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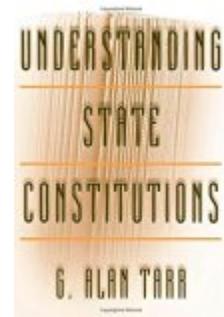
in the Humanities & Social Sciences



G Alan Tarr. *Understanding State Constitutions*. Princeton: Princeton University Press, 1998. 247pp. \$47.50 (cloth), ISBN 978-0-691-07066-7.

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From State Constitutions to State Constitutionalism

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Understanding State Constitutions falls into a special category of books that give readers more than they anticipate from the title. To be sure, this book delivers on what its title promises, but G. Alan Tarr does more—much more. At ground level, *Understanding State Constitutions* can be read as a series of interpretive essays on the history of state constitutions in the United States. At another level, Tarr presents written a theory of “the distinctiveness” of state constitutions, making this book a work on state constitutionalism. At a third level, Tarr begins to build (and advocate) a case for a “distinctive jurisprudence” of state constitutional interpretation.

The first two levels of Tarr’s work are nicely interconnected; the third seems purposefully detachable in a final stand-alone chapter that some readers might find a bit too detached and that might spur others to wonder when Tarr’s advocacy process really began in this book. My hope is that most readers are quite capable of finding and assessing the connections between theory and history, on one hand, and practice, on the other. In any case, I begin my review with the first two levels of Tarr’s work, and then discuss the question of practice in my concluding observations.

To begin, *Understanding State Constitutions* is still the *only* book-length introduction to the subject of state constitutions, other than a few vintage treatises and the one casebook on state constitutional law.[1] This is neither the time nor the place for a bibliographic essay on this

subject. However, the reader should know something about where Tarr and his book fit in the field of state constitutions.

Tarr is a professor of political science at Rutgers University at Camden, where he is also the director of the Center for State Constitutional Studies. I first met Tarr in the early 1980s, when he was writing on the rising tide of state-court decisions by California, New Jersey, New York, Oregon, and other state high courts using the “adequate and independent state ground” doctrine to render decisions based on state constitutional provisions. The use of this traditional doctrine became controversial when it was seen as a way of sidestepping conservative Burger Court review of more liberal state-based interpretations of protections of suspects’ and defendants’ rights.[2] At that time, Tarr was one of the few scholars studying this development as part of a deeper interest in state courts and state constitutions. In 1982, he wrote an article on judicial federalism and the role of state appellate courts. He has since written many articles and several books in this field.[3] He is also the editor of the Greenwood Press reference series on state constitutions.

Before the early 1980s, much of the scholarly literature on state constitutions took the form of encyclopedic accounts of state constitutional revisions, presentations of model constitutions, treatises on state constitutional history, and histories and reference guides of the constitutions of single states. Since the early 1980s, the literature has expanded to include articles on state courts’

uses of state constitutional interpretation as part of the new judicial federalism; articles and a few books on state and regional histories of state constitution making (especially in the South and the West); books on the national history of state constitutions in particular periods (including the early republic); articles and a few books on specific subjects (especially as concerns the protection of individual rights); and the proliferation of single state reference guides in the Greenwood Press series.

Tarr's book then fills a unique yet important position at the threshold of this field. Happily, it is written with this position and its likely readers clearly in mind. Although it is an introduction to the field, it is written for the scholar, graduate student, or jurist likely to read it. It is certainly not written in the style of a textbook or reference work. Rather, it reads like a thoughtful collection of interpretive essays in theory and history. The author is indeed a political scientist, but we are a more varied lot than one might expect. Tarr is also schooled in the law and most appreciative of the historian's craft.

Tarr's Introduction is neither apology nor plea, but rather a straightforward statement of the nature and significance of state constitutions in the American system. He presents three sets of reasons—practical, historical, and theoretical—for studying state constitutions. Practically speaking, “one cannot make sense of state government and state politics without understanding state constitutions” (p. 3). Historically, state constitutions are a rich minefield for the study of political conflict and change because state politics is so often settled in the constitutional arena. For constitutional theory, state constitutions are essential to the study of American constitutionalism precisely because they are so different from the federal Constitution.

That last point takes Tarr to the subject of Chapter 1, on the “Distinctiveness of State Constitutionalism.” Early in this chapter, he distinguishes his position from that of Donald Lutz and others who have written on the “complementarity” of federal and state constitutions. Tarr correctly summarizes the Lutz argument that “the federal Constitution is ‘an incomplete Constitution,’ which depends for its operation on state constitutions that ‘complete’ and consequently form a part of the national constitution” (p. 10). Tarr agrees with the first element of this argument as concerns the federal Constitution but not with the last element, which he reads as suggesting that state constitutions function to complement the federal Constitution and fill in the gaps left by it (see pp. 10, 92-93 and 99).

