State Attorneys General Powers and Responsibilities

Edited by
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National Association of Attorneys General

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This book is dedicated to Attorneys General and the men and women who work for them in the 56 jurisdictions. They continue to make an important contribution to state govenment and the American legal system. Without them, there would be no book to write.

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This book is a collaborative effort, in which different authors with expertise in each substantive area contribute their time and talent. The principal authors are noted on each chapter, but we would like to thank them again here for their hard work and dedication. Many thanks to the following authors:

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Chapter 16

State Constitutional Law

By Steve McAllister, Solicitor General of Kansas

People sometimes forget that there are 51 operative constitutions in the United States—the federal constitution and the constitutions of each of the 50 states. Attorneys general and their offices are guaranteed to encounter important legal issues under their state constitutions, and thus it is imperative that attorneys general be familiar with the provisions of these foundational documents. Because state constitutions are adapted for a single state, they often contain numerous provisions not present in the U.S. Constitution, and they may omit some provisions found in the federal document. Most state constitutions are significantly longer than the U.S. Constitution, in part because state constitutions generally are much easier to amend, and as a result are more responsive to the needs and demands of the citizens of each state.

No lawyers in a state will deal more with state constitutional law than attorneys general and their offices. State constitutions generally have something to say about numerous topics of interest to an attorney general, including interbranch disputes, the legislative process, the selection and authority of the state judiciary, the executive power (sometimes including the power of the Attorney General), and numerous individual rights protections. Furthermore, state constitutions often address important local topics such as education and the environment, neither of which appear in the U.S. Constitution. State constitutions also address taxation and finance, often authorizing line item vetoes by the Governor (not allowed for the President under the federal constitution), and requiring annual balanced budgets (which certainly is not a feature of the U.S. Constitution).

Because attorneys general typically have the duty to advise and represent state officials, they inevitably will provide interpretations of their state constitution and litigate its meaning in all sorts of situations. A significant number of attorney general opinion letters involve questions of state constitutional law, or at least statutes that may implicate state constitutional provisions. Furthermore,

some of the most significant litigation an attorney general may conduct or defend likely will involve issues under the state constitution, such as disputes about the powers granted the branches of government, school finance and education-related claims, and various claims of individual state constitutional rights.

Interpreting State Constitutions[1]

State constitutions are fundamentally different from the federal constitution in several important ways. As a starting point, states have inherent police powers as an aspect of their sovereignty, unlike the federal government which has only the enumerated powers delegated to it by the U.S. Constitution. Thus, when a state acts, the preliminary question generally is not where the state gets the power to take action, but rather whether there is any constitutional provision that limits or prohibits such state action. Further, probably all state constitutions are longer than the federal constitution, and many are significantly longer. Unlike the federal constitution, most state constitutions have been amended numerous times during a state's history, and several have been effectively rewritten over time through constitutional conventions and revision processes. Lastly, unlike the U.S. Constitution, most state constitutions *begin* with an extensive Bill of Rights, rather than starting with structure and the powers of each branch of government. All of these factors, and many others, mean that a state court may approach the interpretation of a state constitution differently than it (or a federal court) would approach interpreting the U.S. Constitution.

Over time, state courts have developed two major approaches to interpreting state constitutions. These approaches are not necessarily mutually exclusive, and a given state supreme court may invoke either approach depending on the particular provision at issue.[2] These approaches sometimes have been given different labels, but a brief summary of the two major categories follows. For attorneys general, it is important to become familiar with the approach or approaches

1 *See generally* Randy J. Holland, Stephen R. McAllister, Jeff Shaman, & Jeffrey S. Sutton, State Constitutional Law: The Modern Experience CH. III (West 2d ed. 2016) (hereinafter "State Con Law 2d ed."). Randy Holland is a Justice on the Delaware Supreme Court, Steve McAllister is Solicitor General of Kansas and a law professor at Kansas University, Jeff Shaman is a law professor at DePaul, and Jeffrey Sutton is a federal circuit judge, who previously served as State Solicitor of Ohio.

2 *See* Jeffrey S. Sutton, *What Does—and Does Not—Ail State Constitutional Law*, 59 Kan. L. Rev. 687 (2011).

utilized (and when they are utilized) by the state supreme court in which the attorney general will be representing the state.

The Independent Meaning Approach

"[S]tate courts in some areas have charted different paths from the U.S. Supreme Court in construing identical or related constitutional guarantees."[3] Furthermore, because many state constitutional provisions have no counterpart in the federal constitution, state courts necessarily must interpret such provisions "independently" of federal law considerations. State courts, of course, cannot give legal effect to interpretations of the state constitution that would provide *less* protection of rights than the U.S. Constitution requires (because of federal preemption), but they can interpret state constitutions and give them legal effect to provide *greater* protection of rights than the federal constitution provides.[4] To give an example of the former, a state supreme court could interpret the state constitution to provide no right to obtain an abortion. That would be an absolutely valid interpretation of the state constitution, but such an interpretation would have no legal effect under current federal law which is to the contrary. Similarly, as an example of the latter, a state supreme court could interpret the state constitution to include a much stronger right to abortion than currently exists under the federal "undue burden" standard. Although such an interpretation would exceed federal requirements, it would be absolutely valid as a matter of state constitutional law and could be given legal effect in that state.[5]

Another twist is whether state courts give the state constitution a primary, secondary or some other role in the greater scheme of the law. Some state courts may actively seek to interpret state constitutional provisions first (as opposed to possibly analogous federal provisions) when doing so will resolve the case. In other words, some courts may look for a state law answer *first*. Many state courts, however, look to federal precedent and federal claims first, giving the state constitution a secondary role. They thus interpret the state constitution only when federal law does not resolve the case.

3 *See* State Con Law 2d ed., at 115.

4 *See* Stephen R. McAllister, *Individual Rights under a System of Dual Sovereignty: The Right to Keep and Bear Arms*, 59 Kan. L. Rev. 867 (2011).

5 State Con Law 2d ed., at 115. *See also Planned Parenthood of Middle Tennessee v. Sundquist*, 38 S.W.3d 1, 15 (Tenn. 2000) ("It is settled law that the Supreme Court of a state has full and final power to determine the constitutionality of a state statute, procedure, or course of conduct with regard to the state constitution, and this is true even where the state and federal constitutions contain similar or identical provisions.")

For the most part, such considerations are front and center when a state constitution contains provisions identical or analogous to provisions in the U.S. Constitution. When, instead, state constitutions include provisions with no federal counterpart (and there are many in almost every state constitution), state courts typically focus primarily on both the *text* of the state constitutional provision and the *history* behind it, often including ballot explanations and so forth for amendments. The meaning of a provision typically is derived from the natural and ordinary meaning of the words used, in light of a careful examination of historical documents, constitutional convention journals and debates, and the historical circumstances surrounding the adoption of the provision. When a state constitutional provision has no counterpart in the U.S. Constitution but many other states have such a provision, state supreme courts also likely will consider the interpretations *sister states* have given to the provision at issue. Lastly, state courts may consider *federal precedent*, if there is a somewhat similar or analogous federal provision.

Even when there is an identical or closely analogous federal provision, however, state courts have the power to reject federal precedent when interpreting their state constitution. There are good reasons why a state court might reject a federal interpretation, including the limited jurisdiction of a state supreme court's ruling (the decision only applies within the state's boundaries, not nationwide), the particular or unique local conditions and traditions of a state that should be given weight, the interpretation of indeterminate provisions (such as "due process" or "equal protection") that do not have a particular, inevitable or inherent meaning, and finally simple disagreement with the reasoning of the U.S. Supreme Court when it interpreted an analogous federal provision.

