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Browning Symposium Opening Comments

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BROWNING SYMPOSIUM OPENING COMMENTS

Jeffrey S. Sutton*

I. OPENING

Hello, thank you. I am so thrilled to be with you all. You know, you write a book, you learn who your friends are. You write a second book, and you *really* learn who your friends are.

I will talk for roughly half an hour and hope that leaves time for some questions. I enjoy being challenged and hearing how people respond to what I am saying. I am going to pick up on some themes from my book that seem to apply to what is going on in the country concerning American constitutional law, judicial review, and state governments.

If I had one overarching point, which I think is consistent with the theme of this Browning Symposium, it is that in America, it is tricky to figure out what should be national and what should be local. So often, what we want to be national is what we really care for and like. What we are willing to tolerate as local is what we do not care for. But it is not quite so simple. America is a vast, diverse country, and our 330 million American neighbors have an awful lot of perspectives. I think it is an American phenomenon trying to figure out what is local and what is national, and above all, constantly recalibrating the balance to account for the issues of the day.

I will start with the judicial perspective, which, as a judge—no surprise—is one I care a bit about.

II. JUDICIAL REVIEW

One thing I found interesting in working on this book is the history of judicial review and the role of the courts in American society. It is hard to find a country in world history where state and federal courts play such a significant role. When we think of judicial review as the authority of a court to invalidate a statute or an executive branch order, we think of *Marbury v. Madison*.¹ But the reality is that, had there been no John Marshall, had there never been an election of 1800, and had there never been a Marbury or a Madison, we would still have judicial review in this country. This is because the state courts were already doing it long before 1803.²

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1. 5 U.S. 137 (1803).

2. See William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455, 508–17 (2005).

In trying to think about the proper role of courts when deciding to invalidate democratically enacted laws or executive branch orders, it's interesting to go back to how these early state courts thought about it. One thing you see with these early decisions is that state courts did not have much doubt about the concept of judicial review.³ For them, there was little pause over its legitimacy. In reality, they thought it was their duty to engage in it. The way they thought about judicial review can be shown in what were called superior and inferior laws.

Of course, the English system did not have a written constitution, so it did not provide a judicial review model that the early American states could follow from England. However, the English system did distinguish between superior and inferior laws.⁴ If there was a conflict between an inferior and a superior law, the superior law would trump the inferior one.⁵

The existence of inferior and superior laws provided a handy analogy for the early American state court judges. They thought of state constitutions, quite understandably, as superior laws relative to state statutes or state executive branch orders.⁶ So, on the one hand, judicial review was not just legitimate; it was part of a judge's duty to honor the superior law when the two conflicted.

On the other hand, the early state judges were cautious and tried to avoid conflict. When you think of the concept of constitutional avoidance, construing a statute to avoid a conflict, they often did what they could within reason to avoid any conflict between their state constitutions and inferior laws.

This pre-1803 phase of American judicial review offers useful insights for sorting out the proper role of judges today. Yes, we judges have a duty to honor the superior law of a constitution, whether state or federal, but we should not lightly say that the two conflict.

This leads to another point, also relevant today. Think of the *Bruen*⁷ case, the Second Amendment right-to-bear-arms case decided last Term at the U.S. Supreme Court. *Bruen* is a history-driven decision, just like its predecessor, *Heller*.⁸ This prompts the question, perhaps anxiety, of whether people like me can fairly figure out the original public meaning of guarantees written in 1791 with roots that sometimes go back well before then.

3. *Id.* at 457–58.

4. See Philip Hamburger, *Marbury and Its Legacy: A Symposium to Mark the 200th Anniversary of Marbury v. Madison: Forward*, 72 GEO. WASH. L. REV. 1, 12 (2005).

5. *Id.*

6. See *Respublica v. Duquet*, 2 Yeates 493, 501 (Pa. 1799).

7. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022).

8. *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008).

In one sense, I am not troubled by judges analyzing history. We may not be experts, it is true. But the same could be said about many complicated disputes we are asked to referee, whether patent disputes, medical malpractice cases, antitrust or securities cases.

The reason we trust federal judges to referee these disputes turns not on pre-existing expertise—that judges understand all the ins and outs of each complicated area. It is because we trust the adversarial process. Good lawyers will either learn what they need to know to present the case to us or bring an expert of their own or an *amicus curiae* into the case. Eventually, we will figure out the decision point, and through the adversarial process, we will determine who should win. Something similar happens in cases that turn on history and tradition.

