

‘The People’ Have Decided



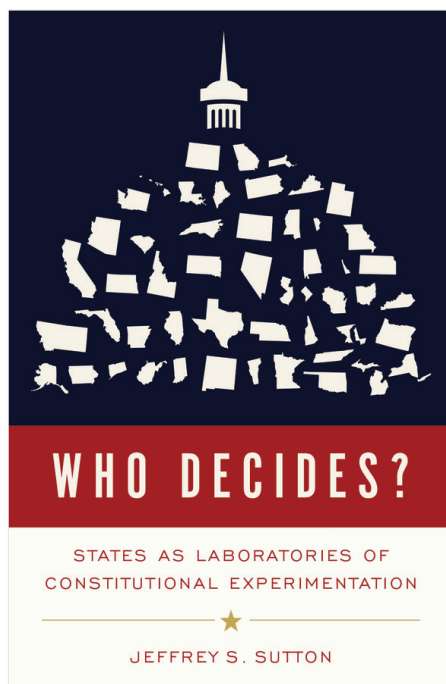
BY ANTHONY SANDERS

There are many great judges.

Only some have a major impact on our law — or even more rarely on our larger culture and society — and most of those do so, unsurprisingly, by being judges. But a select few of these judges make their mark as much off the bench as they do on it.

Judge Jeffrey S. Sutton is one of those. While he has served on the U.S. Court of Appeals for the Sixth Circuit for almost 20 years, you get the sense that were it not for life tenure, he would rather be sitting on the supreme court of his native state of Ohio — or any other state, for that matter. This is because he loves state constitutions. At one time, 50 or so years ago, state constitutions were almost forgotten. They have enjoyed a renaissance in recent decades, but even then their appreciation has been muted outside of state courthouses and narrow bands of academics and public interest lawyers. And yet, Judge Sutton is in the vanguard of turning that small-r “renaissance” into something positively Florentine.

Over the last few years, he has committed himself to spreading the gospel of state constitutionalism. He is a coauthor of a state constitutional



Who Decides? States as Laboratories of Constitutional Experimentation

BY JEFFREY S. SUTTON
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textbook¹ and in 2018 published *51 Imperfect Solutions: States and the Making of American Constitutional Law*.² With thematic storytelling, the

latter book introduced the general reader to how state constitutions and state courts have protected various rights when the U.S. Supreme Court has fallen down on the job. He could have stopped there and retired as by far the most successful evangelist of state constitutions in our young century. But having reached the top, he did not stop.

He’s now written something much larger and more comprehensive with *Who Decides? States as Laboratories of Constitutional Experimentation* (Oxford University Press, 2021).³ The book presents the full landscape of what state constitutions do on just about every relevant subject in addition to the sexy one (rights). It is mostly a primer, of sorts, on subjects such as judicial review, the structure of state executive branches, state administrative law, state legislatures, and local government. And rather than providing just a boring synopsis, he gives us stories and history, plus a comparison to how things work at the federal level.

Notice I said *mostly* a primer. A book within a book is also interwoven into the judicial review chapters. There the judge lays out his own views on judicial

review — and not just in state courts but in federal ones as well. And it takes him back into some of that sexy territory.

The following is first a review of his new book as a whole and, second, a response to the judicial-review chapters. That response is partly because those chapters are especially interesting, but also partly because the judge personally asked me what I — an advocate of a much more “engaged” judiciary than he favors — thought of one particular point: how to accommodate unenumerated-rights claims. I like the book overall very much, and the reader will learn a tremendous amount from it. On judicial review, however, I have my disagreements: I think Judge Sutton ends up worrying too much about how to interpret the federal constitution when, in the area of unenumerated rights, he could have focused more on the state constitutions that are otherwise the bedrock of the book.

Split Executives

Perhaps the most obvious difference between the federal constitutional system and the state constitutional system is the nature of the executive. Although many fights have been spawned at the federal level over whether we have a “unitary executive,”⁴ whatever view you take (and I take no position here), the federal presidency is pretty unitary compared to the states. Almost no state has only a governor in charge of its executive branch — most have other elected officials whom the governor cannot fire. This includes the attorney general, who is independently elected in 43 states; only in Alaska and Wyoming can the AG be selected and fired at will.⁵ A majority of states elect their secretary of state and treasurer, and many

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elect all kinds of executive offices, from obscure boards to South Carolina’s “adjutant general.”

