



9-2018


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

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Repository Citation

Steinglass, Steven H., "Book Review: 51 Imperfect Solutions: States and the Making of American Constitutional Law, by Hon. Jeffrey S. Sutton" (2018). *Law Faculty Articles and Essays*. 978.

https://engagedscholarship.csuohio.edu/fac_articles/978

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Book Review

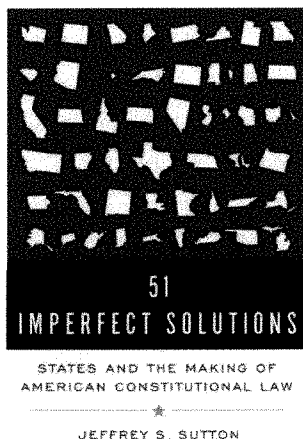
51 Imperfect Solutions: States and the Making of American Constitutional Law by Hon. Jeffrey S. Sutton

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

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

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

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



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

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

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

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

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

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

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

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

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

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UNITED STATES POSTAL SERVICE® (All Periodicals Publications Except Requester Publications)

1. Publication Title: Ohio State Bar Association
 2. Publication Number: 1700 Lake Shore Drive, Columbus, Ohio 43264
 3. Filing Date: September 28, 2014
 4. Issue Frequency: Quarterly
 5. Number of Issues Published Annually: 4
 6. Annual Subscription Price: \$34
 7. Complete Mailing Address of Known Office of Publication (Not printer) (Street, city, county, state, and ZIP+4®):
 Ohio State Bar Association
 1700 Lake Shore Drive
 Columbus, Ohio 43264
 Contact Person: Andrew Harmsel
 Telephone (include area code): 614-487-2350
 8. Complete Mailing Address of Headquarters or General Business Office of Publisher (Not printer):
 Ohio State Bar Association
 1700 Lake Shore Drive
 Columbus, Ohio 43264
 9. Full Names and Complete Mailing Addresses of Publisher, Editor, and Managing Editor (Do not include printer):
 Publisher: Andrew Harmsel
 Ohio State Bar Association
 1700 Lake Shore Drive
 Columbus, Ohio 43264
 Editor: Andrew Harmsel
 Ohio State Bar Association
 1700 Lake Shore Drive
 Columbus, Ohio 43264
 Managing Editor: Andrew Harmsel
 Ohio State Bar Association
 1700 Lake Shore Drive
 Columbus, Ohio 43264
 10. Owner (Do not leave blank. If the publication is owned by a corporation, give the name and address of the corporation immediately followed by the names and addresses of all stockholders owning or holding 1 percent or more of the total amount of stock. If not owned by a corporation, give the names and addresses of the individual owners. If owned by a partnership or other unincorporated firm, give its name and address as well as those of each individual owner. If the publication is published for a proprietor, give the name and address.)
 Full Name: Andrew Harmsel
 Complete Mailing Address: Ohio State Bar Association, 1700 Lake Shore Drive, Columbus, Ohio 43264
 11. Known Bondholders, Mortgagees, and Other Security Holders Owning or Holding 1 Percent or More of Total Amount of Bonds, Mortgages, or Other Securities (Do not leave blank.)
 Full Name: None
 Complete Mailing Address: None
 12. Tax Status (For completion by nonprofit organizations authorized to mail and non-profit rates) (Check one):
 The purpose, function, and nonprofit status of this organization and the exempt status for federal income tax purposes: Has Not Changed During Preceding 12 Months
 Has Changed During Preceding 12 Months (Publisher must submit explanation of change with this statement)

UNITED STATES POSTAL SERVICE® (All Periodicals Publications Except Requester Publications)

13. Publication Title: Ohio Lawyer
 14. Issue Date for Circulation Data Below: July/August 2014
 15. Extent and Nature of Circulation:
 a. Total Number of Copies (Net press run): 24,057 / 23,736
 b. Paid Circulation (By Mail and Outside the Mail):
 (1) Mailed Outside-County Paid Subscriptions (Based on PS Form 3541, include paid distribution above nominal rate, advertiser's proof copies, and exchange copies): 23,955 / 23,616
 (2) Mailed In-County Paid Subscriptions (Based on PS Form 3541) (Exclude paid distribution above nominal rate, advertiser's proof copies, and exchange copies): 0 / 0
 (3) Paid Distribution Outside the Mail (Including Sales Through Dealers and Carriers, Street Vendors, Counter Sales, and Other Paid Distribution Outside USPS): 0 / 0
 (4) Paid Distribution by Other Classes of Mail Through the USPS (e.g., First-Class Mail®): 0 / 0
 c. Total Paid Distribution (Sum of 15b(1)-(4)): 23,955 / 23,616
 d. Free or Nominal Rate Outside-County Copies (Based on PS Form 3541): 0 / 0
 e. Free or Nominal Rate In-County Copies (Based on PS Form 3541): 0 / 0
 f. Free or Nominal Rate Copies Mailed at Other Classes Through the USPS (e.g., First-Class Mail®): 0 / 0
 g. Free or Nominal Rate Distribution Outside the Mail (Carriers or other means): 0 / 0
 h. Total Free or Nominal Rate Distribution (Sum of 15d)-(15g)): 0 / 0
 i. Total Distribution (Sum of 15c and 15h): 23,955 / 23,616
 j. Copies not Distributed (See Instructions to Publishers #4 (page 83)): 102 / 120
 k. Total (Sum of 15a and 15j): 24,057 / 23,736
 l. Paid (PS Form 3541) (PS Form 105): 100 / 100
 *If you are claiming electronic copies, go to the 16 on page 3. If you are not claiming electronic copies, skip to line 17 on page 3.

UNITED STATES POSTAL SERVICE® (All Periodicals Publications Except Requester Publications)

16. Electronic Copy Circulation:
 a. Paid Electronic Copies: 0 / 0
 b. Total Paid Print Copies (Line 15c + Paid Electronic Copies (Line 16a)): 23,955 / 23,616
 c. Total Print Distribution (Line 15c + Paid Electronic Copies (Line 16a)): 23,955 / 23,616
 d. Printed Paid (Both Print & Electronic Copies) (95% divided by 100 = 100): 100 / 100
 I certify that 80% of all my distributed copies (electronic and print) are paid above a nominal price.
 17. Publication of Statement of Ownership:
 If the publication is a general publication, publication of this statement is required. Will be printed in the September/October 2014 issue of this publication.
 Publication not required.
 18. Signature and Title of Editor, Publisher, Business Manager, or Owner:
 Andrew Harmsel, OSBA Assistant Director of Marketing and Communications / Ohio Lawyer Editor
 Date: September 28, 2014
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