As intricate legal problems go, moreover, history is a subject lawyers already know something about. So much of law is history. If you want to say the law is backward-looking, fair enough. In reality, every legal dispute is backward-looking in some sense. Even so, we judges should be humble about our capacity to figure out the meaning of something written in the 18th century. That takes us back to how judicial review was handled at the outset—in the first state court cases.

I said that early state court judges tried to avoid a conflict whenever possible. One way they avoided the conflict was to say, “We’re going to construe the statute so that it does not conflict with the constitution.” At the same time, they would not invalidate a statute unless the constitution clearly applied, unless a clear rule arising out of the constitution’s text and history conflicted with the statute.

These lessons and early state court practices offer a constructive way to think about judicial review today. By placing the burden on the party asserting that an 18th-century or 19th-century provision clearly applies to a modern dispute, these early courts offered a way to cabin the risk that parties and judges will see what they want to see in handling a constitutional case. No one wants, or at least no one should want, inquiries into constitutional history to look like assessments of legislative history in statutory cases, in which people look for friends in the crowd and pick the ones they like. The early state court judges, in exercising judicial review, offer revealing lessons for curbing this peril.

III. INTERPRETING STATE CONSTITUTIONS

While I have touched on this point before,⁹ I want to talk about why state courts have an independent duty to look at the meaning of their state

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

constitutions—why they should avoid the temptation to engage in lockstepping. The idea behind lockstepping is that state courts take a provision in a state constitution, such as a due process or search-and-seizure guarantee, and presume the Montana constitutional guarantee mimics its federal counterpart. I won't go through all the reasons why this does not make sense, but I want to emphasize a few.

One oddity about lockstepping is that the federal guarantees originated in state constitutions.¹⁰ They did not originate in the 1789 Federal Constitution; they did not originate in the 1791 Bill of Rights. They were all borrowed—cut-and-pasted, if you will—from the early state constitutions adopted between 1776 and 1786.¹¹ So, it is strange to think that the meaning of the later federal guarantee should somehow dictate the meaning of the earlier state guarantees.

Another oddity occurs when state courts (not the Montana Supreme Court, I expect) proclaim that they follow the federal interpretation now *and* will do so in the future. That state court, in other words, locksteps into the future.¹² But who takes a trip without knowing the destination? How strange for a state court to follow the U.S. Supreme Court wherever it happens to go—whether increasing rights protection or, for that matter, decreasing rights protection.

Let me emphasize some other reasons why state courts should take their independent duty to construe their own constitutions seriously. Many of these guarantees—particularly the ones we fight the most intensely about—are written in general language. Take the words “unreasonable,”¹³ “cruel and unusual,”¹⁴ “free speech,”¹⁵ and “free exercise.”¹⁶ You would think this general language would demand disagreement as opposed to lockstep consensus. It strikes me as an area where state courts can, and probably should, customize the meaning of these general words to account

10. Joyce A. McCray Pearson, *The Federal and State Bills of Rights: A Historical Look at the Relationship Between America's Documents of Individual Freedom*, 36 *How. L.J.* 43, 49–50 (1993).

11. *Id.*

12. *See* *State v. Brown*, 930 N.W.2d 840, 908 (Iowa 2019) (Cady, C.J., dissenting) (citing examples of state court decisions that chose to lockstep its state constitutional search and seizure provisions with federal precedent: *Gama v. State*, 920 P.2d 1010, 1012 (Nev. 1996) (“reversing course from prior precedent and noting the Nevada Constitution provides no greater protection than that afforded under the Federal Constitution”); and *State v. Vineyard*, 958 S.W.2d 730, 733–36 (Tenn. 1997) (“holding in the context of pretextual traffic stops that the Tennessee Constitution is coextensive with the Fourth Amendment”).

13. *See* U.S. CONST. amend. IV.

14. *See id.* amend. VIII.

15. *See id.* amend. I; *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 566 (1995).

16. *See* U.S. CONST. amend. I; *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 297–98 (1963).

for local circumstances in their history, culture, politics, you name it. This happens to be a welcoming feature of federalism, not a problem with it.

