1-1-2009

Are State Constitutions Un-American?

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ARE STATE CONSTITUTIONS UN-AMERICAN? BOOK REVIEW, JEFFREY M. SHAMAN, EQUALITY AND LIBERTY IN THE GOLDEN AGE OF STATE CONSTITUTIONAL LAW (2009)

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I. INTRODUCTION

Jeffrey Shaman's new book, a catalog of individual rights that receive more expansive protection under state constitutions than they do under current interpretations of the United States Constitution, is thoughtful, comprehensive, careful, and well-crafted. Yet it seemingly offers no thesis other than a descriptive account of how state constitutions sometimes exceed the federal floor. What purpose does such a book serve when its apparent thesis has been established for at least the thirty-odd years since Justice Brennan's famous article, and faces no challenge—great or small—today? The answer, I suggest, reveals how fragile the field of state constitutionalism remains. Professor Shaman's book is a strong contribution toward bolstering this important area of law.

Our secular scripture, the federal Constitution, retains a stranglehold on the constitutional imagination of the bench, bar, academy, and public. We still harbor a fifth-grade social-studies faith in the United States Constitution, through its interpreter the Supreme Court of the United States, as the all-encompassing protector of our most important American rights. But reality, as Professor Shaman's book shows, lies elsewhere. In too many instances to ignore, state constitutions establish the operative law protecting our privacy, free speech, and other values of the most profound importance. If, in reality,

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Americans depend on the little-known, under-theorized, un-worshipped state constitutions to defend American values, the Federal Constitution may potentially appear incomplete, inadequate—flawed where it matters the most. The more important state constitutions become, then, the more they appear to undermine the comforting myth surrounding the Federal Constitution (and its associated institutions). They appear un-American.

Ultimately, however, I conclude that state constitutions' significance in the protection of individual rights poses no real challenge to the Federal Constitution, because they are part and parcel of its design. The Federal Constitution was written after state constitutions, presumed their existence, and depended on their prominence for the protection of individual rights against the state. State and federal constitutions work together: interlaced texts mutually dependent on each other and a common core of American values. Perhaps Professor Shaman's book, by illustrating this intertextuality, may serve to ease the American anxiety around state constitutionalism. That is a project worthy of his effort, and ours.

II. OVERVIEW OF EQUALITY AND LIBERTY

A. What the Book Says

Shaman introduces his work, importantly, with a quick review of a familiar story about the U.S. Supreme Court. I recount it in some detail, because Shaman's telling of this story reveals much about the book's broader approach to state constitutionalism. Under Chief Justice Earl Warren, the federal Court reached its pinnacle of Fourteenth Amendment vigor, judicially enforcing individual liberty and equality rights with special enthusiasm. The halcyon days faded as the Burger Court took charge and "accepted many . . . forms of discrimination as constitutionally permissible," excepting race and gender bias.[1] Under Chief Justices Rehnquist and Roberts, the federal protection of liberty and equality continued to fade away, and, Shaman predicts, the retrenchment will continue. In anticipation of this dismal trend, Justice Brennan rides to the rescue in 1977. Brennan, weary of futile dissenting in D.C., "fanned the flames of federalism" by reminding state high courts of their power to interpret state constitutions with greater liberty and

1. JEFFREY M. SHAMAN, EQUALITY AND LIBERTY IN THE GOLDEN AGE OF STATE CONSTITUTIONAL LAW xiv–xv (2009).

equality protections than the Federal Constitution contains.[2] He published an article consisting largely of a collection of U.S. Supreme Court cases he viewed as insufficient, a collection of state constitutional cases he liked better, and a straight-forward political plea to reproduce the latter faster than the former.[3] And, so the story goes, the article worked. State courts that had ignored their state constitutions started paying attention to them.[4] As state judges heeded the Harvard Law Review's call of "Leftward, Ho!," they developed individual rights doctrines more expansive than any in the United States Reporter—and "New Judicial Federalism" was born.[5] *Equality and Liberty* documents this shift toward a reinvigoration of a state constitutional basis for the protection of Americans' most important civil liberties, independent of the Federal Constitution. "[T]he New [Judicial] Federalism," Shaman declares, "manifests a reawakening of the idea that in our federal system of dual sovereignty, state constitutional law is autonomous of federal constitutional law."[6]

This introduction establishes the structure of the work overall. Federal jurisprudence serves as the touchstone and state constitutional decisions are tested against it like gold against a suspicious buyer's tooth. Some state cases offer a purer, more desirable form of equality or liberty protection, while others glint no brighter than the murky federal cases. But the project of state constitutionalism, as implied by the structure of *Equality and Liberty*, is first and foremost commentary on federal law and national values.

The body of the book goes on to illustrate, with painstaking detail, various areas of substantive law where state high courts have diverged from U.S. Supreme Court precedent in a manner favorable to the civil rights plaintiff or criminal defendant. Following the conventional federal mode of analysis, these areas are divided into the two categories of equality and liberty.

