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## State Courts and Constitutional Structure

### *51 Imperfect Solutions: States and the Making of American Constitutional Law*

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**ABSTRACT.** In a famous 1977 article, Justice William Brennan called on state courts to interpret the individual-rights provisions of their state constitutions more expansively than analogous federal guarantees. Over the years, state constitutions have served as the foundation for important individual-rights decisions, yet their provisions remain unfamiliar to and often ignored by lawyers, scholars, and judges. In an insightful new book, *51 Imperfect Solutions: The Making of American Constitutional Law*, Judge Jeffrey Sutton renews Justice Brennan's call for judicial federalism but recasts it in a number of important ways. Most significantly, he invites us to understand state constitutionalism not solely or primarily as a liberal ratchet, but instead as a structural feature of our governmental system that modulates the timing, process, and substance of individual-rights enforcement. The conventional focus on the federal judiciary as the principal locus of rights innovation, he explains, does not accord with our constitutional history and disserves both state and federal courts. Urging greater balance between state and federal courts in protecting individual rights, Judge Sutton treats state constitutionalism as a mechanism for channeling constitutional debate in a diverse democracy and mitigating the risks of winner-take-all decision-making by the U.S. Supreme Court.

Judge Sutton's account of state constitutionalism is neither liberal nor conservative, and offers a nuanced and multifaceted view of how state courts have helped shape American constitutional law. But his insistence that state courts elaborate constitutional doctrine based on state-specific texts or histories is in tension with his salutary vision of robust constitutional dialogue between state and federal courts. Such dialogue historically has not arisen from a proliferation of state-specific discourses. Instead, the richness of judicial federalism is most evident when state and federal courts are engaged in a *single* discourse, interpreting similar texts or principles in their respective constitutions within a common historical tradition or common framework of constitutional reasoning. This dynamic is at the core of the book's case studies on the exclusionary rule, school-funding inequality, forced sterilization, and mandatory flag salutes. Moreover, it is at the core of the judicial history of school segregation, which includes a more prominent role for state courts in protecting the rights of black schoolchildren than is commonly known. This history, which I elucidate in this review, amplifies Judge Sutton's call for renewed consideration of the basic purposes and premises of judicial federalism.



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## INTRODUCTION

The first time I encountered Jeff Sutton was at the U.S. Supreme Court on October 11, 2000. I was a new law clerk and Judge Sutton, then a lawyer in private practice, was at the podium arguing on behalf of the State of Alabama in *Board of Trustees of the University of Alabama v. Garrett*.<sup>1</sup> The question was whether Congress, in enacting Title I of the Americans with Disabilities Act (ADA),<sup>2</sup> had validly exercised its enforcement power under Section 5 of the Fourteenth Amendment and thereby abrogated state immunity from suit for damages.<sup>3</sup> In a five-to-four decision, the Court said no, reasoning that Congress had not documented a pattern of unconstitutional employment discrimination by the states against persons with disabilities.<sup>4</sup> The Court noted that “by the time that Congress enacted the ADA in 1990, every State in the Union had enacted [laws providing special accommodations for persons with disabilities]. At least one Member of Congress remarked that ‘this is probably one of the few times where the States are so far out in front of the Federal Government, it’s not

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1. 531 U.S. 356 (2001). The Court is fortunate to have exceptional advocates appear in most cases, but even by that standard, Judge Sutton stood out for his command of detail, amiable Midwestern temperament, and unflappable focus in the face of tough questioning. Judge Sutton ended up arguing four cases that Term and won victories in all of them. The other three cases were *Alexander v. Sandoval*, 532 U.S. 275 (2001), in which the Court found no private right of action to enforce disparate impact regulations promulgated under Title VI of the Civil Rights Act of 1964; *Becker v. Montgomery*, 532 U.S. 757 (2001), in which the Court agreed with Judge Sutton, as Court-appointed counsel, that a pro se prisoner’s failure to timely sign a notice of appeal was not a jurisdictional defect requiring dismissal; and *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), in which the Court invalidated most, though not all, of Massachusetts’s regulations restricting the sale, promotion, and labeling of tobacco products on preemption and First Amendment grounds.
  2. 42 U.S.C. §§ 12111-12117 (2018); *id.* § 12112(b)(5)(A) (requiring employers to “mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the [employer’s] business”).
  3. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 65, 72 (1996) (holding that Congress may not use its Commerce Clause powers to abrogate a state’s Eleventh Amendment immunity from suit for damages, as such abrogation can only occur through Congress’s enforcement power under Section 5 of the Fourteenth Amendment).
  4. *Garrett*, 531 U.S. at 368-72.

funny.”<sup>5</sup> This legislative context, including the quoted remark, was extensively documented in Judge Sutton’s merits brief and highlighted at oral argument.<sup>6</sup>

*Garrett* was the third in a trio of Section 5 cases in which Judge Sutton successfully argued the states’ rights position. The previous Term, he had prevailed in *Kimel v. Florida Board of Regents*, in which the Court held that application of the federal Age Discrimination in Employment Act to the states exceeded Congress’s enforcement power.<sup>7</sup> And he prevailed in *City of Boerne v. Flores*, the seminal 1997 decision invalidating the Religious Freedom Restoration Act’s (RFRA) application to the states.<sup>8</sup> Judge Sutton, correctly predicting that many states would enact their own RFRA analogs if RFRA itself were held inapplicable to the states, implored the Court: “Let the states be the principal bulwark when it comes to protecting civil liberties.”<sup>9</sup>

In all three cases, Judge Sutton sounded the same theme: a national solution, however commendable its objective, “in the end would pose more threats to the cause of liberty than it would cure.”<sup>10</sup> Whether or not one agrees with the Court’s holdings, one thing is certain: for more than two decades, Jeff Sutton — as a lawyer, scholar, and judge — has been a serious student of federalism and one of its most thoughtful expositors. Unlike those on the right and the left who expediently invoke federalism when it suits their policy views,<sup>11</sup> Judge Sutton is a true believer in Madison’s insight that dividing power “between two distinct governments,” in addition to dividing power within each government, is vital to securing our basic rights and liberties.<sup>12</sup> His new book, *51 Imperfect Solutions*:

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5. *Id.* at 368 n.5 (citation omitted). The Court noted that “[a] number of these [state] provisions, however, did not go as far as the ADA did in requiring accommodation.” *Id.*
  6. Brief for Petitioners at 2-7, 30-33, *Garrett*, 531 U.S. 356 (No. 99-1240); Transcript of Oral Argument at 7, 18-19, *Garrett*, 531 U.S. 356 (No. 99-1240). Judge Sutton’s brief included an appendix citing all fifty states’ laws.
  7. 528 U.S. 62 (2000).
  8. 521 U.S. 507 (1997). Judge Sutton, then Solicitor General of Ohio, argued the case “by special leave of the Court” after filing an amicus curiae brief on behalf of sixteen states and territories in support of the City of Boerne. *Id.* at 509; see also Brief for States of Ohio et al. as Amici Curiae Supporting Petitioner, *City of Boerne*, 521 U.S. 507 (No. 95-2074).
  9. Transcript of Oral Argument at 25-26, 29, *City of Boerne*, 521 U.S. 507 (No. 95-2074).
  10. Brief for Petitioners, *supra* note 6, at 4.
  11. See Ilya Somin, *No More Fair-Weather Federalism*, NAT’L REV. (Aug. 18, 2017, 8:00 AM), <https://www.nationalreview.com/2017/08/limit-federal-power-left-right-can-agree> [<https://perma.cc/4HMK-JWES>].
  12. THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961).

*States and the Making of American Constitutional Law*, powerfully elucidates this important feature of our constitutional structure.<sup>13</sup>

The book argues that an accurate account of our constitutional history and doctrine must include not only the role of federal courts and the U.S. Constitution, but also what is often overlooked in legal education and scholarship: the role of state courts and state constitutions. Through careful historical analysis of how state and federal courts have shaped constitutional law on four issues—school funding, the exclusionary rule, compulsory sterilization, and flag-salute mandates—Judge Sutton paints a more complex picture of how constitutional doctrine evolves than conventional accounts that focus primarily on U.S. Supreme Court decisions. He writes:

The point of telling these American constitutional law stories in full . . . [is] to illustrate the risks of relying too heavily on the U.S. Supreme Court as the guardian of our rights, to show that the state supreme courts at times have been committed defenders of our rights, and to confirm that the right balance between the state and federal courts when it comes to rights protection is deeply complicated . . . .<sup>14</sup>

The “critical conviction of this book,” he explains, is that “a chronic underappreciation of state constitutional law has been hurtful to state *and* federal law and the proper balance between state *and* federal courts in protecting individual liberty.”<sup>15</sup>

Scholarship by federal judges on state courts and state constitutionalism is a limited genre, and Judge Sutton’s book invites comparison to Justice William

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13. JEFFREY S. SUTTON, *51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW* (2018) [hereinafter SUTTON, *51 IMPERFECT SOLUTIONS*]. The book synthesizes and builds on his numerous articles on related topics. See Jeffrey S. Sutton, *Barnette, Frankfurter, and Judicial Review*, 96 MARQ. L. REV. 133 (2012); Jeffrey S. Sutton, *San Antonio Independent School District v. Rodriguez and Its Aftermath*, 94 VA. L. REV. 1963 (2008); Jeffrey S. Sutton, *What Does – and Does Not – Ail State Constitutional Law*, 59 U. KAN. L. REV. 687 (2011) [hereinafter Sutton, *What Does*]; Jeffrey S. Sutton, *Why Teach – and Why Study – State Constitutional Law*, 34 OKLA. CITY U. L. REV. 165 (2009); Jeffrey S. Sutton & Brittany Jones, *The Certiorari Process and State Court Decisions*, 131 HARV. L. REV. F. 167 (2018); Jeffrey S. Sutton, *Courts as Change Agents: Do We Want More – or Less?*, 127 HARV. L. REV. 1419 (2014) (reviewing EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA’S POSITIVE RIGHTS* (2013)). Judge Sutton has also coauthored a textbook on state constitutional law, see RANDY J. HOLLAND ET AL., *STATE CONSTITUTIONAL LAW: THE MODERN EXPERIENCE* (2d ed. 2015), and regularly teaches a course on state constitutional law at Harvard Law School.

14. SUTTON, *51 IMPERFECT SOLUTIONS*, *supra* note 13, at 190.

15. *Id.* at 174.

Brennan's famous 1977 article, *State Constitutions and the Protection of Individual Rights*.<sup>16</sup> Justice Brennan's sensibilities trace back to his five years of service on the New Jersey Supreme Court and to his leadership role in drafting the 1947 New Jersey Constitution, which "came to be viewed nationally as a model state constitution."<sup>17</sup> Judge Sutton earned his law degree at The Ohio State University, practiced for several years in Columbus, and served four years as Solicitor General of Ohio. The daily controversies he encountered in that latter role deeply shaped his perspectives on federalism.<sup>18</sup>

While echoing Justice Brennan's main thesis that state courts can and must interpret their constitutions independently of the Federal Constitution,<sup>19</sup> *51 Imperfect Solutions* deepens our understanding of judicial federalism in a number of ways. Part I of this Review provides an overview of the book and contrasts its main themes with those of Justice Brennan's article. Whereas Justice Brennan largely conceived of state constitutionalism as a one-way ratchet for expanding individual rights, Judge Sutton presents a more nuanced view of state constitutionalism as a structural feature of our governmental system that modulates the timing, process, and substance of individual-rights enforcement. By focusing on matters of structure and process, and not liberal or conservative results, *51 Imperfect Solutions* helps to lessen the political valence that many observers have associated with judicial federalism in light of Justice Brennan's article.

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16. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

17. Robert F. Williams, *Justice Brennan, the New Jersey Supreme Court, and State Constitutions: The Evolution of a State Constitutional Consciousness*, 29 RUTGERS L.J. 763, 772 (1998); see also William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986); William J. Brennan, Jr., *Some Aspects of Federalism*, 39 N.Y.U. L. REV. 945 (1964).

18. SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 13, at vii-ix. He brought this perspective to bear in *City of Boerne* by illuminating RFRA's sweeping effects on prison administration, education, highway improvement, and other core functions of state governance. See Brief for States of Ohio et al., *supra* note 8, at 2-7. The Court apparently took note. See *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997) (explaining that RFRA's "[s]weeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter").

Judge Sutton did have some early experiences at the federal level: he served as a law clerk to Judge Thomas Meskill on the Second Circuit and was then hired by retired Justice Lewis Powell and worked primarily for Justice Antonin Scalia. Justice Scalia once acknowledged that he hired his clerks almost invariably from elite schools but noted "one sort-of exception": "I wouldn't have hired Jeff Sutton . . . For God's sake, he went to Ohio State! And he's one of the very best law clerks I ever had." Adam Liptak, *On the Bench and off, the Eminently Quotable Justice Scalia*, N.Y. TIMES (May 11, 2009), <https://www.nytimes.com/2009/05/12/us/12bar.html> [https://perma.cc/P68B-HNVQ].

19. See SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 13, at 16; Brennan, *supra* note 16, at 502.

Part II of this Review addresses a persistent question in discussions of state constitutionalism: on what grounds may state courts depart from federal precedent when interpreting similarly worded constitutional provisions? Judge Sutton calls on state courts to develop a more probing and sustained discourse on distinctive state texts and histories. Although this approach is illuminating and dispositive in many cases, there are many areas in which it is not, including the four issues that Judge Sutton explores to showcase dynamic interactions between state and federal courts. What his narrations of those issues show is not a proliferation of state-specific discourses, but rather a single discourse in which state and federal courts are jointly engaged in interpreting shared texts or shared principles within a common historical tradition or common framework of constitutional reasoning. When a state court decides, for example, what is an “unreasonable search” under its state constitution independently of the U.S. Supreme Court’s interpretation of the Fourth Amendment, there is a certain redundancy in interpretive authority. This redundancy makes innovation and variation possible and, for that reason, is a vital feature of our federal system. The legitimacy of independent state constitutionalism rests on basic structural postulates, not necessarily on the development of state-centric constitutional discourse. And it is precisely in those areas where state courts do not employ state-specific reasoning that their decisions have influence beyond their borders and contribute to the making of American constitutional law.

Part III examines the common perception that state courts are less protective of individual rights than federal courts. Judge Sutton observes that the “most conspicuous” source of this perception is the states’ role as the “policy villains” in *Jim Crow*.<sup>20</sup> “Why seek relief from institutions that created the individual-rights vacuum in the first place?,” the argument goes.<sup>21</sup> There is indeed no shortage of bad actors at the state level in the annals of our civil rights history, and *Brown v. Board of Education* was a singular triumph for the U.S. Supreme Court.<sup>22</sup> But a careful look at the role of state courts in addressing school segregation yields a more complicated picture. State courts made important contributions not only to establishing the separate-but-equal doctrine but also to resisting or limiting it. State courts were integral to the doctrine’s demise in *Brown*, and some have since gone beyond federal standards in combatting racial segregation in our public schools. I do not suggest that state courts were unsung heroes of the civil rights movement or that they were generally in the vanguard of efforts to dismantle school segregation. But this history, rarely if ever taught in law school (and not addressed in Judge Sutton’s book), suggests that state courts

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20. SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 13, at viii.

21. *Id.* at 15.

22. 347 U.S. 483 (1954).

played a greater role in protecting the rights of black schoolchildren than commonly thought. The judicial history of school segregation amplifies Judge Sutton's call for renewed consideration of the basic purposes and premises of judicial federalism.

## I. JUDICIAL FEDERALISM RECONSIDERED

Justice Brennan's *State Constitutions and the Protection of Individual Rights* is one of the most cited law review articles of all time.<sup>23</sup> In a mere sixteen pages, the article covers a lot of ground. It begins by describing the general rise of federal law in the wake of the Great Depression and during the civil rights movement.<sup>24</sup> It discusses the transformation of Fourteenth Amendment doctrine as a result of *Brown v. Board of Education*, new understandings of "liberty" and "property" in light of conditions existing in contemporary society,<sup>25</sup> and the incorporation of various Bill of Rights provisions against the states.<sup>26</sup> Justice Brennan then documents "a trend in recent opinions of the United States Supreme Court to pull back from" the Warren Court's expansive interpretations of due process and equal protection.<sup>26</sup> It is against this backdrop that Justice Brennan calls on state courts to interpret their state constitutions to provide greater protections for individual rights.<sup>27</sup> "With federal scrutiny diminished," he writes, "state courts must respond by increasing their own."<sup>28</sup>

This unabashed advocacy of state constitutionalism as a liberal ratchet, intended to continue the Warren Court's protection of individual rights, was cheered by many<sup>29</sup> but criticized by others for being activist and results-oriented.<sup>30</sup> The impetus for Justice Brennan's call for state constitutionalism was

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23. Fred R. Shapiro & Michelle Pearce, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1489 tbl.1 (2012) (ranking Justice Brennan's article ninth, with 1,701 citations).

24. Brennan, *supra* note 16, at 489-91.

25. *Id.* at 491-95.

26. *Id.* at 495-98.

27. *Id.* at 498-503.

28. *Id.* at 503.

29. See, e.g., Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 1-35 (1995); Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 707-22 (1983); David Margolick, *State Judges Are Shaping Law That Goes Beyond Supreme Court*, N.Y. TIMES (May 19, 1982), <https://www.nytimes.com/1982/05/19/us/state-judges-are-shaping-law-that-goes-beyond-supreme-court-courts-trial-last.html> [https://perma.cc/6T2C-UJA8].

30. See, e.g., Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 605-06 n.1 (1981); Ronald K.L. Collins, *Reliance on State Constitutions—Away*

the more than three dozen decisions from 1971 to 1976 in which he dissented,<sup>31</sup> and his article applauds state courts that “have independently considered the merits of constitutional arguments and declined to follow opinions of the United States Supreme Court they find unconvincing, even where the state and federal constitutions are similarly or identically phrased.”<sup>32</sup> His examples include a New Jersey Supreme Court decision holding that in order to establish that a suspect not in custody has consented to a search, the state must prove the suspect knew he had a right to refuse consent;<sup>33</sup> Hawaii and Pennsylvania high court decisions holding that a suspect’s statements taken without *Miranda* warnings are inadmissible for impeachment purposes;<sup>34</sup> a Michigan Supreme Court decision holding that a suspect is entitled to counsel at any pretrial lineup or photographic identification procedure;<sup>35</sup> and Alaska and Maine high court decisions holding that defendants have a right to trial by jury even for petty offenses.<sup>36</sup>

Four decades later, Judge Sutton returns us to the thesis that “state courts no less than federal are and ought to be the guardians of our liberties.”<sup>37</sup> However, in contrast to Justice Brennan’s unidimensional view of state constitutionalism as a corrective for rights-restrictive decisions of the U.S. Supreme Court, Judge Sutton presents a multifaceted account of the role of state courts in the development of American constitutional law, both state and federal. No one would call Judge Sutton a judicial liberal, and *51 Imperfect Solutions* is not devoted to maximizing individual rights. Instead, Judge Sutton treats state constitutionalism as a structural mechanism for American constitutional law to develop in a manner that accounts for “differences in culture, geography, and history,”<sup>38</sup> fosters a di-

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from a Reactionary Approach, 9 HASTINGS CONST. L.Q. 1, 2-3 (1981); Earl M. Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429, 434 (1988).