The Lockstep Approach

A number of state supreme courts have, with some frequency, chosen to follow federal precedent to the letter when interpreting a state constitutional provision that has a federal counterpart, either an identical or closely analogous provision. This "lockstep" approach has benefits as well, including uniformity of rules within a state (*e.g.*, the search and seizure rules law enforcement officers must follow are the same within a state no matter whether considering the provision in the U.S. or the state constitution), efficiency for the courts in not having to reinvent the wheel each time they are confronted with a question under the state constitution, and the frequent wealth of federal precedent to follow when there is no, or virtually no, relevant state precedent. On the other hand, following the lockstep approach definitely minimizes the impact of a state constitution, may give less protection to individual rights than the citizens of a particular state

may have intended or prefer, and does nothing to develop the state constitutional doctrine in a state.

Government Structure and Separation of Powers[6]

Each state constitution establishes a framework for state government. All state constitutions now provide for three branches of government that mirror the federal model—legislative, executive and judicial—and articulate the powers and duties of each branch to some extent.[7] Like the federal constitution, most state constitutions do not explicitly address or recognize the separation of powers (though some do), but state supreme courts generally have found separation of powers principles to be inherent in a state's constitution. Thus, separation of powers issues between the branches of state governments have arisen quite frequently under state constitutions.[8]

Such disputes arise in a variety of contexts, including some that would be unheard of in the federal system. Disputes between governors and legislatures are fairly common, including when a governor exercises the line-item veto power, a legislature removes the selection of certain officials from executive control,[9] or a legislature attempts to control the execution of its enactments in various ways.[10] Sometimes a governor wants to act unilaterally, but the legislature wants to play

6 *See generally* State Con Law 2d ed., CH. XIII, CH. XIV

7 Rhode Island did not have three distinct branches of government until it amended its constitution in 2004. *See In re Request for Advisory Op. from House of Representatives*, 961 A.2d 930 (R.I. 2008).

8 As a general matter, the federal constitution has nothing to say about whether the States have three branches of government, nor how those branches are constituted or what powers they exercise. Thus, Nebraska can have a unicameral legislature, states can have multiple, statewide-elected executive officials, and states can provide for the election of state judges and authorize judges to give advisory opinions. *See, e.g.*, *Sweezy v. New Hampshire*, 354 U.S. 234, 255 (1957) ("the concept of the separation of powers embodied in the United States Constitution is not mandatory in state governments"); *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1934) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself.").

9 *E.g., In re petition of Governor*, 846 A.2d 1148 (N.H. 2004) (dispute over legislature's attempt to change appointment system for the state's Chief Justice).

10 *E.g.*, *Missouri Coalition for the Env't v. Joint Comm. on Admin. Rules*, 948 S.W.2d 125, 134 (Mo. 1997) ("The legislature may not unilaterally control execution of rulemaking authority after its delegation of rulemaking power, regardless of whether it does so by suspension, revocation, or prior approval of administrative rules.").

a role.[11] Another source of litigation (not present in the federal system) has been state constitutional provisions that impose term limits for state and local officials other than the Governor.[12]

It is not uncommon for legislatures and governors to complain that the separation of powers has been violated when a state supreme court issues a significant ruling requiring the political branches to take action. A classic example is a state supreme court ruling requiring increases in education funding. Sometimes legislatures may respond by exerting more control over the judiciary, either through the judicial budget or in other ways. Generally, such legislative actions are constitutional unless "those choices unduly burden the capacity of the judiciary to perform its core function."[13] Core judicial functions under state constitutions include the adjudication of cases, and generally are viewed as encompassing the power to prescribe rules of court procedure and to regulate the practice of law in the state.

Legislative Process—Requirements for Passing Laws[14]

All state constitutions have various requirements for legislation to be valid, many of which have no counterpart in federal law. These include "clear title," "single subject," "public purpose," and "uniformity" rules that limit the form of legislation.[15] Another important feature of legislation under state constitutions is that many authorize a "line-item veto" by the governor, typically giving the governor the power to strike individual "items" within a bill, but usually only items relating to appropriations and state finances, not substantive law provisions.

Clear Title

Most state constitutions require, often in a single provision, that the subject matter of all legislation be clearly expressed in its title and that the legislation

11 *E.g.*, *State ex rel. Stephan v. Finney*, 251 Kan. 559 (1992) (whether Governor alone can finalize a gaming compact with a tribe or whether legislative approval is required).

12 *E.g., Lorton v. Jones*, 322 P.3d 1051 (Nev. 2014); *Telli v. Broward County*, 94 So.3d 504 (Fla. 2012); *Hoerger v. Spota*, 997 N.E.2d 1229 (N.Y. 2013).

13 *State ex rel. Metro. Public Defender Servs., Inc. v. Courtney*, 64 P.3d 1138, 1141 (Or. 2003). *See, e.g.*, *Solomon v. Kansas*, 303 Kan. 512 (2015) (statute removing from the state supreme court the power to appoint chief judges of each district unconstitutionally interfered with powers granted the supreme court under the Kansas Constitution).

14 *See generally* State Con Law 2d ed., CH. XIII.

15 *See, e.g.*, *Martha Dragich, State Constitutional Restrictions on Legislative Procedures: Rethinking the Analysis of Original Purpose, Single Subject, and Clear Title Challenges*, 38 Harv. J. Legis. 103 (2001).

addresses only a single "subject." Though the precise wording differs, a representative example would be as follows: "No bill shall become a law which embraces more than one subject, that subject to be expressed in the title."[16] The first clause is the single subject requirement, and the second is the clear title provision. Thus, these two provisions often work in tandem, though it certainly is possible to have a violation of one requirement without violating the other.

The purpose of the clear title requirement is generally to make sure that legislators are aware of at least the general substance of the legislation on which they vote and that the public can similarly be informed of what is at stake by reading the title alone.[17] Clear title requirements reach well back into the nineteenth century, and of course the courts have to use some discretion and common sense in applying these provisions. A too-strict reading could result in the invalidation of almost any bill because some aspect of its substance was not "clearly" identified in the bill's title. On the other hand, a too lenient reading will effectively nullify the requirement (*e.g.*, upholding a title like "a bill to change the law").[18]

Single Subject

Probably more important, and more likely to result in constitutional challenges, is the "single subject" requirement present in many state constitutions. As noted in the previous section, these provisions generally prohibit a bill from being valid if it "embraces more than one subject." The fundamental reason for single subject rules (a requirement not imposed on Congress by the federal Constitution) is to prevent "log-rolling," often defined as combining multiple unrelated matters in a bill so that the entire bill will receive a majority of votes even though individual provisions in it might not command a majority. There are at least three possible evils that arise from log-rolling: (1) provisions not actually supported by a majority of the legislature may become law; (2) legislators may end up voting in favor of legislation when they have no idea that some provisions are in a particular bill; and (3) log-rolling may frustrate the Governor's general veto power because the Governor will be faced with bills containing a mixed bag of subjects,

16 *See, e.g.*, Ariz. Const. art. 4, pt. 2, § 13; Tenn. Const. art. II, § 17.

17 *State v. Rothauser*, 934 So. 2d 17 (Fla. Dist. Ct. App. 2006) (observing that primary purposes of clear title requirement is "to prevent surprise or fraud by means of provisions in bills of which the titles gave no intimation, and which might therefore be overlooked and carelessly and unintentionally adopted; and [] to fairly apprise the people of the subjects of legislation that are being considered, in order that they may have opportunity of being heard thereon.")

