

FOREWORD

THE ENDURING SALIENCE OF STATE CONSTITUTIONAL LAW

*Jeffrey S. Sutton**

Thank you for inviting me to talk about State Constitutional Law and my new book: *51 Imperfect Solutions: States and the Making of American Constitutional Law*.

It is an honor to be at Rutgers Law School. You are so fortunate to have Professor Robert Williams on your faculty. In many ways, he has been the Dean of State Constitutional Law for the last several decades—the leading professor in an increasingly salient field. I have been reading his work for some time, and I used his textbook for many years in my own classes on the subject. It's fair to wonder, in truth to worry, where the subject of State Constitutional Law would be *without* Robert Williams. That is not a pleasant thought. I am extremely grateful for his work and for his leadership. I am also grateful for the work of Alan Tarr, a Professor of Political Science at Rutgers, who is also with us today. He, too, has done indispensable work in the field. Alan Tarr and Bob Williams, sometimes working together, sometimes apart, but always in the same direction, have done so much for this underappreciated subject. My gratitude goes to both of them for their service in the field.

I also am happy to be in New Jersey. I attended Ridge High School in Basking Ridge, New Jersey, and graduated from the school in 1979. My mother graduated from Rutgers, though from the New Brunswick, not the Camden, campus. (Rutgers has many campuses.) Thank you for giving me a reason to return to the Garden State.

New Jersey offers a take-off point, or perhaps I should say interstate entrance, for my remarks today. Two of the most prominent Justices in American history got their start in New Jersey: Justice Brennan and Justice Scalia. Both are native sons.

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Justice Brennan was born in Newark, New Jersey, in 1906. He was raised in the State, practiced here, and became a Justice on the New Jersey Supreme Court for five years. He left the State only after he became an Associate Justice on the United States Supreme Court in 1956. Justice Scalia was born in Trenton, New Jersey, in 1936, and lived there for a few years before his family moved to Queens, New York.

You might wonder why I would start a talk about State Constitutional Law by referring to two Justices of the United States Supreme Court, whose qualifications rarely turn on expertise in *state* law. It's a fair question. One answer is that one of them, Justice Brennan, served on the New Jersey Supreme Court before he joined the U.S. Supreme Court.

The other answer is that both of them took State Constitutional Law seriously. In his last majority opinion for the U.S. Supreme Court, *Kansas v. Carr*, Justice Scalia had this to say about State Constitutional Law: "The state courts may experiment all they want with their own constitutions, and often do in the wake of this Court's decisions."¹ As support for that proposition, he cited an article in the *Virginia Law Review* about the prominent role that the state courts had played in school-funding litigation after the U.S. Supreme Court rejected a Fourteenth Amendment claim to equal school funding among school districts within a State in 1973.²

As for Justice Brennan, he wrote a landmark 1977 article for the *Harvard Law Review*, *State Constitutions and the Protection of Individual Rights*,³ that is one of the most frequently read (and cited) law review articles of all time. It focuses on reviving State Constitutional Law as an independent source of rights protection, and it too embraces state court interpretive experimentation under state constitutions in the wake of decisions by the U.S. Supreme Court.

In my experience, when Justice Brennan and Justice Scalia agree about something, it deserves our attention. You might even say that you are getting close to an unchallengeable truth.

Let me lay some groundwork with a hypothetical that contains four fanciful facts. The hypothetical takes place at next year's championship game of the NCAA basketball tournament. Fanciful fact number one is that my alma mater, Ohio State, is in the finals. Fanciful fact number two is that your school, Rutgers, is in the finals. Fanciful fact number

1. *Kansas v. Carr*, 136 S. Ct. 633, 641 (2016).

2. See Jeffrey S. Sutton, *San Antonio Independent School District v. Rodriguez and Its Aftermath*, 94 VA. L. REV. 1963, 1971–77 (2008).

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

three is that the score is tied with a few seconds left on the clock. Fanciful fact number four involves this sequence: Just as the last seconds tick off the clock, Rutgers' star player drives the lane, he is fouled in the act of shooting, and he takes just one of the two shots awarded to him. He misses that one shot, and Rutgers proceeds to lose the game in overtime. Now if you think that hypothetical is implausible, so do I. But that leaves us with plenty of explaining to do when we shift from American basketball to American law.