As much as I love the federal courts and think federal judges do the best they can in construing these general terms, moreover, I can't say we always get it right—or at least I can't confidently assert we always get it right. On reflection, some areas of federal constitutional law have not aged well. Tiers of federal review come to my mind. This approach made some sense when we had just two to pick from: strict scrutiny review and rational basis review. Then intermediate scrutiny entered the picture. After that came rational basis plus. One professor says we now have seven tiers of review.¹⁷ It has become almost biblical. On day one, God gave us rational basis. On day two, God gave us strict scrutiny. And so forth and so on.

The key takeaway for me is this: How could anyone reflexively say the federal tiers-of-review model is the unimpeachable answer for dealing with all legislative classifications under state constitutions? Now is a good time for state judges to remember their own histories. Long before tiers of review, state judges innovated the idea of class legislation as a way of thinking about statutory classifications, which are usually at the core of equal protection cases.¹⁸ Either way, why lockstep with an elusive doctrine that does not seem to be working well?

Is it possible, I am sometimes asked, that state court judges presume that federal law dictates the meaning of a similar state guarantee because state court judges are elected in partisan or non-partisan elections, as is true in Montana?¹⁹ But one would have thought elections would liberate local state court judges from the pull of Washington, D.C., not the other way around. Imagine if I ran for the Montana Supreme Court, and imagine I were asked how I would deal with tough questions of state constitutional law. Suppose my response was, “Well, if it gets complicated, I ask myself what the people in D.C. think the right answer to the meaning of due process is.” I can't imagine that is a winning approach to getting elected to the Montana Supreme Court or any court in Montana. One would think local elections would lead to local pride, and local pride would lead to fierce independence regarding the meaning of state constitutions.

Let me shift to a distinct benefit of independent state constitutionalism. The independent construction of state constitutions may inform what should be national and what should be local by creating a meaningful dialogue

17. Randall R. Kelso, *Standards of Review Under the Equal Protection Doctrines Protecting Individual Rights: The “Base Plus Six” Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 256 (2002).

18. William N. Eskridge, Jr., *A Pluralist Theory of the Equal Protection Clause*, 11 U. PA. J. CONST. L. 1239, 1247 (2009) (part of *Symposium: The Second Founding*).

19. MONT. CONST. art. VII, § 8.

between the state and federal courts. Sometimes the U.S. Supreme Court innovates in ways that add meaning to language in a constitutional provision and other times it may dilute the meaning of a federal guarantee. Both settings leave considerable room for state courts, parties, and interest groups to respond.

When the U.S. Supreme Court seems to dilute or underenforce a federal guarantee—say, a free speech, free exercise, or search-and-seizure guarantee—it leaves a gap in coverage. Independent-minded state courts are free to construe their state constitutions to fill this gap. Search-and-seizure cases illustrate the point because every state, including Montana, protects against “unreasonable search and seizure” or something similar.²⁰ If the federal courts offer a stingy interpretation of the national guarantee, the state courts (and even state legislatures) have a significant role to play in deciding whether to protect what the federal courts have not protected.

There are plenty of opportunities in this country for fill-in-the-gap rulings by state courts. In the last year, for which I have the rough numbers, the federal courts had about 400,000 criminal and civil cases.²¹ The counterpart number for the state court system is 40 to 50 million.²² The vast majority of the 40 to 50 million state court cases offer a two-shot opportunity—to win under the federal constitution or the state constitution.

What about a U.S. Supreme Court ruling that potentially errs in the other direction—by innovating a protection that is not there or at least arguably not there? The traditional assumption is that state courts and lawyers have no role to play in this setting. After all, the Supremacy Clause of the U.S. Constitution requires state courts to honor the U.S. Supreme Court’s interpretations of the U.S. Constitution.²³ In one sense, that is true. A state court must honor the U.S. Supreme Court’s interpretation of the U.S. Constitution. But that still leaves room for state court input.

Let me illustrate the point. Many of you know *Citizens United*,²⁴ a federal case decided in 2010 that interpreted the free speech guarantee of the federal First Amendment to limit the capacity of state legislatures to restrict campaign contributions to political candidates or political parties.²⁵

20. See *id.* art. II, § 11.

21. See, e.g., *Federal Judicial Caseload Statistics 2021*, U.S. COURTS, <https://perma.cc/59MR-SKVK> (last visited Oct. 26, 2022).