18 *See, e.g.*, *McIntire v. Forbes*, 909 P.2d 846 (Or. 1996).

some of which the Governor may favor and others the Governor might desire to veto, rather than being able to evaluate a bill on each subject separately.[19]

Thus, the paradigmatic example of what single subject provisions seek to prevent would be something like the following: suppose two separate bills are introduced on different topics; one will pass by a wide margin while the other commands a few votes short of a majority. If those two bills are combined into one, the entire package might well pass, even though part of the subject matter does not command majority support.

Some single subject provisions make an explicit exception for appropriations bills, which by their very nature address many programs and entities, albeit all involving funds. Courts generally uphold omnibus appropriations bills, either on the reasoning that they are subject to an explicit constitutional exception to the single subject rule, or that "appropriations" is itself a single subject. However, sometimes legislatures have attached "substantive" provisions, sometimes called "riders," to an appropriations bill. In those instances, at least where the bill was an omnibus appropriations bill, courts typically have found a violation of the single subject rule. A recently litigated, interesting and less-settled question is whether single subject rules preclude a legislature from combining substantive and appropriations provisions in something less than an omnibus bill when all of the provisions relate to a single subject, like education.[20]

In any event, it is very likely that an Attorney General will be tasked with defending laws against single-subject challenge, providing legal opinions on whether particular laws violate the requirement, or both.

Uniformity

Some states have uniformity requirements that require legislation, particularly in the taxation context, to provide for "a uniform and equal rate of

19 Closely related to the single subject rule is the original purpose rule—included in some state constitutions but definitely not others—which prohibits amendments to proposed legislation that would drastically alter the original purpose of the law. Missouri's original purpose provision is typical: "No law shall be passed except by bill, and no bill shall be so amended in its passage through either house as to change its original purpose." Mo. Const. art III, § 21. The reason for this provision is not to inhibit the normal legislative process by making amendments to proposals exceedingly difficult, but to prevent legislators from being surprised by the content of a statute after its initial proposal. This rule also prevents legislators from skirting the deadline for the introduction of new bills by hiding them in existing bills as amendments. Some states, however, allow and utilize "gut-and-go" procedures by which a previously introduced bill can be stripped of its original content and completely new matters substituted in its place.

20 See *Gregory v. Shurtleff*, 299 P.3d 1098 (Utah 2013); *KNEA v Kansas*, 387 P.3d 795 (Kan. 2017).

assessment and taxation."[21] These provisions typically are interpreted to require that similarly situated persons and property must be subject to uniform rates of taxation. These provisions operate in some respects like an equal protection requirement, but are distinct in that they often are limited to particular matters such as taxation and may not apply equal-protection-type analysis.[22]

Public Purpose Doctrine

The public purpose doctrine requires that public funds be used only for public purposes. Sometimes this principle is found expressly in the state constitution;[23] in some states it is viewed as a basic, though unstated, constitutional tenet.[24] "What constitutes a public purpose varies with changing conceptions of the scope and function of government. As governmental activities increase by reason of the growing complexity of various phases of society, the concept of 'public purpose' expands proportionately."[25] In determining whether an expenditure of public funds is for a public purpose, courts have looked to "the end or total purpose, and the fact that some private interest may derive some incidental benefit from the activity does not deprive the activity of its public nature, if its primary function is public."[26] Judges allow the legislature the first opportunity to decide what is in the public interest, and such legislative decisions generally are given considerable deference when challenged in court.[27] Thus, when determining whether legislation serves a public purpose, the courts typically apply a strong

21 Kan. Const. art. 11, § 1.

22 *See, e.g., Topeka Cemetery Ass'n v. Schnellbacher*, 542 P.2d 278 (Kan. 1975) (uniformity clause violated when legislature taxed property owned by a cemetery corporation for burial purposes but not property owned by individuals for burial purposes); *Leonard v. Thornburgh*, 489 A.2d 1349 (Pa. 1985) (City of Philadelphia did not violate uniformity provision when it taxed non-resident workers in the City at a lower rate than workers who were City residents); *Allegro Serv., Ltd. v. Metropolitan Pier and Exposition Auth.*, 665 N.E.2d 1246 (Ill. 1996) (uniformity provision not violated by an "airport departure tax" applied at O'Hare to all transportation companies, even if they did not deliver passengers to the City of Chicago).

23 *See, e.g.,* Minn. Const. art. X, § 1; N.C. Const. art. V, §§ 2(1), (7).

24 *See, e.g., Town of Beloit v. County of Rock*, 657 N.W.2d 344 (Wis. 2003).

25 *State ex rel. West Virginia Citizens Action Group v. West Virginia Econ. Dev. Grant Comm.*, 580 S.E.2d 869, 892 (W. Va. 2003) (quoting *State ex rel. West Virginia Housing Dev. Fund v. Waterhouse*, 212 S.E.2d 724, 735 (1974)).

26 *Ragsdale v. City of Memphis*, 70 S.W.3d 56, 73 (Tenn. Ct. App. 2001).

27 *Friends of the Parks v. Chicago Park Dist.*, 786 N.E.2d 161, 166 (Ill. 2003).

presumption in favor of constitutionality,[28] and the alleged "[u]nconstitutionality of the act must be demonstrated beyond a reasonable doubt."[29]

The public purpose doctrine often arises in the context of economic development and property redevelopment, when government either participates directly in or provides funding to such projects. The challenges typically arise when there is a significant component of private sector participation and significant financial benefit to private actors. Common examples would include government participation in building stadiums for professional sports teams, or redevelopment projects where all of the property ultimately is owned by the private sector. Because courts have tended to conclude that creating jobs and encouraging economic development are in the public interest, such challenges often have failed.[30]

An important question is what remedy should be imposed for a violation of any of these requirements? Invalidation of the entire bill? Or only severance of "offending" provisions? The answer may vary from state to state, but also often depends on the precise nature of the violation. For example, if a title clearly identified some matters but not others contained in the bill, the remedy might be to sever any provisions of the bill that are not germane to the subject expressed in the caption. A completely inaccurate or misleading title, however, could result in invalidation of the entire bill. Similarly, when there is a single subject violation, the remedy likely will depend on the circumstances. If the violation occurs because legislators combined two unrelated matters in order to secure passage of a bill, then likely the entire bill will be invalidated, and the legislature will have to consider each matter on its own merit. On the other hand, if a legislature attaches a "substantive" "rider" to an omnibus appropriations bill, then the remedy may be only to sever the "rider" from the bill, rather than invalidate all appropriations.

The Line Item Veto[31]

Although the concept of a veto power over legislation dates back centuries, the line item veto notion is of much more recent origin. The U.S. Constitution does not contain any such provision, but many state constitutions started to do so

28 *Town of Beloit v. County of Rock*, 657 N.W.2d 344 (Wis. 2003).

29 *State ex rel. Hammermill Paper Co. v. La Plante*, 205 N.W.2d 784, 792 (Wis. 1973).

30 *See, e.g., Hopper v. City of Madison*, 256 N.W.2d 139 (Wis. 1977); *Maready v. City of Winston-Salem*, 467 N.E.2d 615 (N.C. 1996); *Ragsdale v. City of Memphis*, 70 S.W.3d 56 (Tenn. Ct. App. 2001) (addressing public support of stadium for a professional sports team and discussing other such cases).

