

## A Response to Justice Goodwin Liu

*Jeffrey S. Sutton*

I met Goodwin Liu when we participated in a panel discussion at a conference sponsored by the American Constitution Society in the early 2000s. The topic covered *the* American Constitution—of course—and I doubt that Goodwin, I, or any of the other panelists uttered a word about the other fifty American constitutions during the presentation. Although memories of the event have faded, I presume I was assigned the task of talking about—and defending—the Rehnquist Court’s federalism decisions. In discussing those decisions, it’s fair to say that Goodwin and I started in different places. And it’s fair to say that we started in different places in talking more broadly about the role of the federal courts in addressing structural and individual-rights disputes arising under the U.S. Constitution.

Time and chance find us meeting on a different field today—the role of state courts and state constitutions in protecting individual rights—and struggling to disagree. What happened? At least two things.

One is that we both experienced the federal confirmation process. Each of us was around forty when the President nominated us. And neither of us had an easy visit to the Chambers of the United States Senate. My odyssey lasted two years and ended with a (barely) favorable vote: 52-41.<sup>1</sup> Not exactly a thumbs-up mandate. Goodwin’s odyssey lasted a year. After a failed 52-43 cloture vote at a time when the threat of a filibuster still counted (and the minority party still could insist on sixty votes), he withdrew “[w]ith no possibility of

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1. See 149 CONG. REC. 9877 (2003).

an up-or-down vote on the horizon.”<sup>2</sup> Whether one exits the interest-group sausage grinder of the federal confirmation process with a job or without one, it leaves impressions. One was the striking contrast between our experiences and the not-too-long-ago confirmation experiences of our mentors. Justice Ginsburg was confirmed by a 96-3 vote in 1993, and Justice Scalia was confirmed by a 98-0 vote in 1986.<sup>3</sup> Goodwin is no more “liberal” than Justice Ginsburg, and I am no more “conservative” than Justice Scalia. Yet neither of us could get more than fifty-two votes for a middle-of-the-pack seat on an “inferior” federal court of appeals. How could we not take from that experience the lesson that the selection process for federal judges had become highly politicized and was metastasizing? And how could we not worry that this trend—a trend accelerated by an American proclivity to seek winner-take-all victories in the U.S. Supreme Court under the U.S. Constitution—ran the risk of undermining trust and confidence in a Court we both care deeply about?

The other development is that we started writing about state constitutions—he by necessity, I by choice. In 2011, the Ninth Circuit’s loss became the California Supreme Court’s gain. To his credit and to the good fortune of the people of California, Governor Jerry Brown nominated Goodwin to a seat on the Golden State’s highest court. By day, Justice Liu thus began resolving cases under the California Constitution, and by night he began writing about the role of state constitutions in protecting individual rights.<sup>4</sup> My job in contrast does not require me to write about state constitutional questions; I can recall just one case about the topic in sixteen years. Even so, after I became a federal judge, I began writing about, and teaching, state constitutional law.

That brings us to *51 Imperfect Solutions* and Justice Liu’s Review of it. My response is twofold: I wish that I could say I had written the Review myself, and I would prefer to leave it at that. But convention and the persistence of the editors of the *Yale Law Journal* require more.

Let me respond, then, to the two most important contributions of his incisive and thought-provoking Review—both offered from the perch of someone who preaches *and* practices state constitutional law. One contribution is a reveal: Justice Liu uncovers a fascinating story about the underappreciated role of the state courts—for better and for worse—on the path to *Plessy v. Ferguson*<sup>5</sup>

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2. Abby Phillip, *Goodwin Liu Withdraws Nomination*, POLITICO (May 25, 2011, 7:04 PM), <https://www.politico.com/story/2011/05/goodwin-liu-withdraws-nomination-055724> [<https://perma.cc/SHF9-MLWH>].
  3. *Supreme Court Nominations: Present-1789*, U.S. SENATE, <https://www.senate.gov/pagelayout/reference/nominations/Nominations.htm> [<https://perma.cc/4QGY-BJKT>].
  4. See, e.g., Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. REV. 1307 (2017).
  5. 163 U.S. 537 (1896).

and after that the curvy road to *Brown v. Board of Education*.<sup>6</sup> The other suggests a valuable qualification and elaboration of a thesis of the book.