In American law, when someone challenges the validity of a state or local law, there usually are two chances, not one, to knock out the law. That's because the federal and state constitutions both constrain state and local governments. But American lawyers, for unexplained reasons of their own, frequently prefer to take just one shot to strike the law. The preferred shot is usually under the U.S. Constitution, and if they take the second shot at all they tend to do most of their arguing on federal terms and under federal doctrine.

Nor is this just a question for the bar. It's also a question for the bench. State court judges have a duty to make sure that they honor the second shot and treat it as the independent opportunity it is. That does not always happen.

All of this—the infrequency with which lawyers take the second shot and the infrequency with which state court judges independently assess the second shot—is puzzling on many levels. Start with the origin of our individual rights. They did not appear first in the U.S. Constitution. They appeared first in the initial state constitutions drafted between 1776 and 1787, all before the federal framers authored the U.S. Constitution in the summer of 1787 in Philadelphia. No less a scholar than Gordon Wood attributes the great innovations in constitution writing to the work of the States during that seminal era.⁴

Another hard-to-understand reality is the lack of attention given to state constitutions in the law schools. My own experiences illustrate the point. As the State Solicitor of Ohio from 1995 to 1998, I first became aware of the significance of State Constitutional Law. I had not studied the topic in law school and could not have studied it there. At the time, most law schools in the country, including mine, did not offer a course on State Constitutional Law. As the State Solicitor, however, I found myself facing State Constitutional Law issues in the Ohio Supreme Court on a regular basis. Some of my most significant cases turned on State Constitutional Law: school funding, vouchers, tort reform, search and seizure, and many more to boot. I lost many of those cases on state

4. See, e.g., Gordon S. Wood, *Foreword: State Constitution-Making in the American Revolution*, 24 RUTGERS L.J. 911, 911 (1993).

grounds. As I tell my State Constitutional Law students at Harvard and Ohio State, I could teach a semester-long course on the subject based solely on cases I lost at the Ohio Supreme Court under the Ohio Constitution.

That humbling experience prompted several reactions over time. One was surprise. Why wasn't the subject taught in law school? And why hadn't I seen more of this in practice? The answers, I came to realize, are connected. In attacking the validity of a state or local law, it's difficult to understand why claimants would prefer one chance (a claim under the federal constitution), as opposed to two chances (claims under the federal and state constitutions), to invalidate a law. As my experience as a litigator in the Ohio Supreme Court confirmed, either opportunity has the potential to provide relief for a party.

Another reaction was curiosity. Why didn't books about constitutional law look at debates about bedrock liberty and property guarantees through the lens of the federal *and* state courts as well as the federal *and* state constitutions? Most constitutional law stories focus on the U.S. Supreme Court and the U.S. Constitution. Those accounts also follow a familiar pattern, often casting this state government or that state official as the villain in the story and the federal courts as the heroes. There is ample support for that narrative, and I did not set out in *51 Imperfect Solutions* to contradict it.

But both considerations did prompt me to think about writing an account from another perspective—one that would highlight the relevance of state constitutions and supplement the prevailing narrative with accounts in which the States, especially the state courts, led the way in responding to new challenges to deprivations of liberty or property. If there is a message in the book, it is that an underappreciation of State Constitutional Law (and state judges) has hurt state and federal law and has undermined the proper balance between state and federal courts in protecting liberty and property.

It's not just that state constitutions offer a second path to fixing a problem on behalf of a client. State constitutions often offer a more promising path. Keep in mind that state courts owe no allegiance to the U.S. Supreme Court in construing similar, even identical, language in their own constitutions. Yes, state courts must respect U.S. Supreme Court precedent in construing the U.S. Constitution. But after that they have no more duty to follow a U.S. Supreme Court decision than they do to follow a decision of a sister state supreme court. As the final judicial arbiter of the meaning of their State's constitution, state supreme court justices may construe these guarantees to mean more *or* less than the

counterpart guarantees in the U.S. Constitution. Nonetheless, state supreme courts often defer to rulings of the U.S. Supreme Court in construing similar or counterpart guarantees in their own constitutions. Some indeed commit to following U.S. Supreme Court decisions in lockstep into the future for entire swaths of the law. How strange. Who takes a voyage without knowing its destination?