31 *See* State Con Law 2d ed., CH. XIV.C.2.

around the time of the Civil War.[32] Under such provisions, governors typically are authorized to strike particular "items" within legislation, though almost always the authority is limited to items of "appropriation" or funding. In other words, for the most part, state constitutions do not authorize governors to edit substantive legislation by striking particular provisions. Instead, the purpose of the state line item veto provisions is to give a governor more authority to establish financial priorities, eliminate unconstitutional, improper or unwise appropriations items, and to have some control over state expenditures generally. This allows the governor to establish priorities, eliminate unconstitutional or improper appropriations, and bring expenditures into line with anticipated revenues.[33]

As stated, line item veto provisions generally give governors such authority only with respect to bills that appropriate money. Thus, there are at least two critical questions in this context: (1) what is an "item" of appropriation?; and (2) what aspects of that "item" are within the governor's power to veto?[34] A legislature could frustrate the power by appropriating block grants or lump sums without specifying particulars. Or a governor could misuse the power by leaving an amount appropriated in place but vetoing the conditions on its expenditure,[35] or possibly by reducing the amount of the appropriation without vetoing it entirely.[36]

Executive Power

Under most state constitutions, there is one huge difference from the U.S. Constitution in the organization of the executive. All states have a governor, but most do not have a "unitary" executive system in the same sense that the federal

32 *Rants v. Vilsack*, 684 N.W.2d 193, 201 (Iowa 2004).

33 *In re Karcher*, 462 A.2d 1273, 1276 (N.J. 1983).

34 For several recent examples of line-item veto disputes see *St. John's Well Child and Family Center v. Schwarzenegger*, 50 Cal. 4th 960 (2010) (whether line item veto power permits Governor to make further reductions in funding already reduced by the Legislature); *Jackson v. Sandford*, 398 S.C. 580 (2011) (whether Governor can veto only part of the funding provided for one program in an appropriations bill); *Homan v. Branstad*, 812 N.W.2d 623 (Iowa 2012) (whether Governor can veto conditions accompanying an appropriation but not the appropriation itself).

35 *Welden v. Ray*, 229 N.W.2d 706 (Iowa 1975) ("The legislative device of a lump-sum appropriation with subdivisions unconstitutionally invades the item-veto authority of a governor, just as the gubernatorial device of the veto of a qualification on an appropriation unconstitutionally invades the lawmaking authority of a legislature.").

36 Some state constitutions permit the governor to reduce items without eliminating them altogether. *See, e.g.,* Alaska Const. art. II, § 15; Tenn. Const. art. III, § 18.

system has a President who ultimately controls all executive authority. Instead, in most states there are multiple executive officials who are elected state-wide, including often an attorney general, a secretary of state, a state treasurer, and perhaps a commissioner of insurance or other positions. Although state constitutions generally declare that the "executive power" resides in the state's governor, in practice that is not completely true when other, elected state-wide executive officials exist.

Generally, governors exercise the powers one would expect, including the proposal of state budgets, signing and/or vetoing legislation, making numerous appointments to various state agencies and entities, and generally overseeing the state government. But the governor typically has no power to remove an elected attorney general or secretary of state or other such officials, which means that disputes between these officials can and do arise. That can occur on policy matters, or with respect to the control of litigation, such as when a governor wants to terminate a case but the attorney general wants to continue the litigation.[37] Or one or the other may want to initiate litigation, while the other does not. Complicating matters further is that in many states the legislature has asserted the power to direct the attorney general to bring particular litigation. Sometimes the attorney general even ends up suing the governor to resolve a particular dispute.[38]

Ultimately, although the constitutional provisions and statutes in a state may appear to be "clear" regarding the authority of the governor and the attorney general, the reality is that there often remains much opportunity for conflicts and disagreements to arise. Thus, a good working relationship between the attorney general and the governor is always the ideal.

The Judiciary[39]

Under their state constitutions, some (but not all) state judiciaries differ from their federal counterpart in at least two significant respects. First, many state judges, at all levels of the system, are elected rather than appointed by an executive and confirmed by a state entity. Second, some state courts can and

37 *E.g., Perdue v. Baker*, 586 S.E.2d 606 (Ga. 2003) (rejecting petition for writ of mandamus filed by governor that sought to compel attorney general to dismiss appeal filed in redistricting case). *See, generally,* Chapter 4.

38 *See* Chapter 4, Status in State Government.

39 *See generally* State Con Law 2d ed., CH. XIV.D.

do exercise powers not available to the federal courts, including for example the authority to provide advisory opinions and to hear cases where the litigants would not have standing under federal law.

The states use at least four or five different methods of judicial selection, and some use different methods for different courts within the state. These methods include appointment by an executive authority (often the Governor) followed by confirmation by a body (senate or judicial commission), partisan elections, nonpartisan elections, so-called "merit selection" using a panel of lawyers, citizens and judges to screen candidates and submit nominees to the Governor, or some combination of these four methods. Judicial selection processes can create issues that an attorney general may have to address in some fashion and, in any event, the method(s) used for filling the state bench may impact the way a state's court system functions and litigation strategy.

Many state courts follow the same sorts of limitations on judicial power that exist under Article III of the U.S. Constitution, such as not issuing advisory opinions.[40] They may also decline to rule on cases where the parties lack standing, the question is not yet ripe for decision, the question no longer matters and the case is moot, or the question is nonjusticiable in that it belongs to another branch of government, rather than the courts.[41] That result, however, is not inevitable. Under their state constitutions, some state courts are authorized to provide advisory opinions in some circumstances,[42] to recognize "public interest" standing when traditional standing is lacking,[43] and to decide an issue that is moot when there may be important reasons to do so.[44] Probably no state court system applies stricter jurisdictional standards than the federal courts, but several apply more lenient rules, thus allowing litigation in state courts that would not be possible in federal courts.

40 *E.g., State of Kansas ex rel. Morrison v. Sebelius*, 179 P.3d 366 (Kan. 2008). Note, however, that state supreme courts generally have not viewed answering a "certified question" of state law from a federal court regarding pending litigation in the federal court to be a prohibited "advisory opinion." *E.g., Haley v. University of Tennessee-Knoxville*, 188 S.W.3d 518 (Tenn. 2006).

41 *E.g., Berry v. Crawford*, 990 N.E.2d 410 (Ind. 2013).

42 *E.g., In re Opinion of the Justices (Appointment of Chief Justice of the Supreme Court)*, 842 A.2d 816 (N.H. 2003); *In re Request for Advisory Opinion from House of Representatives*, 961 A.2d 930 (R.I. 2008).

43 *E.g., Gregory v. Shurtleff*, 299 P.3d 1098 (Utah 2013).

44 *E.g., Couey v. Atkins*, 357 Or. 460 (2015); *In re Guardianshhip of Tschumy*, 853 N.W.2d 728 (Minn. 2014).

Individual Constitutional Rights and Protections

All state constitutions protect individual rights, including all of the provisions and protections of the federal Bill of Rights. For example, state constitutions contain guarantees of freedom of speech, freedom of religion, criminal procedure protections, right to a civil jury trial, prohibitions on excessive bail and cruel and unusual punishment, and the protections of due process and equal protection. And, of course, all of the provisions of the federal Bill of Rights (except the Fifth Amendment grand jury requirement and the Seventh Amendment civil jury trial right) apply to the States as part of Fourteenth Amendment Due Process.

Sometimes, however, the analogous state provisions go further than their federal counterparts, perhaps particularly in contexts such as prohibitions on financial interactions between government and religious entities, rights to keep and bear arms,[45] property rights (particularly prohibitions on government takings of property), and civil jury trial rights.