This disunity can lead to some interesting disagreements about who’s in charge, and Judge Sutton tells some interesting stories about what can go wrong and how state institutions have sorted out those power struggles. Often they’re “settled out of court,” so to speak, like disputes between the president and Congress. But the state courts generally see these issues as an appropriate space for them to act as a neutral arbiter, deciding on the merits issues ranging from the scope of line-item vetoes to conflicts between the governor and the attorney general on who can represent the state in court (an underappreciated field to which Judge Sutton devotes considerable space).

Ministers of Administrative Affairs

Another structural difference between federal and state constitutional law concerns the administrative state. As Judge Sutton explains, the states have often approached this “fourth branch” of government more realistically than the U.S. Supreme Court. At the federal level, the Court has famously

given administrative agencies all kinds of deference, including the nearly complete nonenforcement of the non-delegation doctrine (the principle that would prohibit Congress from delegating its powers to other entities). Calls to actually use the doctrine are met with sky-is-falling rhetoric among court-watchers. They would do well to read Judge Sutton’s book. Twenty states have strong nondelegation doctrines “requiring delegations to agencies to contain specific standards for agency action.”⁶ Only six have weak standards comparable to those of the federal government. The rest fall in between, but at least require more than the rubber stamp that has effectively been federal law since the New Deal. Yet somehow these agencies administer the state. In fact, as Judge Sutton explains, “many state courts have not had a problem with line drawing, one of the perceived impediments to enforcing the nondelegation doctrine at the federal level.”⁷

More common than nondelegation problems are interpretation problems. Much of today’s administrative law discourse concerns when courts should defer to agencies in interpreting statutes, usually in the context of *Chevron* deference.⁸ To hear some defenses of that deference, you would think it’s written into the Constitution itself. But, in the states, it’s much less common than you would think. State courts are all over the place in terms of how and when they defer to agency interpretations of the law, and only a few of them follow *Chevron*.⁹ Ten have outright rejected it.

Given that state courts (unfortunately in both my and Judge Sutton’s view) often follow the federal courts when it comes to rights jurisprudence, why do they not follow federal courts on these administrative subjects? Judge Sutton floats a few possibilities ►

but doesn't offer a complete answer (and neither do I). It seems that the fact that judges are often elected may take away some of the federal rhetoric behind the importance of delegation and deference. It could also be that since state executive power is already divided up — and thus limited — adding a nondelegation doctrine doesn't seem as drastic. Whatever the reason, the experience of the states demonstrates that there are many tempests in teapots when it comes to fears of the U.S. Supreme Court taking a closer look at the machinations of federal agencies.

Space doesn't permit much exploration of the book's other areas, but I invite the reader to investigate Judge Sutton's surveys on state legislative powers, redistricting, local government, and constitutional amendment. The redistricting issue has, of course, been in the news in recent years with courts such as Pennsylvania's recognizing partisan gerrymandering claims as justiciable while the U.S. Supreme Court has not.¹⁰ One point of particular interest to me is the seeming death of the constitutional convention. States now appear content to serially amend their constitutions — which most can do relatively easily — and not gather citizens together to rethink the whole thing. They regularly did the latter throughout American history but haven't done so in any state in almost 30 years. Judge Sutton guesses that fear of modern interest-group politics is the reason for this change, and he's probably right.¹¹

Deference to Whom?

Now, I turn to the book within the book on judicial review. Readers will learn a lot from the book's summary of constitutional adjudication in the states before *Marbury v. Madison*.¹² This is a critical period for under-

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standing American judicial review and is frustratingly unknown even to most lawyers. Judge Sutton explains that judicial review, as we know it, did not exist under the prior British system because “the Constitution” was not written.¹³ Indeed, as I'll address below, after the Glorious Revolution of 1688, the Constitution was practically synonymous with Parliament itself. Parliament, with royal assent, could change just about any law or custom.¹⁴ But when states started adopting written constitutions, and state judges started interpreting the acts of legislatures with those constitutions in mind, the obvious question arose: Which prevails, the legislative act or the constitution (the “higher” law)? And, in turn, *who decides* which prevails, the courts or the legislature itself?

“Higher law judicial review” was not an entirely new idea. Judges had long

interpreted corporate charters, royal proclamations, and other documents with legal force to see if they conflicted with “the higher law” adopted by Parliament.¹⁵ But in the new environment things were a bit different. The higher law was a written constitution adopted by “the People,” but the challenged law in a given case had nevertheless been adopted by a state's legislative assembly, akin to Parliament itself. Thus, even though they understood the constitution was superior to legislative acts, courts were reluctant to declare those acts unconstitutional, and from early days gave some degree of deference to the legislatures.

