TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS.[1] Edited by Paul Finkelman[2] and Stephen E. Gottlieb.[3] Athens: University of Georgia Press. 1991. Pp. xi, 448. $45.00.

John V. Orth[4]

Reviewing a collection of essays is a challenging task; reviewing essays about state constitutions when the reviewer is thoroughly familiar with the text and history of only one state constitution is even more challenging. The fifteen essays in this collection (not counting the editors' introduction) cover a wide array of topics, ranging chronologically over the two centuries of American history. Half the essays treat their chosen topics throughout the several states, while half focus, more or less exclusively, on the experience of a single state; the geographic bias, as always it seems, favors the East: two essays on Virginia, two on New York and two on Connecticut.[5] All are well written; individually interesting, they unite to form a provocative whole. The editors, organizers of the conference for which the papers were originally prepared, are to be congratulated. Rather than try to do justice to each of the essays, I propose in this review to comment on several themes which are (or ought to be) central to the subject.

---

1. This collection consists of the following essays: Donald S. Lutz, *Political Participation in Eighteenth-Century America*; James A. Henretta, *The Rise and Decline of "Democratic-Republicanism": Political Rights in New York and the Several States, 1800-1915*; Peter S. Onuf, *State Politics and Republican Virtue: Religion, Education, and Morality in Early American Federalism*; Thomas James, *Rights of Conscience and State School Systems in Nineteenth-Century America*; Morton J. Horwitz, *Republican Origins of Constitutionalism*; Suzanna Sherry, *The Early Virginia Tradition of Extratextual Interpretation*; Ellen A. Peters, *Common Law Antecedents of Constitutional Law in Connecticut*; H. Jefferson Powell, *The Uses of State Constitutional History: A Case Note*; J. Morgan Kousser, *Before* Plessy, *Before* Brown*: The Development of the Law of Racial Integration in Louisiana and Kansas*; Lawrence M. Friedman, *State Constitutions and Criminal Justice in the Late Nineteenth Century*; Burt Neuborne, *The Search for a Usable Present*; Mary L. Dudziak, *Just Say No: Birth Control in the Connecticut Supreme Court Before* Griswold v. Connecticut; Charles J. Ogletree, *Supreme Court Jury Discrimination Cases and State Court Compliance, Resistance, and Innovation*; William M. Wiecek, *State Protection of Personal Liberty: Remembering the Future*; Kermit L. Hall, *Mostly Anchor and Little Sail: The Evolution of American State Constitutions*.

2. Visiting Associate Professor, Brooklyn Law School.

3. Professor, Albany Law School.

4. Graham Kenan Professor of Law, University of North Carolina at Chapel Hill. Author of *The North Carolina State Constitution: A Reference Guide* (Greenwood Press, scheduled for 1993).

5. The geographical focus of several essays appears in their titles. In two cases the focus appears in the text: H. Jefferson Powell's "case note" concerns a Virginia case, *Kamper v. Hawkins*, 3 Va. (1 Va. Cas.) 20 (1794), and William M. Wiecek concentrates on New York.

State constitutions are now in the limelight. For better or worse, they were dramatically called to center stage by Justice William J. Brennan in a famous article in 1977, published in the *Harvard Law Review*.[6] Disappointed by defeats on the United States Supreme Court under Chief Justice Warren E. Burger, Justice Brennan invoked state constitutions in aid of individual rights. The Chief Justice retorted with a fervent prayer that state courts not mimic what were to him the excesses perpetrated by the Court under his predecessor, Chief Justice Earl Warren.[7] What had been the sleepy preserve of a few state lawyers and eccentric academics soon became a sharply politicized discipline. Sounds of the political clash are occasionally audible in these essays, although in most cases only as "noises off."