Equality provisions existed in some state constitutions before the Federal Constitution was written, and later, as new states adopted their own constitutions, they often included similar provisions. These equality-like provisions often varied textually from one another, and frequently took the

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2. *Id.* at xvii.

3. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

4. Shaman's first example of New Judicial Federalism comes from a California Supreme Court case on educational equality decided in 1976—too early to be inspired by Brennan's purportedly seminal article.

5. SHAMAN, *supra* note 1, at xviii–xix.

6. *Id.* at xix.

form of prohibitions on special privileges or emoluments from the government rather than a direct guarantee of equal protection. After the Fourteenth Amendment modified the scope of equal protection under the Federal Constitution, many states adopted similar or even identical provisions in their own constitutions.[7] In modern times, for example, several states have adopted mini-Equal Rights Amendments ("ERAs"), state versions of the national ERA that failed ratification.[8] Shaman also points out that many state constitutions include more than one equality provision, simultaneously prohibiting special emoluments, discrimination, and the denial of equal protection of the laws, and a few states include no explicit equality clauses.[9]

After explaining the standard federal practice of three-tiered review of equal protection claims, the book regretfully acknowledges that state high courts have often followed federal doctrine, either explicitly in lockstep or implicitly in reasoning.[10] Nevertheless, some states have modified the standard interpretive approaches toward their equality provisions, such as sliding-scale review instead of graduated tiers.[11] Having revealed the states' varying textual bases for and methodological approaches toward equality protection, the chapter concludes with Shaman's observation that these state-by-state differences become elided as doctrine becomes "consolidated" and standardized across the country.[12] Equality clauses bearing only a remote facial resemblance to each other are treated by the state high courts as essentially interchangeable, and the states engage in a single national tapestry of interpretation. This united approach to equality by the states means that "[t]o fully understand the meaning of equality in the United States, state constitutional law, as well as federal constitutional law, must be thoroughly considered."[13]

Having established the framework for state constitutional equality analysis, the book moves on to review how different states treat suspect classes; Shaman demonstrates how several states address unequal treatment on the basis of gender, sexual orientation, and age with more rigor than does the U.S. Supreme Court interpreting the Federal Constitution.[14] In keeping

7. *Id.* at 1.
8. *Id.* at 2.
9. *Id.* at 3–4.
10. *Id.* at 15.
11. *Id.* at 20.
12. *Id.* at 44.
13. *Id.*
14. *See generally id.* at 45–77.

with the conventional federal approach toward equality jurisprudence that divides claims into two components—the class at stake and the rights at stake[15]—Shaman follows his classifications discussion with an examination of particular state constitutional rights that have received heightened protection in equality cases. These include, for example, rights to equal treatment among localities in education financing, rights to equal taxation founded on economically meaningful distinctions (in contrast, for example, to higher taxes on racetracks than on riverboat casinos), and equal treatment from the state criminal justice system. After considering state constitutional equality protections case by case, Shaman concludes that the state high courts have not significantly expanded federal "fundamental rights" jurisprudence except in the area of education.[16]

Next, *Equality and Liberty* begins its discussion of liberty claims with a study of the right to privacy, defined here to include "the right to marry, the right to have a family, the right of reproductive freedom, the right of bodily integrity, the right to ingest substances, the right to refuse medical treatment, the right to physician-assisted suicide, the right to cohabitation, and the right of intimate association."[17] Shaman again credits the U.S. Supreme Court with leading the development of privacy jurisprudence (despite its penumbral status),[18] but finds that "state constitutions contain various provisions that can be used to protect the right of privacy."[19] Here Shaman recounts the oft-cited example of Alaska's *Ravin* case, which invalidated a state statute criminalizing the use of marijuana in the home.[20] In light of the U.S. Supreme Court's ambivalence about constitutionalized privacy protection, Shaman suggests that state high courts are on their way to eclipsing the federal courts as the country's primary enforcers of privacy rights.

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15. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 631 (1996) ("[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.").

16. *See* SHAMAN, *supra* note 1, at 119.

17. *Id.* at 121.

18. *Id.* at 122, 125–36 (describing federal privacy doctrine).

19. *Id.* at 123. Alaska, California, Florida, Hawai'i, and Montana have all adopted constitutional amendments expressly providing a right of privacy. *Id.*

20. *Id.* at 156 (citing Ravin v. State, 537 P.2d 494 (Alaska 1975)). Interestingly, although this decision by the Alaska Supreme Court was based in part on the Alaska justices' perception of the uniquely "privacy-favoring" character of their state populace, a majority of that populace has since attempted to supersede the court's holding by initiative. *See* Andrew S. Winters, Note, Ravin *Revisited: Do Alaskans Still Have a Constitutional Right to Possess Marijuana in the Privacy of their Homes?*, 15 ALASKA L. REV. 315, 315, 326 (1998) (describing popular attempts to restore private, in-home use of marijuana as a crime).

