. The law library, now named for Marian Gould Gallagher and led by Penny Hazelton, again undertook a project to improve access. Securing the copyright from the original publisher, the library arranged for the William S. Hein Company to reprint the book, so that a new generation of lawyers, historians, and other researchers could acquire it.<sup>57</sup> Students and staff returned to the microfilm of the newspaper articles to make new copies, which Hein published in a bound volume.<sup>58</sup> Now it's available at all three state law schools and the state law library, not just the library where it was compiled, and it's on acid-free paper, not the fading photostats comprising the first set.

¶14 Even though the reprints by Hein improved access, there was more to do. Hugh Spitzer, who teaches Washington State constitutional law at the University of Washington, was concerned about the situation of a practitioner in a small town, hundreds of miles from a big law library: state constitutional law issues are important, and the state supreme court says that lawyers should brief the history of constitutional provisions;<sup>59</sup> yet that small-town lawyer wouldn't have easy access to many of the important sources. For instance, the Washington Supreme Court has cited an unpublished dissertation that was available until recently in only a few libraries.<sup>60</sup> David Hancock, a student in Spitzer's class and the editor-in-chief of the *Washington Law Review* in 2008–2009, began a project to post materials online, acquiring Hein's digital versions of the newspaper articles and scanning or locating previously scanned copies of other texts. After Hancock's graduation, the project lay fallow for a while, until the law library took it up in the summer of 2011. We have organized the digital materials Hancock gathered and added links to many more sources from a central page: *Washington State Constitution: History* (<http://lib.law.washington.edu/waconst>).<sup>61</sup>

¶15 Like the drafters of many state constitutions, Washington's delegates to the constitutional convention borrowed from other states' constitutions. Many used compilations, so that the delegates had many texts before them.<sup>62</sup> The index in the *Journal of the Washington State Constitutional Convention* cites various constitutions that were influential, including the California Constitution of 1879 and the

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57. THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION, 1889 (Beverly Paulik Rosenow ed., William S. Hein & Co. 1999) (1962).

58. WASHINGTON STATE CONSTITUTIONAL CONVENTION, 1889: CONTEMPORARY NEWSPAPER ARTICLES (Staff of the Marian Gould Gallagher Law Library, Univ. of Wash. School of Law ed., 1999).

59. See, e.g., *State v. Gunwall*, 720 P.2d 808, 812 (Wash. 1986).

60. Wilfred J. Airey, A History of the Constitution and Government of Washington Territory (1945) (unpublished Ph.D. dissertation, University of Washington), available at <http://lib.law.washington.edu/waconst/sources/airey.pdf#page=1>. The dissertation was cited in *Cox v. Helenius*, 693 P.2d 683, 684 (Wash. 1985) and at least five later opinions.

61. For other law school state constitution projects, see *New Jersey Constitutional Documents*, RUTGERS SCHOOL OF LAW, CAMDEN, <http://lawlibrary.rutgers.edu/new-jersey-constitutional-documents> (last visited Feb. 9, 2012); *Pennsylvania Constitution*, DUQUESNE UNIV., <http://www.duq.edu/law/pa-constitution> (last visited Feb. 9, 2012).

62. See Marsha L. Baum & Christian G. Fritz, *American Constitution-Making: The Neglected State Constitutional Sources*, 27 HASTINGS CONST. L.Q. 199, 199 (2000). The compilations were not always accurate. Horst Dippel, *The Trap of Medium-Neutral Citation, or Why a Historical-Critical Edition of State Constitutions Is Necessary*, 103 LAW LIBR. J. 219, 2011 LAW LIBR. J. 14.

Oregon Constitution of 1857.<sup>63</sup> Now the web site links to them.<sup>64</sup> The site also links to a variety of commentary, including articles in the state's historical society journal written by former delegates,<sup>65</sup> the unpublished dissertation mentioned above,<sup>66</sup> and many law review articles from the last three decades. A separate page lists the constitutional amendments, along with links to voters' pamphlets describing the ballot measures when they were adopted.<sup>67</sup>

¶16 State constitutional law does not always have a high profile, and yet state constitutions are important authority, as are the cases interpreting them. State constitutions provide for the structure and operation of state government. They also have provisions to protect individual rights and liberties—provisions that are sometimes interpreted to offer more protection than the federal Bill of Rights.<sup>68</sup> Historical materials may not always be easy to locate, but making them available is a worthy project for law libraries. We can serve not just the patrons who can visit our building, but a much wider audience of researchers.<sup>69</sup>

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63. In 1939, Dr. Arthur S. Beardsley, then the director of the University of Washington Law Library, prepared a list of constitutional provisions with their antecedents in other constitutions. Beardsley's list is reprinted each year in the state's legislative manual. Arthur S. Beardsley, *Sources of the Washington State Constitution*, in STATE OF WASH., 2011–2012 LEGISLATIVE MANUAL 385 (2011–2012), available at <http://www.leg.wa.gov/LIC/Documents/SubscriptionsEndOfSessionHistorical/LegMan.pdf>.

64. We sought sources that seemed official or quasi-official—e.g., from archives, legislatures, and state historical societies. Sometimes we found separately published constitutions in Google Books. In a few instances we linked to compilations. A separate section of the guide links to compilations available online.

65. John R. Kinnear, *Notes on the Constitutional Convention*, 4 WASH. HIST. Q. 276 (1913), available at <https://digital.lib.washington.edu/ojs/index.php/WHQ/article/view/5060/4137>; Theodore L. Stiles, *The Constitution of the State and Its Effects upon Public Interests*, 4 WASH. HIST. Q. 281 (1913), available at <https://digital.lib.washington.edu/ojs/index.php/WHQ/article/view/5061/4138>.

66. Airey, *supra* note 60.

67. Mary Whisner et al., *Washington State Constitution: Amendments*, GALLAGHER LAW LIBRARY, UNIV. OF WASH. SCHOOL OF LAW, <https://lib.law.washington.edu/content/guides/waconstAmend> (last updated Feb. 10, 2012).

68. See Robert F. Williams, *Why State Constitutions Matter*, 45 NEW ENG. L. REV. 901 (2011). The article includes as an appendix a resolution from the Conference of Chief Justices, encouraging all law schools to offer a course in state constitutional law. *Id.* at 912.

69. A recent brief to the Washington Supreme Court cites the web site for both Stiles, *supra* note 65, and Airey, *supra* note 60. Brief for Appellant, *In re: Bond Issuance of Greater Wenatchee Regional Events Center Public Facilities District*, No. 86552-3 (Wash. Nov. 15, 2011), 2011 WL 7005433, at \*24 n.9, \*28 n.12. It is gratifying to see that the web site is already being used by the bar.