State courts that independently construe the liberty and property rights in their own constitutions also create a range of potential benefits for their citizens, lawyers, and judges—and for the law in general. For one, the approach honors the original design of the federalist system and the original meaning of our individual rights. The federal framers, as I just pointed out, relied on our state constitutions in drafting the U.S. Constitution. That was a good model for writing the U.S. Constitution, and it has promise as a model for interpreting the U.S. Constitution. On top of that, the state and federal founders saw federalism and divided government as the first bulwark in rights protection and assumed that the States and state courts would play a significant role, even if not an exclusive role, in that effort. What's sometimes called the New Federalism is not that new.

Another benefit is that independent interpretation by each sovereign's high court of that State's constitution permits variation when variation is due. In a country of our size and diversity, a state supreme court often will have legitimate reasons for interpreting its constitutional guarantees differently from the guarantees in the U.S. Constitution and other state constitutions.

Many explanations for variation exist. Sometimes the state constitutions contain different words. Differences in terms often lead to differences in meaning, and aptly so. The history behind some state guarantees also might warrant a different interpretation. A free-exercise debate might come out differently in States like Maryland, Rhode Island, and Utah than in other States in view of the distinct historical experiences that prompted the freedom-of-religion guarantees in those States. Sometimes different interpretive methodologies will prompt different interpretations. If a U.S. Supreme Court decision turns on a living constitutionalist or pragmatic approach to interpretation, state supreme court justices who embrace originalism are free to adopt a different interpretation of the guarantee under their own constitution. The same is true in the other direction. Even state and federal judges who share the same interpretive methodology can disagree. The meaning of an “unreasonable search and seizure,”⁵ as applied to a technology with

5. See U.S. CONST. amend. IV.

no meaningful analogy to eighteenth-century searches, is bound to generate different interpretations. Just read decisions of the U.S. Supreme Court for proof. If the nine federal Justices can disagree reasonably about such issues, and if even those Justices sharing the same interpretive approach can disagree reasonably about them, why shouldn't we expect similar disagreement between the U.S. Supreme Court and the state supreme courts—or between and among the state supreme courts? And sometimes the terms of the guarantees are sufficiently general that disagreement is inevitable. Is there just one way to construe due process, equal protection, free speech, and so on in *all* of the settings in which those words generate disputes? If we must accept imperfect answers to vexing constitutional questions from time to time, why should we insist on one imperfect solution rather than fifty-one imperfect solutions?

Another virtue of taking State Constitutional Law seriously is that it benefits *federal* constitutional law. All methods of interpreting the federal constitution would benefit from rigorous and independent interpretations of state constitutions by state court judges. For the originalist, State Constitutional Law is indispensable. Just look at the U.S. Supreme Court's decision in *Heller* if you doubt the importance of the provenance of our bedrock guarantees.⁶

The pragmatist benefits from state law developments in a different way. Anyone interested in what works in practice, or concerned about what happens if the U.S. Supreme Court declines to enter the field, will be grateful for independent state court decisions. Just as we build common law doctrines from the ground up, whether in torts, property, or contracts, so we might consider doing the same with constitutional law. Allow a State or two to experiment in addressing a new problem, to be the first responder in this area or that one, after which other state courts (or state legislatures) can decide whether to follow that path or mark a new one. After the evidence is in, the pragmatic judge can decide whether to nationalize the issue, to allow more time, or to leave the issue to the States.

It would seem to be a caricature of living constitutionalism to say that it is solely inward looking, as solely about a judge's personal preferences. To justify an evolved meaning of a federal constitutional guarantee, the judge should be able to say that, if the interpretation does not have the support of the people of 1789 or 1868, it has the support of the people today. One salient place to look for that support is the States. State Constitutional Law decisions, like recent state legislative developments,

6. See *District of Columbia v. Heller*, 554 U.S. 570, 599–605 (2008).

potentially offer a rich source of evidence of shifting societal norms for those inclined to premise federal constitutional rulings on that ground.