31. Brennan, *supra* note 16, at 495-98 & nn.39-60 (citing cases).
32. *Id.* at 500.
33. *State v. Johnson*, 346 A.2d 66 (N.J. 1975) (declining to follow *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973)).
34. *State v. Santiago*, 492 P.2d 657 (Haw. 1971) (declining to follow *Harris v. New York*, 401 U.S. 222 (1971)); *Commonwealth v. Triplett*, 341 A.2d 62 (Pa. 1975) (same); see *Miranda v. Arizona*, 384 U.S. 436 (1966).
35. *People v. Jackson*, 217 N.W.2d 22, 27-28 (Mich. 1974) (declining to follow *United States v. Ash*, 413 U.S. 300 (1973)).
36. *Baker v. City of Fairbanks*, 471 P.2d 386 (Alaska 1970) (declining to follow *Duncan v. Louisiana*, 391 U.S. 145 (1968)); *State v. Sklar*, 317 A.2d 160 (Me. 1974) (same).
37. Brennan, *supra* note 16, at 491; see SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 13, at 204 (warning of “the risk of relying too heavily on the U.S. Supreme Court as the sole guardian of our liberties”).
38. SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 13, at 17.

versity of approaches to difficult questions instead of “winner-take-all solutions,”<sup>39</sup> facilitates experimentation that is “easier to correct,”<sup>40</sup> and allows “the National Court [to] assess the States’ experiences” before deciding a federal constitutional issue.<sup>41</sup>

In Judge Sutton’s view, there are times when state constitutionalism can and should serve as an antidote for misguided decisions of the U.S. Supreme Court. But that is not its only role. Judge Sutton invites us to consider state courts and state law as key parts of the dynamic process by which constitutional doctrine develops over time. That process is important not only for its outcomes with regard to individual-rights enforcement, but also for its pacing of doctrinal change and its allocation of responsibility between state and federal decision makers.<sup>42</sup>

In particular, Judge Sutton understands judicial federalism as a feature of our constitutional structure that “might ease the pressure on the U.S. Supreme Court to be the key rights innovator in modern America” and mitigate the “long-term risks with the national judicialization of so many American policies.”<sup>43</sup> In his account, the U.S. Supreme Court is often correct to leave individual-rights enforcement to state courts and state law; state courts have often taken the lead in protecting individual rights, contrary to conventional wisdom; the U.S. Supreme Court sometimes makes wrong decisions in part because it overlooks decisions of state courts; and the development of American constitutional law is stunted when state courts give too much deference to federal precedent in interpreting their state constitutions. Judge Sutton elaborates these themes through four legal narratives that comprise the main body of his book.

#### A. *Equality and Adequacy of School Funding*

In 1973, the U.S. Supreme Court in *San Antonio Independent School District v. Rodriguez* held that public-school-funding disparities based on local property taxation do not violate equal protection of the laws.<sup>44</sup> Judge Sutton poses this question: given the raft of state court decisions on education funding and legislative reforms over the past forty-five years, did the plaintiffs in *Rodriguez* end

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39. *Id.* at 18.

40. *Id.*

41. *Id.* at 20.

42. *Id.* at 208 (“In many areas of law affected by changing social norms, the most important question is not whether but when, not whether but by whom.”).

43. *Id.* at 214.

44. 411 U.S. 1 (1973).

up “gain[ing] more in the long run by losing their case than they stood to gain by winning it”?<sup>45</sup> The principal effect of *Rodriguez*, he observes, was to shift “accountability over educational funding . . . to the States”; as a result, “the political pressures at the state level increased—to considerable effect.”<sup>46</sup> “As of today, every State has enacted a school-financing equalization scheme of one form or another,” and many states have established a minimum-funding guarantee to ensure an adequate education for all students.<sup>47</sup> “One can fairly wonder,” Judge Sutton writes, “whether the reforms developed by fifty state legislatures and required by twenty-eight state supreme courts over the last forty-five years would have been as far-reaching if the *Rodriguez* Court had not shifted the spotlight on this issue to the States.”<sup>48</sup>

While acknowledging that state reforms have not addressed all the problems identified in the *Rodriguez* litigation, Judge Sutton argues that any victory the *Rodriguez* plaintiffs might have won would have been “diluted by the U.S. Supreme Court’s institutional constraints,” resulting in “a federalism discount to [the Court’s] articulation of the constitutional right and remedy.”<sup>49</sup> In light of the sheer complexity of school finance and the Court’s reluctance to impose a national solution, he contends, “in some cases, the States may have done more than the U.S. Supreme Court ever could have done for the [*Rodriguez*] claimants’ cause.”<sup>50</sup>

### B. *The Exclusionary Rule*

In 1961, the U.S. Supreme Court in *Mapp v. Ohio* held that evidence obtained in violation of a criminal defendant’s Fourth Amendment right to be free from unreasonable searches and seizures may not be used in the State’s case-in-chief.<sup>51</sup> Judge Sutton discusses case law before and after *Mapp* as an example of how “constitutional law can be, and should be, interactive between the States and the national government,” with “state and federal courts respond[ing] to strengths and weaknesses of their own decisions *and* to those of other sovereigns.”<sup>52</sup>

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45. SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 13, at 41.

46. *Id.* at 37.

47. *Id.* at 29-30.

48. *Id.* at 37.

49. *Id.* at 36-37.

50. *Id.* at 41.

51. 367 U.S. 643 (1961).

52. SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 13, at 67.

Early American practice, state and federal, followed the common law rule that competent evidence, no matter how obtained, is admissible in a criminal trial. The remedy for an illegal search was a trespass action for damages or a replevin action for return of the property, rather than the exclusion of the illegally obtained evidence at trial.<sup>53</sup> When the U.S. Supreme Court applied the exclusionary rule to federal prosecutions in the early twentieth century,<sup>54</sup> state prosecutions were unaffected because the Fourth Amendment had not been held applicable to the states, and most state courts did not adopt the exclusionary rule under their own laws.<sup>55</sup> The leading state case was *People v. Defore*, in which Judge Benjamin Cardozo, writing for the New York Court of Appeals, rejected the rule that “[t]he criminal is to go free because the constable has blundered.”<sup>56</sup> Concerned that “[t]he pettiest peace officer would have it in his power, through overzeal or indiscretion, to confer immunity upon an offender for crimes the most flagitious,”<sup>57</sup> Judge Cardozo sided with the weight of state authority (thirty-one jurisdictions had rejected an exclusionary rule while fourteen had adopted it) and concluded that the legislature, not the judiciary, is the better forum for balancing “the social need that crime shall be repressed” against “the social need that law shall not be flouted by the insolence of office.”<sup>58</sup>

Two decades after *Defore*, in 1949, the U.S. Supreme Court in *Wolf v. Colorado* held the Fourth Amendment applicable to the states but declined to require the remedy of exclusion because it “was not derived from the explicit requirements of the Fourth Amendment.”<sup>59</sup> At the time, thirty-one states had rejected the rule while sixteen had adopted it.<sup>60</sup> Citing Judge Cardozo’s “[w]eighted” opinion in *Defore*, the Court said: “We cannot brush aside the experience of States which deem the incidence of such conduct by the police too slight to call for a deterrent

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53. *Id.* at 43-47.

54. See *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920); *Weeks v. United States*, 232 U.S. 383 (1914). While acknowledging that later cases have cited *Weeks* as the first case applying the exclusionary rule, Judge Sutton observes that *Weeks* did not involve the exclusion of illegally obtained evidence from a criminal trial but rather a timely pretrial motion for the return of property that was wrongfully taken. SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 13, at 53-55; see *id.* at 54 (explaining that *Weeks* “stood by the common law rule, not the innovation of exclusion”).

55. SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 13, at 56.

56. 150 N.E. 585, 587 (N.Y. 1926).

57. *Id.* at 588.

58. *Id.* at 589; see also *id.* at 587 (canvassing state authorities); *id.* at 588 (opining that the legislature can easily amend the search and seizure statute if the court misread it).

59. 338 U.S. 25, 28 (1949).

60. *Id.* at 29.

remedy not by way of disciplinary measures but by overriding the relevant rules of evidence.”<sup>61</sup> But state experience was changing. By 1961, as *Mapp* observed, more than half the states had adopted an exclusionary rule in some form.<sup>62</sup> In particular, *Mapp* quoted the California Supreme Court’s observation in *People v. Cahan*, a decision authored by Justice Roger Traynor, that “other remedies have completely failed to secure compliance with the constitutional provisions.”<sup>63</sup> The “experience of other States,” together with intervening federal decisions, led *Mapp* to overrule *Wolf* and declare that “time has set its face against what *Wolf* called the ‘weighty testimony’ of [*Defore*].”<sup>64</sup>

Judge Sutton narrates this progression to illustrate the interaction between state and federal courts in “a healthy system of judicial federalism.”<sup>65</sup> The period from 1949 to 1961 “provided more empirical information about the pros and cons of exclusion” and “allowed more States to develop exclusionary rules . . . under their own constitutions.”<sup>66</sup> “[I]f the U.S. Supreme Court wishes to innovate new constitutional rights” based on evolving norms, he writes, “there is something to be said for the *Mapp* process and the *Mapp* timeline as the way to do it,”<sup>67</sup> although he acknowledges that some might see the twelve years between *Wolf* and *Mapp* as unwarranted “delay” instead of “informed patience.”<sup>68</sup>

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61. *Id.* at 31-32.

62. *Mapp v. Ohio*, 367 U.S. 643, 651 (1961) (citing *Elkins v. United States*, 364 U.S. 206, 224-32 (1960)).

63. *Id.* (quoting *People v. Cahan*, 282 P.2d 905, 911 (Cal. 1955)).

64. *Id.* at 652, 653.

65. SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 13, at 81.

66. *Id.* at 69.

67. *Id.* at 68.

68. *Id.* The same debate attends the U.S. Supreme Court’s decision in *Loving v. Virginia*, 388 U.S. 1 (1967), to invalidate laws against interracial marriage, more than a decade after the Court had the chance but declined to do so in *Naim v. Naim*, 350 U.S. 891 (1955). At the time of *Naim*, more than half the states had antimiscegenation statutes. See *Naim v. Naim*, 87 S.E.2d 749, 753 (Va. 1955). By the time of *Loving*, only sixteen such statutes remained. *Loving*, 388 U.S. at 6. Did the Court wait too long? Or not long enough? One could ask the same questions about same-sex marriage. Compare *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015) (deciding the issue after “years” of “ongoing dialogue” among federal and state courts), *with id.* at 2612 (Roberts, C.J., dissenting) (“[The Court] seizes for itself a question the Constitution leaves to the people, at a time when the people are engaged in a vibrant debate on that question.”), and *DeBoer v. Snyder*, 772 F.3d 388, 421 (6th Cir. 2014) (Sutton, J.) (characterizing the legalization of gay marriage in nineteen states and the District of Columbia since 2003 as “a difficult timeline to criticize as unworthy of further debate and voting”).

But even more provocative is Judge Sutton's analysis of what happened after *Mapp*: the dilution of the exclusionary rule through the good-faith exception,<sup>69</sup> the bar on federal habeas relief based on Fourth Amendment claims,<sup>70</sup> the exemption of grand jury proceedings<sup>71</sup> and civil proceedings<sup>72</sup> from the exclusionary rule, and a rule of nonretroactivity applicable to *Mapp*<sup>73</sup> and then extended to other constitutional rulings.<sup>74</sup> These rulings illustrate the hydraulic relationship between rights and remedies. Since *Mapp*, the dynamic that Daryl Levinson calls "remedial equilibration"<sup>75</sup> as applied to Fourth Amendment rights has been mediated by one Court for the entire nation. It is not obvious, Judge Sutton contends, that *Mapp* has led to greater protections for criminal suspects overall: "Only after *Mapp*, only after its perceived intrusion on the States' long-held authority to investigate and prosecute crime without federal interference, did the Court think to apply a federalism discount to the exclusionary rule, one that limited its reach in state and federal prosecutions."<sup>76</sup> Here Judge Sutton returns to the question he posed about *Rodriguez*: "[O]ne potential price of a nationwide exclusionary rule—or a nationwide rule on any constitutional right—may be a nationwide ebbing of the underlying standard, if not cutbacks on other constitutional rights and principles. Is this price worth the cost?"<sup>77</sup>

### C. Compelled Sterilization

As another example of the risks of deciding a controversial issue in a national forum, Judge Sutton traces the eugenics movement before and after Justice

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69. *United States v. Leon*, 468 U.S. 897 (1984).

70. *Stone v. Powell*, 428 U.S. 465 (1976).

71. *United States v. Calandra*, 414 U.S. 338 (1974).

72. *United States v. Janis*, 428 U.S. 433 (1976).

73. *Linkletter v. Walker*, 381 U.S. 618 (1965).

74. *Stovall v. Denno*, 388 U.S. 293 (1967) (applying *Linkletter* in holding the right to counsel in confrontations for identification purposes to be nonretroactive); *Tehan v. United States ex rel. Shott*, 382 U.S. 406 (1966) (applying *Linkletter* in holding the prohibition on adverse comment by a prosecutor or trial judge upon a defendant's failure to testify to be nonretroactive).

75. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999).

76. SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 13, at 71 (emphasis omitted); *see also id.* ("As to federal criminal defendants, it's difficult to believe that, without *Mapp*, there would have been a *Leon* [establishing the good-faith exception to the exclusionary rule], and if that's right, that makes *Mapp* a net loss when it comes to protection from the federal government." (emphasis omitted)).

77. *Id.* at 75.

Holmes’s infamous opinion upholding forced sterilization of “imbeciles” in *Buck v. Bell*.<sup>78</sup> Before *Buck*, five state courts, beginning with an influential 1913 decision by the New Jersey Supreme Court, had invalidated compulsory sterilization laws under state or federal constitutional provisions.<sup>79</sup> Against this backdrop, Judge Sutton reviews disturbing evidence that *Buck* was a collusive lawsuit brought by eugenics enthusiasts “to avoid constitutional losses in fifty state supreme courts”<sup>80</sup> and that “[t]he U.S. Supreme Court from all appearances was a willing participant” in “a judicial charade.”<sup>81</sup> Justice Holmes’s five-paragraph opinion in *Buck* does not mention any of the contrary state court decisions.

Although state courts remained free to invalidate compulsory sterilization laws under their state constitutions, “most of the state courts fell in line after *Buck*.”<sup>82</sup> Even after the U.S. Supreme Court’s 1942 decision in *Skinner v. Okla-*

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78. 274 U.S. 200, 207 (1927) (“Three generations of imbeciles are enough.”).

79. See SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 13, at 96-107 (discussing *Smith v. Bd. of Exam’rs of Feeble-Minded*, 88 A. 963 (N.J. 1913), and similar cases in Michigan, New York, Oregon, and Indiana). Judge Sutton also notes two federal district court decisions invalidating forced sterilization laws. See *id.* at 94-96 (discussing *Mickle v. Henrichs*, 262 F. 687 (D. Nev. 1918)); *id.* at 105-06 (discussing *Davis v. Berry*, 216 F. 413 (S.D. Iowa 1914)). Only one decision before *Buck* had upheld such a law against constitutional challenge, and that case involved a criminal defendant who was likely wrongly convicted and ultimately pardoned, though not before he was sterilized. See *id.* at 92-94 (discussing *State v. Feilen*, 126 P. 75 (Wash. 1912)).

80. *Id.* at 108. After finding Carrie Buck “feeble-minded” and ordering her sterilized, the Board of the Virginia Colony for Epileptics and Feeble-minded appointed a guardian who chose a former director of the Board, Irving Whitehead, to represent Buck. See *id.* at 109-10. As Judge Sutton recounts, “the trial was a sham.” *Id.* at 110. Whitehead “had approved many earlier sterilizations” and “made no effort to challenge the hereditary premises of eugenics [or] . . . the Colony’s assumptions that Carrie, her mother, and her daughter were themselves all feeble-minded or particularly at risk of procreating.” *Id.* Researchers have found considerable evidence, contrary to the trial record, that Carrie Buck and her daughter Vivian actually possessed normal intelligence, and that Carrie had been committed to the Colony by her parents in order to cover up the fact that she had been raped and, as a result, had given birth out of wedlock. See *id.* at 110-11 (citing ADAM COHEN, *IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK* (2016) and PAUL A. LOMBARDO, *THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND BUCK V. BELL* (2008)); see also *People v. Barrett*, 281 P.3d 753, 777-79 (Cal. 2012) (Liu, J., concurring in part and dissenting in part) (discussing *Buck*).

81. SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 13, at 112 (internal quotation marks omitted) (quoting LOMBARDO, *supra* note 80, at 56).

82. *Id.* at 118; see *id.* at 118-19, 124-25 (discussing state court decisions following *Buck* in Kansas, Oregon, and North Carolina).

*homa ex rel. Williamson*<sup>83</sup> eroded the doctrinal underpinnings of *Buck*, it took several more decades before various states repealed their sterilization laws; thousands of forced sterilizations occurred in the interim.<sup>84</sup> Judge Sutton concludes that the demise of the eugenics movement “almost assuredly came more slowly than it otherwise would have due to Holmes’s and the U.S. Supreme Court’s clanging endorsement of eugenics policy.”<sup>85</sup> This is what can happen, Judge Sutton warns, when the Court decides a federal constitutional issue and state courts give the decision more weight than they should in interpreting their own constitutions.<sup>86</sup>

#### D. Mandatory Flag Salutes

Judge Sutton’s final narrative concerns the validity of state and local policies requiring schoolchildren to salute the flag. In communities throughout the country, parents who were Jehovah’s Witnesses directed their children not to participate in the flag salute because, according to their faith, “[p]ledging fealty to anything but God, whether the object was a country, a leader, or a secular symbol, violated” several of the Ten Commandments.<sup>87</sup> The issue arose repeatedly in state and federal courts before and during World War II, with the Witnesses suffering “a wave of persecution with few rivals in American history.”<sup>88</sup> The U.S. Supreme Court upheld the expulsion of two Pennsylvania schoolchildren for refusing to salute the flag in *Minersville School District v. Gobitis*,<sup>89</sup> but then declared such policies unconstitutional three years later in *West Virginia State Board of Education v. Barnette*.<sup>90</sup>

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83. 316 U.S. 535, 541 (1942) (holding that an Oklahoma statute authorizing forced sterilization of “habitual criminals,” with exceptions for certain offenders, including embezzlers, impinged on “one of the basic civil rights of man” and violated equal protection).

84. See SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 13, at 124–25.

85. *Id.* at 126. Of Justice Holmes, his colleagues Chief Justice William Howard Taft and Justice Louis Brandeis, and the others who joined the majority opinion in *Buck*, Judge Sutton writes, “[e]ven very good judges can have very bad ideas.” *Id.* at 128. Justice Pierce Butler dissented without opinion. *Buck v. Bell*, 274 U.S. 200, 208 (1927) (Butler, J., dissenting).

86. See SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 13, at 118.

87. *Id.* at 136.

88. *Id.* at 137; see *id.* at 137–39 (documenting violent attacks on Jehovah’s Witnesses for their refusal to salute the flag).

89. 310 U.S. 586 (1940).

90. 319 U.S. 624 (1943). Three Justices in the *Gobitis* majority—Hugo Black, William Douglas, and Frank Murphy—changed their minds and joined Chief Justice Harlan Stone (who dissented in *Gobitis*), and Justices Robert Jackson and Wiley Rutledge to comprise the majority in *Barnette*.