Let's start with *his* story—the American path from separate-but-equal to not-equal-if-separate. Justice Liu takes my four stories about the interaction of state and federal constitutional law—and raises me one. There is no more important story about individual rights in this country than the one rooted in the central defect of the original U.S. Constitution: its tolerance of a racial caste system. Justice Liu shows the complexity of the role of the states in that story, one I had not appreciated and one I hope will contribute to a growing field—historical scholarship about the role of the state and federal courts and state and federal charters in protecting individual rights. The best book reviews pick up on the conversation and add to it. Justice Liu has done just that.

Little did I know that the U.S. Supreme Court's decision in *Plessy* leaned on a state-court decision by Massachusetts Chief Justice Lemuel Shaw in *Roberts v. City of Boston*.<sup>7</sup> That is surprising at many levels. Massachusetts led the fight to end slavery, and indeed its high court was the first state court to declare slavery unconstitutional under its state constitution.<sup>8</sup> And Chief Justice Shaw, the author of more than 2,200 opinions, was one of the most celebrated jurists of the nineteenth century.<sup>9</sup> According to biographer and historian Leonard Levy, Shaw became “preëminent” because of his “genius in accommodating the law to the shifting conditions and requirements” of the industrial revolution.<sup>10</sup> As a native son of Massachusetts and an exceptionally thoughtful jurist, Chief Justice Shaw was not a leading candidate to tolerate segregation, let alone to plant its seed as a permissible democratic choice in American legal thought.

*Roberts* adds to a long list of cautionary tales about how the best state-court judges, as with the best federal judges,<sup>11</sup> can have bad days. Imperfect indeed. Reading Chief Justice Shaw's opinion today, I am struck by the thinness of his analysis. Only in his final paragraphs does he address the argument that “separate schools tend[] to deepen and perpetuate the odious distinction of caste.”<sup>12</sup> And even then, he can say only this: “This prejudice, if it exists, is not created

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6. 374 U.S. 483 (1954).

7. 59 Mass. (5 Cush.) 198 (1849).

8. EMILY BLANCK, TYRANNICIDE: FORGING AN AMERICAN LAW OF SLAVERY IN REVOLUTIONARY SOUTH CAROLINA AND MASSACHUSETTS 122-27 (2014).

9. LEONARD W. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 3 (1957).

10. *Id.* at 22.

11. See, for example, Justice Holmes's opinion in *Buck v. Bell*, 274 U.S. 200 (1927), upholding as constitutional compulsory eugenic sterilization.

12. *Roberts*, 59 Mass. (5 Cush.) at 209.

by law, and probably cannot be changed by law.”<sup>13</sup> Making matters worse, as Justice Liu shows, Chief Justice Shaw’s influence created “a jurisprudential echo chamber” in which some other state high courts – and ultimately the U.S. Supreme Court – adopted his separate-but-equal reasoning.<sup>14</sup>

But *Roberts* was not the only state-court decision of that era to address the question of segregation. And it did not have the final say about the role of state constitutions (and state statutes) in ending the practice, as Justice Liu also points out. Looking in part to a provision of the Iowa Constitution requiring “the education of *all the youths of the State* through a system of common schools,”<sup>15</sup> the Hawkeye high court pronounced school children regardless of race “equal before the law” in 1868.<sup>16</sup> A year later, the Michigan Supreme Court reached a similar outcome on statutory grounds,<sup>17</sup> as did the Kansas Supreme Court in 1881.<sup>18</sup> In all, “between 1834 and 1903, black plaintiffs obtained relief in twenty-eight” state high court cases.<sup>19</sup> As with so many stories about the development of American constitutional law, there often is more than meets the eye, or at least more than our constitutional law books tell us.