The book continues with chapters on family rights, civil unions, marriage, and intimate association, in each instance outlining the background federal approach and then detailing how state high courts have interpreted their constitutional clauses in these areas. Shaman includes both careful discussions of leading cases in each area, and very useful footnotes with string citations to similar cases. For important areas like abortion (and abortion funding), same-sex marriage, and adult consensual sex, many state high courts have struck down restrictive statutes in the name of their state constitutions.[21] In a mirror image to the earlier trend where the U.S. Supreme Court initiated privacy jurisprudence and then retreated from it while the state high courts continued its liberal expansion, the state court decisions in these areas are now influencing the federal courts, with *Lawrence v. Texas*[22] standing as the lead example. Shaman views the constitutional jurisprudence leading to *Lawrence* as both the culmination of a state-federal interaction over a universal right of intimate association and as a "powerful example[] of state court independence in the constitutional realm."[23] Finally, *Equality and Liberty* covers the right of "bodily integrity," including physician-assisted suicide and drug use. In these controversial areas, a few states have staked out the more rights-protective extremes, but most states have declined to adopt a right to use marijuana, for example, even where the state constitution contains an express privacy provision.[24]

The evidence of state constitutional caselaw collected in this book shows that state courts are sometimes willing to extend rights protections beyond what the U.S. Supreme Court will provide. While the general trend, according to Shaman, is toward greater and greater judicial enforcement of equality and liberty norms, the innovations have also met with backlash, particularly in the areas of education equity and same-sex marriage, as he describes in his last chapter.[25] In response, "[m]any states have exercised their sovereign independence to create a conception of equality that

21. *See generally* SHAMAN, *supra* note 1, at 163–228. For one famous example, consider the Kentucky Supreme Court's reliance on a 1909 case invalidating the Commonwealth's attempt to criminalize the private possession of alcohol in the home, rather than the federal holding in *Bowers v. Hardwick*, to strike down an anti-sodomy statute. *See id.* at 216–20 (discussing Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992)).

22. 539 U.S. 558 (2003) (invalidating as unconstitutional state laws criminalizing consensual homosexual sex, in accord with earlier state constitutional decisions like *Wasson*).

23. SHAMAN, *supra* note 1, at 228.

24. *See id.* at 239–40 (citing State v. Mallan, 950 P.2d 178 (Haw. 1998)).

25. *Id.* at 243–53.

transcends the federal model of equal protection of the laws,"[26] and states have been even more active in protecting liberty rights above the federal floor.[27] The state constitutions have been strongest, according to Shaman, "in the protection of the most basic of individual rights."[28] The book concludes with the confident prediction that this trend will continue as state constitutional courts advance equality and liberty. Shaman also provides a useful index and an excellent table of cases.

B. Some Normative Assumptions Underlying the Book

Equality and Liberty rests on two major assumptions, both of which are acknowledged but not seriously defended. The first, and dominant, assumption is that ever-greater judicial enforcement of individuals' equality and liberty rights is desirable. The second is that it is preferable for state courts to treat the express text of state constitutional clauses as less important than the state high court's understanding of the just result (i.e., the result that maximizes individual liberty or equality).

While most of *Equality and Liberty* is a careful and dispassionate description of specific cases, the book also includes repeated interjections of the view that the more rights state courts enforce above the federal floor, the better. Expansive state doctrine is "dynamic" and "responsive";[29] while the U.S. Supreme Court retreats, the state courts have "stepped into the breach";[30] ultimately, in exceeding federal standards, the "achievement of the state courts . . . represents the highest fulfillment of the federal system . . . ." and "has made for a more just society."[31] Even the phrase "Golden Age" in the title refers to the expanded use of state constitutions to protect individual rights.[32] This ever-more-activist approach, which I have previously described as the "liberal ratchet" problem, has consistently been linked to state constitutional scholarship and jurisprudence since Brennan's famous *cri de coeur*.[33] The difficulty here is that a court inclined against granting expanded individual rights will seem to be dependent on federal jurisprudence rather

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26. *Id.* at 243.
27. *Id.* at 245.
28. *Id.* at 253.
29. *Id.* at 44.
30. *Id.* at 47, 123.
31. *Id.* at 253.
32. *Id.* at xxii.
33. *See* Justin Long, *Intermittent State Constitutionalism*, 34 PEPP. L. REV. 41, 62 (2006).

than "autonomous," because it has little practical choice but to follow the minimum standards established by federal precedent, which the state court can't undercut. Consequently, any genuinely "autonomous" state constitutional interpretation is likely to be more rights-protective than simple reliance on federal doctrine. Not all of these newly-protected rights would conventionally be described as politically "liberal," of course. Gun possession and private property rights can both be interpreted above the federal floor, as can certain kinds of rights to religious exercise. Ultimately, for Shaman, and Brennan before him, it appears to be the more liberal conception of individual autonomy that normatively justifies state constitutionalism.