Understandably, much scholarship has focused on how “clear” the irreconcilability between constitutions and statutes needed to have been in those early cases for courts to determine a statute unconstitutional.¹⁶ Some judges seem to have simply had a canon of constitutional avoidance in mind, while others espoused something we'd recognize today as judicial restraint. As Judge Sutton repeatedly — and honestly — emphasizes, judicial review can be framed in very different ways. On the one hand, a judge can be seen as an independent observer simply interpreting a constitution and a legislative act together and coming to an independent judgment on whether one overrides another, just like in any conflict-of-laws analysis. On the other hand, because the popularly elected legislature that passed the act (a body elected by the same voters who also, at some point and in some way, ratified the state constitution itself) already judged it constitutional, judges should defer to that interpretation. Two examples of proponents of this latter view, as Judge Sutton points out, are Professor James Bradley Thayer, in his 1893 essay,¹⁷ and Judge Robert Bork, in

his 1990 book.¹⁸ And although Judge Sutton only mentions them in the footnotes, I suspect for the conflict-of-laws view he has in mind libertarians such as Professor Randy Barnett¹⁹ and my former colleague Clark Neily,²⁰ who, like me, advocate for some form of judicial engagement, where judges do not bend over backward to transitory legislative majorities.

Thayer Light

Judge Sutton takes what he considers a middle view between these positions, providing two proposals. Unfortunately, neither is convincing to me. But the second raises an aspect of state constitutionalism that I was hoping his exploration of judicial review would have included. I expand on it here in the hope that perhaps he'll discuss it in future work.

The first proposal is that judges should defer to legislatures when the text of the constitution is “unclear.”²¹ “Absent clarity, the dispute is not for judges to resolve,”²² he writes. He thinks Thayer went too far in demanding that a court refrain from overturning legislation unless it was “unconstitutional beyond a reasonable doubt,” which Judge Sutton says makes constitutional interpretation sound more like a murder trial. This, claims Judge Sutton, would make broad but important constitutional provisions ineffective because “reasonable doubt” implies the need for specific evidentiary proof, whereas the Constitution is actually designed to lack specifics.²³

I appreciate this attempt, but I don't see a lot of daylight between “reasonable doubt” and “clarity.” A state's lawyers can almost always argue a provision is “unclear.” “Equal protection,” for example, will always be unclear to somebody. I do, however, appreci-

ate his separate critique of Thayer's contention that it's more permissible for federal courts to review state laws than federal laws. If federalism means anything, it's that federal courts should be more suspect of federal laws than state ones.

The second proposal to reform judicial review is interesting but misses a big question. When it comes to judicial review, Judge Sutton seems most worried that judges will recognize a constitution as protecting unenumerated rights, or rights beyond those explicitly listed in the document. On this point, he espouses that, “If I had my way, we would not have such do-it-yourself judicial innovations.”²⁴ But he recognizes not everyone will agree, so he proposes a compromise: Before the federal courts recognize an unenumerated right in the U.S. Constitution, wait until a “dominant majority position” of state courts have recognized that right under their own state constitutions.

I understand this perspective and this proposed bargain. The method of tracking how many states protect a right and federally protecting it once that number clears a threshold is one the Supreme Court is familiar with.²⁵ However, we should recognize the proposal for what it is: an atextual and ahistorical compromise. Neither the Constitution's Due Process clauses nor the 14th Amendment's Privileges or Immunities Clause nor the Ninth Amendment (the usual provisions argued to protect unenumerated rights) properly derive their meaning from what state courts say. Indeed, the 14th Amendment was adopted partly because state courts were emphatically *not* protecting various liberties.

But his proposal about a supermajority for unenumerated rights raises a much more interesting question:

What does Judge Sutton think about unenumerated rights and *state* constitutions? Strangely, he doesn't address that topic in any depth, though I suspect he's skeptical of unenumerated rights at the state level as well.

Sovereign Citizens

What makes a state's constitution different from an act of the legislature? After all, there is no inherent need to have a “higher law” document. The British have had a legislature for hundreds of years, incrementally changing their constitutional order many times directly through that legislature.²⁶ The British politely call Queen Elizabeth II their “sovereign,” but constitutionally the ultimate lawgiver is the Queen-in-Parliament. It derives much of its legitimacy through its representation of the people, but “the people” are not sovereign themselves.²⁷ When it comes to acts of Parliament, Parliament itself is sovereign by definition, making its acts constitutional by definition.