Tarr compares the design of federal and state constitutions and argues for the distinctiveness of the latter. He begins with a comparison of governmental power and constitutional purpose. Complementarity explains why federal and state governments differ in the nature and extent of their powers, and this difference explains the difference in the purposes of federal and state constitutions. Because the federal government is one of enumerated powers, the purpose of its Constitution becomes one of granting power. Because state governments possess plenary legislative power, the purpose of state constitutions is the limitation of governmental power. Hence, the constitutionality of a state statute turns on whether it is prohibited by, not authorized by, the state constitution.

Tarr then turns to the length and detail of federal and state constitutions. In examining these and other features, he focuses as much on the differences among state constitutions as on the difference between federal and state constitutions. In this examination, Tarr also builds his case for the distinctiveness of state constitutions, if not that of state constitutionalism. His comparison takes him to features of structure and substance, including: guarantees of rights, outlines of governmental institutions, distribution of governmental power, separation of powers (as concerns its explication), local government, public policy, and state constitutional practice.

In Chapter 2, Tarr examines three sets of explanations why state constitutions differ from the federal constitution and from one another. He focuses on what he deems the most salient difference—the frequency of state constitutional change through amendment and revision. He looks at explanations based on differences among the states and between federal and state constitutions concerning public attitudes and the influence of political culture; legal requirements with regard to the relative ease of the amendment and revision process; and the impact of political forces on the constitutional process, including political failure, demands for modernization, and the role of constitutional change as an outlet for “ordinary politics” (p. 57).

Later in this chapter, Tarr recounts the sources of constitutional commonalities among the states. He looks at the imposition of federal requirements on state constitutions (comparing admission, guarantee, and supremacy clauses). He also looks at the force of federal example (by emulation) and interstate influences (by diffusion).

Taken together, the Introduction and the first two chapters constitute nearly 30 percent of Tarr's book and

represent much of his argument for the distinctiveness of state constitutions. The base of that argument rests on differences in constitutional design, assessed in terms of the various features of state and federal designs and the influences upon them. These chapters nicely assemble and deploy a mounting body of convincing evidence as to the differences in constitutional design between federal and state constitutions and among the states themselves. The explanations why they differ are less fully developed, but perhaps that is because they are part of the historical narrative of this part of the book.

Tarr's argument for the distinctiveness of state constitutionalism is less convincing, but largely because state constitutionalism is more the subject of the final chapter than Chapter 1. (The running chapter head on the recto pages of this chapter reads "Distinctiveness of Constitutions," a more appropriate title than its actual title, "Distinctiveness of State Constitutionalism.") In any case, the relationship between constitutional distinctiveness and complementarity (and between the two, taken to the level of "distinctiveness thesis" and "complementarity thesis") rests a bit too far beneath the surface. If indeed there is a scholarly dispute between supporters of these two theses, Tarr would have better served the reader by presenting a stronger and more systematic articulation of that controversy at the outset, rather than having it emerge toward the end of the book.

Chapters 3, 4, and 5, which constitute half of the book's text, offer a history of state constitutions. Chapter 3 surveys the eighteenth century; Chapter 4, the nineteenth; and Chapter 5, the twentieth. These surveys are too detailed and rich for summary, but I highlight below a few points and key issues.

The value for the study of American constitutionalism of examining eighteenth-century state constitutions is typically that it provides a chance to outline and explore the distinction drawn between Whig and Federalist theories of constitutionalism. The usual presentation is of successive "waves" of state constitutions, progressing more and more in the (inevitable?) journey from Whig to Federalist notions of what a constitution should be. The New York constitution of 1777 is seen as close to that Platonic ideal, and the Massachusetts Constitution of 1780 is closer still, with the federal Constitution of 1787 hitting the mark. Tarr uses his distinctiveness argument to draw out the dangers of periodization by waves and examines such examples as the Georgia Constitution of 1798 to illustrate how and why a state-based view might yield more telling results (see pp. 90-93).

Tarr opens Chapter 4 with the assertion that no period better reveals the divergence of state and federal constitutions than the nineteenth century. This argument is particularly instructive for those histories of the nineteenth century—whether Jacksonian, antebellum, or urban-industrial in scope—in which the focus is on national movements and forces. From such a perspective, whether it be the struggle for abolition or suffrage, state constitutions appear as alternative instruments of reform that could be just as easily substituted for litigation or legislation if the situation warranted. Interestingly, Tarr reveals that, during the nineteenth century, state constitutions were becoming instruments of state government and not merely frameworks for them. In his view, states were experiencing and abetting not so much the politicization of their constitutions as the constitutionalization of their politics, because political parties and interest groups alike were being blocked in the legislature; because ordinary politics were being challenged by in-state political forces seeking to change the distribution of power by constitutional means; and because constitutional conventions were achieving a central place in state politics. For all these reasons, the nineteenth century was a time of significant constitutional revision: many more states adopted new constitutions in the nineteenth than in the twentieth century.

