



**Jackie McDermott:** [00:00:00] Welcome to live at the National Constitution Center, the podcast sharing live constitutional conversations and debates hosted by the National Constitution Center. I'm Jackie McDermott, the show's producer. Each week we share conversations about the United States constitution. But on this week's episode, we focus on state constitutions, early state constitutions influenced the drafting of the U.S. Constitution and the Virginia Constitution of 1776 directly influenced both the declaration of independence and the Constitution's Bill of Rights.

So, as Americans get ready to celebrate independence day and NCC President Jeffrey Rosen was joined by Dick Howard. Professor Howard is an expert on the Virginia Constitution of 1776 and the current Virginia Constitution, which he helped draft. Jeff was then joined by two experts on state constitutions, Judge Jeffrey Sutton and Professor Emily Zackin.

Judge Sutton is the author of, "51 Imperfect Solutions: States and the Making of American Constitutional Law." Professor Zackin is the author of, "Looking for Rights in All the Wrong Places: Why State Constitutions Contain America's Positive Rights." This panel was streamed live on June 28th, 2021. Here's Jeff, to get the conversation started:

**Jeffrey Rosen:** [00:01:17] Ladies and gentlemen, welcome to the National Constitution Center and to today's convening of America's town hall.

I'm Jeffrey Rosen, the president and CEO of this wonderful institution. Let us inspire ourselves for the conversation ahead by reciting together the National Constitution Center's mission statement. Here we go: The National Constitution Center is the only institution in America, chartered by Congress to increase awareness and understanding of the U.S. Constitution among the American people on a nonpartisan basis. Now, although everything that we do is devoted to serving that mission, of increasing awareness and understanding of the United States Constitution. We're going to do that today by shining a light on state constitutions. This is a crucial project as part of our learning together because the U.S. Constitution after all was directly inspired by the state constitutions drafted between 1776 and 1780.

And indeed both the Declaration of Independence and the Bill of Rights were very directly inspired by the Virginia Constitution of 1776, which both Jefferson and Madison had by their sides when they drafted the Declaration and the Bill of Rights. So that's why today's conversation is so meaningful.

And I'm so excited to share with you America's greatest expert on the Virginia Constitution. The original version ratified in 1776 and the current Constitution, which was ratified on July 1st, 1971. He's A.E. Dick Howard, one of America's greatest constitutional scholars and teachers, Warner-Booker Distinguished Professor of International Law at the University of Virginia School of Law.

He was executive director of the commission that wrote Virginia's current constitution and directed the referendum campaign for its ratification. He's the author and editor of many important books, including *Magna Carta: Text and Commentary*, *The Road from Runnymede*, *Commentaries on the Constitution of Virginia*, and *Democracies Dawn: A Directory of*



*American Initiatives on Constitutionalism, Democracy, and the Rule of Law in Central and Eastern Europe.*

Dick and I will talk for a bit and then we'll be joined by two of America's greatest experts on state constitutions today, Chief Judge Jeffrey Sutton and Emily Zackin and I'll talk with them about the role of the states in defining constitutional rights today. So first of all, welcome Professor Howard, it's such an honor to have you, and why don't we begin if you could share with our audience, how was it that George Mason's 1776 Virginia Declaration ended up almost word for word in the preamble of the Declaration of Independence and in the Bill of Rights? Tell us about the history of Mason's draft and where he got his immortal language?

**A.E. Dick Howard :** [00:04:11] Jeff, thank you so much, I'm excited to be back. I'm an old friend of the center. I was a visiting scholar at the center a few years back and admire so much the work you're doing and I'm delighted that you've carved out a moment to talk about state constitutions. And it's very appropriate I think that we do this as we approach Independence Day on July the Fourth, because it was in Williamsburg in May of 1776, that the delegates of the Virginia Convention, they had become the defacto governing body of Virginia right up to the revolution in May of '76 they instructed their delegates in Philadelphia to introduce the Resolution for Independence.

And on the same day they set to work on a constitution for Virginia indeed I should point out that they actually set to work on two documents, the Declaration of Rights, and then a frame of governments, the actual body of the Constitution itself. And I emphasize the fact that it was two documents because it was pure John Locke's social contract theory.