The book's second driving assumption, what I will call the "transjurisdictional approach," is that constitutional text offers a useful positivist hook on which to hang expanded rights protection where possible, but ultimately lacks dispositive importance. There is no doubt that Shaman records and explains textual differences in the relevant state constitutions.[34] He even expressly disclaims reliance on natural law, asserting that:

> Although notions of pre-existent natural law hold little sway in contemporary jurisprudence, the idea that there are—or, at least, should be—certain inherent rights still maintains a certain appeal, although one that is more theoretically acceptable if the rights can be shown to have some connection, even a loose one, to positive law.[35]

Nevertheless, *Equality and Liberty* moves effortlessly from state to state, and between state and nation, like a hummingbird guided solely by where the nectar is sweetest. The reader finds discussed on facing pages, for example, the rights of parents to control their children's upbringing under the Federal Constitution, the Tennessee Constitution, and the Texas Constitution, even in the absence of any textual basis to support such rights.[36] While *Equality and Liberty* documents the relationship among these cases descriptively and

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34. *See, e.g.*, SHAMAN, *supra* note 1, at 48–49 (discussing unusual textual provisions underlying the Connecticut Supreme Court's decision in *Sheff v. O'Neill*, 678 A.2d 1267 (Conn. 1996)).

35. *Id.* at 153.

36. *Id.* at 174–75 ("Noting that the right of privacy is not expressly mentioned in either the federal or [Tennessee] constitution, the court nonetheless thought that there was 'little doubt' that [the parents' right at stake] was grounded in the concept of liberty reflected in both documents.").

praises state "autonomy,"[37] Shaman seems to have a subjective enthusiasm for the defensibility and desirability of this transjurisdictional approach to the extent that its increases rights protection.

Shaman is not alone in the view that state constitutionalism should be a national legal phenomenon with local particularities treated as variations more rhetorical than substantive. The same approach was expressed very early by Chancellor Kent and Thomas Cooley in their influential 19th century treatises.[38] Also, as Shaman demonstrates, state high courts do in fact treat the Federal Constitution and those of other states as profoundly influential on their own constitutional jurisprudence.[39] Still, the view is at odds with contemporary critiques of ends-oriented legal interpretation.[40] The importance of deriving judicial holdings from the constitutional text forms "a central normative premise of written constitutionalism," according to Noah Feldman.[41] So Shaman's affection for the transjurisdictional approach, while consistent with the reality of common state constitutional practice, stands out as a notable assumption underlying his work.

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37. *See id.* at 149–50 (describing, and purportedly rejecting, Thomas Cooley's universalist approach to state constitutional law).

38. *See* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 351–53 (Boston, Little, Brown, & Co. 1868) ("In some form of words, [important individual rights are] to be found in each of the State constitutions; and though verbal differences appear in the different provisions, no change in language, it is thought, has in any case been made with a view to essential change in legal effect . . . ." (footnote omitted)); JAMES KENT, *Lecture XXIV: Of the Absolute Rights of Persons*, *in* 2 COMMENTARIES ON AMERICAN LAW 23 (New York, O. Halsted 1827) (observing that the right of habeas corpus had won express protection in the Federal Constitution and in the constitutions of many states, but concluding that "the right is equally perfect in those states where such a declaration is wanting.").

39. *See* James A. Gardner, *Whose Constitution Is It? Why Federalism and Constitutional Positivism Don't Mix*, 46 WM. & MARY L. REV. 1245, 1247–48 (2005):

> A frequently-expressed frustration in the field of state constitutional law is that state courts . . . ignore subtle (and sometimes not-so-subtle) cues contained in the state constitutional text; they fail to inquire into the views of the state constitution's framers; and they undertake no meaningful investigation into the history of their state or the development of its constitution.

Id.

40. *See, e.g.*, Brian J. Tamanaha, *How an Instrumental View of Law Corrodes the Rule of Law*, 56 DEPAUL L. REV. 469, 484–85 (2007) (describing a corrosive effect on the rule of law caused by ends-oriented judging).

41. Noah Feldman, *Imposed Constitutionalism*, 37 CONN. L. REV. 857, 872 (2005).

III. HOW STATE CONSTITUTIONS' RIGHTS PROTECTION APPEARS TO UNDERMINE THE SACRED STATUS OF THE UNITED STATES CONSTITUTION

A. The Myth of the Federal Constitution

The consistent engagement with *federal* constitutional law in *Equality and Liberty*, both in Shaman's own explanatory passages and in the state constitutional cases he analyzes, would seem surprising but for the outsized "shadow" cast by the Federal Constitution.[42] This shadow falls because of the way American national identity has formed around a set of symbols and ideas which, together, form a civic religion. Our political institutions have adopted a credo,[43] a catechism,[44] a sacred banner,[45] a hymn;[46] and these devices have won profound popular loyalty. But at the center of this civic religion—the national Scripture—is the Federal Constitution.[47] As one scholar describes it, American diversity "has resulted in the absence of a shared, historical *unstated* mythology or ethos, a vacuum that has been filled by the *stated* mythology and ethos of the Constitution."[48] The Federal Constitution is not only the object of "veneration,"[49] but its authorship is

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42. *See* Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1500–01 (2005) (describing the overbearing influence of federal constitutional doctrine on state constitutional interpretation).