For a variety of reasons, Tarr shows that the twentieth century proved to be a time of political failure for most efforts at wholesale constitutional reform. Instead, the twentieth century saw the increased use of piecemeal reform by constitutional amendment, the use of constitutional initiatives for policy change (e.g., California's Proposition 13 in 1978), and a more prominent role for state courts in individual rights cases through the increased use of state constitutional interpretation. The drive to "modernize" state government by constitutional change was more a product of the second half than the first half of the twentieth century. However, the most successful drives for constitutional change in the twentieth century have been single-shot movements (e.g., for tax limits and term limits) rather than comprehensive reform, and their preferred method has been focused amendment rather than broad-based revision.

In Chapter 6, which concludes the book, Tarr turns from the theory and history of state constitutional distinctiveness to the subject of state constitutional interpretation and the development of a "distinctive jurisprudence." Intellectually, Tarr uses this chapter to seek to bridge the gap between constitutional theorists, who have largely ignored state constitutions, and state con-

stitutional scholars, who have largely ignored constitutional theory. Practically, he also seeks in this chapter to build a more solid theoretical foundation on which state courts can fashion a distinctive jurisprudence when venturing onto the less well-traveled grounds of state constitutional interpretation.

Practicality and advocacy blend where Tarr openly seeks to build the legitimacy of state constitutional interpretation, which has been occasionally called into question by critics who stress the majoritarian base of state constitutions, the policy preferences of the judges who interpret them, and state courts' opportunistic rather than principled uses of adequate state grounds to evade Burger Court rulings. (For example, see Tarr's section on the legitimacy issue and its concerns, pp. 174-180.) Tarr reviews three interpretative approaches for dealing with those legitimacy concerns—the lockstep approach, the supplemental/interstitial approach, and the primacy (“first things first”) approach (the last being the approach discussed by Judge Hans Linde of the Oregon Supreme Court)[4], which essentially requires judges to review a challenged action first on the basis of state law, whether constitutional or statutory).

At this point in the discussion, Tarr turns to the scholarly critics of state constitutional interpretation (notably, Professors James Gardner and Paul Kahn) and to the responses to those critics (by Professors Daniel J. Elazar, Earl M. Maltz, David Schuman, and others); the result is an especially lively section of this book which reads like a review essay (pp. 185-189). Tarr ably elucidates two levels of the debate over the legitimacy of state constitutional interpretation on two levels. First, on the level of substance, do state constitutions offer a legitimate alternative to the federal Constitution as a basis for judicial decision-making in cases where the constitutional issue is covered by both a federal and a state provision? Second, on the level of methodology, assuming a positive answer to the first question, can one fashion a basis for interpreting a current state provision (and finding the requisite legal research material) in a situation when (in one of the toughest scenarios) the provision was carried over from an earlier state constitution (maybe even from another state) with no clear indication whether the framers of the new constitution maintained or changed the original provision's intention? Anyone with the slightest bit of interest in these sorts of questions should read this

book. In his initial discussion, Tarr sets forth the theory of state constitutional distinctiveness. In the main body of his work, he shows how that distinctiveness has evolved over the centuries. And, in his concluding remarks, he presents a strong intellectual defense for the legitimacy of that distinctiveness as a basis for current state constitutional interpretation by state courts. In the process, he notably enriches the literature of state constitutionalism.

NOTES [1]. An example of such a treatise is James Q. Dealey, *Growth of American State Constitutions from 1776 to the End of the Year 1914* (Boston: Ginn, 1915). The only casebook is Robert F. Williams, ed., *State Constitutional Law: Cases and Materials* (2d ed., (Charlottesville, VA: Michie, 1993).

[2]. Justice Robert H. Jackson highlighted this doctrine in *Herb v. Pitcairn*, 324 U.S. 117 (1945). In 1977, Justice William J. Brennan wrote an encouraging and widely cited article on the doctrine's use: “State Constitutions and the Protection of Individual Rights,” *Harvard Law Review* 90 (1977): 489. Three years later, an important article by one of the doctrine's most skilled practitioners took up the inquiry: Hans A. Linde, “First Things First: Rediscovering the States' Bills of Rights,” *University of Baltimore Law Review* 9 (1980): 379. (Judge Linde is a member of the Oregon Supreme Court.) Then, in 1983, the U.S. Supreme Court, in *Michigan v. Long*, 463 U.S. 1032, treated state court decisions as reviewable unless the state court clearly states its reliance on the adequate state ground doctrine.

[3]. See, e.g., G. Alan Tarr, *State Supreme Courts in State and Nation* (New Haven: Yale University Press, 1988); G. Alan Tarr, *Judicial Process and Judicial Policy-making* (St. Paul: West, 1994); and G. Alan Tarr, ed., *Constitutional Politics in the States* (Westport, Conn.: Greenwood Press, 1996).

[4]. See Linde, *supra* note 2, *passim*.

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