22. *Caseload Detail – Grand Totals*, COURT STATISTICS PROJECT, <https://perma.cc/C6Y7-6753> (last accessed Nov. 20, 2022).

23. *Tipton v. Mont.* 13th Jud. Ct., 421 P.3d 780, 788 (Mont. 2018).

24. *Citizens United v. FEC*, 558 U.S. 310 (2010).

25. *Id.* at 319 (“The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether.”); *id.* at 411 (Stevens, J., with Ginsburg, Breyer, Sotomayor, JJ., dissenting) (“Today’s decision takes away a power that we have long permitted these branches to exercise. State legislatures have relied on their authority to regulate corporate electioneering . . . for more than a century.”).

It was a close 5–4 decision.²⁶ Acknowledging the risks of generalization, I nonetheless suspect most progressives would put *Citizens United* at the top or near the top of their list of U.S. Supreme Court cases they would like to see overruled.

As it happens, the Montana courts faced a similar challenge the year after *Citizens United*. Montana at that point still had a law limiting corporate contributions to political candidates and parties.²⁷ It was challenged, largely on federal free speech grounds, based on *Citizens United*.²⁸

The case proceeded to the Montana Supreme Court.²⁹ The Court wrote an opinion to the effect that, whatever *Citizens United* means as a matter of federal constitutional law throughout the rest of the country, it was difficult to grasp how any constitution could limit the Montana Legislature’s ability to place caps and other regulations on corporate contributions to political parties.³⁰ The Court pointed to Montana’s unhappy copper baron era, when the copper companies generated a lot of wealth and used that money to influence state legislators, state courts, and the state governor to enact laws that protected their corporate interests.³¹ This was not a healthy chapter in Montana’s history as a matter of governance. The Montana Supreme Court rightly pointed to that history and wondered: How could it be that, given this history, we have to let this happen again?³² In making this point, the decision addressed the meaning of the federal Free Speech Clause.³³

The U.S. Supreme Court summarily reversed the Montana Supreme Court. With *Citizens United* still on the books, the Court explained that the Supremacy Clause required state courts to follow it.³⁴ The dissenters were the same dissenters from *Citizens United* and said *Citizens United* ought to be overruled.³⁵

How might the Montana case have been argued differently? How might it have been written differently? I could imagine a decision that made these essential points.

26. Justice Kennedy authored the majority opinion, joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito. Justice Stevens dissented, joined by Justices Ginsburg, Breyer, and Sotomayor. See *id.* at 372 (Roberts, C.J., with Alito, J., concurring); *id.* at 393 (Stevens, J., with Ginsburg, Breyer & Sotomayor, JJ., dissenting).

27. *W. Tradition P’ship v. Att’y Gen.*, 271 P.3d 1, 3 (Mont. 2011).

28. *Id.* at 4–5.

29. *Id.* at 1.

30. *Id.* at 13.

31. *Id.* at 8–11.

32. *Id.* at 11–12.

33. *W. Tradition P’ship*, 271 P.3d at 5–6.

34. *Am. Tradition P’ship, Inc. v. Bullock*, 567 U.S. 516, 516–17 (2012).

35. *Id.* at 517 (Breyer, J., with Ginsburg, Sotomayor & Kagan, JJ., dissenting). By this time, one of the *Citizens United* dissenters, Justice Stevens, had retired from the Court. Justice Kagan, who joined the Court after being nominated to fill this vacancy, joined the remaining *Citizens United* dissenters in *American Tradition Partnership*.

One: This is a challenge on free speech grounds to Montana's corporate contribution limits. In Montana, two free speech clauses potentially apply. One arises under the Montana Constitution's Declaration of Rights,³⁶ and the other under the Federal Constitution.

Two: We will start with the local constitution. This is usually the best place to start given that the state constitution covers less territory and given that any ruling would apply only in Montana.

Three: The Montana Supreme Court could have explained its history with respect to corporate capture of the organs of state government. Then it could have explained that it is inconceivable that Montana's free speech guarantee³⁷ would prohibit regulation of corporate contributions to political campaigns. Then the Court could have ended with the punch line that in Montana the Free Speech Clause protects speech and not money.