The cause of the commotion, as everyone knows, is that state constitutions contain many of the same promising generalities as the federal Constitution. Indeed, the federal Bill of Rights copied many of the provisions in prior state bills of rights or, as they were then more commonly called, "declarations of rights." Although the essayists regularly recognize this fact, they treat it as unproblematic. To a late eighteenth century lawyer, familiar with both the federal Bill of Rights and state declarations of rights, one suggestive difference was, however, immediately noticeable: while the federal Bill of Rights was in the form of an appendix tacked onto the original document, the state declarations of rights preceded the constitutional text. The North Carolina Declaration of Rights, for example, was adopted the day before the Constitution, the latter incorporating the former by reference.[8] Logically as well as chronologically prior, the Declaration of Rights contained, in addition to the prized guarantees of individual liberty, a set of principles to inspire and explain the subsequent details of governmental arrangements. For instance, the Declaration of Rights leads off with the general principle of popular sovereignty, "That all political Power is vested in and derived from the People only,"[9] then proceeds to the local application of that general principle, "That the People of this State ought to have the sole and exclusive Right of

6. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977).

7. *Florida v. Casal*, 462 U.S. 637, 639 (1983) (Burger, C.J., concurring).

8. The North Carolina Declaration of Rights was adopted on behalf of the people by the Fifth Provincial Congress on December 17, 1776. William L. Saunders, ed., 10 *The Colonial Records of North Carolina* 973 (1890). The North Carolina Constitution was adopted on December 18, 1776. Id. at 974. It provided "That the Declaration of Rights is hereby declared to be Part of the Constitution of this State, and ought never to be violated on any Pretence whatever." N.C. Const. of 1776, § 44.

9. N.C. Const. of 1776, Declaration of Rights, § 1.

regulating the internal Government and Police thereof."[10] There follow (among other general principles) declarations in favor of separation of powers and frequent elections. The constitutional text implements these principles by providing for direct annual elections of state senators and representatives and indirect elections of executive officers and judges. After spelling out the principles on which the new governmental machinery should be erected, the Declaration of Rights then proclaims principles of individual liberty (freedom of the press, right of assembly, religious liberty), as well as the now familiar code of criminal procedure. Attention to the structure of early declarations of rights like North Carolina's casts new light on the relationship between self-government and individual rights.

I

To Burt Neuborne, whose essay is written from the perspective of a "civil liberties lawyer," the past is familiar country: the Revolutionary elite was imbued with the values of eighteenth-century philosophy, which "resonate well with the notion of individual rights." To historian Donald S. Lutz, the past is a different country: "Bills of rights . . . were viewed as providing a statement of broad principles rather than a set of legally enforceable rights." Lutz vouches in evidence the frequent usage in the first declarations of rights of "admonitory language" like *should* and *ought*, rather than what he calls "legally binding" language like *shall* and *will*. Differing with Neuborne, Lutz contends that state courts "did not actively protect these rights in any substantive sense." Apparently conceding Lutz's point, Connecticut Chief Justice Ellen A. Peters tries to find her way back to familiar terrain by relying on traditional common law safeguards of individual rights, while Suzanna Sherry, recognizing the structural divide between declarations of rights and constitutional texts, focuses on the safeguards of individual rights in the former and the purely institutional arrangements in the latter. Sherry observes: "In cases involving individual rights, the natural law component was usually dominant. In cases involving the structure of government, however, the written constitution was often more decisive." These comments, then, imply three dichotomies, familiar today but far less so the century before last: (1) *ought* as opposed to *shall*, (2) natural and common law—the two were related—as opposed to written constitutions, and (3) declarations or bills of rights as opposed to other constitutional provisions.

With regard to the first, it may be observed that legal usage in

10. Id. § 2.

the late eighteenth century had not settled down in the matter of *ought* and *shall*. The North Carolina Declaration of Rights, for example, in successive sections declares "That Elections of Members to serve as Representatives in General Assembly *ought* to be free"[11] and "That in all criminal Prosecutions every Man has a Right to be informed of the Accusation against him, and to confront the Accusers and Witnesses with other Testimony, and *shall* not be compelled to give Evidence against himself."[12] It is hard to believe that the drafters thought they had crossed the line between admonition and command. In this context, it is worth noting that the wording of the North Carolina declaration in favor of free elections closely follows that of the comparable section of the Virginia Declaration of Rights[13] and that both clearly derive from the English Declaration of Rights (1689): "That Elections of Members of Parliament *ought* to be free."[14] Certain expressions become stereotyped by use, like the bad Latin of the phrase *ex post facto*. In any event, commands to the sovereign may be more politely phrased but are commands nonetheless, just as a hostage with a gun to his head is coerced whether or not the gunman says *please* and *thank you*. (For centuries English subjects initiated suits against the Crown in the polite form of the "petition of right" rather than with the usual process.) After all, what makes the word *shall* a word to conjure with is only that the judges have decided it *shall* be so. In North Carolina the 1776 Declaration of Rights was carried forward verbatim (including *ought* and *shall*) in the 1868 Constitution, where it appeared as Article I. In 1971 it was again brought forward in the state's third Constitution, although this time *ought* was throughout replaced with *shall*. By the twentieth century it was plain that the change made no difference; indeed, the failure to make it in 1868 had made no difference.