43. *See* 36 U.S.C. § 302 (2006) ("'In God we trust' is the national motto.").

44. *See* 4 U.S.C. § 4 (2006) (enacting the "Pledge of Allegiance," an oath expressing the speaker's loyalty to the nation and commitment to various national values).

45. *See* 4 U.S.C. § 1 (2006) (establishing the "flag of the United States").

46. *See* 36 U.S.C. § 301 (2006) (designating the "Star-Spangled Banner" as the national anthem).

47. *See* Palma Joy Strand, *Law as Story: A Civic Concept of Law (With Constitutional Illustrations)*, 18 S. CAL. INTERDISC. L.J. 603, 609 (2009) (noting that the Federal "Constitution is . . . inextricably intertwined with our national identity: we are defined by the Constitution."). Some Americans' religious commitments cause them to view the Constitution as literally sacred. *See* Sanford Levinson, *Constitutional Imperfection, Judicial Misinterpretation, and the Politics of Constitutional Amendment: Thoughts Generated by Some Current Proposals to Amend the Constitution*, 1996 BYU L. REV. 611, 613–14 (1996) (describing the religious significance of the U.S. Constitution to The Church of Jesus Christ of Latter-day Saints).

48. Strand, *supra* note 47, at 609.

49. Sanford Levinson, Jerome Hall Lecture, *Our Schizoid Approach to the United States Constitution: Competing Narratives of Constitutional Dynamism and Stasis*, 84 IND. L.J. 1337, 1341 (2009).

"mythic[al]"[50] and even its physical location carries sacred significance.[51] Leading historians understand the Federal Constitution as an apex of law-making in the history of civilization.[52]

As the central text of the American civic religion, the Federal Constitution stands alone among laws as the embodiment and shield of Americans' most important national values. State constitutions, on the other hand, do not even come close to the same cultural prominence. One poll (concededly from a period before same-sex marriage litigation was winning front-page coverage) found that less than half of Americans were aware of the existence of state constitutions.[53] Just as ordinary Americans ignore their state constitutions, even American constitutional scholars treat these documents as beneath their attention.[54]

This popular and scholarly apathy toward state constitutions may have doctrinal roots linked to the cultural primacy of the modern Federal Constitution. In part, the Federal Constitution earned its reputation by providing the legal tools to defeat massive social injustices like Jim Crow.[55] When state courts were not up to the task of enforcing constitutional equality guarantees, the U.S. Supreme Court asserted itself[56] and significant legal change ensued. In fact, the Warren Court's expansion of rights protection under the federal Fourteenth Amendment was so transformative of American equality law[57] that some scholars argue it motivated social reformers toward

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50. Daniel B. Rodriguez, *State Constitutional Theory and Its Prospects*, 28 N.M. L. REV. 271, 274 (1998).

51. *See* Levinson, *supra* note 49, at 1341.

52. *See* Christian G. Fritz, *Fallacies of American Constitutionalism*, 35 RUTGERS L.J. 1327, 1333 (2004) (describing Willard Hurst's, Gordon Wood's, and J.G.A. Pocock's views of the Constitution, each of which described it as the culmination of broad social trends).

53. *See id.* at 1346–47 (citing a 1988 poll revealing that 44% of Americans knew they had a state constitution).

54. *See* Rodriguez, *supra* note 50, at 272 ("Reading the scholarly literature on constitutional law and theory, one would suppose that state constitutionalism is a relatively minor element of the American constitutional order.").

55. *See* David S. Tatel, Lecture, *Judicial Methodology, Southern School Desegregation, and the Rule of Law*, 79 N.Y.U. L. REV. 1071, 1081–84 (2004) (describing the federal courts' role, under the U.S. Constitution, in ending *de jure* segregation).

56. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1, 18 (1958) (ordering state compliance with federal constitutional decisions).

