

## Enhancing the Role of States in Making Constitutional Law

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Jeffrey S. Sutton, **51 Imperfect Solutions: States and the Making of American Constitutional Law** (2018).

Jeffrey Sutton has much to teach us about the role of courts, state and federal, in making constitutional law. Sutton, well-known for his work as a judge on the United States Court of Appeals for the Sixth Circuit, has drawn on years of experience and research in this book-length rumination on the way state courts (and constitutions) can contribute to constitutionalism more broadly. Sutton served for some years as the solicitor general of Ohio, and knows the joys and heart-breaks of state constitutionalism first hand. Indeed, among the many happy turns of phrase in the book, one finds Sutton (many years after the fact) wistfully pursuing motions to reconsider the adverse decisions that most set his teeth on edge.

Sutton approaches his task with a deep appreciation of modern constitutionalism and an eye and ear for storytelling keen enough to engage readers both learned and lay. In brief, Sutton, argues, we have mistakenly come to view federal or national constitutionalism as the only game in town and have slighted state constitutionalism as a source of rights. Sutton describes a world hungry for rights articulation and suggests that state courts might play a more active role in the process. Sutton encourages lawyers to mount more state constitutional challenges, thereby giving their clients an extra shot at success. He also encourages state courts to take their own constitutions more seriously, noting that these documents often contain provisions missing from their national counterpart.

Sutton's argument for state constitutionalism would advance three related goals. He invokes the familiar Brandeis idea of states as laboratories, extending it to judicial experimentation with constitutional rights. Rather than locking us all into a single national solution, state constitutionalism can flex in light of local conditions. States might vary in terms of the strictness with which they enforce the right to bear arms, depending on whether they tend to worry more about urban gun violence or the preservation of a rural hunting ethos. Other states, depending on their own history and patterns of migration and settlement, might take different views of the free exercise of religion or the guarantee of compensation for the taking of private property.

Apart from allowing states to experiment and adapt constitutional guarantees to local conditions, Sutton's vision of state constitutionalism would allow the national courts to draw on state experience in considering when to nationalize a particular set of rights. Sutton points to the way the Court in [Mapp v. Ohio](#) drew on the experience of the states with the exclusionary rule, in contrast to [Buck v. Bell](#), in which the Court, through Justice Holmes, refused to take opposing state court decisions seriously in the course of upholding the forced sterilization of Carrie Buck. Sutton's dismay with Holmes, who upheld the Virginia law less as a dispassionate judge and more as an enthusiastic cheerleader for eugenics, leaps off the page. Sutton also observes that state courts led in developing a guarantee of same-sex marriage equality, providing the [Obergefell](#) Court with signposts to guide its way.

Finally, Sutton argues that, by virtue of their knowledge of local conditions and politics, state courts can better "manage" the implementation of the new rights they recognize than the far-away Supreme Court. Sutton offers the school finance cases as a lesson, tracing how state courts responded after the Supreme Court [rejected an equal protection challenge to school funding disparities](#). Sutton sees the complexity in how states fund their public schools and doubts that the Supreme Court could have articulated a standard that would apply effectively to the wide array of local arrangements. He contrasts national incapacity with the more nuanced appreciation that state judges brought to task of reworking school funding decisions. While he recognizes some state-to-state disparities, Sutton views the state experience as a qualified success—virtually every state has re-worked its school funding models, without needing a

federal obligation to do so.

Sutton proposes changes in the way state courts resolve constitutional claims. State courts facing challenges to state action based on parallel provisions of the state and federal constitution typically decide the federal question first. This sequencing stultifies state constitutionalism. Many state courts also interpret parallel state provisions in lockstep with their national constitutional counterpart and decline to give any independent content to state constitutional guarantees. Sutton would have state courts step out on their own, developing pockets of independent law that might grow over time as the judges gain greater confidence. Sutton asks law schools to give greater attention to state constitutionalism, hoping to generate more interest and more action as it were. Along the way, he devotes thoughtful attention to Justice Brennan's attempt, some forty years ago, to encourage development of state constitutional law.

This bracing effort to revive state constitutionalism will open eyes and might change constitutional practice. One can, of course, question one or two particulars. The Supreme Court does not stand alone in crafting constitutional rights or in managing their implementation. Having learned the lessons of *Brown*, the Court relies extensively on the creativity and energy of lower federal court judges to carry its pronouncements into effect. In thinking about how courts might manage a guarantee of equality in school funding, Sutton may focus too much on the comparative isolation of the Supreme Court and too little on the managerial capacity of local federal district judges. Sutton's account of the role of federalism in constitutional rights development may also teach unexpected lessons about the viability of originalist precepts. He explains that one cannot premise a national constitutional right on "local traditions, cultures, or history . . . of one region of the country or one group of citizens." While addressed to constitutional lawmaking today, this analysis may cast doubt on the relevance of the traditions, cultures, and history that surrounded the relatively narrow slice of individuals who made up the founding generation. If so, that is just one of the many insights one gains from reading this lively and informative book.

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