Furthermore, many state constitutions protect rights not recognized at all under the U.S. Constitution. For example, some state constitutions have explicit privacy provisions, and virtually all have provisions addressing education. About three-fourths have "right to a remedy/due course of law" provisions which trace their heritage to the Magna Carta. Many now also have "victims' rights" provisions that impact a state's criminal justice system.

The rights guaranteed by state constitutions are a source of constant litigation in both the civil and criminal contexts. Attorneys general thus necessarily will be in a position of responding to and defending against claims of violations of rights under their state's constitution.

State Constitutional Rights with Federal Counterparts

Freedom of Religion/Establishment of Religion[46]

All 50 states have freedom of religion provisions that are analogous to and at least as strong as the First Amendment's Free Exercise Clause.[47] Many

45 *See* Stephen R. McAllister, *Individual Rights under a System of Dual Sovereignty: The Right to Keep and Bear Arms*, 59 Kan. L. Rev. 867 (2011), *at* Appendix (listing the provisions of all 50 states).

46 *See generally* State Con Law 2d ed., CH. IX.

47 Some state freedom of religion provisions pre-dated, and served as models for, the First Amendment. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise*

state constitutional free exercise provisions are in fact much more detailed, more expansive, and more strongly-worded than the First Amendment.[48]

Free exercise challenges under state constitutions have been an interesting and active area of litigation, one where state courts often have interpreted state constitutional provisions differently than their federal counterparts. One notable instance involves *Employment Division, Department of Human Resources of Oregon v. Smith*,[49] in which the U.S. Supreme Court essentially eliminated any possibility of successful federal religious rights objections to neutral laws of general applicability. After *Smith*, Congress passed the Religious Freedom Restoration Act (RFRA), requiring that courts use strict scrutiny when reviewing free exercise challenges, but the U.S. Supreme Court held that Congress lacked the authority to impose that high bar on state and local governments.[50] There were two important state responses to *Smith* and its aftermath. First, a number of state courts have declined to follow *Smith* when interpreting their state constitutional religious freedom provisions.[51] Second, a number of state legislatures have enacted their own versions of RFRA, applicable solely to their state and local governments.[52]

Again, similar to the First Amendment, most states have constitutional provisions that address the same kinds of concerns that motivated the First Amendment's Establishment Clause. That said, again the state provisions often go far beyond the terse Establishment Clause language, providing much more specificity and sometimes explicitly prohibiting government actions that the U.S. Supreme Court has held do not violate the First Amendment.

Among the interesting state provisions are no-preference clauses, which prohibit the state government from favoring or disfavoring any particular religions,[53] as well as the somewhat infamous "Blaine Amendments" present

of Religion, 103 Harv. L. Rev. 1409, 1455-58 (1990). That is also true of other provisions in the federal Bill of Rights, leading some to suggest the U.S. Supreme Court should look to state constitutional interpretations when interpreting analogous federal provisions, rather than state courts looking to federal interpretations. Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. Cal. L. Rev. 323 (2011).

48 *Compare* Mass. Const. art. 46, § 1; Pa. Const. of 1776, art. II, *with* Ohio Const. art. I, § 7; Minn. Const. art. I, § 16.

49 494 U.S. 872 (1990).

50 *City of Boerne v. Flore*, 521 U.S. 507 (1997).

51 *See, e.g.*, *Humphrey v. Lane*, 728 N.E.2d 1039 (Ohio 2000).

52 *See, e.g., Barr v. City of Sinton*, 295 S.W.3d 287 (Tex. 2009) (applying the Texas RFRA).

53 Jennifer Friesen, State Constitutional Law: Litigating Individual Rights, Claims, and Defenses § 4-84 (2006).

in roughly two-thirds of state constitutions.[54] Blaine Amendments take several forms, and have been interpreted by state courts with varying levels of severity or leniency, but they all typically prohibit, or at least strongly limit, the provision of public funds to religious organizations, or use of public funds in ways that would aid religious organizations.[55] Blaine Amendments trace their roots to anti-Catholic sentiment in the latter part of the nineteenth century when a Speaker of the U.S. House proposed a federal constitutional amendment which never passed. Although the federal effort failed, a significant number of states over time have adopted constitutional provisions that reflect Rep. Blaine's concerns.

Both no-preference clauses and Blaine amendments may be at issue when state programs provide funding that may ultimately end up in the hands of religious organizations. A good example is voucher programs that permit students to spend state money at the school of their choice, including private sectarian schools.[56] Other possible problem areas may be property tax exemptions for religious entities, charitable deduction provisions in a state's tax code that directly benefit religious entities, and even neutral state programs that provide a general form of aid for which religious organizations may sometimes apply, such as financing assistance for building projects,[57] or even funds for playground resurfacing with recycled tires.[58]

Property Rights[59]

All state constitutions, like the U.S. Constitution, have provisions explicitly protecting property rights, typically both a "takings clause" and a provision identical or analogous to the federal due process clauses.[60] In recent years, there

54 *See* Mark E. DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 Harv. J.L. & Pub. Pol'y 551 (2003).

55 *Id.*

56 The U.S. Supreme Court rejected an Establishment Clause challenge to such a program in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), but some state courts have invalidated voucher programs under their state constitutional provisions. *E.g., Taxpayers for Public Education v. Douglas County Sch. Dist*., 351 P.3d 461 (Colo. 2015); *Cain v. Horne*, 202 P.3d 1178 (Ariz. 2009).

57 *E.g., California Statewide Comm. Dev. Auth. v. All Persons Interested in the Matter of the Validity of a Purchase Agreement*, 152 P.3d 1070 (Cal. 2007).

58 *Trinity Lutheran Church v. Comer*, ___ U.S. ___, 137 S. Ct. 2012 (2017) (church must be allowed to participate in a state program that provides direct taxpayer grants to improve school playgrounds, ruling applies only to "express discrimination based on religious identity with respect to playground resurfacing.")

59 *See generally* State Con Law 2d ed., CH. VIII.

60 State law, and not federal law, of course primarily defines what is "property." *Phillips v. Wash. Legal Foundation*, 524 U.S. 156, 164 (1998), so in that sense as well state law plays a leading role in

has been considerable litigation involving state constitutional "takings clauses," as well as new legislation expanding the protection of private property from governmental taking. The main reason for this significant activity under state law was the U.S. Supreme Court's decision in *Kelo v. City of New London*,[61] which held that the federal Takings Clause was not violated when government took private property and turned it over to private developers who would redevelop the property, making it more valuable and stimulating economic growth. The Court concluded that such a purpose constituted a "public use" under the Fifth Amendment.

Following *Kelo*, many state supreme courts and state legislatures reacted strongly, and many rejected the rationale of *Kelo*, either by interpreting their state constitutional provisions differently, or by enacting statutes that imposed a higher bar on government for taking private property.[62] That said, not all states reacted negatively to *Kelo*, with some state supreme courts adopting its analysis[63] and some state legislatures taking no action to increase the requirements for taking private property. Ultimately, *Kelo* and its aftermath can be seen as an excellent example of the virtues of federalism. Under the U.S. Constitution, the Supreme Court set a relatively low bar for the protection of individual property rights from government taking, but the States then were free to respond—and many did—in their own fashion under state law, with some providing greater protection of individual property rights, and others following federal law.