The dichotomy between constitutions and other sources of law, be they common or natural law, is certainly clearer now than it was two centuries ago. When Chief Justice John Marshall in *Marbury v. Madison* struck down the offending sentence in the Judiciary Act of 1789, he roundly declared that "a law repugnant to the constitution

---

11. Id. § 6 (emphasis added).

12. Id. § 7 (emphasis added).

13. Va. Const. of 1776, Declaration of Rights, § 6. Although the North Carolina Declaration of Rights is used for exemplary purposes in this review, much that is said of it could also be said of the Virginia, Maryland and (to some degree) Pennsylvania Declarations of Rights. For a tabular comparison of the North Carolina Declaration of Rights with the other three, see John V. Orth, *North Carolina Constitutional History*, 70 N.C. L. Rev. 1759, 1797-1802 (1992).

14. The Declaration of Rights, § 8 (1689), in Lois G. Schwoerer, *The Declaration of Rights, 1689* 297 (Johns Hopkins U. Press, 1981).

is void," meaning, of course, a law repugnant to the United States Constitution is void.[15] Yet Marshall was only restating an idea from the celebrated 1610 English case involving Dr. Bonham, in which the supreme law referred to was a medieval amalgam of common and natural law, with popular ideas of fair play mixed in.[16] Judges, like other human beings, necessarily understand the present in terms of the past, and they require at least as much time as anybody else to recognize something decidedly new. Like John Marshall, state judges naturally understood the newfangled declarations of rights in terms familiar to them from prior experience of English common law. (The same "time lag" occurred in the 1870s and 1880s as a generation of United States Supreme Court Justices read the Reconstruction Amendments in light of their pre-Civil War understandings of federalism.)

Just as *ought* and *shall* could not be sharply distinguished in the late eighteenth century, and just as the modern positivistic concept of the constitution had barely emerged from the welter of other constitutional sources, so too the declaration or bill of rights was not yet sharply set off from the rest of the Constitution. The drafters were not conscious of a discontinuity when they passed from the declaration of principles of self-government to the declaration of principles of individual rights. The foremost guarantee of liberty was to be representative government itself. Today, especially for those believers in individual liberty who put their faith in elite, insulated, countermajoritarian institutions like the judiciary and who see the people as the major threat to liberty, the original declarations of rights with their mixture of institutional and libertarian features seem a hopeless hodge-podge. The Founders saw it otherwise.

Of course, when one came to ask just how separate the separated powers had to be or how frequent the "frequent elections," one looked to the specific provisions in the Constitution, not to the general principles in the Declaration of Rights. But then, one did the same thing when one sought specific content for the declaration of religious liberty: the text of the North Carolina Constitution made plain it prohibited an established church but not a religious test for office.[17] And so *mutatis mutandis* with other rights. "That every Freeman restrained of his Liberty is entitled to a Remedy, to enquire into the Lawfulness thereof, and to remove the same if unlawful, and that such Remedy ought not to be denied or delayed."[18]

15. 5 U.S. (1 Cranch) 137, 180 (1803).
16. *Dr. Bonham's Case*, 8 Co. Rep. 107a, 77 Eng. Rep. 638 (1610).
17. N.C. Const. of 1776, §§ 32, 34.
18. N.C. Const. of 1776, Declaration of Rights, § 13.