Just as American citizens benefit from laboratories of policymaking experimentation by state legislatures, they can benefit from laboratories of *interpretation* by state courts. And that is true for everyone, whether they prefer originalist, pragmatic, living constitutionalist, or any other method (or sub-method!) of interpretation. When done at the state level, every method of interpretation offers lessons for like-minded members of the U.S. Supreme Court. The one thing we all should be able to agree about is that new approaches to an issue would profit from initial experimentation at the state level, whether it is a new approach to substantive due process or natural law or some other innovation.

Is there anything the law schools can do to improve matters? Yes, in a word. The vast majority of law schools do not teach State Constitutional Law. But they all offer a course on “Constitutional Law,” which teaches just half of the story, focusing on federal constitutional law cases and largely (sometimes completely) ignoring related State Constitutional Law decisions. A law school should preserve this status quo for as long as it remains comfortable graduating lawyers half-equipped to represent clients faced with an overreaching state or local law.

A law school that wishes to correct this deficit has two options. One is to offer a class on “State Constitutional Law.” To be clear, I do not mean a course based solely on one State’s constitution. I have never taught the class that way. I instead would suggest a traditional survey course on the subject. Just as state law courses on property, torts, and contracts use representative examples of state court opinions from around the country, so too should a course on “State Constitutional Law.” There are plenty of excellent state court opinions to work with. The other option is to teach “American Constitutional Law,” a class that would cover the pertinent federal court cases and juxtapose them with pertinent state court cases. Any other approach is a little like offering a course on civil procedure and neglecting to tell the students that there are federal *and* state courts and federal *and* state court rules of civil procedure.

In a panel discussion about State Constitutional Law, I recently had the good fortune of meeting Jay Ranney, a private practitioner in Wisconsin and a part-time legal historian. He passed along an observation from Leonard Levy that inspires him and helps to explain my interest in the state courts and State Constitutional Law:

[A] society reveals itself in its law and nowhere better than in the reports of the decisions of the state courts. The state reports are, however, the wasteland of American legal history. . . . [The work of state judges is] undeservedly unstudied. So long as that condition exists, there can be no history of American law, and without it, no adequate history of this nation's civilization.⁷

I am often asked whether the manner of selection and tenure of most state court judges—elections for defined terms—explains our lack of appreciation for state court judges and state constitutions. Maybe so. How can one trust majoritarian-elected judges, the thinking goes, to enforce counter-majoritarian guarantees? Rather than comment on the relative merits of the different judicial selection methods—debates that grow in intensity the more power a given court exercises—I might question our assumptions about the issue. Are the federal courts really that counter-majoritarian, and, when so, is it for better or worse? And what of the state courts? Are they really that majoritarian and, when so, is it for better or worse? One reason for examining the American Constitutional Law debates in the book—school funding, the exclusionary rule, involuntary sterilizations, and compelled flag salutes—is to identify some nuances and complexities about these assumptions. As I can attest from my experience as a state court advocate, the election of state court judges does not invariably stand in the way of counter-majoritarian claims. Sometimes, it seemed to me, the election of state court judges helped the proponents of change, those seeking to recognize a new constitutional right under the state constitution. At any rate, the point of telling these four stories is to examine the performances of the federal and state courts and the dialogue that developed between them in some instances and not in others.

I also frequently am asked if there are areas in which we might expect state constitutional innovation in the future. The answer turns on a local question, usually this question: Is a U.S. Supreme Court decision interpreting a federal guarantee consistent with the text, history, and

7. LEONARD W. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* 3–4 (1957).

precedent of that State's similar guarantee? If not, state courts are free to offer more or less protection in construing their own guarantee. In a healthy federalist system, one would anticipate differences of opinion on all manner of current rights disputes, whether structurally focused (e.g., delegation or deference to agencies), liberty focused (e.g., criminal law, equal protection, free speech, due process, or religion), or property focused (e.g., takings or impairment of contracts).

As a judge, I try to keep up with the most recent scholarship about constitutional interpretation. But I often run short on time, leaving me occasionally missing the distinction between one school of thought or another, or wondering how I would answer a difficult hypothetical raised by an advocate of a given approach. Even so, I continue reading these articles because they contain valuable insights. So long as these debates remain focused on winner-take-all-disputes at the U.S. Supreme Court, the stakes are very high—perhaps too high to generate a lasting consensus. But the many useful insights in these debates leave me puzzled why so few scholars engage the state courts on these issues and urge them to embrace a given methodology. It seems like a missed opportunity. Just as an engaged marketplace of ideas has been healthy for American democracy, so an engaged marketplace of interpretation might be healthy for American courts.