Persons Accused of Crimes[64]

State constitutions contain provisions establishing the rights of persons accused of crimes, and those rights almost always mirror the provisions in the federal Bill of Rights, including prohibitions on unreasonable searches and seizures, rights against double jeopardy and self-incrimination, and the rights to confront witnesses, to have a speedy, public, jury trial, and a right to counsel. Criminal procedure seems to be an area where many state courts are inclined to follow analogous federal law in lockstep, but not always. Sometimes state provisions actually have significantly different language than the federal counterpart,[65]

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protecting property rights and interests.

61 545 U.S. 469 (2005).

62 *See, e.g., City of Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006); *Bd. of County Comm'rs of Muskogee County v. Lowery*, 136 P.3d 639 (Okla. 2006); *Reading Area Water Auth. v. Schuykill River Greenway Ass'n*, 100 A.3d 572 (Penn. 2014).

63 *E.g., Goldstein v. New York State Urban Dev. Corp.*, 921 N.E.2d 165 (N.Y. 2009).

64 *See generally* State Con Law 2d ed., CH. VI.

65 *E.g.*, Wash. Const. art. I, § 7 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law."); *State v. Jorden*, 156 P.3d 893 (Wash. 2007) (interpreting

and sometimes state courts disagree with the U.S. Supreme Court's reasoning and conclusion.[66]

A good example of states differing with the U.S. Supreme Court's reasoning and conclusion is state responses to that Court's recognition of a "good faith" exception to the exclusionary rule in *United States v. Leon*.[67] A number of state courts have rejected *Leon* and declined to create or recognize a good faith exception to the exclusionary rule that otherwise applies when law enforcement officers violate state constitutions' search and seizure provisions.[68] For example, the Pennsylvania Supreme Court opined that creating such an exception "would virtually emasculate those clear safeguards which have been carefully developed under the Pennsylvania Constitution over the past 200 years."[69] And the North Carolina Supreme Court declined to "abandon a proven remedy" for a constitutional violation.[70]

The "independent and adequate" state law ground doctrine: Perhaps in the criminal procedure area in particular, where federal rights are always present, state courts have not always been careful about making clear the basis for their decision suppressing evidence or invalidating a conviction. If a state supreme court relies solely on the state constitution, and makes that reliance clear, there is no basis for review by the U.S. Supreme Court. But where a state supreme court intertwines federal and state law, or ultimately does not make clear the basis for its decision, the U.S. Supreme Court has the power to review the federal aspects of the decision, and has not been shy about doing so.[71] Thus, although state courts certainly have the authority to accord criminal defendants greater protections under the state constitution than exist under federal law, they must make clear that their decision rests on "independent and adequate" state law grounds if they want to preclude any chance of reversal by the U.S. Supreme Court.[72]

the "private affairs" provision to require a warrant before law enforcement may examine a motel registry containing guest names).

66 *See, e.g., State v. Hempele*, 576 A.2d 793 (N.J. 1990) (holding that the New Jersey Constitution protects an expectation of privacy such that a warrant is required before searching trash seized on the curb; rejecting U.S. Supreme Court's reasoning and contrary conclusion in *California v. Greenwood*, 486 U.S. 35 (1986)).

67 468 U.S. 897 (1984).

68 *See, e.g., State v. Canelo*, 653 A.2d 1097 (N.H. 1995), and cases cited therein.

69 *Commonwealth v. Edmunds*, 586 A.2d 887, 899 (Pa. 1991).

70 *State v. Carter*, 370 S.E.2d 553, 560 (N.C. 1988).

71 *E.g., Ohio v. Robinette*, 519 U.S. 33 (1996).

72 *Michigan v. Long*, 463 U.S. 1032 (1983).

Civil Jury Trials[73]

The U.S. Constitution's Seventh Amendment right to a jury trial in civil cases is one of the few federal Bill of Rights provisions the U.S. Supreme Court has not applied to the states through the Fourteenth Amendment,[74] making state constitutions the exclusive protectors of jury trial rights in state civil proceedings. A common provision in state constitutions declares that "[t]he right of trial by jury shall be inviolate."[75] Another fairly common state constitutional provision declares that "the right of trial by jury as heretofore enjoyed shall remain inviolate."[76] Such provisions long have been interpreted as requiring that the right to a jury trial shall continue as it existed at common law.[77] State constitutional jury trial provisions have been important in the context of legislative regulation of states' tort systems, with some courts invalidating damages caps or other such measures under the state right to a jury trial provision,[78] while other courts have upheld such legislative restrictions.[79]

Equal Protection[80]

State constitutions are an ample source of protection for equality. Some of the earliest state constitutions spoke about men being "born equally free and independent."[81] Later provisions are more likely to contain language such as "All people are created equal and are entitled to equal rights and opportunity under the law."[82] Many state constitutions include equality language identical to or very similar to the famous language of the Declaration of Independence.[83]

Often state courts utilize the federal, three-tiers of scrutiny approach to analyze equal protection issues under the state constitution. Sometimes, however, state courts have rejected federal equal protection standards, and adopted a more exacting standard, such as rejecting a requirement that discriminatory intent by

73 *See generally* State Con Law 2d ed., CH. XII.C.

74 *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211 (1916).

75 *E,g.*, Kan. Const. Bill of Rights § 5.

76 *E.g.*, Mo. Const. Bill of Rights § 22(a).

77 *E.g.*, *Standidge v. Chicago Rys. Co.*, 98 N.E. 963 (Ill. 1912).

78 *E.g., Watts v. Lester E. Cox Medical Centers*, 376 S.W.3d 633 (Mo. 2012); *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989).

79 *E.g., Miller v. Johnson*, 289 P.3d 1198 (Kan. 2012).

80 *See generally* State Con Law 2d ed., CH. IV.

81 Pa. Const. art, I, § 1 (1776).

82 Wis. Const. art, I, § 1 (1982).

83 *See* Steven G. Calabresi & Sofia M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 Tex. L. Rev. 1299 (2015).

the State be proven, and instead permitting discriminatory impact to suffice.[84] State courts have interpreted such provisions to address and prohibit or limit distinctions based on race, gender,[85] age,[86] or sexual orientation.[87] State courts have also, on occasion, held that economic legislation[88] and laws affecting voting rights[89] violated state equal protection provisions.

One important provision in several states is an explicit guarantee of gender equality. Although the Equal Rights Amendment was never ratified at the federal level, a number of states did adopt such provisions, and they have been the basis for decisions protecting gender equality.[90]

State Constitutional Rights with no Federal Counterpart

Privacy[91]

Many state constitutions recognize rights of privacy broader than anything recognized under the U.S. Constitution. Such rights may include several types of claims: "(1) the right to be free of unreasonable government … surveillance; (2) the right to prevent the accumulation or dissemination of certain kinds of information (sometimes called 'informational' privacy); and (3) the right to make important choices about personal or family life free of state coercion (sometimes called 'autonomy' rights)."[92] Although there is no explicit privacy provision in the U.S. Constitution, a handful of state constitutions have provisions expressly protecting privacy.[93] Many states recognize privacy rights through due process-type or even Declaration of Independence-type provisions.[94]

84 *See, e.g.*, *Sheff v. O'Neill*, 678 A.2d 1267 (Conn. 1996).

85 *See, e.g.*, *Commonwealth v. Pennsylvania Interscholastic Athletic Ass'n,* 334 A.2d 839 (Pa. 1975).

86 *See, e.g.*, *O'Neill v. Bane*, 568 S.W.2d 761 (Mo. 1978).

87 *See, e.g.*, *Tanner v. Oregon Health Sciences Univ.*, 971 P.2d 435 (Or. Ct. App. 1998).

