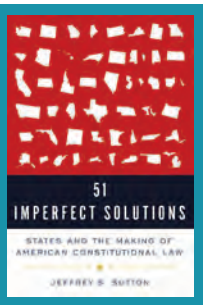
change agents

Looking to state constitutions for rights innovations

BY JEFFREY S. SUTTON



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EXCERPT FROM CHAPTER 2:
AMERICAN CONSTITUTIONALISM: A SECOND SOURCE OF POWER COMES WITH DUAL CONSTRAINTS ON THAT POWER

The point of this chapter is twofold: (1) to explain how we got here — how the bench and bar became so one-sided in their understanding of American constitutional law and diminished the States' constitutions in the process, and (2) to consider reasons for changing course — why American lawyers and judges (and citizens) would benefit from taking our state constitutions more seriously than they currently do.

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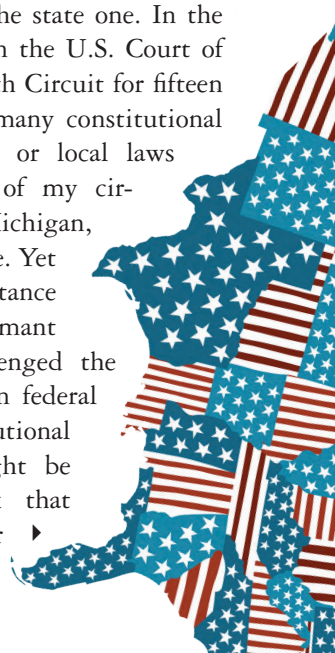
A few features of American constitutional law confirm the similarities between the two situations. In this country, state and local laws face two sets of constitutional constraints: those under the U.S. Constitution and those under the relevant state constitution. The Framers of the U.S. Constitution modeled all individual rights guarantees after guarantees that originated in a state constitution — usually one of the state constitutions ratified between 1776 (after, in most cases, the colonies declared independence from England) and 1789 (when the people ratified the U.S. Constitution). Take some of our most celebrated rights: free speech; free exercise of religion; separation of church and state; jury trial; right to bear arms; prohibitions on unreasonable searches and seizures; due process; prohibition on governmental taking of property; no cruel and unusual punishment; equal protection. *All* of them, and all of the other individual rights guarantees as well, originated in the state constitutions and were authored by a set of not inconsequential political leaders in the States, such as John Adams, Benjamin Franklin, Robert Livingston, James Madison, and George Mason.

The upshot is that American constitutional law creates two potential opportunities, not one, to invalidate a state or local law. Individuals who wish to challenge the validity of a state or local law thus usually have two opportunities to strike the law — one premised on the first-in-time state constitutional guarantee and one premised on a counterpart found in the U.S. Constitution.

Yet most lawyers take one shot rather than two, and usually raise the federal claim rather than the state one. In the course of serving on the U.S. Court of Appeals for the Sixth Circuit for fifteen years, I have seen many constitutional challenges to state or local laws within the States of my circuit: Kentucky, Michigan, Ohio, and Tennessee. Yet I recall just one instance in which the claimant meaningfully challenged the validity of a law on federal *and* state constitutional grounds. One might be tempted to think that federal judges hear ▸



lawsuits only under federal law. Don't be. We hear many state common law and state statutory claims. That's because our power to hear federal statutory and constitutional claims comes with authority to hear related claims that arise under state law. And our power to hear disputes between citizens of one State against citizens of another permits claims under state or federal law — or both.

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What we have today is not an inevitable feature of the Framers' vision. It is in reality quite remote from anything the Framers could have imagined. The original constitutional plan created largely exclusive federal and state spheres of power as opposed to largely overlapping spheres of power. Which makes sense: Why would a libertarian group of Framers, skeptical of governmental power and intent on dividing it in all manner of ways, have *doubled* the governmental bodies that could regulate the lives of Americans? And tripled and quadrupled them if one accounts for cities and counties? A system of largely separate dual sovereignty (federal *or* state power in most areas) has become a system of largely overlapping dual sovereignty (federal *and* state power in most areas). Good or bad, textually justified or not, this feature of American government is not going away. American constitutional law today thus permits at least two sets of regulations in every corner of the country and what comes with it: the potential for dual challenges to the validity of most state or local laws. That has been true since the end of the Warren Court for most liberty guarantees, and it is difficult to envision a scenario in which that reality disappears.