Let me finish my talk with a brief description of one chapter in the book, which covers the eugenics story.

Catch a conservative on a bad day, and you are bound to be asked: Who has done more harm? The well-intentioned or the out-and-out scoundrel? Anyone who thinks that is an easy debate to win never met the eugenics movement.

The movement grew out of the best of intentions. The idea was that society could use intentional breeding (and non-breeding) to improve the next generation and weed out the weak, the immoral, the disabled, and the criminal. The eugenicists' worldview was stark. If you doubt me, consider the words of one:

[N]early all the happiness and nearly all the misery of the world are due, not to environment, but to heredity; that the differences among men are, in the main, due to differences in the germ cells from which they are born; that social classes, therefore, which you seek to abolish by law, are ordained by nature; that it is, in the large statistical run of things, not the slums which make slum people, but slum people who make the slums . . . that if you want artists, poets, philosophers, skilled workmen and great

statesmen you will also have to give nature a chance to breed them.⁸

Before asking what the eugenicists were thinking, it's well to remember who was doing the thinking: Teddy Roosevelt, John Rockefeller, the Harrimans, and other members of the American establishment circa the early 1900s.

There is a part of this story that you know and one you may not know. The part you likely remember is the federal side of the story: the United States Supreme Court's decision in *Buck v. Bell* and its rejection of Carrie Buck's Fourteenth Amendment claim that the State had no right to sterilize her involuntarily.⁹ That part of the story of course ends with an 8-1 decision, authored by Justice Holmes and joined by Chief Justice Taft and Justice Brandeis, permitting the sterilization. Only Justice Butler dissented. The Holmes opinion contains the infamous line: "Three generations of imbeciles are enough."¹⁰

Here is the part of the story you may not know. Between 1907 and 1922, fifteen States enacted sterilization laws—all States above the Mason-Dixon line. In response, eight claimants filed constitutional challenges to the laws under the state and federal constitutions, and six of the eight were filed in state courts. Seven of the challenges led to victories for the plaintiffs. The best state court decision from the era comes from the New Jersey Supreme Court, which prohibited the State from sterilizing Alice Smith.¹¹ Anyone who hails from New Jersey, as I do, should be proud of the decision. It is well done and has aged well over time.

In abridged fashion, let me mention a few takeaways from the eugenics story. It is a story in which the state courts set a *positive example* in the development of American Constitutional Law. It's also a story that puts the lie to the notion that only life-tenured federal judges can be trusted to enforce counter-majoritarian liberty and property guarantees. Ask Alice Smith and Carrie Buck which set of judges—federal or state—they would trust to protect their rights.

One other takeaway from the eugenics story is the contrast between the state courts' impressive track record before the U.S. Supreme Court decided *Buck v. Bell* in 1927 and their relative disappearance after the decision. Yes, after 1927, the state courts were bound by the U.S. Supreme Court's interpretation of the Fourteenth Amendment. But they

8. ALBERT EDWARD WIGGAM, THE NEW DECALOGUE OF SCIENCE 42–43 (1922).

9. *Buck v. Bell*, 274 U.S. 200, 205 (1927).

10. *Id.* at 207.

11. *Smith v. Bd. of Exam'rs of Feeble-Minded*, 88 A. 963 (N.J. 1913).

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had no obligation to follow the decision in construing their state constitutions' due process and other liberty guarantees. One might have thought that the state courts would continue to vindicate these independent guarantees after *Buck v. Bell* in the same way that they had vindicated them before the decision. But that didn't happen.

Think about the matter this way. If Congress opts not to pass a law, no state legislature would think it was required not to pass a similar law. Just so with *Buck v. Bell*. The Supreme Court opted not to constitutionalize a right against involuntary sterilization, but that left the States free to recognize a right on their own—or, easiest of all, to follow the state court precedents already on the books to that effect. As the eugenics story confirms, those who put all of their faith in just one system of government for individual rights protection eventually will be disappointed.

Thank you.