88 *See, e.g.*, *Benson v. North Dakota Workmen's Comp. Bureau*, 283 N.W.2d 96 (N.D. 1979) (invalidating law that excluded agricultural employees from the benefits of the Workmen's Compensation Act); *but cf. Collins v. Day*, 644 N.E.2d 72 (Ind. 1994) (reaching opposite conclusion).

89 *E.g., Weinschenck v. State*, 203 S.W.3d 201 (Mo. 2006) (invalidating "Voter ID" law on equal protection grounds).

90 *E.g., Commonwealth v. Pennsylvania Interscholastic Athletic Ass'n*, 334 A.2d 839 (Pa. 1975); *Griffin v. Crane*, 716 A.2d 1029 (Md. 1998).

91 *See generally* State Con Law 2d ed., CH. V., CH. XII.A.

92 Jennifer Friesen, 1 State Constitutional Law: Litigating Individual Rights, Claims and Defenses § 2.01 (4th ed. LexisNexis 2006).

93 These states are: Alaska, California, Florida, Hawaii, and Montana.

94 *E.g., Hodes & Nauser v. Schmidt*, 368 P.3d 667 (Kan. Ct. App. 2016) (en banc) dividing 6-1-7

Some state supreme courts follow federal standards when considering privacy claims, but several have interpreted their state constitutions to go further. Examples include protecting abortion rights with a test more rigorous than the federal "undue burden" standard,[95] protecting rights of intimate association that include sexual conduct between consenting adults (before the U.S. Supreme Court recognized any such federal right),[96] recognizing rights for same-sex couples to obtain civil unions and marriages[97] (again, well before the U.S. Supreme Court recognized such a federal right), a right to refuse life-saving or life-prolonging medical treatment,[98] a right of fit, married parents to preclude grandparent visitation (notwithstanding a state grandparent visitation law),[99] and, in one notable instance, even the right of an adult to possess and use marijuana at home (again, long before any states legalized marijuana usage for any purpose).[100]

Education[101]

Every state constitution requires the state to provide for schools. In fact, in most if not all state constitutions, an entire article is devoted to education, including the public schools and higher education. State constitutional education provisions differ widely, but many have been interpreted by state supreme courts to impose judicially enforceable, substantive obligations on the state. That said, at least some state supreme courts have found education issues—and school funding in particular—to present nonjusticiable questions not appropriate for the courts to attempt to answer.[102]

State constitutional education provisions contain language such as "The legislature shall provide for the maintenance and support of a system of free

on question whether Kansas constitutional provisions mirroring language of the Declaration of Independence protect a right to obtain an abortion).

95 *E.g.*, *North Florida Women's Health and Counseling Services, Inc. v. State of Florida*, 866 So. 2d 612 (Fla. 2003) (striking down abortion restriction using strict scrutiny test); *Planned Parenthood v. Sundquist*, 38 S.W.3d 1 (Tenn. 2000) (applying strict scrutiny to abortion laws).

96 *E.g., State v. Saunders*, 381 A.2d 333 (N.J. 1977); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992).

97 *E.g., Baker v. State*, 744 A.2d 864 (Vt. 1999); *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003).

98 *E.g., In re Matter of Ferrell*, 529 A.2d 404 (N.J. 1987).

99 *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993) (striking provisions of Tennessee law on grandparent visitation).

100 *Ravin v. State*, 537 P.2d 494 (Alaska 1975).

101 *See generally* State Con Law 2d ed., CH. X.

102 *E.g., Oklahoma Educ. Ass'n v. State ex rel. Oklahoma Legislature*, 158 P.3d 1058 (2007); *Nebraska Coalition for Educational Equity and Adequacy v. Heineman*, 731 N.W.2d 164 (2007).

common schools, wherein all the children of this state may be educated,"[103] or "The general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the State. . . ."[104] Several state constitutions impose requirements that the state adopt and maintain a "uniform" or "general" system of schools.[105] Others explicitly require "an adequate public education,"[106] or have been interpreted to required "adequate" levels of funding.[107]

Since the U.S. Supreme Court rejected the argument that the U.S. Constitution contains any "right to education" or any basis for heightened equal protection review of school funding systems, litigation over schools and education funding has developed almost exclusively in the state courts. Over the last four decades, plaintiffs have invoked state constitutional requirements to challenge the ways states fund and deliver education services. Sometimes the challenges have focused on equal protection and "equity" notions, but much of the time the critical arguments have been about the "substantive" requirements briefly described above: is school funding "adequate," or does it lead to a "thorough and efficient" system of schools?

Some of the litigation has lasted for years, even decades, and some states have substantially and repeatedly altered their school systems as a result of the litigation. Sometimes plaintiffs have been thrown out of court on the ground that the questions are not justiciable. Other times plaintiffs have obtained a ruling on the merits but lost when a court gives great deference to legislative policy decisions. And sometimes courts seem to have tired of or given up on the litigation, initially ordering substantial changes, and eventually coming around to a position of giving great deference to the legislature.[108] School finance litigation is another fascinating example of federalism at work, where all of the action has been in the States after the U.S. Supreme Court set only a minimal federal bar for states to clear. It certainly is fair to say that state constitutional law plays the leading role in education funding litigation across the country.[109]

103 N.Y. Const. art. XI, § 1.

104 Ohio Const. art. VI, § 2. *See also* Wyo. Const. art. VII, § 9.

105 Ind. Const. art. VIII, § 1; Or. Const. art. VIII, § 3.

106 Ga. Const. art. VIII, § 1, ¶ 1.

107 *E.g., Gannon v. Kansas*, 319 P.3d 1196 (Kan. 2014).

108 Richard E. Levy, *Gunfight at the K-12 Corral: Legislative vs. Judicial Power in the Kansas School Finance Litigation*, 54 U. Kan. L. Rev. 1021 (2006); Mills and McLendon, *1999 Florida Constitution Revision: Setting a New Standard for Public Education: Revision 6 Increases the Duty of the State to Make "Adequate Provision" for Florida Schools*, 52 Fla. L. Rev. 329 app. II at 402-09 (2000).

109 Jeffrey S. Sutton, *San Antonio Independent School District v. Rodriguez and Its Aftermath*, 94

Right to a Remedy / Due Course of Law[110]

At least three-fourths of state constitutions contain a provision often referred to as a "right to a remedy" or "open courts" clause. These provisions trace their lineage back to the Magna Carta and have no counterpart in the U.S. Constitution, although some state courts have interpreted these provisions similarly to the federal Due Process and Equal Protection Clauses. These provisions vary in their wording, but typically declare a right to "a remedy by due course of law," guarantee that the courts of the state "shall be open," and/or provide that justice shall be "prompt" or administered "without delay." Their historical purpose (going back to the Magna Carta) seems to have been to respond to practices by which citizens had to pay to obtain access to various English courts, or which denied various citizens access to certain courts altogether.[111]

In state constitutions, these provisions now are most commonly invoked in response to state legislative "tort reform" efforts, with plaintiffs arguing that restrictions on civil recovery violate their right to a remedy or result in the courts not being "open." The state courts have not developed a consensus approach to interpreting these provisions, but some important factors or considerations have emerged. Some states hold that the provisions protect only rights and remedies recognized at common law, so that if the legislature creates a statutory right, like wrongful death claims, it can limit or abolish such claims without running afoul of the constitutional provision.[112] Some look to whether the legislature has provided a substitute, or a "quid pro quo," for the right it has extinguished, as in substituting worker's compensation systems for tort claims against an employer,[113] or providing a state-sponsored insurance fund for victims of medical malpractice while limiting liability in other ways.[114]

Several aspects of legislative tort reform have been particularly fruitful in terms of generating litigation under these state constitutional provisions, with mixed results in the state supreme courts: (1) damages caps;[115] (2) statutes of

Va. L. Rev. 1963 (2008).