Judge Sutton contends that neither federal courts nor state courts “perform[ed] more admirably than the other in addressing these issues” during “a time of intense patriotic fervor.”<sup>91</sup> Instead, “the cases show two court systems stumbling toward a correct answer.”<sup>92</sup> Before *Gobitis*, the high courts of New Jersey, Massachusetts, Georgia, New York, Florida, and California had rejected state and federal constitutional challenges, largely on the ground that the flag salute was a patriotic, not religious, observance and therefore did not interfere with religious freedom.<sup>93</sup> No state high court had declared mandatory flag salutes unconstitutional, although the New York Court of Appeals had granted relief in one case on procedural grounds.<sup>94</sup> After *Gobitis* and before *Barnette*, amid increasing violence against Jehovah’s Witnesses, the high courts of Kansas, Washington, New Hampshire, Illinois, Massachusetts, and New Jersey granted relief in flag-salute challenges on the basis of their state constitutions or other state-law grounds.<sup>95</sup> Judge Sutton acknowledges *Barnette* as “one of the great opinions in American legal history” but notes that

[m]any of the stirring themes in the Jackson opinion had forerunners in the state court decisions, and he would have done well to mention them—not just for the sake of sharing credit but also for the sake of providing support for the First Amendment norms his opinion recognizes, if not creates.<sup>96</sup>

For Judge Sutton, the flag-salute cases show that “it’s perilous at times to place too much faith in judges to enforce constitutional guarantees.”<sup>97</sup> This reality “confirms the benefit . . . of having two sets of court systems tasked with enforcing two sets of constitutional guarantees independently,” if for no other

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91. SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 13, at 169.

92. *Id.*

93. *Id.* at 153–60 (discussing *Gabrielli v. Knickerbocker*, 82 P.2d 391 (Cal. 1938); *State ex rel. Bleich v. Bd. of Pub. Instruction*, 190 So. 815 (Fla. 1939); *Leoles v. Landers*, 192 S.E. 218 (Ga. 1937); *Nicholls v. Mayor of Lynn*, 7 N.E.2d 577 (Mass. 1937); *Hering v. State Bd. of Educ.*, 189 A. 629 (N.J. 1937); *People ex rel. Fish v. Sandstrom*, 18 N.E.2d 840 (N.Y. 1939)).

94. *Sandstrom*, 18 N.E.2d at 841–42, 844 (reversing the parents’ conviction on the ground that if discipline was to be meted out, it should have been directed at the student, not her parents).

95. SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 13, at 160–66 (discussing *People v. Chiafreddo*, 44 N.E.2d 888 (Ill. 1942); *State v. Smith*, 127 P.2d 518 (Kan. 1942); *State v. Lefebvre*, 20 A.2d 185 (N.H. 1941); and *Bolling v. Superior Court*, 133 P.2d 803 (Wash. 1943)); *id.* at 166 n.225 (citing *Commonwealth v. Johnson*, 35 N.E.2d 801 (Mass. 1941) and *In re Latrecchia*, 26 A.2d 881 (N.J. 1942)).

96. *Id.* at 172.

97. *Id.* at 170.

reason than that “one set of independent protections assuredly will fail us more often than two.”<sup>98</sup>

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Judge Sutton supplements these four historical narratives with brief discussion of a few others: the wide-ranging state-level backlash to *Kelo v. City of New London*,<sup>99</sup> a similar state legislative and judicial backlash to *Employment Division v. Smith*,<sup>100</sup> and the recent history of same-sex marriage from *Goodridge v. Department of Public Health* to *Obergefell v. Hodges*.<sup>101</sup> Through these narratives, Judge Sutton paints a more nuanced picture of state courts and state constitutionalism than Justice Brennan did forty years ago. Some aspects of the narratives, such as the post-*Gobitis* state court decisions invalidating mandatory flag salutes under state constitutions, fit Justice Brennan’s vision of state courts stepping forward to mitigate mistakes by the U.S. Supreme Court. Judge Sutton’s criticism of state courts that fell in line behind *Buck v. Bell*, without independently examining sterilization laws under their state constitutions, also fits the Brennan thesis. But other aspects of the narratives go beyond Justice Brennan’s argument and add complexity to our understanding of judicial federalism.

First, whereas Justice Brennan’s 1977 article largely conceived of state constitutionalism as a second-best corrective for U.S. Supreme Court decisions that fail to properly vindicate individual rights, Judge Sutton’s account of the school-funding decisions and Fourth Amendment doctrine invites us to consider whether state forums might yield the greatest or optimal level of rights protection, at least on some issues. Problems with a high level of practical complexity may not be amenable to national solutions or, if resolved by a national court, may result in a federalism discount that dilutes the underlying right.<sup>102</sup> And

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98. *Id.*

99. 545 U.S. 469 (2005) (holding that the city’s exercise of eminent domain for economic-development purposes satisfied the “public use” requirement of the Takings Clause); see SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 13, at 204-05 (discussing state constitutional decisions and legislation that “filled many, even if not all, of the gaps left by” *Kelo*).

100. 494 U.S. 872 (1990) (holding that generally applicable laws that incidentally burden religious exercise do not violate the Free Exercise Clause so long as they have a rational basis); see SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 13, at 206-07 (discussing state constitutional decisions and legislation requiring such laws to satisfy “strict scrutiny or at a minimum something more than rational basis”).

101. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (recognizing same-sex couples’ right to marry under the Massachusetts Constitution); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (recognizing same-sex couples’ right to marry under the U.S. Constitution); see SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 13, at 207 (“There is no *Obergefell* without *Goodridge*.”).

102. See SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 13, at 208.

shifting accountability to state courts may elicit responsive innovation on issues with a majoritarian cast, such as education, property rights, and religious freedom.<sup>103</sup>

Second, even when an issue ultimately will be decided by the U.S. Supreme Court, Judge Sutton shows how state constitutionalism can play an important role in the process of doctrinal change. State courts can serve as useful “first responders in addressing innovative rights claims,”<sup>104</sup> such as the exclusionary rule or marriage equality, because a state constitutional decision is more limited in its impact than a federal constitutional decision and can be more easily overruled by constitutional amendment.<sup>105</sup> Percolation of an issue through various state courts can provide valuable insights and options for the federal high court to draw on when it chooses to decide the issue. And an accumulation of state decisions can provide an indication of “changing norms objectively provable beyond 1 First Street.”<sup>106</sup> So understood, state constitutionalism is not, as Justice Brennan suggested, a way to backfill rights protections that the U.S. Supreme Court should have already recognized, but rather a key mechanism for prospectively shaping federal constitutional law and regulating the pace and timing of doctrinal change. On many issues, the U.S. Supreme Court should not be the first to decide, and state courts are a vital component of the process by which constitutional law properly evolves. Judge Sutton envisions this “ground-up approach to developing constitutional doctrine” as one that “places less pressure on the U.S. Supreme Court.”<sup>107</sup>

Third, whereas Justice Brennan expressly situated state constitutionalism within a theory of living constitutionalism,<sup>108</sup> Judge Sutton observes that “[r]enewing the States’ role in rights innovation offers benefits to all schools of

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103. *See id.* at 209 (“Some supposedly countermajoritarian constitutional issues are not counter-majoritarian at all when presented effectively to elected state court judges . . . . 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.”).

104. *Id.* at 212.

105. *See id.* at 213; *see also id.* at 212 (“The risks of error associated with a state-first approach are fewer.”).

106. *Id.* at 69.

107. *Id.* at 216.

108. *See Brennan, supra* note 16, at 495 (“[T]he genius of our Constitution resides not in any static meaning that it had in a world that is dead and gone, but in the adaptability of its great principles to cope with the problems of a developing America. A principle to be vital must be of wider application than the mischief that gave it birth.”).

constitutional interpretation.”<sup>109</sup> For originalists, state court decisions that plumb the history of state constitutional provisions can provide useful guidance on the original public meaning of federal guarantees modeled on those state provisions.<sup>110</sup> For living constitutionalists, “new interpretations of state constitutions by state court judges” can provide guidance for the U.S. Supreme Court on changing norms and mores.<sup>111</sup> And for pragmatists, state court decisions can “show what works and what doesn’t.”<sup>112</sup>

Finally, in contrast to Justice Brennan’s conception of state constitutionalism as “a liberal ratchet,” Judge Sutton correctly observes that “[t]here’s nothing about the state constitutions that necessarily points toward liberal or conservative rights.”<sup>113</sup> Take, for example, the state constitutional decisions that have interpreted property rights and religious freedom more expansively than *Kelo* and *Smith*, respectively. State courts are also free to adopt greater protections for gun rights,<sup>114</sup> to set more stringent limits on agency decision-making,<sup>115</sup> and to accord less deference to economic regulation<sup>116</sup> than what U.S. Supreme Court

109. SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 13, at 211 (emphasis omitted).

110. *Id.*

111. *Id.*

112. *Id.* at 212.

113. *Id.* at 176.

114. Compare *Britt v. State*, 681 S.E.2d 320, 323 (N.C. 2009) (holding that a law prohibiting felons from possessing firearms violates the North Carolina Constitution as applied to plaintiff), with *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (stating that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons”).

115. See SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 13, at 177 n.15 (“Many state courts have not followed the U.S. Supreme Court’s abandonment of the nondelegation doctrine.”); *id.* (citing examples, including *New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Department of Health & Mental Hygiene*, 23 N.Y.3d 681, 690-92 (2014), and *Texas Boll Weevil Eradication Foundation v. Lewellen*, 952 S.W.2d 454, 465-475 (Tex. 1997)).

116. See, e.g., *People ex rel. Orcutt v. Instantwhip Denver, Inc.*, 490 P.2d 940 (Colo. 1971) (invalidating the Colorado Filled Milk Act under the state due process clause notwithstanding Supreme Court precedent upholding similar legislation under the federal due process clause); see *id.* at 945 (“What is permissible under the Federal Constitution in matters of State economic regulation is not necessarily permissible under State law. The Constitution of a State may guard more jealously against the exercise of the State’s police power.”) (quoting *CoffeeRich, Inc. v. Comm’r of Pub. Health*, 204 N.E.2d 281, 286 (Mass. 1965)); *Fair Cadillac-Oldsmobile Isuzu P’ship v. Bailey*, 640 A.2d 101, 107-08 (Conn. 1994) (invalidating Sunday closing laws despite Supreme Court precedent upholding such laws); *Rogers v. State*, 199 A.2d 895, 897 (Del. 1964) (same); *Racing Ass’n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 9-16 (Iowa 2004) (invalidating tax on slot machines on state equal protection grounds after the Supreme Court had upheld the tax against federal equal protection challenge); *Spartan’s In-*

precedent provides. Judge Sutton also notes that state courts may interpret their constitutions to provide less protection than analogous federal provisions, even though state courts must give effect to any floor of protection established by the U.S. Supreme Court.<sup>117</sup>

In all these ways, *51 Imperfect Solutions* broadens our understanding of the role of state courts in our federal system and reduces the polarity that has long been associated with state constitutionalism in light of Justice Brennan's 1977 article.

## II. THE MAKING OF AMERICAN CONSTITUTIONAL LAW

In addition to foregrounding matters of structure and process instead of liberalism or conservatism in substantive outcomes, Judge Sutton's treatment of judicial federalism answers a deeper concern about state constitutionalism. While highlighting the authority of state courts to interpret state constitutions independently of the Federal Constitution, Justice Brennan did not explain when or on what grounds it is proper for state courts to depart from federal precedent

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du. v. Oklahoma City, 498 P.2d 399, 402 (Okla. 1972) (invalidating Sunday closing laws despite Supreme Court precedent upholding such laws); see also Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. REV. 1307, 1320 (2017) (citing other examples); Anthony B. Sanders, *The "New Judicial Federalism" Before Its Time: A Comprehensive Review of Economic Substantive Due Process Under State Constitutional Law Since 1940 and the Reasons for Its Recent Decline*, 55 AM. U. L. REV. 457 (2005) (comprehensively cataloguing these state court decisions).

117. See SUTTON, *51 IMPERFECT SOLUTIONS*, *supra* note 13, at 66 (discussing *State v. Walker*, 267 P.3d 210, 216 (Utah 2011) (Lee, J., concurring) (arguing that "there is no exclusionary rule under the Utah Constitution" notwithstanding *Mapp*)); *id.* at 184 (arguing that state courts "should explain the interrelation between the two sets of charters in both directions, whether the state guarantee covers more ground or less").

In 2011, the Montana Supreme Court upheld a state law restricting corporate independent expenditures on behalf of candidates under the U.S. and Montana Constitutions. See *W. Tradition P'ship v. Att'y Gen.*, 271 P.3d 1, 3 (Mont. 2011). Applying strict scrutiny as a matter of state and federal law, the state court determined from the record before it that historically independent expenditures in Montana did in fact lead to corruption or the appearance of corruption, and it distinguished *Citizens United v. FEC*, 588 U.S. 310 (2010), on that ground. See *W. Tradition P'ship*, 271 P.3d at 6, 8-11, 13. The U.S. Supreme Court summarily reversed in a five-to-four decision. See *Am. Tradition P'ship v. Bullock*, 567 U.S. 516 (2012) (per curiam). Although the Montana high court's federal constitutional ruling no longer stands, its judgment that the statute does not run afoul of the state constitution remains valid, and its findings on the relationship between independent expenditures and corruption would be relevant in the event that the U.S. Supreme Court reconsiders *Citizens United*. Cf. *Bullock*, 567 U.S. at 517 (Breyer, J., dissenting) ("Montana's experience, like considerable experience elsewhere since the Court's decision in *Citizens United*, casts grave doubt on the Court's supposition that independent expenditures do not corrupt or appear to do so.").

interpreting similarly worded provisions, beyond asserting that state courts may depart whenever they do not find U.S. Supreme Court decisions to be “logically persuasive and well-reasoned.”<sup>118</sup> The implication of this view is that state courts may simply adopt the dissenting views in federal decisions as a matter of state constitutional law. Although some courts have taken this approach,<sup>119</sup> it has drawn criticism for failing to advance “a coherent discourse of state constitutional law – that is, a language in which it is possible for participants in the legal system to make intelligible claims about the meaning of state constitutions.”<sup>120</sup> Seizing on this concern, Judge Sutton writes:

While state court judges and advocates assuredly have the authority to invoke dissents rather than majority opinions of the U.S. Supreme Court in construing their own constitutions, exclusive (or even heavy) reliance on debates about the meaning of a federal guarantee is not apt to dignify the state constitutions as independent sources of law. Much to the contrary. There will never be a healthy “discourse” between state and federal judges about the meaning of core guarantees in our American constitutions if the state judges merely take sides on the federal debates and federal authorities, as opposed to marshaling the distinct state texts and histories and drawing their own conclusions from them.<sup>121</sup>

He urges state courts to engage in “first-principle inquiries into the meaning of the state provisions” and to ask “whether state constitutional law demand[s] a different answer from federal constitutional law based on local language, context, and history.”<sup>122</sup> Many state courts have applied some variant of this approach, limiting departures from federal precedent to circumstances where the

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118. See Brennan, *supra* note 16, at 498–502.

119. See, e.g., *State v. Goss*, 834 A.2d 316, 319 (N.H. 2003) (agreeing with the dissenting views in *California v. Greenwood*, 486 U.S. 35 (1988)); *City of Norwood v. Horney*, 853 N.E.2d 1115, 1136–42 (Ohio 2006) (agreeing with the dissenting views in *Kelo v. City of New London*, 545 U.S. 469 (2005)); see also *infra* text accompanying notes 161–174 (discussing state decisions agreeing with the dissenting views in *United States v. Leon*, 468 U.S. 897 (1984)).

120. James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 764 (1992); see also Daniel B. Rodriguez, *State Constitutional Theory and Its Prospects*, 28 N.M. L. REV. 271, 271 (1998) (describing Justice Brennan’s article as “avowedly strategic” and observing that the “renaissance of state constitutional law” he urged has been “rather modest” in its contributions).

121. SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 13, at 177 (endnote omitted).

122. *Id.*; see *id.* at 17, 178–90.

particular text, history, or purpose of a state constitutional provision or the underlying values of the state polity support a state-specific interpretation.<sup>123</sup>

This approach – what James Gardner has described as “a call to positivism in state constitutional law”<sup>124</sup> – is an outgrowth of the notion that law, “far from being some body of general principles upon which courts and legislators draw, is better understood as the specific commands of specific sovereigns.”<sup>125</sup> And there is certainly a role for a positivist approach to state constitutional adjudication given the range of topics and directives that such constitutions encompass. For example, most state constitutions contain “page after page of laws that amount to nothing more than legislation dressed up in constitutional garb.”<sup>126</sup> In interpreting such provisions, state courts typically apply the same methods of interpretation they apply in statutory construction in order to give effect to the lawmakers’ intent.

In addition, many state constitutions include provisions defining rights and government structures that are unique to a particular state. The California Constitution, for example, includes an express right to “privacy” among its enumeration of “inalienable rights.”<sup>127</sup> This right to privacy was enacted by a 1972 ballot initiative. It therefore makes sense that the California Supreme Court has elaborated its meaning by looking to the intent of the state electorate (against the backdrop of common law and constitutional concepts of privacy) and by crafting a privacy doctrine that has no equivalent in federal constitutional law.<sup>128</sup> Other

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123. See, e.g., *People v. Teresinski*, 640 P.2d 753, 760-61 (Cal. 1982); *Curious Theatre Co. v. Colo. Dep’t of Pub. Health & Env’t*, 220 P.3d 544, 551 (Colo. 2009); *State v. Geisler*, 610 A.2d 1225, 1232-34 (Conn. 1992); *People v. Tisler*, 469 N.E.2d 147, 157 (Ill. 1984); *State v. Hunt*, 450 A.2d 952, 955-57 (N.J. 1982); *Commonwealth v. Edmunds*, 586 A.2d 887, 895 (Pa. 1991); *State v. Gunwall*, 720 P.2d 808, 811 (Wash. 1986); see also ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 146-62 (2009) (collecting examples).

124. James A. Gardner, *The Positivist Revolution That Wasn’t: Constitutional Universalism in the States*, 4 ROGER WILLIAMS U. L. REV. 109, 128 (1998).

125. *Id.* at 121.

126. Sutton, *What Does*, *supra* note 13, at 689. Many such provisions, he notes, are quite “exotic.” *Id.* (citing, among other examples, ALA. CONST. amend. 492, § 1 (promoting the sale of catfish), CAL. CONST. art. X B, § 3-5 (phasing out gill nets for fishing), and IDAHO CONST. art. XVI, § 1 (mandating the protection of livestock from “pleuro pneumonia, glanders, splenetic or Texas fever”)); see also FLA. CONST. art. X, § 21 (“Limiting cruel and inhumane confinement of pigs during pregnancy”).

127. CAL. CONST. art. I, § 1.

128. See *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 808-10 (Cal. 1997) (plurality opinion); *Hill v. NCAA*, 865 P.2d 633, 641-57 (Cal. 1994).

examples of state-specific provisions include those addressing religion,<sup>129</sup> environmental protection,<sup>130</sup> and workers' rights.<sup>131</sup> We would expect state courts to interpret such provisions by parsing their specific texts and enactment histories.<sup>132</sup>

Moreover, some state constitutional provisions with similar wording as their federal counterparts have demonstrably state-specific meanings. Consider, for example, whether the constitutional right to a jury trial applies to persons charged with petty crimes. The U.S. Supreme Court has said that “[s]o-called petty offenses were tried without juries both in England and in the Colonies and have always been held to be exempt from the otherwise comprehensive language of the Sixth Amendment’s jury trial provisions.”<sup>133</sup> The Maine Supreme Court reached a different conclusion under the state constitution’s similarly worded guarantee.<sup>134</sup> The Maine high court cited historical sources and early precedents showing that in Massachusetts (of which the District of Maine was a part), “the principle that a defendant charged with a criminal violation is entitled to a trial by jury encompassed not only the ‘serious’ but also the ‘petty’ violations of the criminal law.”<sup>135</sup> During the colonial and Founding eras, Massachusetts and

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129. See G. Alan Tarr, *Church and State in the States*, 64 WASH. L. REV. 73 (1989); Robert F. Williams, *State Constitutional Religion Clauses: Lessons from the New Judicial Federalism*, 7 U. ST. THOMAS J. L. & PUB. POL’Y 192 (2013).