Of course, that's not true in the United States. Here, the ultimate lawgiver actually is “the people.” But here's the catch: In this context, “the people” doesn't simply mean a majority of voters. It's the people *individually*. They individually delegate some power over their rights to their state governments. Moreover, that delegation is not the kind imagined by Thomas Hobbes, who argued that people delegate all authority to an all-powerful sovereign.²⁸ Instead, it's more in the vein of John Locke, whose view was more limited²⁹: We delegate a lot of power over our lives, liberty, and property to the state — but not *all* power. And we delegate power through constitution-making *only*. We don't delegate power when we merely elect representatives to the legislature or when those representatives adopt legislation. That is ►

just an exercise of power *already* delegated by “the people.” In our system, there are two steps: “higher law” constitution-adoption and “ordinary law” lawmaking. We *could* be like Britain and have just one step. But — rightly or wrongly — we don’t.

How on Earth, you may ask, is this relevant to interpreting today’s state constitutions?

It is relevant because Americans write constitutions against an assumed backdrop of Lockean social contract theory. For example, Maryland’s Declaration of Rights of 1776 stated: “That all government of right originates from the people, is founded in compact only, and instituted solely for the good of the whole.”³⁰ The preamble to Massachusetts’ Constitution of 1780 explained that “[t]he body politic is formed by a voluntary association of individuals: it is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.”³¹ And Virginia’s 1776 Declaration of Rights declared:

That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.³²

That language then made its way into the Declaration of Independence. And it was adopted and readopted across American history from Illinois’s Constitution of 1818,³³ to Idaho’s of 1890,³⁴ to Florida’s of 1968.³⁵

As long as we have written constitutions and a (very defensible, in my view) distinction between the sovereign acts of “the people” and the nonsovereign acts of their delegates, then protecting unenumerated rights will be a proper function of judges.



What does this background mean for interpreting constitutions?

It means that constitutions are charters of limited government, not just for the federal government but for state governments, too. State governments are often said to possess plenary power. That’s wrong. States only possess the power that “the people” have delegated to them. This doesn’t mean state legislatures don’t have broad police powers. They do. But *because* they do, state constitutions place firewalls to mitigate the *abuse* of those powers. And two big firewalls are bills of rights and broad judicial review of those bills of rights. Otherwise, the Lockean delegation can quickly turn Hobbesian, or at least British. And — here’s the nuance Judge Sutton seems to have not considered — this Lockean firewall includes the promise of judicial review to protect unenumerated rights.

The uneasiness of broad state powers is perhaps most clearly expressed at the end of Pennsylvania’s Declaration of Rights, something that’s been in effect since 1790: “To guard against transgressions of the high powers which

we have delegated, WE DECLARE, [t]hat everything in . . . [the Declaration of Rights] is excepted out of the general powers of government, and shall forever remain inviolate.”³⁶ In other words, the people have delegated powers to the state, but not to the degree that those powers would allow the legislature to violate their retained rights. Accordingly, broad judicial review is a way to keep the legislature in line.

Further, as rights are famously hard to enumerate, allowing judicial review to cover unenumerated rights is a way to keep that review broad. Indeed, over 40 states either have a provision that directly refers to unenumerated rights (often called “baby Ninth Amendments”) or provisions written so broadly, such as the Lockean language quoted above, that they essentially constitute an unenumerated-rights provision.³⁷ In these states, judicial review of unenumerated rights is commanded by the state constitutions.

This does not mean judges cannot give deference to legislatures, such as some kind of rebuttable presumption. But anything approaching the almost irrebuttable presumption of Thayer turns the Lockean delegation on its head.

I am certain many readers (and maybe Judge Sutton) will say that this sounds like angels dancing on pins. Indeed, many state constitutions are not all that hard to amend, making constitutional amendments seem similar to statutes. If so, why must judges view the constitution as “higher” than a statute, particularly when the statute is often much closer to what “the people” *currently* seem to want?

It’s an interesting idea. The problem is that it also justifies the supremacy of the British Parliament and its lack of a written “higher law” — exactly the kind of supremacy American written

constitutions are supposed to reject. Thus, a rejection of stronger judicial review in favor of the various flavors of Thayerism is actually a call to be more British.

Now, there's a lot to be said for the Westminster system of government. It has worked well in many ways. But it's not what our constitutional system, whether at the state or federal level, is designed to do. As long as we have written constitutions and a (very defensible, in my view) distinction between the sovereign acts of "the people" and the nonsovereign acts of their delegates, then protecting unenumerated rights will be a proper function of judges.

With so many other issues to address, I do not fault Judge Sutton for not engaging with Lockean firewalls. But for him to fully flesh out his constitutional bargain — the practice that would allow federal protection of an unenumerated right only after a critical mass of state courts have protected it — he should further examine how unenumerated rights work at the state level. I think he will find that when state judges interpret state constitutions and find unenumerated rights, it need not be the lawless exercise he fears. Instead, it can be the lawful protection of, among other things, "the people's" retained right to "the pursuit of happiness."