57. *See* John C. Brittain, *A Look at* Brown v. Board of Education *in 2054*, 3 SEATTLE J. SOC. JUST. 29, 31 (2004) ("Ushering in an acceptance for racial and cultural assimilation, *Brown*'s message of equality under the law for all ignited the women's movement, the fight for equal protection for people with different physical and mental abilities, and the fight for rights of gays and lesbians in the succeeding decades.").

federal courts and away from majoritarian politics for decades.[58] Many of these Warren Court equality-promoting achievements and the Court's resultant credibility were won by restraining the states.[59]

This history is partly responsible for the perception, shared by state jurists, that the U.S. Constitution "seemed to supply a complete set of hierarchically superior constitutional norms" over any values the state constitutions might offer.[60] Indeed, the virtues of the U.S. Supreme Court's application of the Bill of Rights to the nation as a whole has won such widespread support that it has led to a growing appreciation for national uniformity of constitutional law as a value in itself.[61] The privileged status of the Federal Constitution and the belief that its law falls uniformly across the land, helps to ratify our collective sense of national identity.[62] In our diverse nation, the Federal Constitution offers a strong unifying idea, offering an almost irresistible opportunity to avoid the conflict that inheres in a pluralist society.[63]

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58. *See, e.g.*, Orly Lobel, *The Paradox of Extra-Legal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 947–48 (2007) (describing scholarly critiques of U.S. Supreme Court civil rights jurisprudence for having sapped the momentum toward more radical equality reforms).

59. *See* JAMES A. GARDNER & JIM ROSSI, DUAL ENFORCEMENT OF CONSTITUTIONAL NORMS (forthcoming 2010) (manuscript at 5, *available at* http://ssrn.com/abstract=1488935) (noting that the U.S. Supreme Court "not only dramatically expanded the reach and impact of the rights protected by the federal Bill of Rights, but also imposed those constraints on state governments.").

60. *Id.*

61. *See* Wayne A. Logan, *Contingent Constitutionalism: State and Local Criminal Laws and the Applicability of Federal Constitutional Rights*, 51 WM. & MARY L. REV. 143, 145 (2009) (explaining how the federal Bill of Rights' applicability to the states has led to "frequent denunciations" of breaches in national constitutional uniformity).

62. *See* Fritz, *supra* note 52, at 1327–28 (describing the conventional story that the drafting of the U.S. Constitution "proves that America's diversity—its broad geographic, cultural, political, and economic diversities—was united in a single test of legitimate constitutional government both then and today.").

63. *Cf.* Chantal Mouffe, *Democracy, Power, and the "Political," in* DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 245, 246 (Selya Benhabib, ed., 1996) (describing how societies founded on both liberalism and pluralism tend to "find procedures to deal with differences whose objective is actually to make those differences irrelevant and to relegate pluralism to the sphere of the private"); MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 91–103 (1996) (describing how federal constitutional privacy law reflects an attempt to adopt liberalism's neutral approach to varying individual conceptions of the good life).

B. Federal Constitutional Scholars' Critiques of the Federal Constitution

The sacred status of the Federal Constitution has recently inspired a scholarly backlash. Skeptical constitutionalists remind Americans of deep flaws in the text that the traditionally worshipful approach ignores.[64] Sanford Levinson, the leader of the Federal Constitution's current critics, adopts a view of the Federal Constitution that calls to mind the Wizard of Oz behind his green curtains: "[o]nce one becomes willing to accept the possibility that our Constitution is imperfect, the imperfections become glaringly obvious."[65] In both academic and popular media, Levinson has called for a constitutional convention to re-write the federal Constitution, doing away with antiquated features like the electoral college, the Senate, and life tenure for Justices.[66] Another scholar, discussing Laurence Tribe's abandonment of his dominant treatise on American constitutional law, suggests that the Federal Constitution has led to such "doctrinal disorder" in the U.S. Supreme Court that the very possibility of constitutional law is in doubt.[67] Even the apparent uniformity of federal constitutional law faces growing skepticism, as contemporary constitutionalists point out how varying state legal contexts alter the meaning of the federal constitutional text.[68]

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64. *See, e.g.*, Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 373 (2007) (describing recent disenchantment with the Federal Constitution).

65. Sanford Levinson, *How the United States Constitution Contributes to the Democratic Deficit in America*, 55 DRAKE L. REV. 859, 866 (2007).

66. *See, e.g.*, SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 11 (2006); Sanford Levinson, *Our Broken Constitution*, L.A. TIMES, Oct. 16, 2006, at B13.

67. *See* Alice Ristroph, *Is Law? Constitutional Crisis and Existential Anxiety*, 25 CONST. COMMENT, 431, 437–38 (2009).

68. *See, e.g.*, Logan, *supra* note 61, at 146 (describing federal constitutional law as a "crazy quilt" that varies depending on the state and local law that fill its interstices); Jason Mazzone, *When the Supreme Court is Not Supreme*, 104 NW. U. L. REV. __ (forthcoming 2010) (describing how the U.S. Supreme Court's interpretive authority becomes filtered and altered by the state courts). *Cf.* Danforth v. Minnesota, 128 S. Ct. 1029, 1047–48 (2008) (Roberts, C.J., dissenting) (attacking a holding of the Court that would lead to divergent dispositions under the same federal constitutional law depending on the retroactivity law of each state and arguing that the U.S. Supreme Court holds "the responsibility and authority to ensure the uniformity of federal law").