110 *See generally* State Con Law 2d ed., CH. XI.

111 *See Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333 (Or. 2001).

112 *E.g., Rose v. Doctors Hospital*, 801 S.W.2d 841 (Tex. 1990)

113 *Mello v. Big Y Foods*, 826 A.2d 1117 (Conn. 2003).

114 *Lemuz v. Fieser*, 933 P.2d 134 (Kan. 1997).

115 *E, g., Arbino v. Johnson & Johnson*, 880 N.E.2d 420 (Ohio 2007); *Miller v. Johnson*, 289 P.3d 1198 (Kan. 2012).

repose;[116] (3) grants of immunity to potential defendants;[117] and (4) restrictions on successor or vicarious liability.[118] An attorney general may well encounter this provision if and when parties challenge state enactments limiting or regulating civil liability.

Victims of Crime[119]

Relatively recent additions to a number of state constitutions are provisions recognizing some rights for the victims of crime.[120] These rights may include the right to confer with the prosecution, the right to be present at all proceedings where the defendant has the right to be present, the right to be informed of all proceedings, the right to be heard at certain types of proceedings, and the right to restitution. These rights naturally become the subject of litigation when a defendant believes they impair the fairness of the judicial system. For example, the Missouri Supreme Court has held that a provision of the Missouri Constitution which grants crime victims the right to be heard at sentencing does not give victims any power to direct the prosecution or choose the appropriate punishment:

> [A]lthough this provision delineates victims' 'rights,' it does not give victims the right to dictate the prosecutor's charging decision. Nor does it diminish the basic tenet of the criminal justice system that prosecutions are undertaken and punishments are sought by the state on behalf of the citizens of the state, and not on behalf of particular victims or complaining witnesses. [121]

The Supreme Court of Arizona, however, held that a provision of the Victims' Bill of Rights in the Arizona Constitution overrode a procedural rule that otherwise permitted defendants to bar witnesses from the courtroom before they

116 *E.g., Ruther v. Kaiser*, 983 N.E.2d 291 (Ohio 2012); *McIntosh v. Melroe Co*., 729 N.E.2d 972 (Ind. 2000).

117 *E.g., Laney v. Fairview City*, 57 P.3d 1007 (Utah 2002); *Tindley v. Salt Lake City Sch. Dist*. 116 P.3d 295 (Utah 2005).

118 *E.g., Ieropoli v. AC&S Corp*., 842 A.2d 919 (Pa. 2004); *Holt v. Wesley Medical Center*, 86 P.3d 1012 (Kan. 2004).

119 *See generally* State Con Law 2d ed., CH. XII.F.

120 *See, e.g.,* Alaska. Const. art. I, § 24; Ariz. Const. art. II, § 2.1; Md. Const. Decl. of Rights, art. 47; Miss. Const. art. III, § 26A; N.J. Const. art. I, ¶ 22; R.I. Const. art. I, § 23; S.C. Const. art. I, § 24; Tenn. Const. art. I, § 35; Tex. Const. art. I, § 30; Utah Const. art. I, § 28; Va. Const. art. I, § 8-A.

121 *State v. Barnett*, 980 S.W.2d 297, 308 (Mo. 1998).

testify.[122] Another question that has arisen in this context is whether all such "rights" specified are in fact judicially enforceable, or whether they are more in the nature of aspirational goals for the considerate treatment of crime victims.[123]

Amending and Revising State Constitutions[124]

As a general rule, state constitutions are far easier to amend than the U.S. Constitution. Proof of that proposition is provided by the fact that, between 1776 and 1994, there were over 5,800 amendments to state constitutions.[125] During the same time period, there have been only 27 amendments to the U.S. Constitution, and ten of those came in 1791 with the ratification of the Bill of Rights.

State constitutions may be amended in several ways, with the procedures varying from state to state.[126] There are essentially four basic methods for amending state constitutions. The most commonly used is the legislative proposal method, which operates much like the federal amendment process. The legislature first develops the language of the proposal and generally must approve it by a supermajority vote.[127] Every state but Delaware then refers the proposal to the people for approval, where a simple majority of votes is required for adoption.[128] A second method is citizen initiative where, by meeting various requirements, citizens can place a proposed amendment directly on the ballot with no involvement by the legislature.[129] Sixteen states provide for such a "direct initiative" procedure. Two states (Massachusetts and Mississippi), however, permit citizens to propose amendments but still require legislative approval of such proposals, a process sometimes labeled "indirect initiative."

122 *State v. Fulminante*, 975 P.2d 75 (Ariz. 1999).

123 *See Schilling v. Crime Victims' Rights Bd.*, 692 N.W.2d 623 (Wis. 2005).

124 *See generally* State Con Law 2d ed., CH. XV.

125 Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 American Political Science Review 359 (1994); *see also* State Con Law 2d ed., at 971-974 (reprinting 2009 speech of California Chief Justice Ronald M. George on *The Perils of Direct Democracy: The California Experience*).

126 Anne Permaloff, *Methods of Altering State Constitutions*, 33 Cumberland L. Rev. 217 (2003).

127 This method is available in all states. Council of State Governments, The Book of the States 14 (2011).

128 *Id.*

129 The constitutional initiative is available in 18 states and the Northern Mariana Islands. *Id.* at 16.

Two other methods available typically provide for more comprehensive amendments, often of entire articles of a constitution, or even the entire document. One such method is the constitutional convention. Fourteen states require automatic periodic votes by the electorate on whether to have a convention, and state constitutions vary greatly on whether a popular vote is needed to approve any recommendations made by a constitutional convention.[130] The other method is use of a constitutional commission,[131] typically an appointed, advisory group of public officials and legal experts who identify possible needed revisions, study the options available, and ultimately develop recommendations for changes, which then would be implemented by following one of the preceding methods, most likely legislative approval followed by submission to the voters.

One issue that has arisen in this context, particularly when a constitutional amendment is proposed by initiative, is whether the proposal is in fact a proper "amendment," or whether instead it is so substantial, broad in scope, and will have such an impact on state government and the state constitution that it must be considered a "revision" of the constitution, which generally means it can only be pursued through a constitutional convention or constitutional commission.[132]

Conclusion

This chapter touches on only a few of the numerous state constitutional law topics that exist. The best advice for attorneys general, and the lawyers that work for them, is to conduct a careful review of their state's constitution in order to become familiar with its nature and provisions. Because attorneys general hold a unique position as their states' chief legal officers, they frequently will be required to address state constitutional issues when advising state entities and officials, and attorneys general inevitably will be involved in litigation over the meaning of various state constitutional provisions. There is no question that state attorneys general and their offices will always be at the forefront of the development of state constitutional law, playing a unique role in that respect, and encountering more state constitutional issues than any other officials or lawyers in the state. State constitutions are important, and perhaps no one ultimately will realize that more than a state attorney general.

130 *Id.* at 17.

131 Council of State Governments, The Book of the States 4 (2011).

132 *E.g., Forum for Equality PAC v. McKeithen*, 893 So.2d 715 (La. 2005); *Opinion of the Justices*, 264 A.2d 342 (Del. 1970); *Adams v. Gunter*, 238 So.2d 824 (Fla. 1970).