130. See EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA’S POSITIVE RIGHTS 146-96 (2013); Barton H. Thompson, Jr., *Constitutionalizing the Environment: The History and Future of Montana’s Environmental Provisions*, 64 MONT. L. REV. 157, 160 (2003) (“[M]ore than a third of all state constitutions now contain environmental policy provisions.”).

131. See, e.g., FLA. CONST. art. X, § 24 (mandating a minimum wage); N.Y. CONST. art. I, § 17 (guaranteeing the right to organize and collective bargaining). See generally JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION 188-204* (2006) (discussing the history of workers’ rights provisions in state constitutions).

132. See, e.g., Tarr, *supra* note 129, at 94-95 (noting that many state religion clauses “reflect their origin in specific disputes about the relationship between church and state” and “have characteristically been phrased in language aimed at the specific evils which brought them forth,” using terms “considerably more concrete and more specific than that found in the federal document”).

133. *Duncan v. Louisiana*, 391 U.S. 145, 160 (1968).

134. *State v. Sklar*, 317 A.2d 160 (Me. 1974). Compare U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .”), with ME. CONST. art. I, § 6 (“In all criminal prosecutions, the accused shall have a right . . . [t]o have a speedy, public and impartial trial, and, except in trials by martial law or impeachment, by a jury of the vicinity.”).

135. *Sklar*, 317 A.2d at 167.

Maine “uniquely deviated from prevalent conceptions of the reach of the principle of trial by jury in criminal cases.”<sup>136</sup> Further, the court explained, specific features of the Maine Constitution’s drafting history show that the state jury trial right, which applies to “all criminal prosecutions,”<sup>137</sup> “means precisely what it says—‘all’—without qualification, restriction, or limitation of any kind” except for those expressly stated in the Maine Constitution.<sup>138</sup>

Another example is the Connecticut Supreme Court’s recent holding that the death penalty is cruel and unusual punishment prohibited by the state constitution’s due process provisions.<sup>139</sup> The court relied extensively on “Connecticut’s unique historical and legal landscape,”<sup>140</sup> observing that the state’s citizenry and leaders adhered to a tradition of leniency and moderation during the colonial era<sup>141</sup> and “witnessed a pronounced liberalization in public, legislative, and judicial attitudes toward crime and punishment” during the period leading up to adoption of the Connecticut Constitution in 1818.<sup>142</sup> In addition, the court discussed legislative developments and contemporary practice, noting that “Connecticut has imposed sustained death sentences at a rate (taken as a percentage of capital eligible convictions) that is among the lowest in the nation” since 1973 and that “Connecticut has put only one offender to death over the past fifty-five years, and that was a serial killer who believed that he deserved to die and voluntarily waived his right to further appeals and habeas remedies.”<sup>143</sup> “[T]he sheer rarity with which death sentences are imposed and carried out in Connecticut . . . suggests that any conceivable deterrent value will be far less than in a state like Texas, for example, which carries out executions on a regular basis.”<sup>144</sup> Although the court also discussed national trends as well as general arguments

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136. *Id.*

137. ME. CONST. art. I, § 6.

138. *Sklar*, 317 A.2d at 169.

139. *State v. Santiago*, 122 A.3d 1 (Conn. 2015); see also CONN. CONST. art. I, §§ 8-9 (due process clauses of the Connecticut Constitution); *Santiago*, 122 A.3d at 14 (“Although neither provision of the state constitution expressly references cruel or unusual punishments, it is settled constitutional doctrine that both of our due process clauses prohibit governmental infliction of cruel and unusual punishments.”).

140. *Santiago*, 122 A.3d at 10.

141. *Id.* at 20-24.

142. *Id.* at 24.

143. *Id.* at 49. The *Santiago* case arose after the state legislature had prospectively repealed the death penalty, a “compromise” measure that was nonetheless “motivated in no small part by a principled belief that state sanctioned executions are no longer a necessary or appropriate form of punishment, even for the most heinous crimes.” *Id.* at 48.

144. *Id.* at 60.

about retribution,<sup>145</sup> state-specific considerations permeate the court's analysis and inform its conclusion that "Connecticut's capital punishment scheme no longer comports with our state's contemporary standards of decency."<sup>146</sup>

As these examples confirm, Judge Sutton is correct to insist that state courts look to state-specific considerations in independently interpreting provisions of their state constitutions. To the extent that a state constitutional provision has particular textual or historical features that distinguish it from its federal counterpart, judicial interpretation can and must reflect those state-specific features.

However, despite his call for a more robust discourse based on distinct state texts and histories, the four historical narratives at the core of Judge Sutton's book do not suggest that the importance or legitimacy of state constitutionalism depends on such state-centric discourse. To the contrary, each narrative depicts state and federal courts grappling with similar constitutional language or concepts, with state courts having influence beyond their jurisdictions precisely because their decisions are not readily cabined or distinguished on state-specific grounds. This is unsurprising given that

the development of state constitutions since the Founding Era has often reflected an amalgam of influences rather than legal traditions or values specific to each state. Drafters of state constitutions have made regular recourse to other states' constitutions and to the Federal Constitution; in turn, the Framers of the Federal Constitution borrowed heavily from state constitutional text and experience. Although state constitutions vary in their language and content, the recurring cross-pollination of constitutional concepts indicates that state constitutions are both sources and products of a shared American legal tradition.<sup>147</sup>

When state-specific sources do not yield helpful guidance on a constitutional question – and this will often be the case<sup>148</sup> – state courts properly look to other

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145. See *id.* at 50-54, 61-71.

146. *Id.* at 55. Although the court mentioned in passing that "we have no reason to believe that the [E]ighth [A]mendment would compel a different result," *id.* at 14 n.11, this unanalyzed assertion does not contend with the many ways in which the opinion's state-specific reasoning could be distinguished in analysis under federal law.

147. Liu, *supra* note 116, at 1321-22 (footnotes omitted). For further elaboration of historical and conceptual reasons why state constitutional interpretation often lacks state-specific reasoning, see Gardner, *supra* note 124; Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147 (1993); and Liu, *supra* note 116, at 1322-28.

148. See Gardner, *supra* note 120, at 765 (suggesting that research into a state constitutional provision often yields no insight into "the history of the state constitution"; "the identity of the founders, their purposes in creating the constitution, or the specific events that may have shaped their thinking"; "the character or fundamental values of the people of the state"; or why "certain things are more important to the people than others").

sources, including federal and state decisions interpreting similar language in the Federal Constitution or other state constitutions. The sine qua non of independence in state constitutional interpretation is not reliance on state-specific reasoning; it is *analytical independence*, as opposed to a posture of deference, in evaluating whatever materials are brought to bear on a particular issue. A state court should give respectful consideration to federal precedent as well as decisions of other state courts, but it must decide for itself what approach is most persuasive and worthy of adoption as a matter of state constitutional law. Importantly, as Judge Sutton's stories show, it is primarily in areas where constitutional provisions do *not* have state-specific meanings that we see a rich dialogue between and among state and federal courts.

Consider the exclusionary rule. Two of the leading state cases that Judge Sutton discusses are instructive. In *Defore*, the issue of whether to admit illegally obtained evidence arose under a New York statute prohibiting unreasonable searches and seizures;<sup>149</sup> no such provision appeared in the New York Constitution until 1938.<sup>150</sup> Judge Cardozo's opinion for the New York Court of Appeals cited an earlier decision of that court rejecting a rule of exclusion,<sup>151</sup> observed that the statute's text "says nothing about consequences" of a violation,<sup>152</sup> and deemed the state legislature to have "acquiesced" in the earlier ruling.<sup>153</sup> Along the way, the opinion canvassed constitutional decisions of the U.S. Supreme Court and other state courts, and ultimately agreed with the then-majority view that other remedies for police misconduct were sufficient without adding a rule that would allow some criminals "to go free because the constable has blundered."<sup>154</sup> In *Cahan*, Justice Traynor's opinion for the California Supreme Court also canvassed state and federal authorities as well as the views of leading scholars, discussed the competing principles and practical consequences, and ultimately concluded that the applicable state and federal constitutional provisions "contemplate that it is preferable that some criminals go free than that the right of privacy of all the people be set at naught."<sup>155</sup>

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149. *People v. Defore*, 150 N.E. 585, 588 (N.Y. 1926) (citing N.Y. CIV. RIGHTS LAW § 8).

150. N.Y. CONST. art. I, § 12 (adopted Nov. 8, 1938). The text includes language identical to the Fourth Amendment as well as a separate provision ensuring "[t]he right of the people to be secure against unreasonable interception of telephone and telegraph communications." *Id.*

151. *See Defore*, 150 N.E. at 587 (citing *People v. Adams*, 68 N.E. 636 (N.Y. 1903), *aff'd*, *Adams v. New York*, 192 U.S. 585 (1904)).

152. *Id.* at 588.

153. *Id.*

154. *Id.* at 587; *see id.* at 587-88.

155. *People v. Cahan*, 282 P.2d 905, 914 (Cal. 1955); *see id.* at 907-14.

Neither *Defore* nor *Cahan* relied on any concepts of privacy, evidence, or search and seizure unique to New York or California. That is unsurprising, since there does not appear to be any textual or historical basis for giving a state-specific interpretation to the search and seizure provision in either the New York statute<sup>156</sup> or the California Constitution.<sup>157</sup> If any state-specific considerations were available, surely the likes of Judge Cardozo and Justice Traynor would have discovered them. Both opinions instead relied on general, common-law-like reasoning about the prevailing weight of authority, the practical consequences of adopting one rule or another, and the ultimate balance to be struck between privacy and law enforcement. And it is precisely because these cases did not employ state-specific reasoning that the U.S. Supreme Court cited *Defore* as “[w]eighty testimony” against the exclusionary rule in *Wolf*<sup>158</sup> and then later cited *Cahan* in declaring “[t]he obvious futility of relegating the Fourth Amendment to the protection of other remedies” in *Mapp*.<sup>159</sup> The competing assertions in *Defore* and *Cahan* as to the efficacy of other remedies may have reflected the experiences of those states. But the reasoning of those cases was not bottomed on distinct state texts or histories—and that is why the state courts and the U.S. Supreme Court were able to have “a two-way dialogue about the meaning of generally worded guarantees.”<sup>160</sup>

Similarly, almost all of the state constitutional decisions that have rejected the good-faith exception to the exclusionary rule have employed general, not state-specific, reasoning.<sup>161</sup> These decisions rely on scholarly criticism of the Su-

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156. See Robert M. Pitler, *Independent State Search and Seizure Constitutionalism: The New York State Court of Appeals' Quest for Principled Decisionmaking*, 62 BROOK. L. REV. 1, 42-55 (1996) (reviewing history of the New York statute and its interpretation in *Defore*); Matthew M. Weissman, *People v. Torres and the Limits of State Constitutionalism: Has the Court of Appeals Forgotten the Cop?*, 24 COLUM. J.L. & SOC. PROBS. 299, 338-40, 341 n.185 (1991) (same).

157. California's prohibition on unreasonable searches and seizures, first adopted in the original state constitution of 1849, is virtually identical to the Fourth Amendment. Compare CAL. CONST. art. I, § 13, and CAL. CONST. of 1849, art. I, § 19, with U.S. CONST. amend. IV.

158. *Wolf v. Colorado*, 338 U.S. 25, 31 (1949); see *id.* at 31 n.2 (specifically quoting a passage from *Defore* that employs general, not state-specific, reasoning).

159. *Mapp v. Ohio*, 367 U.S. 643, 651-52 (1961).

160. SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 13, at 82.

161. See *State v. Marsala*, 579 A.2d 58, 62-68 (Conn. 1990); *State v. Guzman*, 842 P.2d 660, 672-77 (Idaho 1992); *State v. Cline*, 617 N.W.2d 277, 288-93 (Iowa 2000); *State v. Canelo*, 653 A.2d 1097, 1103-05 (N.H. 1995); *State v. Novembrino*, 519 A.2d 820, 853-57 (N.J. 1987); *State v. Gutierrez*, 863 P.2d 1052, 1067-68 (N.M. 1993); *People v. Bigelow*, 488 N.E.2d 451, 457-58 (N.Y. 1985); *State v. Carter*, 370 S.E.2d 553, 556-62 (N.C. 1988); *State v. Oakes*, 598 A.2d 119, 121-27 (Vt. 1991); *State v. Sanchez*, 875 P.2d 712, 715 (Wash. Ct. App. 1994). An exception is *Commonwealth v. Edmunds*, where the Pennsylvania Supreme Court concluded that “[t]he history of [the Pennsylvania Constitution's search and seizure provision] . . . indicates that the

preme Court's decision in *United States v. Leon*,<sup>162</sup> Justice Brennan's dissent in *Leon*,<sup>163</sup> strict understandings of the probable cause or warrant requirement, or the state court's own judgment as to the costs and benefits of excluding evidence unlawfully obtained by the police acting in good faith. In discussing one of these decisions, *State v. Guzman*,<sup>164</sup> Judge Sutton laments that the Idaho Supreme Court did not "explain its rejection of a good faith exception to the exclusionary rule based on reasons specific to Idaho's Constitution or even to its sister States."<sup>165</sup> But it is not apparent what Idaho-specific reasons the court could have given. The prohibition on unreasonable searches and seizures in the Idaho Constitution mirrors the Fourth Amendment, except that it says no warrant shall issue without probable cause "shown by affidavit"<sup>166</sup> instead of "supported by Oath or affirmation."<sup>167</sup> And the enactment history does not indicate anything distinctive about the state provision's meaning.<sup>168</sup>

Where no state-specific considerations are apparent, it is not clear what Judge Sutton would have state courts do. I doubt he would argue they should simply follow federal precedent.<sup>169</sup> The Idaho high court in *Guzman* (like other courts in this line of cases) did exactly what it should have done: it gave respectful consideration to *Leon* but undertook its own independent analysis of the good-faith exception. After examining its own case law, the court disagreed with "the basic premise of the *Leon* decision – that the decision whether to apply the

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purpose underlying the exclusionary rule in this Commonwealth is quite distinct from the purpose underlying the exclusionary rule under the 4th Amendment" insofar as the state provision "demonstrates . . . the paramount concern for privacy." 586 A.2d 887, 897 (Pa. 1991) (citation omitted). In addition, three state high courts have rejected the good-faith exception principally on state statutory grounds. See *Mason v. State*, 534 A.2d 242, 254-55 (Del. 1987); *Gary v. State*, 422 S.E.2d 426, 430 (Ga. 1992); *Commonwealth v. Upton*, 476 N.E.2d 548, 551-52 (Mass. 1985).

162. 468 U.S. 897 (1984) (adopting good-faith exception to the exclusionary rule).
163. *Id.* at 928 (Brennan, J., dissenting).
164. 842 P.2d at 660.
165. SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 13, at 65.
166. IDAHO CONST. art. I, § 17.
167. U.S. CONST. amend. IV.
168. See 2 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF IDAHO, 1889, at 1635-36 (I.W. Hart ed., 1912) (indicating that the constitutional convention adopted the search and seizure language without any substantive discussion); see also DONALD CROWLEY & FLORENCE HEFFRON, THE IDAHO STATE CONSTITUTION: A REFERENCE GUIDE 57-59 (1994).
169. See SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 13, at 20 ("For too long, we have lived in a top-down constitutional world, in which the U.S. Supreme Court announces a ruling, and the state supreme courts move in lockstep in construing the counterpart guarantees of their own constitutions.").

exclusionary rule should be made by determining whether the goal of police deterrence would be furthered in the case at bar.”<sup>170</sup> That approach, the court asserted, “totally fails to take into account the other purposes of our independent state exclusionary rule,” namely, preserving judicial integrity and deterring the issuance of invalid warrants.<sup>171</sup> The court also “reject[ed] the *Leon* Court’s cost-benefit analysis of the exclusionary rule.”<sup>172</sup> Such analysis contains all the hallmarks of independent decision-making; it is not clear why the absence of state-specific reasoning should mean that the decision “does not amplify the independent nature of a state constitutional guarantee.”<sup>173</sup> Judge Sutton acknowledges that decisions like *Guzman* exemplify how “constitutional law can be, and should be, interactive between the States and the national government.”<sup>174</sup> I would emphasize that it is *because* decisions like *Guzman* have not relied on state-specific reasoning that state courts have been in active dialog with each other and with the U.S. Supreme Court in this area.

The same point is implicit in Judge Sutton’s chapter on compulsory sterilization laws. The pre-*Buck v. Bell* state decisions invalidating such laws relied on two main theories: first, the lack of basic protections to ensure that a measure as drastic as involuntary sterilization was imposed only after an “individual specific, record supported, and thorough” selection process; and second, the “means-end disconnect” of laws that “turned on the risk that the ‘feebleminded’ would reproduce but applied only to those least able to procreate: institutionalized individuals.”<sup>175</sup> Almost all of the decisions applied these due process and equal protection concepts as a matter of federal constitutional law;<sup>176</sup> one applied state

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170. *State v. Guzman*, 842 P.2d 660, 672 (Idaho 1992).

171. *Id.*

172. *Id.* at 673; *see also id.* at 673-77 (citing, among other things, Justice Brennan’s dissent in *Leon*, scholarly commentary, and other state high court decisions rejecting the good-faith exception).

173. SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 13, at 65. The state courts that have rejected *Leon* plainly do not subscribe to the proposition that “[s]imply disagreeing with the United States Supreme Court about the meaning of the same or similar constitutional provisions . . . risks undermining confidence in the judicial process and the objective interpretation of constitutional and legislative enactments.” *Curious Theatre Co. v. Colo. Dep’t of Pub. Health & Env’t*, 220 P.3d 544, 551 (Colo. 2009).

174. SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 13, at 67.

175. *Id.* at 130, 131; *see also id.* at 92-108 (discussing these state decisions).

176. *See Williams v. Smith*, 131 N.E. 2, 2 (Ind. 1921) (invalidating the statute under federal due process principles); *Smith v. Command*, 204 N.W. 140, 143-44 (Mich. 1925) (invalidating part of the statute under federal equal protection principles and rejecting a federal due process challenge to the statute); *Haynes v. Lapeer*, 166 N.W. 938, 940 (Mich. 1918) (invalidating the statute under federal equal protection principles, as indicated by its citation to 6 RULING CASE

and federal equal protection guarantees without differentiating between the two.<sup>177</sup> If the state courts had instead relied on constitutional texts, histories, or concepts unique to their jurisdictions, there would be less support for Judge Sutton's criticism that Justice Holmes in *Buck* "never mentioned the considerable state court authority in support of *Buck*."<sup>178</sup> And Judge Sutton's observation that "the state courts for the most part refused to take seriously arguments under their own constitutions after *Buck*"<sup>179</sup> is fairly read as criticism of those courts not for failing to identify state-specific grounds for invalidating compulsory sterilization laws, but rather for failing to exercise their independent authority to squarely reject *Buck*'s flawed reasoning as a matter of state law.<sup>180</sup>

The state decisions concerning mandatory flag salutes likewise do not contain much in the way of state-specific reasoning. Although the religious-freedom clauses of many state constitutions are more detailed than the First Amendment, the principal issue in the flag-salute cases was whether courts would give credence to the Jehovah's Witnesses' belief that their religion forbade them from participating in the salute. As Judge Sutton notes, the courts that rejected the Witnesses' claims characterized the salute as having nothing to do with religion and "second-guessed whether the individuals' faith required their action";<sup>181</sup> the

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LAW: CONSTITUTIONAL LAW 373 (William M. McKinney & Burdett A. Rich eds., 1915)); *Smith v. Bd. of Exam'rs of Feeble-Minded*, 88 A. 963, 966-67 (N.J. 1913) (invalidating the statute under federal equal protection principles); *Osborn v. Thomson*, 169 N.Y.S. 638, 642-44 (Sup. Ct. Albany Cty. 1918) (invalidating the statute under federal equal protection principles), *aff'd*, 185 A.D. 902 (N.Y. App. Div. 1918) (no opinion).

177. SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 13, at 104-05 & n.170 (discussing *Cline v. State Bd. of Eugenics*, No. 15-422 (Or. Cir. Ct. Dec. 13, 1921) (invalidating one statute under state and federal equal protection principles, and invalidating another statute under federal due process principles)).

178. *Id.* at 115.

179. *Id.* at 130.

180. Judge Sutton suggests that state courts could have relied on state constitutional prohibitions on "class legislation." *Id.* at 131 (citing Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 252 (1997)). But it is not clear how such provisions would have served as anything more than alternative vessels for adopting equal protection reasoning contrary to *Buck*'s conclusions. Melissa Saunders contends that the Federal Equal Protection Clause was originally "understood and intended . . . to nationalize the developing state constitutional doctrine against partial or special laws." Saunders, *supra*, at 249. On this view, if compulsory sterilization laws violated those state prohibitions, then the laws also violated the federal equal protection guarantee. The application of state prohibitions on "class legislation" to invalidate such laws would not have been a means of distinguishing *Buck* on state-specific grounds; it would have essentially been another way of saying that *Buck* was wrongly decided.

181. SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 13, at 169; *see id.* at 153-55 (discussing *State ex rel. Bleich v. Bd. of Pub. Instruction*, 190 So. 815, 816 (Fla. 1939); *Leoles v. Landers*, 192 S.E.

courts that granted relief were those that “took the Witnesses at their word.”<sup>182</sup> Nothing in this reasoning, in either direction, turned on state-specific considerations. Indeed, one of the post-*Gobitis* state constitutional decisions that Judge Sutton lauds expressly relied on federal authorities,<sup>183</sup> and another appealed directly to national, not state, values.<sup>184</sup> These cases again illustrate that state-centric reasoning is not necessary “to dignify the state constitutions as independent sources of law”<sup>185</sup> and that it is on issues not susceptible to such reasoning that state and federal courts are (or should be) jointly engaged as expositors of American constitutionalism.

The one area among Judge Sutton’s four narratives that would seem most likely to include distinct state analyses is school funding. Unlike the Federal Constitution, almost every state constitution has explicit language requiring the provision of free public schooling,<sup>186</sup> and school-finance litigation in state courts over the past forty years has produced a wide variety of outcomes. But one would be hard pressed to correlate the variation in outcomes with variation in the text or history of state constitutional provisions. Differences in outcomes have had less to do with the “specific wording of a state constitution” and “more to do with each court’s particular understanding of educational opportunity”<sup>187</sup> and “dif-

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218, 222 (Ga. 1937); *Nicholls v. Mayor & Sch. Comm. of Lynn*, 7 N.E.2d 577, 579-80 (Mass. 1937); *Hering v. State Bd. of Educ.*, 189 A. 629, 629 (N.J. Sup. Ct. 1937)).

182. *Id.* at 162; *see id.* at 155-59 (discussing *People ex rel. Fish v. Sandstrom*, 18 N.E.2d 840 (N.Y. 1939)); *id.* at 160-67 (discussing *Zavilla v. Masse*, 147 P.2d 823, 826 (Colo. 1944); *State v. Smith*, 127 P.2d 518, 523 (Kan. 1942); *Bolling v. Superior Court*, 133 P.2d 803, 809 (Wash. 1943); *State v. Mercante* (W. Va. Cir. Ct. June 1, 1942) (on file with author)).

183. *Bolling*, 133 P.2d at 808-09 (quoting extensively from Chief Justice Stone’s dissent in *Gobitis* and from the three-judge district court decision in *Barnette*).

184. *Mercante*, slip op. at 6 (“The moment any court takes to itself the right to hold a religious view unreasonable, that moment the American courts begin to deny the right of religious freedom.”); *id.* at 13 (“[W]hat this court is asked to do is to force children . . . to do something against the consciences of both themselves and their parents. This has not been done in America hitherto; we shall not begin it here.”).

185. SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 13, at 177.

186. *See* Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 814-16, 814 n.138, 815 nn.143-44 (1985) (providing comprehensive citations to these state provisions and grouping them into four categories based on content and prescriptiveness).

187. Martin R. West & Paul E. Peterson, *The Adequacy Lawsuit: A Critical Appraisal*, in *SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY* 1, 9 (Martin R. West & Paul E. Peterson eds., 2007).

ferent perceptions of the role properly played by the courts in overseeing compliance with the state's basic charter."<sup>188</sup>

For example, some state courts have found their state education clauses to be purely aspirational or too vaguely worded to support a justiciable adequacy claim,<sup>189</sup> while other state courts have reached contrary conclusions about similarly vague provisions.<sup>190</sup> Although some of these decisions examine the enactment history of the constitutional provisions, what is most often dispositive is each court's understanding of separation of powers and the judicial role, informed by the behavior of other courts.<sup>191</sup> In addition, judicial definitions of educational adequacy have relied more on practical inquiry into the skills needed

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188. *Campaign for Quality Educ. v. State*, 209 Cal. Rptr. 3d 888, 906 (Ct. App. 2016) (Pollak, J., dissenting).

189. See, e.g., *id.* at 896-99 (construing CAL. CONST. art. IX, § 1 ("A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement."); and CAL. CONST. art. IX, § 5 ("The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year . . .")); *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1189-93 (Ill. 1996) (construing ILL. CONST. art. X, § 1 ("The State shall provide for an efficient system of high quality public educational institutions and services.")); *Comm. for Educ. Equal. v. State*, 294 S.W.3d 477, 488-89 (Mo. 2009) (construing MO. CONST. art. IX, § 1(a) ("A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools . . .")).

190. See, e.g., *Montoy v. State*, 120 P.3d 306, 309-10 (Kan. 2005) (per curiam) (construing KAN. CONST. art. VI, § 6(b) ("The legislature shall make suitable provision for finance of the educational interests of the state.")); *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 205-13 (Ky. 1989) (construing KY. CONST. § 183 ("The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State.")); *Abbott v. Burke*, 575 A.2d 359, 367-68 (N.J. 1990) (construing N.J. CONST. art. VIII, § 4, para. 1 ("The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.")); *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661, 665-68 (N.Y. 1995) (construing N.Y. CONST. art. XI, § 1 ("The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.")).

191. Compare, e.g., *Edgar*, 672 N.E.2d at 1191 ("The constitution provides no principled basis for a judicial definition of high quality . . . . Nor is education a subject within the judiciary's field of expertise . . . . Rather, the question of educational quality is inherently one of policy . . ."), and *Comm. for Educ. Equal.*, 294 S.W.3d at 489 ("The aspiration for a 'general diffusion of knowledge and intelligence' concerns policy decisions, and these political choices are left to the discretion of the other branches of government." (quoting MO. CONST. art. IX, § 1(a))), with *Montoy v. State*, 112 P.3d 923, 930 (Kan. 2005) (per curiam) ("Although the balance of power may be delicate, ever since *Marbury v. Madison*, it has been settled that the judiciary's sworn duty includes judicial review of legislation for constitutional infirmity. We are not at

for effective civic and economic participation than on close parsing of specific constitutional texts.<sup>192</sup> And courts have stated such definitions in generally applicable terms; they do not purport to set standards for New York children *as New Yorkers* or for Kentucky children *as Kentuckians*. Thus, even in an area where state constitutions plainly differ from each other and from the Federal Constitution, we observe state courts speaking a common language of constitutional concepts in a mutually informative dialogue across jurisdictions.

In sum, Judge Sutton's four narratives illuminate that state constitutionalism does not ultimately derive its legitimacy or independence from a state-centric approach to interpretation. Although state constitutionalism may benefit from "first-principle inquiries" into "local language, context, and history,"<sup>193</sup> *51 Imperfect Solutions* actually drives home a different thesis: our system of judicial federalism contemplates redundancy in interpretive authority, and the justification for that redundancy fundamentally lies in considerations of constitutional structure, not interpretive methodology.

In the end, these structural considerations are Judge Sutton's main themes. First, redundancy serves as a safeguard due to the simple fact that two independent layers of judicial review are better than one.<sup>194</sup> In the face of an ill-reasoned U.S. Supreme Court decision, redundant interpretive authority at the state level can "prevent[] matters from being worse" and eventually cause the U.S. Supreme Court to rethink its precedent.<sup>195</sup>

Second, the U.S. Supreme Court and state high courts are differently positioned when it comes to constitutional adjudication. "In some settings, the challenge of imposing a constitutional solution on the whole country at once will increase the likelihood that federal constitutional law will be underenforced, that a 'federalism discount' will be applied to the right. State courts face no such

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liberty to abdicate our own constitutional duty." (citation omitted)), and *Rose*, 790 S.W.2d at 209 ("The judiciary has the ultimate power, and the duty, to apply, interpret, define, construe all words, phrases, sentences and sections of the Kentucky Constitution . . . . This duty must be exercised even when such action serves as a check on the activities of another branch of government . . .").

192. See, e.g., *Rose*, 790 S.W.2d at 212 (enumerating seven capacities that an efficient system of education must provide to every child); *Campaign for Fiscal Equity*, 801 N.E.2d at 330-32 (defining "sound basic education" in terms of skills needed for civic and economic participation in contemporary society); *Pauley v. Kelly*, 255 S.E.2d 859, 877 (W. Va. 1979) (enumerating eight capacities that a thorough and efficient school system must provide to every child).

193. SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 13, at 177.

194. See *id.* at 170.

195. *Id.* at 128-29; see Liu, *supra* note 116, at 1332 (discussing *Mapp v. Ohio*, 367 U.S. 643 (1961), *Batson v. Kentucky*, 476 U.S. 79 (1986), and *Lawrence v. Texas*, 539 U.S. 558 (2003) as examples of cases where the Court cited state constitutional decisions in overruling its own precedents).

problem in construing their own constitutions.”<sup>196</sup> Also, state constitutional decisions are generally easier to override by constitutional amendment than federal constitutional rulings.<sup>197</sup>

Third, innovation by state courts can inform federal constitutional adjudication, allowing the U.S. Supreme Court to assess what has worked and what has not.<sup>198</sup> The notion of states as laboratories suggests that “whenever the Court confronts a federal constitutional problem with a state analogue, it might usefully learn from the experience of the state courts that got there first.”<sup>199</sup>

Fourth, some constitutional issues are inherently complex and, as a practical matter, might be best resolved on a state-by-state basis rather than through one-size-fits-all adjudication for the entire nation.<sup>200</sup>

Fifth, deciding a federal constitutional issue against the backdrop of convergent state decisions can lessen “the assumption of power that invariably occurs when the [U.S. Supreme] Court nationalizes a right,” especially in areas where constitutional doctrine directs the Court to take account of changing societal norms.<sup>201</sup>

Finally, interpretive redundancy can help “ease the pressure on the U.S. Supreme Court to be the key rights innovator in modern America” by situating accountability for individual-rights protection in multiple forums.<sup>202</sup> The availability of multiple forums for litigating and resolving similar constitutional issues comports with the Framers’ understanding that “a large and diverse nation committed to liberty will not often agree on one right answer to questions of intense public controversy. The redundancies built into our structure of govern-

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196. SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 13, at 17; *see also* Arizona v. Evans, 514 U.S. 1, 30-31 (1995) (Ginsburg, J., dissenting) (noting that federal courts’ “reluctan[ce] to intrude too deeply into areas traditionally regulated by the States . . . does not touch or concern state courts interpreting state law”); Lawrence Gene Sager, *Fair Measure: The Legal Status of Unenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1217-18 (1978).

197. SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 13, at 18, 213.

198. *Id.* at 68-69, 178, 207.

199. Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 343 (2011); *see id.* (“In other words, state courts need not be independent laboratories. They can be part of the same general research institution as the Supreme Court.”); *see also* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“There must be power in the states and the nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs.”).

200. SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 13, at 40, 208.

201. *Id.* at 69; *see also* Blocher, *supra* note 199, at 366.

202. SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 13, at 214; *see id.* at 37, 188-89.

ment largely serve to channel and manage conflict rather than to facilitate permanent resolution.”<sup>203</sup>

None of these features of our constitutional structure depends on the invigoration of state-centric discourse as the hallmark of independent state constitutionalism. Indeed, interactive dialogue among state courts and between state and federal courts could not get far off the ground if state constitutional decisions were siloed by the idiosyncrasies of particular state texts, histories, or values. The commonality of the interpretive task facing state and federal courts is nicely captured by the title of Judge Sutton’s book: it does not speak of distinctively federal or distinctively state constitutional law, but rather “the Making of *American Constitutional Law*.”<sup>204</sup>

### III. STATE COURTS AND SCHOOL SEGREGATION

*51 Imperfect Solutions* aims to dislodge the conventional wisdom that “only life-tenured federal judges, not elected state court judges, only the national government, not the States, can be trusted to enforce constitutional rights.”<sup>205</sup> Although the four narratives in the book further this objective, Judge Sutton offers this caveat:

Ever since *Brown v. Board of Education*, a recurring theme in federal constitutional law has been that the States and their constituent parts—legislatures, governors, courts, local governments—have been the policy villains in this or that area of law and this or that era of history. The States, to their discredit, often supplied ample evidence to support these stories, Jim Crow being the most conspicuous example but hardly the only example.<sup>206</sup>

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203. Liu, *supra* note 116, at 1335 (footnote omitted). This is not to minimize the role of the U.S. Supreme Court in issuing definitive rulings on controversial issues, as it did in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), and *Brown v. Board of Education*, 347 U.S. 483 (1954), for example. But it does “underscore the delicacy of the Supreme Court’s role in adjudicating individual rights claims.” Liu, *supra* note 116, at 1336.

204. SUTTON, *51 IMPERFECT SOLUTIONS*, *supra* note 13, at tit. (emphasis added); *see id.* at 196 (noting that nineteenth- and early twentieth-century treatises on constitutional law covered both state and federal law, and asking, “Why not offer a course on *American* constitutional law, one that covers all facets of the topic?”); *see also* Kahn, *supra* note 147, at 1148 (“The common object of state interpretive efforts is American constitutionalism.”).

205. SUTTON, *51 IMPERFECT SOLUTIONS*, *supra* note 13, at 203.

206. *Id.* at viii.

This is certainly consistent with how I was taught constitutional law: the history of segregation cast the states in such a poor light and, because of *Brown*, vested the U.S. Supreme Court with such moral authority that the notion of state courts as protectors of individual rights was relegated to an afterthought, if considered at all. Although Judge Sutton does not squarely confront this history,<sup>207</sup> I suspect many readers will insist on some reckoning with it before accepting his call to “return[] the States to the front lines of rights protection.”<sup>208</sup>

For decades, *Brown* has stood as the U.S. Supreme Court’s most honored decision—“th[e] Court’s finest hour.”<sup>209</sup> But the road to *Brown* is more complicated than the usual telling. One clue is in the caption of *Brown* itself.<sup>210</sup> *Brown* involved four consolidated cases. Three of them—from Kansas, South Carolina, and Virginia—came to the Supreme Court from federal district courts that had upheld segregated schooling, while one case—from Delaware—came from a state high court that had ordered the admission of black students to white schools.<sup>211</sup> When the Court issued its disposition in *Brown*, it reversed the three federal district courts and affirmed the one state high court.<sup>212</sup>

This bit of history invites more thorough consideration of the role of state courts in addressing school segregation. What emerges is another story of interaction between state and federal courts in the making of American constitutional law, one in which the state courts had a greater role in the struggle for racial equality than is commonly acknowledged. If Judge Sutton’s book had included a narrative on school segregation, here is what it might have said.

#### A. *Separate but Equal*

In 1896, *Plessy v. Ferguson* established the separate-but-equal principle that gave legal sanction to Jim Crow.<sup>213</sup> But the Supreme Court in *Plessy* did not write

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207. Judge Sutton observes that “[e]ven 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.” *Id.* at 204. But he does not develop this point beyond citing *Bolling v. Sharpe*, 347 U.S. 497 (1954), to note that school segregation was practiced not only by the states but also by the federal government.

208. SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 13, at 213.

209. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 867 (2007) (Breyer, J., dissenting).

210. *Brown v. Bd. of Educ.*, 347 U.S. 483, 483 & n.\* (1954).

211. *Id.* at 487-88 & n.1.

212. *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955).

213. 163 U.S. 537 (1896).

on a blank slate. One of the key authorities it relied on was *Roberts v. City of Boston*, an 1849 decision of the Massachusetts Supreme Judicial Court upholding separate schools for white and colored children under the state constitution.<sup>214</sup>

The plaintiff in the Massachusetts case, five-year-old Sarah Roberts, was represented by Charles Sumner, who became a U.S. Senator and vigorous champion of emancipation and equal rights for freedmen. The school committee of Boston had denied Roberts admission to the primary school nearest her residence and had assigned her to a school exclusively for colored children.<sup>215</sup> This segregation, Sumner argued, “is a source of practical inconvenience to [colored children] and their parents, to which white persons are not exposed, and is, therefore, a violation of equality.”<sup>216</sup> He further argued that “[t]he separation of children in the public schools of Boston, on account of color or race, is in the nature of caste, and is a violation of equality.”<sup>217</sup> Sumner brought these claims under two provisions of the Massachusetts Constitution, one declaring that “[a]ll men are born free and equal” and the other broadly prohibiting hereditary privilege.<sup>218</sup>

The *Roberts* decision was written by Chief Justice Lemuel Shaw, one of the most able and prolific jurists of the nineteenth century.<sup>219</sup> In a passage that *Plessy* later quoted, Chief Justice Shaw wrote:

The great principle, advanced by the learned and eloquent advocate for the plaintiff, is, that by the constitution and laws of Massachusetts, all persons without distinction of age or sex, birth or color, origin or condition, are equal before the law. This, as a broad general principle, such as ought to appear in a declaration of rights, is perfectly sound; it is not only expressed in terms, but pervades and animates the whole spirit of our constitution of free government. But, when this great principle comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion, that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment; but only that the rights of all, as they are settled and regulated by law, are

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214. *Id.* at 544-45 (quoting *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 206 (1849)).

215. *Roberts*, 59 Mass. (5 Cush.) at 200-01.

216. *Id.* at 202.