C. State Constitutions as Competitors Undermining the United States Constitution

Well-founded critiques of the U.S. Constitution by academic commentators challenge the virtue of one of the most central unifying symbols of the American national identity. The structural challenges offered by recent federally-oriented scholarship, however, run parallel to a different sort of critique offered by the state constitutional jurisprudence so carefully annotated in *Equality and Liberty*. As Americans' most important individual rights—those associated with equality and liberty—find greater protection in state constitutions, those documents become an implicit rebuke to the sanctity of the Federal Constitution. As James Gardner and Jim Rossi observe, the myth of American constitutional law as a story solely about the U.S. Constitution and the U.S. Supreme Court "has begun to unravel" in the face of increased constitutional pluralism in both form and substance.[69]

Under the myth of the U.S. Constitution, the federal Bill of Rights, incorporated against the recalcitrant states, stands as the supreme protector of American liberties. The reality that Americans' lived experience with constitutional protections frequently derives from *state* constitutions[70] instead undermines the Scriptural status of the Federal Constitution. How great can my First Amendment rights be, if my state's free speech rights are greater? In this sense, each of the state constitutional decisions collected in *Equality and Liberty* that protect individual rights above the federal floor reveal that floor to be inadequate. Vigorous state constitutionalism might be perceived to undermine the Federal Constitution roughly like the way that trade-unionism undermines the dictatorship of the proletariat; if we really depend on the supposedly weaker institution to protect the common person, then perhaps the stronger institution lacks the normative legitimacy it claims.

D. American Anxiety in the Face of Secular Blasphemy

Given the role of the U.S. Constitution as a sacred symbol of national identity, state constitutionalism's implicit critique comes with a blasphemous flavor. Americans can (and do) disagree on what defines the good life. But

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69. GARDNER & ROSSI, *supra* note 59 (manuscript at 1, *available at* http://ssrn.com/abstract=1488935).

70. *See* Rodriguez, *supra* note 50, at 271 ("State constitutions create the legal frameworks in which many of the basic regulatory decisions affecting American citizens' lives are made.").

even a fractured and contentious people may still find common ground together in a single imagined community defined by the procedural values enshrined in the Federal Constitution. These procedural values are the very equality and liberty provisions that Shaman extols. These clauses—free expression, privacy, equal access to government services—are the clauses that offer license to those who would speak against dominant morality, or act privately in accordance with unpopular norms, or pursue the education that will permit them to escape illiberal local communities. As Michael Sandel has written, equality and liberty provisions designed to protect individual autonomy are what help form the United States into a "procedural republic," capable of evading the deeper disagreements unspoken beneath our public discourse.[71]

To undermine Americans' faith in the Federal Constitution as the best (perhaps ideal) guarantor of equality and liberty is thus to unsettle American national identity at its core. How can the American experiment work if the one document we agree on (because it shows us how to live together without agreeing on anything else) is actually deficient in protecting the very values we most need when compared to state constitutions? State constitutionalism, practiced as Shaman observes here, seditiously illustrates how incomplete the Federal Constitution really is. Consequently, reliance on state constitutions to carry out the vital legal work we thought the U.S. Constitution was doing may provoke an unconscious "anxiety of authority" in the public and among constitutional scholars.[72]

This sense of unease can only seem amplified by the potentially dubious normative legitimacy of state constitutions in the first place. The myth of the Federal Constitution includes ample valorization of the Founding (note the capital "F").[73] But state constitutions benefit from no such mythology; their origins are "ignored or dismissed", not sanctified.[74] Shaman's research reveals the importance of state constitutions in protecting the most important American rights, and by doing so implicitly reveals apparently devastating weakness in the Federal Constitution. As if that were not unpatriotic enough,

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71. *See* SANDEL, *supra* note 63, at 275.

72. *Cf.* Michael Bacchus, Comment, *Strung Out: Legal Citation,* The Bluebook, *and the Anxiety of Authority*, 151 U. PA. L. REV. 245, 249–50 (2002) (describing the anxiety of authority as the lawyer's need to point to a predecessor text authorizing the newly created text, comparable to Harold Bloom's "anxiety of influence").

73. *See, e.g.*, Rodriguez, *supra* note 50, at 274 ("The founding of the republic represents the story that, in the myriad of ways in which it is told, frames the normative enterprise of constitutional theorists.").

74. *See* Fritz, *supra* note 52, at 1348.

the legal documents that Shaman shows us fulfilling the Federal Constitution's identity-forming role are almost entirely devoid of the cultural significance we might think necessary to hold the country together.