Justice Liu’s Review also requires a modest qualification, or at least an elaboration, of some of the ideas in *51 Imperfect Solutions*. One theme of the book builds on Justice Brandeis’s insight about an evergreen virtue of federalism: that it can be wise to experiment with small sample sizes rather than large ones. In talking about the states as laboratories of policy-making experimentation, Justice Brandeis was referring to state legislatures as the source of the new ideas and policies. Why not do the same thing with constitutional law, the book argues? Just as American legislation profits from ground-up experimentation by state legislatures, so might American constitutional law benefit from ground-up experimentation by state courts construing the individual rights guarantees that appear in nearly all of our fifty-one constitutions. Justice Liu is right to point out that *this* laboratory of experimentation applies to some constitutional rights but not to others. If, for example, a state guarantee differs textually from other constitutions or turns on historical experiences unique to a given state, it is less likely that its innovations will carry over to other states

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13. *Id.*

14. Goodwin Liu, *State Courts and Constitutional Structure*, 128 YALE L.J. 1304, 1344 (2019) (book review).

15. *Clark v. Bd. of Dirs.*, 24 Iowa 266, 274 (1868).

16. *Id.* at 277.

17. *People v. Bd. of Educ.*, 18 Mich. 400, 415 (1869).

18. *Bd. of Educ. v. Tinnon*, 26 Kan. 1, 22-23 (1881).

19. Liu, *supra* note 14, at 1345-46.

lacking that language or that it will benefit the U.S. Supreme Court if the Federal Constitution lacks that language. True enough.

But that does not make this type of independent state constitutionalism any less valuable. This inevitable feature of a country with fifty-one constitutions contributes to another theme of the book: that we need not resolve all of our constitutional debates on the winner-take-all stage of the U.S. Supreme Court but that we can resolve many of them on the winner-take-some stages of the state courts.

In addition to that mild riposte, I have a slight quibble with Justice Liu's assessment that the four stories in *51 Imperfect Solutions* all deal with constitutional guarantees that are identical or essentially identical on both the state and federal levels—and thus mainly implicate the state courts' stage-setting role for U.S. Supreme Court decisions as opposed to the role of independently addressing and finally resolving these debates.<sup>20</sup> Better, it seems to me, to think of the four stories as occupying points on a spectrum.

At one edge is the exclusionary-rule chapter—a chronicle that turns on fifty-one guarantees that share nearly identical language when it comes to the propriety of an exclusionary rule. Here, we have the best example for using the state courts as laboratories of constitutional experimentation—and using those lessons before nationalizing a right and perhaps even after nationalizing it. He and I agree on this point.

The compelled flag salute story, implicating free speech and free exercise guarantees, occupies the next slot. My one qualification of his qualification is that many state religious liberty guarantees refer to a right of “conscience,” which is broader than a right to “free exercise,” and indeed it was the right of conscience that was relied on in some of the state-court decisions.<sup>21</sup> Still, Justice Liu is right that the failures and successes of this story turn largely (if not always) on state and federal judges assessing similar constitutional concepts.

The dawn and dusk of the eugenics movement come next. Even the state-court cases that turned on the federal equal protection guarantee, such as the New Jersey Supreme Court decision in *Smith v. Board of Examiners*, were built on deeply embedded state-court doctrines about “class legislation.”<sup>22</sup> The U.S. Supreme Court appeared to abandon this approach after *Lochner v. New York*<sup>23</sup> (which is one explanation for *Buck v. Bell* in 1927), yet the class-legislation doc-

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20. *Id.* at 1332, 1341-45.