Namely you articulate the fundamental rights of people in this commonwealth, and then having done that, you move on to write a frame of government that the freight pre-seed, they're not dependent on government. They preceded. Now all this has beginning to anticipate, as you pointed out the declaration of independence itself, because the Virginia Declaration of Rights, largely the work of George Mason was a compendium that drew heavily on British constitutionalism.

Magna Carta, the English Bill of Rights of 1689, other documents. And it drew very much on John Locke in his treatise on government, the social contract theory. So when you read the Declaration of Rights of 1776, you're looking at a bridge from the hundreds of years of Anglo-American development to American constitutional law itself, or that document.

He after imagine how exciting it was to be president of the dawn of the making of modern constitutions. We take constitutions for granted today. Virtually every country has one, but in the 18th century, it was unclear exactly what you were doing when you wrote a constitution. So these folks in Williamsburg said about the task, wrote a declaration rights frame of government, and then they really launched the ship of constitutionalism in a very real search.

So having adopted the Virginia Declaration and frame of government quickly this idea spread. The other colonies, emerging states were also writing constitutions and the Virginia document was in that respect, very influential. It was then ultimately influential on the the



federal Bill of Rights very much framed indeed, mostly the work of James Madison, who at age 25 had been a member of the Virginia Convention in 1776, he was their president of that creation.

Indeed, this Virginia document would have to be counted, I think is on the top 10 list of the most important Anglo American constitutional documents of all time. And even influenced the fresh Declaration of Rights of Man and the Citizen in 1789. So, as we approach Independence Day, you see the direct crossover from what was happening in Williamsburg and Virginia and then what was happening in Philadelphia when the Declaration of Independence was drawn up.

**Jeffrey Rosen:** [00:07:45] Thank you so much for all of that, for that wonderful history. The language is so striking. I want to begin with section 15, "that no free government or the blessings of Liberty can be preserved to any people, but by affirm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles," those are the four classical virtues from Cicero and Aristotle: justice moderation, temperance, and fortitude was the other. Where did Mason get that language, did he write it on his own or did he take it from some other sources?

**A.E. Dick Howard :** [00:08:17] Well, you know, Mason, back in those days, we didn't have the kind of organized bar we have today, but Mason had access to his uncle's law library. His uncle had a vast collection of books and people, if you were plantation owner or merchant or shipper or whoever you may be in those days, you had to know something about law. And law in those days was nicely intersected with philosophy and history and jurisprudence. It's clear from that language. You just quoted that Mason like so many of the people of his generation understood classical teachings, history of Greece, history of Rome. Very it's very clear. James Madison, for example, at Philadelphia, in the summer of 1787, that they clearly were drawing upon what they thought were the teachings of ancient history.

I think it's fascinating when we talk about state constitutions, the extent to which these documents are aspirational documents, the federal constitution is fairly sparse. It has a preamble, but by and large, it sticks to the frame of government itself. Where state constitutions go on. So there's at least these original constitutions develop the aspirational qualities of citizenship.

Look, what should the good citizen be? And that section 15, that you've just quoted beautifully, summarizes in a few words, the bridge, not only from British constitutionalism, but from the ancient world is as well from, from Greece and Rome. I'm happy to say that language is still in the state constitution.

I quoted to my classes. To anybody who will listen to it with a notion that especially that language. Frequent recourse to fundamental principles is lovely language. The notion that constitutions are not static, they don't stand still. However good they are. They have to evolve with the generations as I'm sure we will be talking about this morning, hell, over a period of time where the federal constitution has been amended a few times, but never completely rewritten.



It has been fairly common in the states to revise constitutions. We in Virginia have had a half dozen of them, including 1971. And in many ways they track the great social and economic and political debates of each generation. You can read those state constitutions and see the changing times through the 19th, 20th and into the 21st century.

**Jeffrey Rosen:** [00:10:44] Wonderful, so inspiring that you quote that to your class. I'm very glad that that section is still in the Virginia constitution. Now I have to ask you a course about section one. I'll just read it because it sounds so much like the famous second sentence of the Declaration of Independence, "that all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot by any compact, deprive or divest their posterity; namely the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."

Jefferson must've been clearly influenced by that as he wrote the Declaration. Where did Mason get that language from?

**A.E. Dick Howard :** [00:11:24] Well, when you read that, if you've read John Locke *Treatise on Government*, you see how Lockian this language is. And it imagines a state of nature. I mean, not the one actually existed historically, but the analytical notion that you can think about government as being something which assumes an earlier status of people in a state of nature, then they enter into a state of society.