IV. HOW *EQUALITY AND LIBERTY* MIGHT ASSUAGE AMERICAN ANXIETY ABOUT THE PRACTICAL IMPORTANCE OF STATE CONSTITUTIONS

Luckily for American nationalists, Shaman's excellent book includes the antidote to the poisonous anxiety state constitutionalism can provoke. Yes, vigorous rights protections under state constitutions is actually happening; *Equality and Liberty* shows that for many Americans, their most important rights are protected more strongly by their disdained state constitutions than by their venerated U.S. Constitution. But Shaman's steady engagement with federal doctrine and federal theory at every stage of a book nominally devoted to state constitutions illuminates the way out from the secular blasphemy of state constitutions. Shaman consistently demonstrates how the state constitutional jurisprudence he analyzes exists in mutual dependence on federal constitutional law, not true state autonomy. State judges, dissatisfied with the level of protection offered in a particular area of the incorporated Bill of Rights, might respond by elevating protection under the auspices of their state constitution.[75] Likewise, the federal Justices might find a state constitutional trend toward expanded rights protection influential in construing the Federal Constitution.[76] Viewed in this light, state constitutions are not an interloper, a competitive constitutionalism undermining the foremost legal symbol of national unity. Instead, the state and federal constitutions are irrevocably intertwined. There is no existential threat to American identity from state constitutions so long as Americans understand what *Equality and Liberty* has to teach: state constitutions are *part* of how the U.S. Constitution does its work.

This understanding of the relationship between state and federal constitutions echoes and confirms the more explicit theoretical arguments developed in other new books on state constitutionalism. The text of *Equality and Liberty* thus operates in the context of a growing consensus among state

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75. *See, e.g.*, SHAMAN, *supra* note 1, at 122–25 (discussing how the U.S. Supreme Court's "equivocation" in privacy protection led to some state high courts' more expansive jurisprudence in the area).

76. *See, e.g.*, *id.* at 134–35 (discussing the U.S. Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), which rested in part on a recent trend—found partly in the state courts—toward recognizing greater sexual privacy).

constitutionalists that American state and federal constitutionalism are inherently and rightfully inseparable. For example, in his new book, *Polyphonic Federalism*, Robert Schapiro describes how states operate as a vital component of the national legal rights discourse, not as a separate sphere.[77] The dean of state constitutionalists, Bob Williams, also described the contemporary academic understanding of state constitutions as interrelated with federal constitutional interpretation in his new book, *The Law of American State Constitutions*.[78] And as a reader of his earlier work might expect, Jim Gardner endorses a "transjurisdictional dialogue" of state and federal constitutionalism in his soon-to-be published book co-authored with Jim Rossi, *Dual Enforcement of Constitutional Norms*.[79] Even an important recent book by critics of federalism, Malcolm Feeley and Edward Rubin's *Federalism: Political Identity & Tragic Compromise*, describes American state constitutions as an integral part of the national constitutional culture.[80] This widespread agreement on the role of state constitutions as a component of American constitutionalism rather than a competitor to it, of which Shaman's work stands as a concrete example, should alleviate the American anxiety around state constitutions. The power of state constitutions to protect core rights more expansively than the Federal Constitution can be seen to pose no threat to the primacy of the national charter (and the national unity it represents) so long as the state constitutions are accurately perceived as playing the very role assigned to them by the U.S. Constitution. The sacred mythology endowing the Federal Constitution with its popular legitimacy can also serve to authorize the state constitutions it prefigures.

V. CONCLUSION

Shaman's book, at first glance, provokes the question of why he wrote it. He describes federal doctrine; he describes state doctrine, and catalogs the cases; sometimes the latter exceeds the former in liberality. Surely no work of such care and comprehensiveness could be necessary in 2010 to prove the

77. ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS 97–104 (2009).

78. ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 131–33 (2009).

79. GARDNER & ROSSI, *supra* note 59, (manuscript at 4, *available in part at* http://ssrn.com/abstract=1488935).

80. *See* MALCOLM M. FEELEY & EDWARD RUBIN, FEDERALISM: POLITICAL IDENTITY & TRAGIC COMPROMISE 115–16 (2008) (describing the American political identity as unified nationwide, with little room for state-by-state divergence on any issue of importance).

vintage thesis that state constitutions may sometimes be interpreted above the federal floor. Yet *Equality and Liberty in the Golden Age of State Constitutional Law* both poses and potentially resolves a problem of inordinate significance to contemporary American constitutionalism. Are state constitutions un-American? That is, does the reality that many Americans (whether they know it or not) rely on their state constitutions to protect their privacy, free speech, education, intimate associations, etc., deflate the popular mythology surrounding the Federal Constitution? If so, then the very rights that allow a wildly diverse polity to get along in our procedural republic may be degrading the national unity they are meant to preserve. Americans, both lay and lawyerly, should be anxious if state constitutionalism has this effect.

Shaman's work, however, defangs the dilemma. By demonstrating, through careful evidence, that state and federal constitutional jurisprudence together comprise a single interpretive project, *Equality and Liberty* imbues state constitutions with their share of the sacred status held by the national charter. State constitutionalism is no threat to the Federal Constitution because state constitutionalism is *part* of the federal constitutional method for protecting individual rights. The consequences of that realization may be far-reaching, but they are indubitably American.