

# Resurrecting Michigan Constitutional Law

This past fall, I taught state constitutional law for the first time. Besides my genuine interest in the subject, I started teaching the course because I believe that the Michigan Constitution is generally being neglected. I found this surprising, because our state constitution is filled with so many provisions awaiting exploration. Yet the document is frequently overlooked.

Neglecting the state constitution is not inconsequential. It hampers the development of our state's constitutional jurisprudence and does a disservice to the people of the state of Michigan who adopted the state constitution as the "charter of law and government for the state."<sup>1</sup> It also dilutes that which the established bar has helped develop since 1963—meaningful state constitutional law. Of perhaps greater interest, individual clients are being denied constitutional benefits. In other words, there are real victories that have yet to be discovered in our state constitution.

So why, then, is so little attention paid to our state constitution? I think some attorneys perhaps share a fundamental misunderstanding about the state constitution's relationship to the U.S. Constitution and, similarly, state constitutional law's role in the federal system. Such misunderstandings may be augmented by a lack of substantive knowledge about our state constitution and its particular provisions.

The causes for this condition are undoubtedly plentiful. We could start by pointing to the federal obsession of high school and college civics and history courses and the national media. The general public, including pre-law students, are simply not learned in state history or state government. Thus, they arrive at law schools with very little, if any, exposure to state constitutions. In fact, a 1988 national poll revealed that 52 percent of Americans did not know that their state had its own constitution.<sup>2</sup>

"Even among lawyers, state constitutional law is relatively unknown and little practiced."<sup>3</sup> The heart of this problem is that legal academia's enthrallment with the U.S. Constitution and its judicial interpretation instills in students an incomplete understanding of *American* constitutional law, which includes both federal *and* state constitutional law.<sup>4</sup> Nationalized legal education and constitutional law casebooks preoccupy our students with federal constitutional law. State constitutions receive very little attention. At last check, the course I teach is the only one offered in all of Michigan's law schools that is dedicated exclusively to state constitutional law. In addition, professors have offered a plethora of worthy research and commentary on the U.S. Constitution, but comparatively little on state constitutional law—particularly Michigan's constitution. The nature of academic competition understandably compels such a federal focus, but the product is that law school administrators, professors, and students are effectively disclaiming state constitutional law as a subject meriting study and exploration.

The course of judicial events has admittedly contributed to our condition as well. It was predominantly the federal courts, not the state courts, that initially recognized broader individual rights during the twentieth century and then applied such expansion to the states through the Fourteenth Amendment and the incorporation doctrine. Yet it is at this point that many law schools, and accordingly many attorneys, finish their analysis. That is, they begin and end at the federal constitution. But by ignoring state constitutions, they are missing much.

---

All columns are the opinion of the writer and do not represent the position of the Legal Education and Professional Standards Committee or the State Bar of Michigan.

---

Our law schools should address this gap or else an entire generation of attorneys will enter the profession unlearned about state constitutional law. For starters, law students should be reminded that our U.S. Constitution was modeled after the state constitutions of the original colonies, not vice versa. This historical lesson relates to one of the most basic conceptual misunderstandings about state constitutions—that they are dependent on the U.S. Constitution. A state constitution has its own text and interpretation and does not, as a matter of course, merely follow from the U.S. Constitution. Interpreting a state constitution calls for discerning the intent of its ratifiers, which does not necessarily mirror the intent of those at the federal constitutional convention. State constitutions are independent.

Thus, as a matter of analysis, one should begin by determining the intent of the people of the state of Michigan who ratified the state constitution. Again, this should be done independent of what is understood about the federal constitution. (Of course, it may be revealed that the state's intention was to mirror the federal constitution.) By way of example, consider the federal Second Amendment: "A well regulated Militia, being necessary to the security of a free state, the right of the people to keep and bear Arms, shall not be infringed." The state constitution also protects the right to bear arms, but its language is distinct: "Every person has a right to keep and bear arms for the defense of himself and the state." While there is some debate as to whether the Second Amendment's intent extends beyond a military purpose, the state provision is unequivocal—one has a right to bear arms for personal defense.

While the incorporation doctrine and the Supremacy Clause may compel a state to apply a broader federal constitutional right notwithstanding a more limited interpretation of the comparable state right, Michigan is



wholly free to provide broader rights than provided federally. For example, if such intent could be derived, Michigan's petition clause could be interpreted to provide an absolute privilege against defamation, whereas the First Amendment has been interpreted to provide less.<sup>5</sup> Such intent, however, must first be explored by attorneys.

As the composition of our United States Supreme Court changes, we may see changes in our federal constitutional law. This may place high profile issues at the feet of the Michigan Supreme Court. For example, if *Roe v Wade* and its progeny were ever overturned, the issue of abortion rights might be decided under the Michigan Constitution. Important cases in other states, such as the equal protection marriage decision in Massachusetts, have highlighted such state constitutional relevance. But Michigan's attorneys are not being prepared for such exploration or the burdens of developing meaningful state constitutional law.

As a result, our state constitution is often being neglected. Our nation's law schools, and particularly those in Michigan, need to resurrect the relevance of our state constitutional law by emphasizing it in their constitutional law instruction and by offering specific courses on state constitutional law. The future relevance of our state constitution depends on it. ◆



*Allen L. Lanstra, Jr. is an attorney in the Lansing office of Dickinson Wright PLLC, where he focuses his practice on appellate and commercial litigation. Mr. Lanstra also serves as an adjunct professor at the Michigan State University College of Law and is in*

*the process of authoring a treatise on Michigan constitutional law.*

#### FOOTNOTES

1. Robert F. Williams, *State Constitutional Law* xiv (LexisNexis 3d ed 1999).
2. John Kincaid, *The New Judicial Federalism*, 61 J STATE GOV'T 169 (Sept/Oct 1988).
3. *Id.*
4. Williams, *supra* at xiii.
5. See *J&J Constr Co v Bricklayers & Allied Craftsmen*, 468 Mich 722 (2003).