217. *Id.*

218. MASS. CONST. pt. 1, art. I; *id.* pt. 1, art. VI; see *Roberts*, 59 Mass. (5 Cush.) at 201.

219. See generally FREDERIC HATHAWAY CHASE, LEMUEL SHAW: CHIEF JUSTICE OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS 1830-1860 (1918).

equally entitled to the paternal consideration and protection of the law, for their maintenance and security.<sup>220</sup>

As required by the state constitution, the Massachusetts legislature had created school districts and had vested “plenary authority” in elected committees to “arrange, classify, and distribute pupils” in the manner the committee thought “best adapted to [students’] general proficiency and welfare.”<sup>221</sup> Just as the committee might group students by age or socioeconomic status, so too it might decide to separate students by race.<sup>222</sup> The plaintiff still “had access to a school” that was as “well conducted” and “well fitted” for education “as the other primary schools.”<sup>223</sup> The court thus saw no basis for second-guessing the committee’s “honest” determination based on “experience and judgment” that maintaining segregated schools would serve “the good of both classes of schools.”<sup>224</sup>

As for Sumner’s contention that school segregation “tends to deepen and perpetuate the odious distinction of caste, founded in a deep-rooted prejudice in public opinion,” Chief Justice Shaw replied that “[t]his prejudice, if it exists, is not created by law, and probably cannot be changed by law.”<sup>225</sup> Whether such prejudice would be lessened by admitting white and colored children to the same schools “may well be doubted,” he said, and in any event, this was a question for the school committee to decide based on “reason,” “experience,” and “honest judgment.”<sup>226</sup> *Roberts* thus upheld the doctrine of separate but equal in public education.

The *Roberts* decision proved influential due to the prestige of the opinion’s author, the stature of the plaintiff’s lawyer, and the fact that the court belonged to a state “where the political rights of the colored race have been longest and most earnestly enforced.”<sup>227</sup> The decision was cited by the high courts of Nevada, California, New York, and Missouri in opinions upholding segregated schools under their state constitutions or the Fourteenth Amendment.<sup>228</sup> These

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220. *Roberts*, 59 Mass. (5 Cush.) at 206; see *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896) (quoting *Roberts*, 59 Mass. (5 Cush.) at 206).

221. *Roberts*, 59 Mass. (5 Cush.) at 207-08.

222. *Id.* at 208.

223. *Id.* at 205.

224. *Id.* at 209.

225. *Id.*

226. *Id.* at 209-10.

227. *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896).

228. See *Ward v. Flood*, 48 Cal. 36, 52-56 (1874) (quoting *Roberts*, 59 Mass. (5 Cush.) at 205-10); *Lehew v. Brummell*, 15 S.W. 765, 767 (Mo. 1891) (citing *Roberts*); *State ex rel. Stoutmeyer v.*

opinions, along with decisions from Ohio and Indiana,<sup>229</sup> comprised a jurisprudential echo chamber, as the state courts repeatedly cited each other.

In *Bertonneau v. Board of Directors*, the first published federal decision upholding segregated schools under the Fourteenth Amendment, the principal authorities on which the court relied were the decisions of the Ohio and Nevada high courts.<sup>230</sup> The opinion, authored by then-Judge (and later U.S. Supreme Court Justice) William Woods, echoed Chief Justice Shaw's reasoning in *Roberts* by analogizing racial segregation to gender or age classifications and explaining: "Any classification which preserves substantially equal school advantages does not impair any rights, and is not prohibited by the constitution of the United States. Equality of rights does not necessarily imply identity of rights."<sup>231</sup>

These state court decisions, along with *Bertonneau*, formed the nucleus of authorities on which *Plessy* relied.<sup>232</sup> In addition to citing *Roberts*, the Court in *Plessy*—in its infamous passage declaring that the law does not and cannot play any role in perpetuating or overcoming racial prejudice—quoted the New York Court of Appeals' assertion that social intercourse between blacks and whites

can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. When the government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it was organized and performed all of the functions respecting social advantages with which it is endowed.<sup>233</sup>

Although *Plessy* involved segregated railway coaches, the U.S. Supreme Court in *Gong Lum v. Rice* had no difficulty applying the separate-but-equal doctrine to

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Duffy, 7 Nev. 342, 347-48 (1872) (citing *Roberts*); *People ex rel. King v. Gallagher*, 93 N.Y. 438, 453-54 (1883) (quoting *Roberts*, 59 Mass. (5 Cush.) at 206).

229. See *Cory v. Carter*, 48 Ind. 327 (1874); *State ex rel. Garnes v. McCann*, 21 Ohio St. 198 (1871).

230. *Bertonneau v. Bd. of Dirs. of City Schs.*, 3 F. Cas. 294, 296 (D. La. 1878) (No. 1361) (citing *McCann* and *Duffy*).

231. *Id.*

232. See *Plessy*, 163 U.S. at 544-45.

233. *Id.* at 551 (quoting *Gallagher*, 93 N.Y. at 448); see also *Wong Him v. Callahan*, 119 F. 381, 382 (N.D. Cal. 1902) (relying on *Roberts* and other state decisions to hold that segregated schooling does not violate the Fourteenth Amendment); *United States v. Buntin*, 10 F. 730, 735-37 (S.D. Ohio 1882) (same).

public education in light of *Plessy's* reliance on the body of state and federal decisions upholding segregated schools.<sup>234</sup>

This early case law shows state and federal courts converging on several themes: (1) state legislatures are vested by the education clauses in state constitutions with a broad mandate to establish a system of public schools; (2) state legislatures or local entities with delegated authority have wide discretion to assign students to schools, including assigning by race; (3) equality under the law means equality of material opportunities and does not include what courts then called “social equality”; and (4) with respect to any stigma associated with segregated schooling, the law is neither part of the problem nor part of the solution.<sup>235</sup> These principles were forged through recurring interactions among state courts and between state courts and federal courts.

### B. *Pro-integration Voices*

It is not surprising that many state courts, like the federal courts of that era, declined to find segregation unlawful. What is perhaps surprising, or at least less known, is that a number of state courts granted relief in nineteenth-century cases challenging segregated schools. In a comprehensive survey of those cases, historian J. Morgan Kousser reports that among forty-eight decisions by state high courts between 1834 and 1903, black plaintiffs obtained relief in twenty-eight

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234. See *Gong Lum v. Rice*, 275 U.S. 78, 85-87 (1927) (citing *Plessy*, *Bertonneau*, *Roberts*, and the state high court decisions *supra* notes 228-229). The decision in *Gong Lum*, issued six months after *Buck v. Bell*, was authored by Chief Justice Taft on behalf of a unanimous Court that included Justice Holmes and Justice Brandeis. Cf. *supra* note 85. The Court had previously upheld the constitutionality of a separate and unequal school system in *Cumming v. Richmond County Board of Education*, 175 U.S. 528 (1899). In that case, a Georgia school district maintained a high school for white children but refused to provide one for blacks because of insufficient funds. The Court reasoned that the district had acted within its discretion in deciding how to allocate limited tax revenue and that the decision to operate a high school only for whites had not “been made with any desire or purpose on the part of the Board to discriminate against any of the colored school children of the county on account of their race.” *Id.* at 544. The issue of segregation was not directly addressed. The *Cumming* decision was written by Justice John Marshall Harlan, the lone dissenter in *Plessy*, and demonstrated the limits of his commitment to racial equality. See Goodwin Liu, *The First Justice Harlan*, 96 CALIF. L. REV. 1383, 1385-86, 1390-92 (2008).

235. Other state decisions in this line include *Burnside v. Douglas School District No. 27*, 261 P. 629 (Ariz. 1927); *Dameron v. Bayless*, 126 P. 273 (Ariz. 1912); *Richardson v. Board of Education*, 84 P. 538 (Kan. 1906); *Reynolds v. Board of Education*, 72 P. 274 (Kan. 1903); and *McMillan v. School Committee*, 12 S.E. 330 (N.C. 1890).

cases.<sup>236</sup> By comparison, among ten federal decisions reported during that period, black plaintiffs obtained relief in five cases.<sup>237</sup> Courts granted relief on state constitutional or statutory grounds far more often than on federal constitutional grounds.<sup>238</sup>

An early victory for black schoolchildren was the Iowa Supreme Court's 1868 decision in *Clark v. Board of School Directors*.<sup>239</sup> The court framed the issue of segregation not in terms of whether public sentiment was sufficient justification for the practice, but in terms of whether state law vested the school board with any discretion to segregate by race.<sup>240</sup> Tracing the history of state enactments on the matter, the court discerned "three distinct phases of legislative sentiment": first, the total exclusion of black children from public schools under the original Iowa Constitution of 1846 and related statutes; second, an 1858 statute "provid[ing] for the education of the *colored youths* in separate schools," except where "the unanimous consent of the persons sending to the school" allowed blacks to attend with whites; and third, statutes enacted in 1860, 1862, and 1866 providing for "the instruction of *youth* between the ages of five and twenty-one years," with "no mention of, or discrimination in regard to, color."<sup>241</sup> The legislature had enacted the latter statutes pursuant to a new mandate in the 1857 state constitution to "provide for the education of *all the youths of the State*, through a system of common schools."<sup>242</sup>

Against the backdrop of the prior enactments, the court read the 1857 constitutional provision and implementing statutes to mean "all the youths are equal before the law, and there is no discretion vested in the board of directors or elsewhere, to interfere with or disturb that equality."<sup>243</sup> The court's use of the phrase "equal before the law" provided a direct counterpoint to Chief Justice Shaw's use of the same phrase in *Roberts*.<sup>244</sup> The court in *Clark* broadly declared that the school board had no authority under state law to discriminate by race, color, nationality, religion, or economic circumstance.<sup>245</sup> Such discrimination, the court

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236. See J. MORGAN KOUSSER, DEAD END: THE DEVELOPMENT OF NINETEENTH-CENTURY LITIGATION ON RACIAL DISCRIMINATION IN SCHOOLS 61 tbl.5 (1986).

237. *Id.*

238. *Id.*; *see id.* at 9.

239. 24 Iowa 266 (1868).

240. *Id.* at 269-70.

241. *Id.* at 270-72.

242. *Id.* at 271; *see id.* at 274.

243. *Id.* at 277.

244. *See Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 206 (1849).

245. *Clark*, 24 Iowa at 275-77.

said, would violate “the spirit of our laws” and “would tend to perpetuate the national differences of our people and stimulate a constant strife, if not a war of races.”<sup>246</sup>

The following year, the Michigan Supreme Court held in *People ex rel. Workman v. Board of Education* that school segregation in Detroit violated an 1867 state statute declaring that “[a]ll residents of any district shall have an equal right to attend any school therein.”<sup>247</sup> The question was whether the statute was intended to apply to Detroit, and the court, in an opinion by Chief Justice Thomas Cooley,<sup>248</sup> explained that the legislature had enacted the law to reach districts previously “empowered to make their own regulations” on school attendance.<sup>249</sup> Such districts included Detroit, and the statute was intended “to prohibit what the legislature evidently regard[ed] as an unjust discrimination.”<sup>250</sup> Chief Justice Cooley was unmoved by the school board’s citation to *Roberts* for the proposition that whether segregation or integration would best serve the interests of children of both races is a matter for local authorities to determine.<sup>251</sup>

The next case in this line was the Kansas Supreme Court’s 1881 decision in *Board of Education v. Tinnon*.<sup>252</sup> The holding in *Tinnon*, as in *Clark* and *Workman*, rested on statutory grounds: local school boards had no authority to assign students to schools on the basis of race “unless it appears clear beyond all question that the legislature intended to authorize such distinctions to be made.”<sup>253</sup> The court adopted this clear-statement rule upon observing that “[t]he tendency of the times is, and has been for several years, to abolish all distinctions on account of race, or color, or previous condition of servitude, and to make all persons absolutely equal before the law.”<sup>254</sup> Implicitly dismissing *Roberts* as “very old” and

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<sup>246.</sup> *Id.* at 276.

<sup>247.</sup> 18 Mich. 400, 409-10 (1869).

<sup>248.</sup> Chief Justice Cooley, a leading jurist of his time, was the author of a widely cited treatise on American constitutional law. See THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (Bos., Little, Brown, & Co. 1868).

<sup>249.</sup> *Workman*, 18 Mich. at 412.

<sup>250.</sup> *Id.* at 412-13.

<sup>251.</sup> *Id.* at 407-08.

<sup>252.</sup> 26 Kan. 1 (1881).

<sup>253.</sup> *Id.* at 18. The legislature had provided no such clear authorization to “cities of the second class,” including the city of Ottawa, the jurisdiction at issue in *Tinnon*. See *id.* at 18-23. Thus, *Tinnon* affirmed the trial court’s judgment ordering the admission of the black plaintiff to a white school. *Id.* at 23.

<sup>254.</sup> *Id.* at 18.

“rendered before the war,”<sup>255</sup> the court instead relied on the Iowa decision in *Clark*.<sup>256</sup>

Although *Tinnon* declined to address Fourteenth Amendment issues,<sup>257</sup> the court all but said that no rational basis could support segregated schooling. “No good reason” could be given, the court noted,

for separating two children, living in the same house, equally intelligent, and equally advanced in their studies, and sending one, because he or she is black, to a school house in a remote part of the city, past several school houses nearer his or her home, while the other child is permitted, because he or she is white, to go to a school within the distance of a block.<sup>258</sup>

Further, in contrast to Chief Justice Shaw’s doubts as to whether integration would tend to lessen prejudice, the Kansas court offered the following dicta:

Is it not better for the grand aggregate of human society, as well as for individuals, that all children should mingle together and learn to know each other? At the common schools, where both sexes and all kinds of children mingle together, we have the great world in miniature; there they may learn human nature in all its phases, with all its emotions, passions and feelings, its loves and hates, its hopes and fears, its impulses and sensibilities; there they may learn the secret springs of human actions, and the attractions and repulsions, which lead with irresistible force to particular lines of conduct. But on the other hand, persons by isolation may become strangers even in their own country; and by being strangers, will be of but little benefit either to themselves or to society. As a rule, people cannot afford to be ignorant of the society which surrounds them; and as all kinds of people must live together in the same society, it would seem to be better that all should be taught in the same schools.<sup>259</sup>

One year after *Tinnon*, the Illinois Supreme Court in *People ex rel. Longress v. Board of Education* held that a local segregation policy violated a state statute prohibiting school boards from “excluding” any child from a school “on account of

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255. *Id.* at 23; *see id.* at 6 (noting the school board’s reliance on *Roberts*).

256. *See id.* at 19–20, 23.

257. *Id.* at 18.

258. *Id.* at 21.

259. *Id.* at 19; *cf.* *Milliken v. Bradley*, 418 U.S. 717, 783 (1974) (Marshall, J., dissenting) (“[U]nless our children begin to learn together, there is little hope that our people will ever learn to live together.”).

the color of such child.”<sup>260</sup> The court read this prohibition on exclusion as a prohibition on segregation in light of the 1870 state constitution’s directive that the legislature “provide a thorough and efficient system of free schools, whereby *all* children of this State may receive a good common school education,”<sup>261</sup> as well as an 1872 statute requiring school districts to “secure to all children the right and opportunity to an equal education in such free schools.”<sup>262</sup> As in *Tinnon*, the court declined to decide whether the local policy violated the Fourteenth Amendment and, citing *Clark*, said “[w]e base our decision on the constitution and laws of the State.”<sup>263</sup>

In 1913, the Oregon Supreme Court in *Crawford v. District School Board* broadly surveyed state case law and, relying on *Tinnon* and *Clark*, held that “[w]hen the state Legislature has not passed an act expressly authorizing them to do so, school boards . . . have no lawful power to provide separate schools for the education of white and colored children.”<sup>264</sup> The court found no such authorization in a statute providing that children “may be admitted [to schools] on such terms as the district may direct.”<sup>265</sup> Although this language was no less broad in its delegation of authority than the statute considered in *Roberts*,<sup>266</sup> the Oregon court declined to follow *Roberts*, noting the subsequent ratification of the Fourteenth Amendment and its interpretation by the U.S. Supreme Court to mean “all persons, whether colored or white, shall stand equal before the laws of the states.”<sup>267</sup>

The import of these decisions extended beyond segregation in schools. In 1873, the Iowa Supreme Court applied its decision in *Clark* to affirm a jury verdict in favor of a black woman who had been forcibly denied seating at a dinner table with white passengers aboard a Mississippi River steamboat.<sup>268</sup> The Iowa court broadly held that “a common carrier cannot refuse to transport all persons without distinctions based upon color or nationality.”<sup>269</sup> In 1890, the Michigan Supreme Court construed a state public accommodations law to prohibit racial segregation in restaurants.<sup>270</sup> Relying on *Clark*, *Tinnon*, *Longress*, and its earlier

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<sup>260.</sup> 101 Ill. 308, 314 (1882).

<sup>261.</sup> *Id.* at 313.

<sup>262.</sup> *Id.* at 314.

<sup>263.</sup> *Id.* at 316; *cf. id.* (quoting *Clark v. Bd. of Sch. Dirs.*, 24 Iowa 266, 277 (1868)).

<sup>264.</sup> 137 P. 217, 220 (Or. 1913); *see id.* at 220-21.

<sup>265.</sup> *Id.* at 220.

<sup>266.</sup> *See Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 207-08 (1849).

<sup>267.</sup> *Crawford*, 137 P. at 220 (quoting *Strauder v. West Virginia*, 100 U.S. 303, 307 (1880)).

<sup>268.</sup> *See Coger v. Nw. Union Packet Co.*, 37 Iowa 145 (1873).

<sup>269.</sup> *Id.* at 159.

<sup>270.</sup> *See Ferguson v. Gies*, 46 N.W. 718 (Mich. 1890).

decision in *Workman*, the court redrew the distinction between social equality and “equality . . . before the law”:

The man who goes either by himself or with his family to a public place must expect to meet and mingle with all classes of people. He cannot ask, to suit his caprice or prejudice or social views, that this or that man shall be excluded because he does not wish to associate with them. He may draw his social line as closely as he chooses at home, or in other private places, but he cannot in a public place carry the privacy of his home with him, or ask that people not as good or great as he is shall step aside when he appears. All citizens who conform to the law have the same rights in such places, without regard to race, color, or condition of birth or wealth. The enforcement of the principles of the Michigan civil rights act of 1885 interferes with the social rights of no man, but it clearly emphasizes the legal rights of all men in public places.<sup>271</sup>

As these examples show, there was a significant body of state decisions rejecting the legality of segregation when the Supreme Court decided *Plessy* in 1896 and *Gong Lum* in 1927. Because these state decisions rested on state law and not the Fourteenth Amendment,<sup>272</sup> it is unsurprising that *Plessy* and *Gong Lum* cited none of them. However, it must be recalled that *Roberts*, on which *Plessy* and *Gong Lum* relied, rested entirely on Chief Justice Shaw’s interpretation of the Massachusetts Constitution and education statutes, informed by his understanding of “equality before the law.” If it was appropriate for the U.S. Supreme Court to consider *Roberts*, then it should have also considered *Clark*, *Tinnon*, and the other cases just discussed. In those latter cases, it is evident that the state courts construed their constitutions and statutes with a presumption against the lawfulness of segregation. Neither the constitutions nor the statutes at issue clearly prohibited the challenged segregation, as the dissenting opinions in the

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271. *Id.* at 721; see also *People v. King*, 18 N.E. 245, 248 (N.Y. 1888) (rejecting a constitutional challenge to New York’s public accommodations law and declaring: “It is evident that to exclude colored people from places of public resort on account of their race, is to fix upon them a brand of inferiority, and tends to fix their position as a servile and dependent people.”).