21. See *State v. Smith*, 127 P.2d 518, 522 (Kan. 1942); *State ex rel. Bolling v. Superior Court*, 133 P.2d 803, 806 (Wash. 1943); see also *State v. Mercante*, slip op. at 11-12 (W. Va. Cir. Ct. June 1, 1942) (looking to the text of the state constitution's specific religious freedom provision).

22. See *Smith v. Bd. of Examiners*, 88 A. 963, 966 (N.J. 1913).

23. 198 U.S. 45 (1905).

trine still has many useful lessons for today's equal protection disputes. One other variation in this story is that the state legislatures (as well as state courts) contributed mightily to bringing eugenic sterilizations to an end.

The school-funding story belongs at the far end of the spectrum. Much of that history turns on unique state guarantees that have no parallel in the U.S. Constitution. Proof is the contrast between the fortunes of the school-funding plaintiffs in the first phase of this litigation history (1971 to 1989) and the second phase (1989 to the present). In the first phase, the claimants relied on federal doctrine (fundamental rights, suspect classes, tiers of review) and lost most of the cases under their state constitutions.<sup>24</sup> In the second phase, the claimants (and state courts) relied on state-specific constitutional mandates that their legislatures create free systems of “adequate,” “thorough,” “efficient,” and “common” schools—and won most of the cases.<sup>25</sup> High up the ladder of abstraction, I suppose, one could reach a rung in which it's fair to say that the federal and state courts were looking at the same problem—equality in school funding in order to create equality of opportunity—and thus engaged in a shared narrative. But the salient point is that the specificity of the state guarantees and the unsuitability of the federal doctrines made all the difference.

All in all, these considerations underscore two of the key ideas of the book. One is to use the state courts as resources in resolving the next difficult constitutional debate. The other is to remember that there is nothing wrong with tolerating state-by-state or regional differences when it comes to some constitutional protections. This is a big country. Before the people of Ohio tell the people of California how to run their lives (through the U.S. Constitution), they might do well to ask whether they will resent it if the people of California return the favor. Not all rights disputes lend themselves to one and only one solution.

That leads me back to where I started. Justice Liu and I agree that state courts and state constitutions have played a crucial, if underrecognized, role in the development of American constitutional law, and we both agree that they have the potential to play a crucial role going forward. Efforts to recover more of these stories from the past may help lay the foundation for a healthier relationship between the two sets of courts and constitutions. Appropriately enough, Chief Justice Shaw's biographer, Professor Levy, put the point well in 1957: “[A] society reveals itself in its laws and nowhere better than in the reports of the decisions of the state courts. The state reports are, however, the wasteland of American legal history. . . . [The work of state judges is] unde-

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24. JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 30 (2018).

25. *Id.*

servedly unstudied. So long as that condition exists, there can be no history of American law, and without it, no adequate history of this nation's civilization."<sup>26</sup>

If that perspective does not motivate the reader, perhaps these numbers will. In 2016, there were 84.2 million cases filed in state courts.<sup>27</sup> For the year ending March 31, 2017, a total of 367,937 cases were filed in federal court.<sup>28</sup> As these statistics confirm, anyone who cares about justice in this country must pay attention to our state courts and the *two* sets of charters that govern them.

In taking up Levy's call, Justice Liu has added a new page to the most important chapter in the history of American individual rights: the end of separate-but-equal. For that, and for his masterful Review, I am grateful.

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26. LEVY, *supra* note 9, at 3-4.

27. *Total Incoming Cases in State Courts, 2007-2016*, CT. STAT. PROJECT, [http://www.courtstatistics.org/NCSC-Analysis/~/\\_media/7F3DA5FEF1BF4BE1BE2BDE6BA0E86C60.ashx](http://www.courtstatistics.org/NCSC-Analysis/~/_media/7F3DA5FEF1BF4BE1BE2BDE6BA0E86C60.ashx) [<https://perma.cc/V4SF-Q4T7>].

28. *Federal Judicial Caseload Statistics 2017*, U.S. CTS., <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2017> [<https://perma.cc/ED93-CH9W>].