Nevertheless, this homework assignment does not detract from my recommendation to read his book. It will be the authority on state constitutions for years to come.



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¹ JEFFREY S. SUTTON ET AL., *STATE CONSTITUTIONAL LAW: THE MODERN EXPERIENCE* (3d ed. 2020).

² JEFFREY S. SUTTON, *51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW* (2018).

³ JEFFREY S. SUTTON, *WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION* (2021) [hereinafter *WHO DECIDES*].

⁴ See, e.g., *Myers v. United States*, 272 U.S. 52 (1926) (holding that Congress cannot restrict the president's power to remove appointed executive branch officials); *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935) (holding that the president's removal power is not "illimitable"); *Morrison v. Olson*, 487 U.S. 654 (1988) (holding that the "good cause" removal standard in the Ethics in Government Act of 1978 did not "unduly trammel[] on executive authority").

⁵ *WHO DECIDES*, *supra* note 3, at 149.

⁶ *Id.* at 195.

⁷ *Id.*

⁸ See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (directing courts to defer to an agency's reasonable interpretation of a statute).

⁹ *WHO DECIDES*, *supra* note 3, at 211.

¹⁰ Compare *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737 (Pa. 2018), with *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

¹¹ *WHO DECIDES*, *supra* note 3, at 363–64.

¹² 5 U.S. (1 Cranch) 137 (1803).

¹³ *WHO DECIDES*, *supra* note 3, at 39.

¹⁴ See James Allan, *The Glorious Revolution and the Rule of Recognition*, 30 *CONST. COMMENT.* 509, 515 (2015).

¹⁵ *WHO DECIDES*, *supra* note 3, at 39.

¹⁶ For a thorough survey see Christopher R. Green, *Clarity and Reasonable Doubt in Early State-Constitutional Judicial Review*, 57 *S. TEX. L. REV.* 169 (2015).

¹⁷ James B. Thayer, *The Origin and Scope of the*

American Doctrine of Constitutional Law, 7 *HARV. L. REV.* 129 (1893).

¹⁸ ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990).

¹⁹ RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004 ed.).

²⁰ CLARK M. NEILY III, *TERMS OF ENGAGEMENT: HOW OUR COURTS SHOULD ENFORCE THE CONSTITUTION'S PROMISE OF LIMITED GOVERNMENT* (2013).

²¹ *WHO DECIDES*, *supra* note 3, at 65.

²² *Id.* at 68.

²³ *Id.* at 61–62.

²⁴ *Id.* at 99.

²⁵ See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 651 (1961) (justifying applying the exclusionary rule against the states due to a growing number of states who had recently done so under state law).

²⁶ As our Founding Fathers well knew, the British did this twice in the 17th century, chopping off the head of Charles I and ushering James II out of the country.

²⁷ N.W. Barber, *The Afterlife of Parliamentary Sovereignty*, 9 *INT'L. J. CONST. L.* 144, 145 (2011).

²⁸ THOMAS HOBBS, *LEVIATHAN* 129–41 (Michael Oakeshott ed., Simon & Schuster 2008) (1651).

²⁹ JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 42–51 (C.B. Macpherson ed., Hackett Publ'g Co. 1980) (1689).

³⁰ MD. CONST. of 1776, Dec. of Rights art. I, https://avalon.law.yale.edu/17th_century/ma02.asp.

³¹ MASS. CONST. pmbl., <https://malegislature.gov/laws/constitution#preamble>.

³² VA. CONST. of 1776, Dec. of Rights § 1, https://avalon.law.yale.edu/18th_century/virginia.asp.

³³ ILL. CONST. of 1818, art. VIII, § 1, <http://www.idaillinois.org/digital/collection/isl2/id/162>.

³⁴ IDAHO CONST. art. I, § 1., <https://legislature.idaho.gov/statutesrules/idconst/ArtI/Sect1/>.

³⁵ FLA. CONST. art. I, § 2., <https://files.floridados.gov/>

³⁶ media/693801/florida-constitution.pdf.
PENN. CONST. of 1790, art. IX, § 26, <https://www.paconstitution.org/wp-content/uploads/2017/11/const-1970-pa-archives-vol10.pdf>.

³⁷ Anthony B. Sanders, *Baby Ninth Amendments and Unenumerated Rights in State Constitutions before the Civil War*, 68 *MERCER L. REV.* 389, 391–92 (2017).