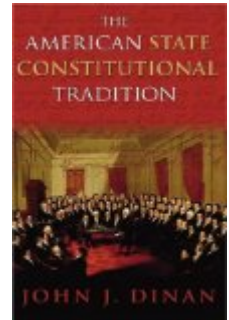


**John J. Dinan.** *The American State Constitutional Tradition.* Lawrence: University Press of Kansas, 2006. 430 pp. \$35.00, cloth, ISBN 978-0-7006-1435-6.



**Reviewed by** Eva Sheppard Wolf

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One admires John Dinan's boldness in taking on the entirety of the state constitutional tradition in America, since, in contrast to the single federal convention that has been the object of so much scholarly attention, individual states held 233 constitutional conventions from 1775-2005. Quite a number of books and articles have focused on particular conventions, states, or issues, but no one has attempted what political scientist Dinan does here. In order to understand how state constitution makers addressed and revised the same fundamental questions of governance that concerned the founders of the U.S. Constitution, Dinan has read all the extant debates, 114 of them, of U.S. state constitutional conventions. His main contention is that the debates held at the state level are intrinsic to a full understanding of the American constitutional tradition and ought to receive more attention from both scholars and constitution makers around the world.

Focusing on debates leads Dinan into the nineteenth and twentieth centuries, since conventions generally did not record their debates in the founding period. Several important changes in

those two centuries shaped delegates' thought on key questions. First, the democratic political ideas of the Jacksonian era forced constitution makers to reconsider, in several ways, the relationship between citizens and their state governments. As a result they expanded the use of the referendum, democratized provisions regarding state senates, and created easier methods of revising the state constitutions. A generation later, the turmoil of the Civil War brought on a flurry of constitution making, giving constitutional conventions an opportunity to further change how the government interacted with individuals, particularly in the area of public schooling. Responses to the industrial and economic changes of late-nineteenth-century America impelled the constitution makers of the Progressive era to broaden the public's role in lawmaking so that the people might prevail when corporate interests managed to corrupt the legislatures. And the cultural changes of the 1960s and succeeding decades again altered how constitution makers envisioned the proper relationship between government and people. Conventions and amendments of those years legalized lotteries and, in response to the 1964 U.S. Supreme Court

ruling *Reynolds v. Sims*, further changed how state senators were elected.

The book's first chapter very briefly outlines these historical periods and also describes the ways state constitutional conventions organized themselves, and how and why they recorded their debates. Each of the following chapters refers to the historical factors that shaped state constitution making, but the book is organized topically, with a chapter each devoted to six main subjects: amendment and revision, representation, separation of powers, bicameralism, rights, and citizen character.

Since the overall argument of the book rests on the contention that precisely because they are more frequently amended, state constitutions more accurately reflect the "accumulated wisdom and experience of American constitution makers" (a phrase used repeatedly throughout the book), amendment procedures make a fitting place to start. Dinan shows that, during the Jacksonian period, "advocates of a flexible amendment process generally succeeded in overcoming the critics and demonstrating the merits of departing from the rigid federal approach" (p. 41). By the end of the nineteenth century, every state but New Hampshire had enacted procedures by which the legislature could amend the state's constitution without having to call a convention, and many states further facilitated legislative amendments by doing away with requirements that such amendments be approved at two consecutive legislative sessions or by a supermajority vote. Most states did require, however, that voters also approve proposed changes through a referendum. In the twentieth century, eighteen states allowed voters, in the absence of legislative action, to amend state constitutions through the initiative process. In general, advocates for easier amendment procedures argued that people ought to be able to change their constitutions frequently to take account of economic and political developments, while opponents felt constitutions should provide

more fundamental and permanent guidelines than legislation and thus be more difficult to alter.

The main conclusion Dinan draws from this history, that the difficulty of revising the federal constitution stifled desired reforms allowed by state amendment procedures, does not take into account the possibility that Americans wanted different things from their state governments than from the national one. Changes at the state level, especially changes in the amendment process itself, first had to overcome barriers similar to those at the federal level. The fact that the federal constitution has remained largely untouched compared to the states' constitutions would seem, then, less a reflection of the differing amendment processes, which at first posed similar challenges to reformers, than of differing expectations about the state governments compared with the federal one.

In the case of representation, state governments began in the nineteenth and early-twentieth centuries to involve people more directly in the governing process through the referendum and initiative. Dinan contends that these changes show that state constitution makers rejected James Madison's argument that in a republic representation could "refine and enlarge the public views" and combat the "violence" of faction (Madison in *Federalist* 10, quoted on p. 65). Instead, framers at the state level opted for more democratic procedures. But one could as easily argue that the absence of a federal referendum or initiative results from the sense that such procedures, useful at the state level, are not appropriate nationally.

Dinan's discussion of how state conventions treated the separation of powers suggests another possible reason for the different experiences in the states versus in the nation. Starting in the 1860s, state constitutions allowed the executive to use the item veto, an option now available in most states. In the Progressive era, state constitution makers moved to restrict the power of judges by

providing that they could be recalled (in twelve states) or by requiring a supermajority vote to determine a law unconstitutional (three states). In all those cases, as Dinan shows, constitution makers were trying to fix what they believed to be imbalances among the branches of government, so they implemented changes to preserve not challenge a widely shared view that government powers should be separated and balanced. Perhaps Americans have failed to support a Presidential item veto, though several presidents have lobbied for it, not because amending the U.S. Constitution is so hard, but because they fear tampering with the main features of a document that, like the Declaration of Independence, has become a sort of "American Scripture."<sup>[1]</sup> (The growing protest over President George W. Bush's signing statements may help illuminate Americans' thoughts on this point.)