Four: The Court's resolution of the federal claim could have required one sentence to this effect: "So long as *Citizens United* remains good law—and we hope not for long—we must follow it under the Supremacy Clause, and therefore we invalidate this corporate contribution limit."

Some of you may be wondering: What good would that do? The dispute over the validity of the state law still ended with its invalidation. Fair point. Even so, what this kind of approach would have accomplished is something that matters a great deal in American federalism. There is, and there should be, a dialogue between state courts and federal courts about the meaning of these general guarantees, about the right way to think about reform, and about the best ways to get these decisions right as a matter of pragmatism, living constitutionalism, or originalism.

Let us imagine a state court had written an opinion along these lines in 2011. Is it not possible that other like-minded state courts would have followed suit by now? Is it not possible that these courts might have done so on a variety of grounds, perhaps originalist, perhaps pragmatic? All of this is healthy in a federal system—not because *Citizens United* is necessarily wrong but because no decision should be beyond respectful second-guessing by our 51 court systems. This is a strength, not a weakness, of federalism. In the end, whether U.S. Supreme Court decisions are perceived as unduly diluting guarantees or unduly innovating them, there is a role for state courts to play in response.

36. See generally MONT. CONST. art. II.

37. *Id.* art. II, § 7.

IV. TERRITORIES SEEKING STATEHOOD

Let me turn to another chapter in Montana history. Before writing *Who Decides?*,³⁸ I knew little about the territorial phase of American history—about the states that gained statehood after the initial colonies became states.³⁹ Montana’s territorial chapter is from 1864 to 1889.⁴⁰ What’s interesting about that experience in Montana and elsewhere—whether in the Midwest, Southwest, or West—is what motivated the people to leave territory status and become states.

Territorial status meant the area was a federal enclave. Think of the relationship of the colonies *vis-à-vis* the Crown. But here, all power came from D.C., not Britain. The territories had governors, but they were governors appointed by U.S. presidents. There were territorial supreme courts, but U.S. presidents appointed their members. The same was true of the early legislatures.⁴¹ Once you had enough people in this territory, you could elect your local legislature, but federal law loomed large, and federal officials ultimately controlled things.⁴²

One motivation for people in the territories to seek statehood was the opportunity to write their own laws, write their own constitutions, elect their own governors, and choose their own judges. It grated on people in the territories to live under the rule of carpetbagging. It was mainly those with close connections to a president or a political party, usually people from the East Coast, who would receive appointments as governors or state court judges, all with little knowledge about the area they were governing.

One story in *Who Decides?* illustrates the problem in an amusing way. A trial was about to be held. The judge recently arrived in Montana from the East Coast. At the beginning of the trial, he notices one of the jurors does not have a suit jacket. He says to the bailiff, “This is an important proceeding. Everybody should be formally dressed. Please ask the juror to go home and put on a more appropriate outfit.” The bailiff does just that. The juror leaves the courtroom. Fifteen minutes go by. A half hour goes by, and the judge finally says to the bailiff, “When will this juror be back?” The bailiff responds, “Well, sir, he lives about 15 miles away and just got on his horse. He will get back as soon as he can.”

38. JEFFREY S. SUTTON, *WHO DECIDES?: STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION* (2021).

39. George E. Bogden, Note, *Traditions of Early American Treaty Inheritance: Universal Succession as a Means to Achieve Stability and Security*, 14 N.Y.U. J.L. & LIBERTY 598, 611 (2020).

40. *Timeline of the Montana Capitol’s History*, MONT. HISTORICAL SOC’Y, <https://perma.cc/MUP9-9D3R> (last visited Oct. 26, 2022).

41. See William Wirt Blume & Elizabeth Gaspar Brown, *Territorial Courts and Law: Unifying Factors in the Development of American Legal Institutions—Pt. 1: Establishment of a Standardized Judicial System*, 61 MICH. L. REV. 39, 100 (1962).

42. *Id.* at 42.

People in the territory wanted people from the area to be their judges, governors, and legislators. When did we forget this history and the local pride that comes with it? As it happens, any state court judge or state lawyer who looks only to federal constitutional law to interpret the Montana Constitution looks a lot like, I dare say, a territorial judge or a territorial lawyer.

Let me stop at this point and see if I have provoked anybody and see if there are any questions. It is always nice to respond to questions because you know at least one person is listening.