This history, much abridged for sure, suggests two explanations for the seeming reluctance of lawyers and courts to take one part of American constitutional law seriously. The first is a function of time. Because it took until the 1960s for the U.S. Supreme Court to complete the individual rights revolution by incorporating most of the Bill of Rights into the Fourteenth Amendment, it was not until then that American lawyers, law schools, and state courts had any reason to think about using state and federal court systems, and state and federal constitutions, to vindicate civil rights. We thus are not talking about a set of litigation opportunities, a litigation strategy, that existed for most of American history. It's been roughly fifty years since the U.S. Supreme Court completed much of this transformation. That's not a long time, less than a fourth of American legal history. And that's even less time if we consider the most recently incorporated right: the Second Amendment in 2010.

The second reason emerges from a central explanation for the success of the federal rights revolution: the States' relative underprotection of individual rights. Who could blame lawyers and their clients for being reluctant to develop a strategy built in part on state constitutional rights? The U.S. Supreme Court recognized many of the rights it did between the 1940s and the 1960s *because* many state courts (and state legislatures and state governors) resisted protecting individual rights, most notably in the South but hardly there alone. One can forgive lawyers from this era for hesitating to add state constitutional claims to their newly minted federal claims. Why seek relief from institutions that created the individual rights vacuum in the first place?

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EXCERPT FROM CHAPTER 9: EPILOGUE

When told in full, [the stories told in the book] provide a healthy counterweight to received wisdom. They show the risk of relying too heavily on the U.S. Supreme Court as the sole guardian of our liberties as well as the farsighted role the state courts have played before in dealing with threats to liberty. Even the most acclaimed individual rights decision in American history, *Brown v. Board of Education,* is more complicated than it might at first appear when it comes to the role of the States and national government in rights protection. It's worth remembering the other half of that story. The companion case to *Brown* was *Bolling v. Sharpe*, in which the Court demanded the end of segregation in the public schools of the District of Columbia, an enclave controlled by the federal government, not a State. Those who place complete faith in just *one* branch of American government to protect their rights will eventually be disappointed.

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All of this prompts an essential question, one of the most crucial underlying this book. What is it about the issues in *San Antonio Independent School District v. Rodriguez, Mapp v. Ohio, United States v. Leon, Buck v. Bell,* or *Minersville School District v. Gobitis* (or for that matter, *Kelo v. City of New London* or *Employment Division v. Smith* or *Baker v. Nelson)* that prevented Supreme Court defeats from becoming the death knell of the claimants' objectives and instead spurred equally promising, if not more promising, state and local initiatives? Why in these areas? Why not others?

A common thread in many of these examples — and others in which the States have been leaders rather than followers — is the complexity of the problem at hand. While national interest groups will invariably favor winner-take-all approaches, complexity often stands in the way. The more difficult it is to find a single answer to a problem, the more likely state-by-state

variation is an appropriate way to handle the issue and the more likely a state court will pay attention to an advocate's argument that a single State ought to try a different approach from the one adopted by the National Court. Just as the intricacy of a problem might prompt different, even competing, answers, it might prompt state courts (and legislatures) to pace change at different speeds. In many areas of law affected by changing social norms, the most important question is not whether but when, not whether but by whom.

A second consideration prompted by these stories is accountability. When the U.S. Supreme Court shifts the spotlight from the national to the local stage, it clarifies the lines of authority.

A third consideration relates to the selection method for most state court judges: elections. Dissonant though it may sound, judicial elections sometimes are the friend of innovative individual rights litigation, not its enemy. Some supposedly countermajoritarian constitutional issues are not countermajoritarian at all when presented effectively to elected state court judges. Just as there may be politically functional and politically dysfunctional issues in legislation, the same may be true in litigation. And the two do not always overlap. That reality may explain why these education, criminal procedure, property-rights, free exercise, and eventually marriage issues resonated with some state-elected judges but not life tenured federal judges. In the Ohio school-funding litigation, in which I represented the State, I thought it helped the plaintiffs — the advocates of change — that the justices of the Ohio Supreme Court were elected. I say this not to plug one method of appointment over another but to show that traditional assumptions about judicial elections and constitutional guarantees may not always hold true.