But in creating a government, as they emerge into this organized society, they do not leave their rights behind. They bring with them those inherent rights. And you know today we would talk about human rights. That's the language of international law, international concourse today. Natural rights in the 18th century, where the analog of what we would talk about as being human rights.

So this is perfect. John Locke would have loved this. He would understand that I think the generation who wrote these early state and finally the federal constitution were very steep. They all read John Locke as well as the other treatises of their time. And they would have agreed this was almost something that you would almost take for granted. That stating making this declaration at the beginning of the constitution you are stating something which an English one of the same time could not have pointed to in his or her constitution. That as wonderful as British constitutionalism was in the 18th century, and as wonderful as Locke's theories were. The English had not put into play the statement that you find in section one of the Virginia Constitution. So we are here at the threshold of only articulating fundamental rights, but beginning the building blocks of modern American constitutionalism.

In John Marshall and *Marbury v. S Madison* would have understood and agreed with this language. So in many ways, Mason is speaking for his generation of people who had inherited these ideas, had put them into play and beginning the process that we, I'm happy to say, our air to today.

**Jeffrey Rosen:** [00:13:30] Beautifully put. Well, now let's talk about further developments in Virginia's Constitution. After the founding era there was a progressive constitution written



during reconstruction in 1870, but then a remarkably regressive post reconstruction constitution of 1902, which was grounded in white supremacy and aimed at the mass disenfranchisement of African-Americans. That was the constitution that you set out to revise in 1971. Tell us about that 1902 Constitution. What some of its most progressive elements were and how you set about to revise it when the time came?

**A.E. Dick Howard** : [00:14:08] You're quite right in saying the 1870 Constitution, that was the reconstruction period, the southern state and the former Confederate states, in order to read the readmitted to the union, had to agree to ratify the 14th amendment and to write a new state constitution, which would recognize the franchise rights of African Americans, former slaves, and free men alike.

And so 1870 was clearly a step forward. It also was the first statement in Virginia of a public education system which was also meant to help bring newly enfranchised African-Americans into the mainstream of society. Sadly, after the end of reconstruction, last federal troops left the south in 1877, and then we were drawn into what we look back on happily as that post-reconstruction period, every Southern state, then rewrote its reconstruction constitutions to try to turn the clock back. They couldn't reinstitute slavery obviously, the 13th amendment took care of that, but they were going to push the clock as far back as they could. And basically push blacks, African Americans out of the mainstream of society, as much as they could.

Other states have led the way. So by 1902 in Virginia it's not surprising, but still shocking to read the debates of the Virginia Convention of 1901, 1902, because it is page after page built upon proclamations of white supremacy. The notion that the Anglo-Saxons are inherently meant to rule the world, you can almost see the imperialistic kind of thrust in the language of 1902.

And delegates were there validly as representing the white society and equally intent on disenfranchising, every black Virginian that they could. And they were very successful at that. They use the poll tax, they had understanding requirements, you wanted to go to the registrar and sign up to vote, the registrar could put before you the Virginia Constitution open it at random to any section and ask you to interpret it.

Well, there's sections of the Virginia Constitution. I can't completely interpret and it was clear in 1902 after that constitutionalism was promulgated that if you went to the registrar and you were the wrong color. You were a person, you were African-American, you were not going to satisfy that registrar or you, no matter what you said, you might be educateed, college educated.

You still, you want them to get the vote. So most blacks of that era knew that it was a futile gesture to go and register. They wouldn't even give up a day's pay to go and be turned away at the registrar's office. Virginia is a poles, showed that in 1867, about half of the registered voters in Virginia were black.

In 1904, after this push reconstruction constitution was adopted, it plunged to below 5%. And that was the beginning of machine rule of so-called Berg machine of Virginia for



decades went on based on this poll tax, the registration requirements, the other limitations of the 1902 Constitution. That was what we inherited.

In the 1960s the impetus for change was clearly in the air, because think about the national scene. It was the decade that the Supreme Court had decreed one person, one vote the Voting Rights Act of 1965 was in place, including Virginia and the other Southern states. The Poll Tax had been declared unconstitutional by the U.S. Supreme Court.