State constitution makers also deviated from the federal model in determining what rights government ought to respect and protect. Dinan notes that, in the eighteenth century, the framers primarily concerned themselves with preventing government from intruding on people's liberties, but in the succeeding centuries they asserted that government ought to act positively to ensure certain rights. In America, the rise of the concept of positive rights began in the nineteenth century with concerns over workers' rights, and has continued to the present in debates over whether state constitutions should guarantee, for example, a healthful environment. Although state constitution makers generally rejected broad guarantees of economic security, they embraced other positive rights. Provisions protecting collective bargaining or guaranteeing the right to work even if not a union member have been enshrined in the constitutions of a number of states, as have declarations that the government should conserve a state's natural resources. Dinan convincingly argues that the adoption of these provisions, and the reasons given for them, suggest an evolution since

the founding era in Americans' concepts of rights, at least in relation to state governments.

Just as state constitutions assumed a more intimate relationship between citizens and government than did the federal constitution--protecting certain positive rights, allowing direct participation through the initiative and referendum--they also allowed for or even required closer supervision of individuals. In the chapter on citizen character, Dinan describes how state constitution makers discussed the role of religion and public education as ways to stimulate morality, and enacted provisions in the nineteenth and early-twentieth centuries to prevent citizens from harmful behaviors, such as gambling in lotteries or drinking liquor. Dinan asserts that discussions over these provisions show how much the American constitutional tradition has concerned itself with citizen character. The argument would persuade readers even more fully, however, if it pointed to the dissimilar expectations Americans have of state versus federal governments. Only in the case of the eighteenth amendment did Americans consent that the federal government should play a similar role to state governments in this regard, and the twenty-first amendment soon rescinded that consent.

The different functions of and different ideas about the state governments compared to the federal government come through clearly in the chapter on bicameralism, the most thoughtful and intriguing of the book. In it, Dinan does not so much trace changes in form, since all states but one now have a bicameral legislature, as changes in ideas. The original justification for bicameralism rested on a republican and elitist worldview in which the upper house, made up of propertied interests, could cool the passions of the lower house. In the Jacksonian age those justifications came under fire, and constitutions of the era eliminated property requirements for senators and their electors. The upper house lost further support during the Progressive period, when dele-

gates to many state constitutions suggested eliminating the state senates, bodies believed to be particularly subject to corruption because of their small size. While every state except Nebraska (1937) retained the upper house in the first half of the twentieth century, the belief that bicameralism was an intrinsic good lost force in the second half of the century, particularly after *Reynolds v. Sims* (1964) invalidated schemes that represented political entities such as counties (and not population) in the state senates. In the last two generations, those desiring to retain bicameral systems tended more and more to stress the benefits of having a deliberative check on legislation, since key features that had distinguished the two houses had been eliminated and could no longer serve to justify bicameralism. Here, as Dinan emphasizes, the different purposes of the state governments compared with the federal one obviously help explain the divergent history of ideas about bicameralism at the state and federal levels. What is more surprising, perhaps, than the fact that bicameralism at the state level has come under question is that so many states have retained it despite its dubious function. More explanation of why precedent in this case has carried so much weight might yield important insights about American understandings of government.

As an overview of a vast quantity of material, *The American State Constitutional Tradition* succeeds impressively. The footnotes alone are worth the price of admission; in each chapter Dinan directs the reader to all the sources he examined that discuss a particular topic, even sources not otherwise mentioned in the chapter. The appendix, a list of all the extant debates, will likewise prove a useful resource. Scholars in a number of fields will surely want to turn to this book as a starting place for further investigations.

And scholars will likely want to explore the points raised in this book further, since examining debates and not just constitutional changes themselves raises questions about motivation,

contemporary politics, ideology, and culture that Dinan hardly tackles. The book gives the reader a very good sense of the main features of debate on a variety of topics and includes extensive quotations to illustrate the various points of view, but it does not interrogate or attempt to disentangle the language offered up by the sundry convention delegates. Here Dinan's stated purpose of explaining "why state convention delegates resolved ... questions" (p.3) as they did goes unfulfilled, since explaining why would require precisely the sort of cultural and ideological analysis that he avoids, perhaps by disciplinary instinct. It would also require putting the constitutional conventions more fully in their historical context. The Second Great Awakening (even if that designation is misleading) goes unmentioned in discussions of state constitution makers' attempts to ban lotteries and liquor in the mid-nineteenth century, but would probably help explain why those issues were so important at the time.

Furthermore, the contention that the states' experience reflects "accumulated wisdom and experience" suggests a notion of progress--indeed the word "progress" is used in the conclusion--that historians may find suspect. As a Californian, I am particularly doubtful that my own state's constitution, with its Progressive-era provisions for initiative and recall, is any more wisely formulated than the federal one.

Neither am I convinced that there is a single American constitutional tradition to which state constitutions contribute. It would seem there is more analytical power in viewing state constitutions as part of a history separate from that of the federal constitution. Doing so would take account of their distinct function in creating governments designed to act more directly on and interact more closely with citizens than the federal government is designed to do. And since the federal system is so rare in the world, it is the state constitutions, not the federal one, that more closely resemble the constitutions of other countries and

that constitution makers might wish to understand more fully. Drawing the distinction between the two, rather than collapsing them into one American constitutional tradition, would highlight rather than lessen the importance of investigating state constitutions as models.

Note

[1]. Pauline Maier, *American Scripture: Making the Declaration of Independence* (New York: Vintage Books, 1997).

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