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Book Review: 51 Imperfect Solutions: States and the Making of American Constitutional Law, by Hon. Jeffrey S. Sutton

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Book Review

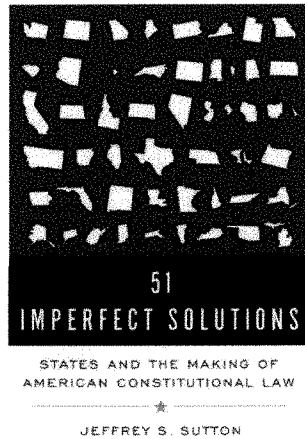
51 Imperfect Solutions: States and the Making of American Constitutional Law by Hon. Jeffrey S. Sutton

The Hon. Jeffrey S. Sutton, a judge on the United States Court of Appeals for the Sixth Circuit, has written an excellent book on the importance of state constitutions as bulwarks against state abuse and the source of protections of individual rights. The book, *51 Imperfect Solutions: States and the Making of American Constitutional Law*, argues that individual rights are more secure when both federal and state constitutional protections are strong. And our system of federalism and the quality of state and federal judicial decisions are improved when there are state constitutional safeguards.

Written for lawyers and non-lawyers, the book is well-researched and well-written, and, as readers of his judicial opinions know, Judge Sutton's style is fluid and non-pretentious.

The book has three distinct parts. The first part contains Judge Sutton's views about the proper functioning of our federal judicial system and the double source of protection provided by the existence of both state and federal bills of rights. The second part consists of four chapters which tell stories that involved, directly and indirectly, state constitutions. Though focused on state constitutional law nationally, the book contains a chapter about school funding litigation in which Ohio and the *DeRolph* case played prominent roles. It also includes chapters on the Jehovah's Witness/flag salute cases, the forced sterilization/eugenics decision (in which Justice Oliver Wendell Holmes,

Jr. proclaimed that "three generations of imbeciles are enough"), and the exclusionary rule decisions in *Mapp v. Ohio* and its progeny.



In the final part of the book, Judge Sutton addresses the important question going forward: what should be done to permit state constitutions to play their rightful role in our system of judicial federalism? After all, state constitutions and their bills of rights—at least in the original colonies—came before the federal Bill of Rights.

In Judge Sutton's view, state courts should adopt the primacy approach under which they decide state constitutional issues before reaching federal ones, and they should require lawyers to brief state constitutional issues first and separately. Most importantly, state courts should avoid "lockstepping," the practice of accepting presumptively federal interpretations of analogous rights and only departing from the federal model in special

cases. Lawyers who might complain about the extra work required by the primacy approach will find that Judge Sutton has "little sympathy" for those who do not want "the chance to shape arguments on a clean slate." These reluctant lawyers should simply get used to presenting state constitutional arguments based on the unique language, purpose and history of state provision without undue reliance on federal law. Law schools can help by adding state constitutional law to the curriculum, and bar examiners should include state constitutional issues on bar exams.

What is remarkable about this book is not its thesis—U.S. Supreme Court Justice William J. Brennan, Jr., said many of the same things about the importance of state constitutions four decades ago—but who is saying it. It is rare for federal judges to opine on state constitutional law, but Judge Sutton is preeminently qualified to do so. A former State Solicitor of Ohio, he has taught a course on State Constitutional Law at the Moritz College of Law, he has lectured about state constitutional law throughout the country, and he is co-editor of one of the leading law school casebooks on state constitutional law.

As for Judge Sutton's views on the merits of state constitutional claims, he is appropriately judicious. He criticizes Justice Brennan's plea for resort to state constitution as too result-oriented, preferring instead a more principled

state constitutional jurisprudence, but he tells us little about what such a jurisprudence would look like beyond his trenchant criticism of “lockstepping” and his support of the primacy approach (which he notes is followed in only three states). Nonetheless, Judge Sutton has performed an important service to the bench, the bar, and the public by raising these issues and bringing us to the starting line.

To bring this discussion closer to home, one should ask what is it about Ohio’s legal, political, economic, and social history that supports placing limitations on warrantless misdemeanor arrests that the U.S. Supreme Court has rejected under the Fourth Amendment? What justifies a more robust Ohio free exercise doctrine than the U.S. Supreme Court embraces under the First Amendment? And what supports providing greater state constitutional protection for property than is provided under the federal Takings Clause?

To address these and many other state constitutional issues, we must identify the tools for building a state-focused constitutional jurisprudence. One must begin with the text, but we are fortunate to have verbatim transcripts of the Proceedings at the 1850-51 and Progressive-Era 1912 Ohio Constitutional Conventions. But these sources tell us little about the original Ohio Bill of Rights and the legal, political, economic, and social history that can inform judicial decision-making. And does one only look to the law and history of Ohio or should we also look to the other states that were carved out of the Northwest Territory? And does the legal culture of staid New England, which sent many of its citizens to northeastern Ohio, or the values of the rebellious south, from which many early Ohio political leaders emigrated, play a role? These are not easy questions.

Finally, I end with a caveat. State constitutional law is not for the faint of heart, and like federalism, as Justice Sutton notes, has no constituency. For some, state constitutions mean marriage equality, better school funding, expanded gun ownership, and increased protection of private property. State constitutional decisions cut different ways, and those only interested in the substantive result—which today seems to be almost everyone—will often not be pleased with the prospect of a strong state bill of rights. But that is how Judge Sutton sees it, and the strengthening of state constitutional law will give lawyers additional tools to represent the interests of their clients. And, in the long run, according to both Judge Sutton and Justice Brennan, our constitutional system will be stronger.

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