The obvious reference here was "extratextual": the Habeas Corpus Act of 1679, received as part of the state's common law.[19] The Declaration of Rights declared generally "That Perpetuities and Monopolies are contrary to the Genius of a free State, and ought not to be allowed"[20]; the Constitution specifically required "That the future Legislature of this State shall regulate Entails in such a Manner as to prevent Perpetuities."[21] Finally the General Assembly did its duty and adopted the original of the statute still in force.[22] In cases without constitutional or statutory text, including the right of free speech and the guarantee against double jeopardy, one looked to the glorious grab-bag of the common law. After all, no one ever said the Constitution plus its associated Declaration of Rights created the essential rights of popular sovereignty and individual liberty; they only declared (some of) them and made them operational.

After so promising a start, where did the state declarations of rights go? By and large, they proved more durable than the institutional arrangements and are still operational. In North Carolina, for example, while the Revolutionary Declaration of Rights was carried forward in 1868 (with a few additions made necessary by defeat in the Civil War), the machinery of government was radically redesigned, including among other things the direct election of judges.[23] Part of the problem from the modern libertarian perspective is that state courts pursued their own understandings of civil rights, not those of twentieth century liberals, tolerating racial segregation, for example, and pioneering concepts of substantive due process. This means their set of values was "conservative," at least by the lights of Burt Neuborne, to whom "conservative means that wealthy people like it and poor people do not"—a candid but crude definition that, by the way, assumes a unity of interest on each side of the economic divide that was usually lacking.

II

Increasingly, after the Civil War, state jurisprudence was eclipsed by federal. And by the turn of the century, powerful homogenizing forces were at work in the legal profession, not least the

19. See "Report of the Commissioners Appointed by an Act of the Legislature of 1817, To Revise the Laws of North-Carolina," in Henry Potter, ed., 1 *Laws of North Carolina* v-vi (1821).

20. N.C. Const. of 1776, Declaration of Rights, § 23.

21. N.C. Const. of 1776, § 43.

22. N.C. Gen. Stat. § 41-1 (1984). For the history of this statute, see John V. Orth, *Does the Fee Tail Exist in North Carolina?*, 23 Wake Forest L. Rev. 767 (1988).

23. For an edited transcript of the relevant debates from the 1868 Constitutional Convention, see John V. Orth, *Tuesday, February 11, 1868: The Day North Carolina Chose Direct Election of Judges*, 70 N.C. L. Rev. 1825 (1992).

new model law school created by Dean C.C. Langdell at Harvard. In his essay, Lawrence M. Friedman recognizes in passing the impact of legal education: "Law schools were generally concerned with 'legal science'; their prestige depended on their national rather than their local status; state constitutional law was irrelevant to their central concerns." Second only to the Supreme Court and the Supremacy Clause, "national" law schools ensured the primacy of federal law and legal institutions. No one should underestimate the extent to which local legal elites were reoriented by their legal education. Discussing a sentence from perhaps North Carolina's most famous constitutional decision, *Bayard v. Singleton*,[24] an early example of judicial review, the North Carolina Supreme Court in 1982 mistook clear references to the state and its constitution for references to the federal union and Constitution. When Judge Samuel Ashe, one of the drafters of the North Carolina Declaration of Rights and Constitution, wrote in 1786 "the people of this country, with a general union of sentiment, by their delegates, met in Congress, and formed that system of those fundamental principles comprised in the Constitution,"[25] he meant, of course, by "country" North Carolina and by "Congress" the Fifth Provincial Congress. The state Supreme Court in the late twentieth century thought he was "obviously referring to our national government,"[26] so completely had traditions of localism and "state sovereignty" been effaced, even south of the Mason-Dixon line.

Legal education not only contributed to the decline of state constitutions, it remains a formidable barrier to their future development. State constitutions simply do not fit into the categories of modern law schools. Although logically part of the subject Constitutional Law, they find no room in the course of that name, not only because of its national focus but also because they do not lend themselves to the summary treatment appropriate to their subordinate status. Unlike partnership law, quickly reviewed by way of the Uniform Partnership Act at the beginning of the course on Business Associations, state constitutional law is too unwieldly for similar treatment. Nor do they lend themselves to the common law theme-and-variation approach used in the Property course, although they share the jurisdictional specificity of land law. If only intractable local traditions and vested interests had yielded gracefully to the blandishments of the Model State Constitution, legal

24. 1 N.C. (1 Mart.) 42 (1787).