272. One exception was an 1881 decision by Judge Pearson Church of the Pennsylvania Court of Common Pleas, squarely holding that a state law requiring segregated schools violated the Thirteenth and Fourteenth Amendments. *Commonwealth ex rel. Allen v. Davis*, 10 Weekly Notes of Cases 156 (Pa. Ct. Com. Pl. of Crawford Cty. 1881). The opinion, which called the segregation law “a badge of servitude” and “the very personification of caste,” *id.* at 160, ably articulated the principles of racial equality encompassed by the Reconstruction Amendments. See KOUSSER, *supra* note 236, at 21-22 (discussing *Allen*).

cases emphasized.<sup>273</sup> The courts instead examined the basic meaning of “equality before the law” against the backdrop of emancipation, the Civil War, and the Reconstruction Amendments to derive the rule that school boards, even when vested with broad discretion over school attendance, had no power to segregate unless expressly authorized. In light of the background principles that informed these state decisions, the Court in *Plessy* was compelled to acknowledge that state courts had “not uniformly” endorsed the constitutionality of school segregation.<sup>274</sup>

At the same time, the fact that “racially egalitarian nineteenth-century judges crafted their final opinions in formally narrow terms of state law . . . greatly reduced the value of the decisions as precedents, even in their own states.”<sup>275</sup> In Kansas, for example, despite *Tinnon*’s strong language condemning segregation, the state high court had no difficulty two decades later in *Reynolds v. Board of Education* (with different justices comprising the bench) holding that a statute expressly authorizing school boards to segregate students by race did not violate the state constitutional guarantee of “a uniform system of common schools” or the Federal Equal Protection Clause.<sup>276</sup> Whereas *Tinnon* had declined to follow *Roberts*, the court in *Reynolds* quoted extensively from *Roberts* in concluding that “the principle of equality is in no wise violated by the establishment of separate race schools.”<sup>277</sup>

Despite the significant number of decisions granting relief to black plaintiffs, the narrow state-law grounds on which they relied meant that “later lawyers and judges could more easily ignore, dismiss, or distinguish these rulings.”<sup>278</sup> By contrast, as Kousser explains, the decisions upholding segregation “logically *had* to consider the more abstract, national questions of whether racial classifications were against the Fourteenth Amendment or fundamental notions of equal rights. Thus these latter, pro-segregation opinions . . . inevitably played a larger

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273. See *People ex rel. Longress v. Bd. of Educ.*, 101 Ill. 308, 318 (1882) (Walker, J., dissenting); *Clark v. Bd. of Sch. Dirs.*, 24 Iowa 266, 279 (1868) (Wright, J., dissenting); *Bd. of Educ. v. Tinnon*, 26 Kan. 1, 24-25 (1881) (Brewer, J., dissenting); *People ex rel. Workman v. Bd. of Educ.*, 18 Mich. 400, 418-19 (1869) (Campbell, J., dissenting).

274. *Plessy v. Ferguson*, 163 U.S. 537, 545 (1896).

275. J. Morgan Kousser, *Before Plessy, Before Brown: The Development of the Law of Racial Integration in Louisiana and Kansas*, in *TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS* 213, 217 (Paul Finkelman & Stephen E. Gottlieb eds., 1991).

276. *Reynolds v. Bd. of Educ.*, 72 P. 274, 277-81 (Kan. 1903); see Kousser, *supra* note 275, at 236-39 (discussing *Reynolds*).

277. *Reynolds*, 72 P. at 278; see *id.* (quoting *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 206, 208, 209 (1849)).

278. Kousser, *supra* note 275, at 217.

role in shaping equal protection law than the state-based, closely focused, pro-integration decisions.”<sup>279</sup>

### C. *The Road to Brown*

By the 1930s, the National Association for the Advancement of Colored People (NAACP) had become engaged in a legal strategy to dismantle school segregation.<sup>280</sup> The blueprint was the 1931 Margold Report, which urged litigation challenging “the constitutional validity of segregation if and when accompanied . . . by discrimination.”<sup>281</sup> The idea was that lawsuits directed at separate and unequal educational opportunities would highlight the difficult and often impractical task of equalization within a system of segregation and thereby invite “adjudication as a means of destroying segregation itself.”<sup>282</sup> Although school-equalization lawsuits seeking an integration remedy were not unprecedented, the approach evolved into a concerted strategy with the NAACP’s careful planning and commitment of resources.

Charles Hamilton Houston, then dean of Howard Law School, sought to initiate the strategy at graduate and professional schools, where separate and unequal opportunities were most obvious.<sup>283</sup> Conventional accounts focus on a progression of successful cases in the U.S. Supreme Court—*Missouri ex rel. Gaines v. Canada*,<sup>284</sup> *Sipuel v. Board of Regents*,<sup>285</sup> *Sweatt v. Painter*,<sup>286</sup> and *McLau-*

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279. *Id.* at 217-18.

280. See RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 132-37 (1975); MARK V. TUSHNET, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950*, at 21-33 (1987).

281. TUSHNET, *supra* note 280, at 27-28 (quoting the Margold Report). The author of the report, Nathan Margold, was a young Harvard Law School graduate and “a protégé of Felix Frankfurter.” *Id.* at 15; see also KLUGER, *supra* note 280, at 133. The Margold Report was, in the recollection of civil rights lawyer and professor William Hastie, “the Bible of the NAACP legal drive.” KLUGER, *supra* note 280, at 136.

282. TUSHNET, *supra* note 280, at 28 (quoting the Margold Report).

283. KLUGER, *supra* note 280, at 136.

284. 305 U.S. 337 (1938) (holding that the state policy excluding a qualified black student, a Missouri citizen, from the University of Missouri School of Law and providing tuition payment for such student at an out-of-state law school violated equal protection).

285. 332 U.S. 631 (1948) (holding that the exclusion of qualified black students from the University of Oklahoma School of Law, the state’s only public law school, violated equal protection).

286. 339 U.S. 629 (1950) (holding that the disparity between opportunities offered to white students at the University of Texas School of Law and opportunities offered to black students at a newly created law school at Texas State University violated equal protection).

*rin v. Oklahoma State Regents for Higher Education*<sup>287</sup> – that laid the foundation for *Brown*.<sup>288</sup> Three of those decisions reversed the judgment of a state court.<sup>289</sup> However, the stepping stone to those decisions was a key ruling in 1936 by the high court of Maryland: *Pearson v. Murray*.<sup>290</sup>

In the wake of unsuccessful suits challenging the exclusion of black students from state universities in North Carolina and Tennessee,<sup>291</sup> the NAACP turned its attention to Maryland. Howard Law School graduate Thurgood Marshall had recently opened a law office in Baltimore,<sup>292</sup> and in 1934, local attorneys found an ideal plaintiff who had been denied admission to the University of Maryland School of Law because of his race. Donald Murray, a Baltimore resident and graduate of Amherst College who hailed from a prominent black family, was amply qualified for admission. Yet his application was returned with a letter from the university president, Raymond Pearson, offering partial scholarships for attendance at out-of-state law schools.<sup>293</sup> Marshall and Houston took Murray's case to Baltimore City Court. At trial, Houston "reduce[d] the defense to rubble" by eliciting testimony from Pearson and other state officials about the patent racial inequality in opportunities offered by Maryland's university system.<sup>294</sup> Under questioning, Pearson also acknowledged that no money had been allocated for out-of-state scholarships at the time Murray's application was rejected; the legislature had appropriated money for scholarships only after the initiation of Murray's lawsuit.<sup>295</sup> The trial court ruled for Murray and ordered his admission to the law school.<sup>296</sup>

In affirming the trial court's order, the Maryland Court of Appeals did not question the lawfulness of segregation per se but insisted that "[s]eparation of

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287. 339 U.S. 637 (1950) (holding that the segregation of a black graduate student in the classroom, library, and cafeteria at the University of Oklahoma violated equal protection).

288. See, e.g., GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 473-76 (7th ed. 2013); KATHLEEN M. SULLIVAN & NOAH FELDMAN, *CONSTITUTIONAL LAW* 661-63 (19th ed. 2016); Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 *GEO. L.J.* 1, 4-30 (1979).

289. See *State ex rel. Gaines v. Canada*, 113 S.W.2d 783 (Mo. 1937), *rev'd*, 305 U.S. 337; *Sipuel v. Bd. of Regents*, 180 P.2d 135 (Okla. 1947), *rev'd*, 332 U.S. 631; *Sweatt v. Painter*, 210 S.W.2d 442 (Tex. Civ. App. 1948), *rev'd*, 339 U.S. 629.

290. 182 A. 590 (Md. 1936).

291. See KLUGER, *supra* note 280, at 155-58; TUSHNET, *supra* note 280, at 52-55.

292. See KLUGER, *supra* note 280, at 181-86 (recounting Marshall's early days in law practice).

293. See *id.* at 187-89.

294. *Id.* at 189; see *id.* at 189-91.

295. See *id.* at 189-90.

296. See *Pearson v. Murray*, 182 A. 590, 590 (Md. 1936).

the races must nevertheless furnish equal treatment.”<sup>297</sup> The University of Maryland School of Law was the state’s only public law school, and the opportunity to attend an out-of-state law school with a state scholarship was not “substantially equal.”<sup>298</sup> The court explained that receiving a scholarship was “far from assured” and that attending an out-of-state school would result in “considerable expense” even with a scholarship.<sup>299</sup> Further, Murray “could not there have the advantages of study of the law of this state primarily, and of attendance on state courts, where he intends to practice.”<sup>300</sup> The court said the number of black students affected by the discrimination was irrelevant because “the essence of the constitutional right is that it is a personal one. . . . It is the individual who is entitled to the equal protection of the laws . . . .”<sup>301</sup> With the state lacking any in-state alternative for blacks, students like Murray “must, at present, be admitted to the one school provided.”<sup>302</sup> “Compliance with the Constitution cannot be deferred at the will of the state. Whatever system it adopts for legal education now must furnish equality of treatment now.”<sup>303</sup>

Two years later, the U.S. Supreme Court faced a similar lawsuit and for the first time ordered the admission of a black student to a white school. The plaintiff, Lloyd Gaines, also represented by Houston, met the qualifications for admission to the University of Missouri School of Law but was rejected because of his race.<sup>304</sup> The State asserted that the legislature had authorized the creation of a comparable law school for blacks “whenever necessary or practical” and that, in the meantime, Gaines could apply for a scholarship that would cover tuition at “recognized schools” in adjacent states.<sup>305</sup> In finding this arrangement to be an equal protection violation, the Court quoted *Murray*’s holding and determined that Missouri’s commitment to building a separate law school for blacks was no more definite than Maryland’s.<sup>306</sup> As to the advantages or disadvantages of attending an out-of-state law school, the Court went beyond *Murray* in declaring “these matters . . . beside the point. The basic consideration is not as to

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297. *Id.* at 593.

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.* at 593-94 (quoting *McCabe v. Atchison, Topeka & Sante Fe Ry.*, 235 U.S. 151, 161-62 (1914)).

302. *Id.* at 594.

303. *Id.*

304. See *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 342-43 (1938).

305. *Id.* at 342-43, 346 (quoting *State ex rel. Gaines v. Canada*, 113 S.W.2d 783, 791 (Mo. 1937)).

306. See *id.* at 345-48 (quoting *Murray*, 182 A. at 594).

what sort of opportunities other States provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to negroes solely upon the ground of color.”<sup>307</sup>

*Gaines* then explained, as *Murray* had explained, that “limited demand . . . for the legal education of negroes” does not “excus[e] the discrimination in favor of whites” because the right to equal protection is “a personal one.”<sup>308</sup> In addition, echoing *Murray*’s insistence on “equality of treatment now,”<sup>309</sup> the Court rejected the State’s contention that the discrimination was merely “temporary” pending the establishment of a law school for blacks.<sup>310</sup> These propositions, set forth in *Murray* and amplified in *Gaines*, led the Court to underscore in 1950 that *Sipuel*, *Sweatt*, and *McLaurin* “concern rights which are personal and present.”<sup>311</sup>

By the time the Court decided these professional and graduate school cases, several lawsuits challenging segregation in elementary and secondary schools were moving forward in federal and state courts,<sup>312</sup> including the four cases eventually consolidated in *Brown*.

307. *Id.* at 349; *see id.* at 350 (“Manifestly, the obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction. It is there that the equality of legal right must be maintained.”).

308. *Id.* at 350–51; *see Murray*, 182 A. at 593–94.

309. *Murray*, 182 A. at 594.

310. *Gaines*, 305 U.S. at 351–52.

311. *Sweatt v. Painter*, 339 U.S. 629, 635 (1950); *see also McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637, 640, 642 (1950) (holding that the segregation of a black doctoral student in the classroom, library, and cafeteria “deprive[d] him of his personal and present right to the equal protection of the laws”); *Sipuel v. Bd. of Regents*, 332 U.S. 631, 633 (1948) (citing *Gaines* in declaring that the state must offer legal education to black applicants “as soon as it does for applicants of any other group”).

312. In California, a suit challenging the segregation of Mexican American students in several Orange County school districts resulted in a judgment invalidating the practice. *See Mendez v. Westminster Sch. Dist.*, 64 F. Supp. 544, 545, 551 (S.D. Cal. 1946), *aff’d*, 161 F.2d 774 (9th Cir. 1947) (en banc). In Arizona, black plaintiffs succeeded in challenging segregation in a Phoenix high-school district. *See Phillips v. Phoenix Union High Schs. & Junior College Dist.*, No. 72909, slip op. at 3 (Ariz. Super. Ct. Feb. 9, 1953). Judge Struckmeyer acknowledged the U.S. Supreme Court’s holding in *Gong Lum* but said that “democracy rejects any theory of second-class citizenship. There are no second-class citizens in Arizona.” *Id.* at 2. From the time that the principle “all men are created equal” appeared in the Declaration of Independence, he observed, the trend “has been to constantly reconsider the status of minority groups and their problems . . . . In the spirit of this marked social maturity our Legislature abandoned mandatory segregation. A half century of intolerance is enough.” *Id.* His decision ultimately rested on the state-law ground that the legislature had unconstitutionally delegated to local school boards “the arbitrary power to segregate,” with no “standard, criteria or guide as to the circumstances under which such power may be exercised.” *Id.* at 3.

In the Virginia case, *Davis v. County School Board*, the plaintiffs argued that the “necessary and natural effect” of the segregation mandate in the state constitution “is to prejudice the colored child in the sight of his community” and “to implant unjustly in him a sense of inferiority as a human being to other human beings.”<sup>313</sup> Rejecting this claim, the three-judge federal district court opined that “the separation provision rests neither upon prejudice, nor caprice.”<sup>314</sup> Rather, “it declares one of the ways of life in Virginia. Separation of white and colored ‘children’ in the public schools of Virginia has for generations been a part of the mores of her people.”<sup>315</sup> Segregation “has not been social despotism,” the court maintained; “whatever its demerits in theory, in practice it has begotten greater opportunities for the Negro.”<sup>316</sup> Finding “no hurt or harm to either race,”<sup>317</sup> the court affirmed that segregation per se did not violate the Constitution. The court went on to find “actual inequality . . . in respect to buildings, facilities, curricula and buses” in Prince Edward County, and ordered state and local officials “to pursue with diligence and dispatch” a plan to build a new high school for black students.<sup>318</sup> The court did not order an integration remedy in the meantime.

In the South Carolina case, *Briggs v. Elliott*, the three-judge district court noted that segregation had garnered “the unanimous approval of the Supreme Court of the United States [in *Gong Lum*] at a time when that court included Chief Justice Taft and Justices Stone, Holmes and Brandeis.”<sup>319</sup> “[I]f conditions have changed so that segregation is no longer wise,” the court said, “this is a matter for the legislatures and not for the courts. The members of the judiciary have no more right to read their ideas of sociology into the Constitution than their ideas of economics.”<sup>320</sup> The court went on to find that “the school facilities

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313. 103 F. Supp. 337, 338 (E.D. Va. 1952) (three-judge court); *see id.* (“[Plaintiffs] argue that in spirit and in truth the colored youth is, by the segregation law, barred from association with the white child, not the white from the colored, that actually it is ostracism for the Negro child . . .”).

314. *Id.* at 339.

315. *Id.*; *see id.* (“The importance of the school separation clause to the people of the State is signaled by the fact that it is the only racial segregation direction contained in the constitution of Virginia.”); *id.* at 340 (“So ingrained and wrought in the texture of their life is the principle of separate schools . . . that its involuntary elimination would severely lessen the interest of the people of the State in the public schools, lessen the financial support, and so injure both races.”).

316. *Id.* at 340.

317. *Id.*

318. *Id.* at 340-41.

319. 98 F. Supp. 529, 537 (E.D.S.C. 1951) (three-judge court).

320. *Id.*

furnished Negroes in District No. 22 [of Clarendon County] are inferior to those furnished white persons.”<sup>321</sup> As for the remedy, the court opted to “direct the equalizing of conditions” rather than “enjoin segregation” because the inequality “results, not from the law, but from the way it has been administered.”<sup>322</sup> The decision drew a lengthy dissent from Judge Julius Waties Waring, who said that “the present facilities are hopelessly disproportional” and that “[s]egregation is per se inequality” and “must go now.”<sup>323</sup>

The claims of black schoolchildren received a warmer reception in the Kansas and Delaware cases. In the *Brown* case, the Topeka school board had addressed inequality between black and white schools to a degree that the plaintiffs “did not give it great emphasis” and instead “relied primarily upon the contention that segregation in and of itself without more violates their rights guaranteed by the Fourteenth Amendment.”<sup>324</sup> The three-judge court found it “difficult to see why” segregation in the lower grades would not violate the same “right to commingle with the majority group” that the U.S. Supreme Court had recently upheld in *McLaurin* and *Sweatt*.<sup>325</sup> Despite this logic, the district court considered itself bound by *Plessy* and *Gong Lum*, and denied relief<sup>326</sup>—but not without including the following statement among its “Findings of Fact”:

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racially integrated school system.<sup>327</sup>

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321. *Id.*

322. *Id.* Six months later, the court observed that the defendants had complied with the equalization decree “as rapidly as was humanly possible,” and it again rejected the argument that “because [the schools] are not now equal, [the court] should enter a decree abolishing segregation.” *Briggs v. Elliott*, 103 F. Supp. 920, 922 (E.D.S.C. 1952).

323. *Briggs*, 98 F. Supp. at 547-48 (Waring, J., dissenting).

324. *Brown v. Bd. of Educ.*, 98 F. Supp. 797, 798 (D. Kan. 1951) (three-judge court).

325. *Id.* at 800.

326. *See id.*

327. The passage is not included in the Federal Supplement reporter, but it is quoted in KLUGER, *supra* note 280, at 424.

Two years later, the Supreme Court quoted this passage as support for its assertion that segregation imposes on black children “a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”<sup>328</sup>

The Delaware case, *Belton v. Gebhart*, was filed in the Delaware Chancery Court and came before Chancellor Collins Seitz.<sup>329</sup> In 1950, then-Vice Chancellor Seitz had issued an opinion finding the blacks-only Delaware State College “woefully inferior” to the whites-only University of Delaware and ordering the admission of black students to the university.<sup>330</sup> The opinion’s detailed and multidimensional analysis of educational quality, including observations from site visits to both institutions,<sup>331</sup> presaged his approach in *Belton* to elucidating the disparities between black and white schools in New Castle County.

In a comprehensive survey of conditions at the high-school level (again including site visits), Chancellor Seitz concluded that “with respect to teacher training, pupil-teacher ratio, extracurricular activities, physical plants and aesthetic considerations, the Howard-Carver School [for blacks] is inferior to Claymont [for whites] under the ‘separate but equal’ test.”<sup>332</sup> The facilities, in particular, were “vastly superior” at Claymont than at Howard-Carver.<sup>333</sup> The remedy, he explained, must be the admission of the plaintiffs to the white school:

To do otherwise is to say to such a plaintiff: “Yes, your Constitutional rights are being invaded, but be patient, we will see whether in time they

328. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954). By the time the *Brown* case reached the Supreme Court, the Topeka school board had decided not to defend the suit, and it declined to provide briefing or present oral argument. Only after the Court ordered a response from Kansas Attorney General Harold Fatzer did the state, through Fatzer’s assistant Paul Wilson, participate in the case. See *Brown v. Bd. of Educ.*, 344 U.S. 141, 141-42 (1952) (per curiam); KLUGER, *supra* note 280, at 547-50.