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Even the crudest electoral practicalities do not invariably warrant distrust in the capacity of state court judges to construe their constitutions independently. Truth be told, there are many settings in which judicial elections should lead to *more* state court independence from the U.S. Supreme Court, not less. Aren't there many federal constitutional rulings that *increase* the scope of a protected right and with which elected judges in some States disagree? And with which a majority of the electorate in those States disagree? Aren't there many federal constitutional rulings that *decrease* the scope of a protected right and with which elected judges in some States disagree? And with which a majority of the electorate in those States disagree? The answer of course will depend on the issue and the State. Think about it another way. Surely there are originalist justices on the state courts who disagree with living constitutionalist U.S. Supreme Court decisions. And surely the opposite is true. Electoral practicalities often should liberate, not confine, state court judges in following their own interpretive approaches.

An objective of this book is to urge a few modest steps toward closing the gap between *one* feature of the original design of American government and current practice by returning the States to the front lines of rights protection and rights innovation. As written, the U.S. Constitution was *not* designed to facilitate rights innovation, whether through Congress or the courts. The document contains one blocking mechanism after another, all quite appropriate given the potential breadth of power exercised by the federal branches. As written, the state constitutions were change incubators, governing smaller, often more congenial populations with shared world views. And the state constitutions were, and remain, easy to amend. Unlike the Federal Constitution, the state constitutions are readily amenable to adaptation, as most of them can be amended through popular majoritarian votes, and all of them can be amended more easily than the federal charter. The design of each charter signals that the States were meant to be the breakwater in rights protection and the national government the shoreline defense.

Increasing the salience of the state courts and state constitutional law honors some worthy traits of the original federal constitutional framework, most notably its conspicuous horizontal *and* vertical separations of powers. If there's one feature of American government worth preserving over every other, it's that differentiated lines of constitutional structure — honored and undiluted — preserve liberty. Only by retaining a balance of authority among the branches do we keep the most malignant risks to liberty at bay.

A revival of independent state constitutionalism not only might return us to something approximating the original design, but it also might ease the pressure on the U.S. Supreme Court to be the key rights innovator in modern America. Why not put the state constitutions, state courts, and state legislatures on the front lines (or more precisely return them to the front lines) when it comes to rights innovation? Even if one accepts that many of the Warren Court decisions were for the good as a matter of policy, and even if one assumes that the States brought this diminishment of authority upon themselves, that does not tell us what to do next. All essential constitutional questions ultimately come down to structure. And structure concerns who, not what — who should be the leading change agents in society going forward, not looking backward. One point of telling these stories is to make the case that it's time to shift the balance back to the state courts.

While nearly all interest groups and most Americans seem to remain comfortable with using the U.S. Supreme Court (as opposed to the state courts) as their preferred change agent, it's easy to wonder how long this can last and to worry how it will end. So long as we insist on casting the Court in this role, two things are inevitable: The people will care deeply about who is on the Court, and the people will criticize the Court, as opposed to the elected branches, when five justices do not do their bidding. The confirmation process — picking justices to resolve structural and individual rights debates known and unknown for the next twenty-five to thirty years — is not well-equipped to handle the first development, and the Court as an institution is not well-equipped to respond to the second.

Whatever the prospects for change through state constitutions and state courts may have been in the 1950s and 1960s, I have a hard time understanding why they remain inappropriate vehicles for rights innovation in the twenty-first century — and why they should not be the lead change agents going forward. When Justice Brandeis launched the laboratory metaphor for policy innovation, he used the plural, not the singular, signaling an interest in hearing how the States in the first instance would respond to new challenges. A single laboratory of experimentation for fifty-one jurisdictions and 320 million people poses serious risks. A ground-up approach to developing constitutional doctrine allows the Court to learn from the States — useful to pragmatic justices interested in how ideas work on the ground, useful to originalist justices interested in what words first found in state constitutions mean. It gives both sides to a debate time to make their case. And it places less pressure on the U.S. Supreme Court. The Court may wait for, and nationalize, a dominant majority position, lowering the stakes of its decision in the process. Or it may treat occasionally indeterminate language in the way it should be treated, as allowing for fifty-one imperfect solutions rather than one imperfect solution.

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