25. Id. at 43.

26. *State ex rel. Wallace v. Bone*, 304 N.C. 591, 599, 286 S.E.2d 79, 84 (1982). For a detailed discussion of this and other historical errors in that case, see John V. Orth, *"Forever Separate and Distinct": Separation of Powers in North Carolina*, 62 N.C. L. Rev. 1 (1983).

pedagogues would have long ago rescued state constitutional law from obscurity!

III

The search for a "usable past" can make historians queasy. In his essay, William M. Wiecek says flatly that "history cannot be used" and finds its "principal lesson" to be banal: "things did not have to turn out the way they did"—a point with which I must agree, having just said much the same thing myself.[27] Yet H. Jefferson Powell is probably right to observe that "history is to be used" and to insist on its responsible use: "Ransacking the past for isolated 'good quotes' is bad history and bad law (although, of course, at times politically effective)."

Politics, as we know, is what sparked the recent interest in state constitutions. Burt Neuborne, the "ACLU lawyer," is candid about his objective and uncertain only about the proper metaphor, economic or military: he aims "to open up a second market or a second front in the enforcement of individual rights." State constitutions are decidedly second best; federal court enforcement of federal constitutional norms remains the "strategy of first choice." Neuborne waxes nostalgic for the good old days, when he appeared before federal judges whom he found to be "smarter" than their state counterparts and "much more elite." The federal court system offers "the most insulated forum possible," insulated, that is, from the non-elite. This is necessary because Neuborne's causes are unpopular; his norms frankly "countermajoritarian." Elections are the thing to be feared: "an angry populace" turned the enlightened California Supreme Court out of office. Fortunately, state supreme courts are now "less majoritarian than they used to be," thanks to the movement toward appointments or a "formal election process that is not particularly threatening to the judges."

Popular sovereignty, seen from this perspective, is the enemy. Far from being the first right in the Declaration of Rights, it now appears antithetical. Only a person without historical sense can fail to see the ironical similarity between such a viewpoint and that of England's colonial governors: not yet having learned to call themselves countermajoritarians, they styled themselves simply the "better sort." Their ideological heirs in the nineteenth century, as documented in James A. Henretta's essay, called more candidly for a restricted franchise. This is not, of course, to say that judges

27. John V. Orth, *Thinking About Law Historically: Why Bother?*, 70 N.C. L. Rev. 287 (1991).

ought to be chosen in partisan elections (as they are in North Carolina), nor is it to say that individual rights should be at the mercy of plebiscites. It is simply to observe that even Federalists like Alexander Hamilton, smarter and much more elite than anybody else, realized that they had somehow to square liberty with popular rule: they appealed from the people angry to the people calm. Constitutions are the higher law precisely because they are the majority's considered opinion.

REFLECTIONS OF AN AFFIRMATIVE ACTION BABY.

By Stephen L. Carter.[1] New York: Basic Books. 1991. Pp. xiii, 286. Cloth, $23.00.

Daniel R. Ortiz[2]

Despite its press, this is not really a book about affirmative action. To be sure, it swipes at the various arguments used to justify affirmative action programs, challenges many orthodoxies and argues for a major overhauling of racial preferences, but its real concern lies elsewhere—in the contemporary politics of African-American identity. Racial preferences may have sparked these reflections, but racial identity remains the focus of their true concern. To understand this, however, discussion must begin with Carter's ostensible subject: affirmative action.

Carter takes on both the "traditional" and "modern" approaches to racial preferences, by which he means the remedial and diversity justifications, respectively. Although both approaches actually have a long history in the debate and can, for example, be found in *Regents of the University of California v. Bakke*,[3] it is true that the diversity rationale, the "modern" approach, has enjoyed increasing prominence with the advent of critical race studies.[4] The more "traditional" approach captures little of Carter's interest and he dispatches it quickly.

Against those who believe that racial preferences are permissible and sometimes even necessary to remedy racial oppression, Carter makes three primary arguments. First, he notes that racial oppression has not harmed all African-Americans the same way.

1. William Nelson Cromwell Professor of Law, Yale University.

2. Professor of Law and Harrison Foundation Research Professor, University of Virginia.

3. 438 U.S. 265 (1978).

4. See Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 Duke L.J. 705.