329. See *Belton v. Gebhart*, 87 A.2d 862 (Del. Ch. 1952); KLUGER, *supra* note 280, at 430-33, 443-50 (discussing Chancellor Seitz’s background and his role in *Belton*). A parallel case filed in federal district court was stayed pending the state court’s resolution of *Belton*. See *Wilson v. Beebe*, 99 F. Supp. 418, 421 (D. Del. 1951) (three-judge court).

330. *Parker v. Univ. of Del.*, 75 A.2d 225, 234 (Del. Ch. 1950).

331. *Id.* at 231.

332. *Belton*, 87 A.2d at 869. Chancellor Seitz also determined that travel times imposed a greater burden on the plaintiffs than on comparable white students and contributed to “inferior educational opportunities.” *Id.*

333. *Id.* at 868. The Carver building had no auditorium or gymnasium, a “makeshift cafeteria . . . in a dingy basement [with] neither seats nor tables,” only “one lavatory which has an unsanitary cement floor,” and inadequate playing space. *Id.* at 866-67. By contrast, Claymont had a gymnasium and “ample room for playground and equipment,” and was aesthetically “very attractive.” *Id.*

are still being violated.” If, as the Supreme Court has said, this right is personal, such a plaintiff is entitled to relief immediately, in the only way it is available, namely, by admission to the school with the superior facilities. To postpone such relief is to deny relief, in whole or in part, and to say that the protective provisions of the Constitution offer no immediate protection.<sup>334</sup>

Chancellor Seitz found similarly glaring inequalities between the black and white elementary schools and ordered the plaintiffs’ admission to the white school.<sup>335</sup> On appeal, the Delaware Supreme Court upheld many (though not all) of Chancellor Seitz’s findings<sup>336</sup> and, expressly disagreeing with the district courts in *Briggs* and *Davis*, refused to require the plaintiffs to “wait another year” for the state to equalize facilities: “If, as [the U.S. Supreme Court has held], the right to equal protection of the laws is a ‘personal and present’ one, how can these plaintiffs be denied such relief as is now available?”<sup>337</sup>

In the Delaware courts, the separate-but-equal doctrine was given robust application as courts required actual equality and ordered integration remedies when school authorities fell short. But equally significant was a portion of Chancellor Seitz’s opinion in *Belton* addressing the constitutionality of segregation per se. He acknowledged he was bound by *Gong Lum*’s resolution of the issue<sup>338</sup> but nevertheless determined from the plaintiffs’ “many expert witnesses,” and the fact that there were “[n]o witnesses in opposition,” that state-enforced segregation “creates a mental health problem in many Negro children with a resulting impediment to their educational progress.”<sup>339</sup> Disputing *Gong Lum*’s implication that “a separate but equal test can be applied, at least below the college level,” Chancellor Seitz concluded that “[s]tate-imposed segregation in education itself results in the Negro children, as a class, receiving educational opportunities which are substantially inferior to those available to white children otherwise similarly situated.”<sup>340</sup> He invited the U.S. Supreme Court “to re-examine its doctrine in the light of my finding of fact,”<sup>341</sup> and he emphasized that it was no answer to say “the State may not be ‘ready’ for non-segregated education . . .

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334. *Id.* at 869-70.

335. *Id.* at 870-71.

336. *Gebhart v. Belton*, 91 A.2d 137, 144-52 (Del. 1952).

337. *Id.* at 149.

338. *Belton*, 87 A.2d at 865.

339. *Id.* at 864.

340. *Id.* at 865.

341. *Id.* at 866.

The application of Constitutional principles is often distasteful to some citizens, but that is one reason for Constitutional guarantees. The principles override transitory passions.”<sup>342</sup>

As it turned out, the Court in *Brown* was listening: it quoted Chancellor Seitz alongside the district court in Kansas in concluding that segregation unconstitutionally harms black children.<sup>343</sup> The judgment of the Delaware courts was affirmed in *Brown*; the judgments of the federal courts in Virginia, South Carolina, and Kansas were reversed.<sup>344</sup>

#### D. After Brown

In the wake of *Brown*, both state and federal courts confronted the question of how far states and local districts had to go toward integrating their schools. The district court in *Briggs* opened the bidding by declaring that the Constitution, as interpreted in *Brown*, “does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation.”<sup>345</sup> For a decade, *Brown* went largely unenforced in the South.<sup>346</sup> Only after Congress and the President conditioned federal education funding on desegregation compliance did the U.S. Supreme Court require states and local authorities to “convert promptly to a system without a ‘white’ school and a ‘Negro’ school, but just schools,” and to “come forward with a plan that promises realistically to work, and promises realistically to work *now*.”<sup>347</sup>

Desegregation would not have occurred to the extent that it did without the courage and integrity of federal judges, including the judges on the U.S. Court

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342. *Id.* at 864-65.

343. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 n.10 (1954) (quoting *Belton*, 87 A.2d at 865).

344. *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955).

345. *Briggs v. Elliott*, 132 F. Supp. 776, 777 (E.D.S.C. 1955).

346. See ERICA FRANKENBERG ET AL., THE CIVIL RIGHTS PROJECT, A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? 37 tbl.10, 38 fig.10 (2003) (showing that the percentage of black students attending majority-white schools in the South increased from zero in 1954 to 2.3 percent in 1964). The extraordinary case of *Cooper v. Aaron*, 358 U.S. 1 (1958), in which President Eisenhower had called in the National Guard to supervise the integration of Central High School in Little Rock, Arkansas, was the exception indicative of a general posture of state or local noncompliance.

347. *Green v. County Sch. Bd.*, 391 U.S. 430, 439, 442 (1968); see *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); see generally Goodwin Liu, *Brown, Bollinger, and Beyond*, 47 HOW. L.J. 705, 713-17 (2004) (describing the Supreme Court’s limited role after *Brown* until Congress gave desegregation enforcement authority to the Department of Health, Education, and Welfare).

of Appeals for the Fifth Circuit who supervised much of *Brown*'s enforcement in the South.<sup>348</sup> But state courts were part of the story as well, in several instances articulating standards for desegregation under state law that went beyond the requirements of the Fourteenth Amendment.

In 1963, the California Supreme Court in *Jackson v. Pasadena City School District* condemned segregation whether practiced "openly and directly or indirectly by evasive schemes," and declared that "the Fourteenth Amendment is violated where zoning is merely a subterfuge for producing or perpetuating racial segregation in a school."<sup>349</sup> The court made clear that where residential segregation exists, school boards may not assign students to schools "on a geographic basis without corrective measures. The right to an equal opportunity for education and the harmful consequences of segregation require that school boards take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools regardless of its cause."<sup>350</sup>

In 1974, the U.S. Supreme Court, with four Justices recently appointed by President Nixon, decided *Milliken v. Bradley*, the first of several cases holding that desegregation orders under the Federal Constitution must be limited to remedying the demonstrable effects of de jure segregation.<sup>351</sup> But the California Supreme Court was undeterred. In *Crawford v. Board of Education*, the court acknowledged *Milliken* but went on to explain that no principled distinction could be drawn between de jure and de facto segregation.<sup>352</sup> Adhering to its decision in *Jackson*, the court unanimously said: "In California, all public school districts bear an obligation under the state Constitution to undertake reasonably

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348. See, e.g., *Henry v. Clarksdale Mun. Separate Sch. Dist.*, 409 F.2d 682 (5th Cir. 1969); *United States v. Bd. of Educ.*, 396 F.2d 44 (5th Cir. 1968); *Davis v. Bd. of Sch. Comm'rs*, 393 F.2d 690 (5th Cir. 1968); *United States v. Jefferson Cty. Bd. of Educ.*, 380 F.2d 385 (5th Cir. 1967); *Singleton v. Jackson Mun. Separate Sch. Dist.*, 348 F.2d 729 (5th Cir. 1965). See generally JACK BASS, *UNLIKELY HEROES: THE DRAMATIC STORY OF THE SOUTHERN JUDGES OF THE FIFTH CIRCUIT WHO TRANSLATED THE SUPREME COURT'S BROWN DECISION INTO A REVOLUTION FOR EQUALITY* (1981) (describing the crucial role the Fifth Circuit judges played in desegregating the South). At the time, the Fifth Circuit encompassed what is now the Eleventh Circuit.

349. *Jackson v. Pasadena City Sch. Dist.*, 382 P.2d 878, 881 (Cal. 1963).

350. *Id.* at 882.

351. 418 U.S. 717, 744-45 (1974); see *Missouri v. Jenkins*, 515 U.S. 70, 92-102 (1995); *Freeman v. Pitts*, 503 U.S. 467, 494 (1992); *Bd. of Educ. v. Dowell*, 498 U.S. 237, 249-50 (1991); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 434-36 (1976).

352. See *Crawford v. Bd. of Educ.*, 551 P.2d 28, 33-42, 33 n.4 (Cal. 1976).

feasible steps to alleviate school segregation, regardless of the cause of such segregation.”<sup>353</sup> On this basis, the state high court affirmed a trial court order requiring the Los Angeles Unified School District “to undertake reasonably feasible steps to desegregate its schools,” even if the segregation was de facto in nature.<sup>354</sup> *Crawford* was superseded when California voters amended the state constitution in 1979 to prohibit state courts from ordering desegregation remedies beyond what a federal court could order under the Fourteenth Amendment.<sup>355</sup> If anything, the action by the electorate underscored the countermajoritarian solicitude of the state high court.

Two decades later, as the federal courts were winding down their desegregation efforts, significant litigation proceeded in state courts. In 1996, the Connecticut Supreme Court held in *Sheff v. O’Neill* that the state constitution “requires the legislature to take affirmative responsibility to remedy segregation in our public schools, regardless of whether that segregation has occurred de jure or de facto.”<sup>356</sup> The court declined to follow the narrower remedial standard under the Fourteenth Amendment in light of the Connecticut Constitution’s guarantee of free public education and its express directive that “[n]o person shall . . . be subjected to segregation.”<sup>357</sup> Further, the court observed that whereas “the federal cases are guided by principles of federalism” that counsel restraint in examining state action, “[p]rinciples of federalism . . . do not restrict *our* constitutional authority to enforce the [state] constitutional mandates . . . .”<sup>358</sup> Upon finding that minority students in Hartford had been denied “substantially equal educational opportunity that is free from substantial racial and ethnic isolation,”<sup>359</sup> the court issued a declaratory judgment and asked the legislature to take

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353. *Id.* at 42; *see id.* at 34 (reaffirming that school boards in California are constitutionally required to alleviate segregation “whether the segregation be de facto or de jure in origin”).

354. *Id.* at 30; *cf. id.* (declining to affirm the portion of the trial court order “defining ‘segregated’ schools in terms of specific racial and ethnic percentages”).

355. *See* CAL. CONST. art. I, § 7(a); *see also* *Crawford v. Bd. of Educ.*, 458 U.S. 527, 535 (1982) (upholding the amendment as constitutional and explaining that “Proposition I does not inhibit enforcement of any federal law or constitutional requirement. Quite the contrary, by its plain language the Proposition seeks only to embrace the requirements of the Federal Constitution with respect to mandatory school assignments and transportation”).

356. 678 A.2d 1267, 1283 (Conn. 1996).

357. CONN. CONST. art. I, § 20; *see id.* art. VIII, § 1 (guaranteeing free public education); *Sheff*, 678 A.2d at 1281-83 (discussing these provisions). *But cf. id.* at 1314-27 (Borden, J., dissenting) (arguing that the phrase “subjected to segregation” in the state constitution means de jure, not de facto, segregation).

358. *Sheff*, 678 A.2d at 1279 (majority opinion).

359. *Id.* at 1286.

appropriate action.<sup>360</sup> Since then, a number of settlement agreements have resulted in uneven progress toward reducing the racial isolation of Hartford's minority students.<sup>361</sup>

In 2004, the New Jersey Supreme Court similarly affirmed that “[w]hether due to an official action, or simply segregation in fact, our public policy applies with equal force against the continuation of segregation in our schools.’ . . . [R]acial imbalance resulting from *de facto* segregation is inimical to the [state] constitutional guarantee of a thorough and efficient education.”<sup>362</sup> The court applied this principle in the context of a petition by the Borough of North Haledon to withdraw from a regional high-school district comprised of three boroughs. Over time, North Haledon had assumed a disproportionate share of the funding burden for the district; meanwhile, the district's demographics had changed from eighty-one percent white in 1991-92 to fifty-one percent white in 2001-02, with significant increases in black and Hispanic enrollments.<sup>363</sup> The withdrawal of North Haledon would have further reduced white enrollment by nine percentage points.<sup>364</sup>

North Haledon obtained approval for a proposed referendum on withdrawal from the state education department's Board of Review, but the New Jersey high court held that the board's approval violated “the constitutional imperative to prevent segregation in our public schools.”<sup>365</sup> The court emphasized that both white and minority “[s]tudents attending racially imbalanced schools are denied the benefits that come from learning and associating with students from different backgrounds, races, and cultures.”<sup>366</sup> By accelerating the decline of white enrollment in the district, the court explained, “withdrawal by North Haledon will deny the benefits of the educational opportunity offered by a diverse student body to both the students remaining at Manchester Regional and to the students

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360. *See id.* at 1290.

361. *See* GERALD E. FRUG ET AL., LOCAL GOVERNMENT LAW: CASES AND MATERIALS 500 (6th ed. 2015); Matthew Kauffman, *Number of Hartford Students in Integrated Schools Drops by Hundreds*, HARTFORD COURANT (Dec. 20, 2017, 1:45 PM), <http://www.courant.com/news/connecticut/hc-news-sheff-magnet-school-numbers-20171221-story.html> [<https://perma.cc/9AR3-49FJ>].

362. *In re* Authorization to Conduct a Referendum on the Withdrawal of N. Haledon Sch. Dist. from the Passaic Cty. Manchester Reg'l High Sch. Dist., 854 A.2d 327, 336 (N.J. 2004) (first alteration in original) (quoting *In re* Grant of Charter Sch. Application of Englewood on the Palisades Charter Sch., 753 A.2d 687, 692 (N.J. 2000)).

363. *See id.* at 329-32.

364. *Id.* at 332.

365. *Id.* at 339; *see id.* at 342.

366. *Id.* at 337.

from North Haledon.”<sup>367</sup> The court invalidated the proposed referendum and ordered the state education commissioner “to develop . . . an equitable cost apportionment scheme” to lessen North Haledon’s tax burden.<sup>368</sup>

Finally, consider the U.S. Supreme Court’s last decision addressing school desegregation. In *Parents Involved in Community Schools v. Seattle School District No. 1*, the Court invalidated the voluntary, race-conscious efforts of Seattle and Louisville school officials to alleviate de facto segregation in their districts.<sup>369</sup> Many state and federal courts had held, to the contrary, that such efforts to remedy de facto segregation do not violate equal protection.<sup>370</sup> Justice John Paul Stevens, dissenting in *Parents Involved*, quoted one of those state decisions, a 1967 ruling by the Massachusetts Supreme Judicial Court upholding a state statute mandating racial integration in public schools: “It would be the height of irony if the racial imbalance act, enacted as it was with the laudable purpose of achieving equal educational opportunities, should, by prescribing school pupil allocations based on race, founder on unsuspected shoals in the Fourteenth Amendment.”<sup>371</sup> There is actually a double irony here: the U.S. Supreme Court in *Plessy* and *Gong Lum* had relied heavily on the Massachusetts high court’s broad view of policymaking discretion when it worked to keep students of different races apart, yet the Court in *Parents Involved* took no guidance from the same Massachusetts court’s broad view of policymaking discretion when it worked to bring students of different races together. In our increasingly diverse society, the challenge of creating schools where children of different races can learn to work and play together would seem to be a prime candidate for (at least) fifty-one imperfect solutions.

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367. *Id.* at 341.

368. *See id.* at 341-42.

369. 551 U.S. 701 (2007).

370. *See, e.g.*, *Tometz v. Bd. of Educ.*, 237 N.E.2d 498, 503 (Ill. 1968); *Borders v. Bd. of Educ.*, 290 A.2d 510, 517 (Md. 1972); *Booker v. Bd. of Educ.*, 212 A.2d 1, 6 (N.J. 1965); *Vetere v. Allen*, 206 N.E.2d 174, 176 (N.Y. 1965); *Balsbaugh v. Rowland*, 290 A.2d 85, 91-92 (Pa. 1972); *see also Parents Involved*, 551 U.S. at 826 (Breyer, J., dissenting) (quoting *Tometz*, 237 N.E.2d at 501 (collecting cases)).

371. *Parents Involved*, 551 U.S. at 801-02 (Stevens, J., dissenting) (quoting *Sch. Comm. of Bos. v. Bd. of Educ.*, 227 N.E.2d 729, 733 (Mass. 1967) (footnote omitted)). The Massachusetts decision was appealed to the U.S. Supreme Court, and the Court dismissed the appeal “for want of a substantial federal question.” *Sch. Comm. of Bos. v. Bd. of Educ.*, 389 U.S. 572 (1968) (per curiam); *see Parents Involved*, 551 U.S. at 802 (Stevens, J., dissenting) (“That decision not only expressed our appraisal of the merits of the appeal, but it constitutes a precedent that the Court overrules today.”).

**CONCLUSION**

The case law on school segregation does not show that state courts were in the vanguard of protecting the rights of black schoolchildren or that they explored every avenue under the law for dismantling Jim Crow. Before *Brown*, there were plenty of state decisions that ratified the status quo. But there were also many state decisions that called segregation into doubt; short of holding it unconstitutional, state courts invalidated the practice on a variety of other grounds. It is true that none of the examples above involved state courts in the South, but it is not obvious that the federal courts in those jurisdictions performed much differently, as *Briggs* and *Davis* suggest. The doctrine of separate but equal was a synthesis of state and federal decisions, and the undoing of the doctrine also featured the kinds of interactions between state and federal courts that Judge Sutton highlights throughout his book. *Brown* itself was a singularly bold accomplishment of the U.S. Supreme Court. But the history of segregation, before and after *Brown*, adds a further dimension to Judge Sutton's refutation of the commonplace view that state courts cannot be trusted to protect individual rights. And it provides yet another example of state courts engaged in a shared constitutional discourse, not multiple state-centric discourses, with each other and with the federal courts.

Justice Brennan's 1977 paean to judicial federalism had particular resonance in light of the changing composition and increasingly conservative tilt of the U.S. Supreme Court. We may be at a similar moment today. But the call for judicial federalism in *51 Imperfect Solutions* has a different message and comes from a different messenger. While sharing Justice Brennan's faith in state courts as protectors of individual rights, Judge Sutton is not an apostle of individual rights maximalism. His book is not a response to anticipated backsliding by the U.S. Supreme Court in enforcing constitutional rights. Instead, Judge Sutton's concerns, like those of the Framers of the 1789 Constitution, are primarily structural and focus on the process by which individual rights take shape in our diverse democracy. By deepening our understanding of the federal-state balance and urging its recalibration in our legal culture, *51 Imperfect Solutions* reminds us that the meaning of liberty, in whatever era, cannot be understood apart from the question of who decides.