So federal initiatives were in the air. And I think the impetus for the rewriting of Virginia's Constitution was that the leaders of the state wanted to basically reclaim promising in that they wanted the future of their citizens to be in the hands of their own people and not have to be told what to do by both federal courts.

So the governor in 1968, Governor Mills Godwin called for the creation of a commission constitutional revision. And that was broad and big and included some amazing people. Lewis Powell, who later sat on the U.S. Supreme Court, Hardy Dillard later, remember the work or the HIG Oliver Hill, who was the leading civil rights attorney in Virginia.

He was the Thurgood Marshall of Virginia at that, at that a number of people of that stature to former governor settled the commission. It was a, a bi-partisan commission, Democrat and Republican, and very progressive. I think they picked up the instinct that they really had to take the Virginia Constitution into their own hands.

So the really, I think as the framers of the present constitution saw it really two tasks at hand, one was retrospective, namely to close the door on the legacy of the 1902 Constitution. They did that, they flipped education into the bill of rights into George Mason's Declaration of Rights. Education becomes a fundamental right alongside speech and the other fundamental rights.

They made it a leading mandate on the general assembly to provide education for every school. Every child was school aged in Virginia and a mandate on localities, counties and cities to put up their share of the money. Dictated by the general assembly. And point of that was to make it impossible, to have massive resistance, which had clouded Virginia after Brown v. Board of Education, we had school closing, Prince Edward County being the ugliest and most memorable example, a generation of black children not receiving public education.

So one of the purposes of the revisers, the framers of the present Virginia Constitution was to close that door and make that sort of thing possible to happen again. And by the way, added to the Declaration of Rights of Virginia, an anti-discrimination clause that never been one in the Virginia Constitution. So there's now a provision that says the shall be no governmental discrimination based on race, religion, national origin, and the like. So that was the retrospective, then the prospective was to try to nudge Virginia in the direction of quality education for every child in Virginia. I won't go into the details of that, but the framers of the constitution did not want to empower the courts to tell the legislators and the administrators what to do.



But they wanted to come as close to that goal of equity in education as, as it could. So not a perfect constitution, but not about not a bad one by any means. I think one has stood the test of time

**Jeffrey Rosen:** [00:21:06] not a bad one at all. Thanks to you for your superv work in helping drafted it was ratified overwhelmingly by voters in 1970 and it now celebrates its 50th anniversary. Dick Howard, we're so grateful to you for having educated us about the history and current state of the Virginia Constitution. And that perfectly sets up our next conversation with our two guests who I will welcome right now.

Judge Jeffrey Sutton serves on the U.S. Court of Appeals for the Sixth Circuit. He is one of Americas, most distinguished appellate judges, scholars, and commentators on the Constitution and his wonderful book, *51 constitutions* is a model for using state constitutions to interpret our rights in diverse and pluralistic ways.

And Emily Zackin is a PhD from Princeton University. She is the author of, *Looking for Rights in All the Wrong Places: Why State Constitutions Contain America's Positive Rights*. And she is also very well situated to share with us the state of state constitutions today. So welcome Judge Sutton and Professor Zackin.

And Jeff Sutton, let me start with you. You heard professor Howard talk about the Virginia Constitutions effort to enshrine a positive right to education in your wonderful book, *51 Constitutions* you use state constitutions treatment of a positive right to education as a case study for how states after the U.S. Supreme Court refused to find a positive right to equal educational funding reached a different conclusion on their own and you viewed this as a model of pluralism. So tell us about the story of education in the state constitutions.

**Jeffrey Sutton:** [00:23:03] Thank you, Jeff. It's great to be with Emily and Professor Howard. Thank you for all the work the National Constitution Center is doing not just in celebrating our national constitution, but educating us about our 50 other constitutions.

You know, a way to chat about the education provisions in our state constitutions is actually to start where Dick Howard left off and to think about Jim Crow, one of the great liberty equality failures in American history, just remember as I have a right arm and a left arm, Jim Crow is a double failure.

It's a failure at the federal level with the U.S. Supreme court decision in Plessy. And it's a failure in the southern states not to use democracy, their constitution to protect individuals from discrimination. So my goal and the thing we really should be working towards is strengthening the right and the left arm.

So that kind of double failure never happens again. Sometimes the problems we face in American government, aren't quite as easy. It's obvious we should not have segregation separate, but equal. Education funding is a much more complicated problem. It's not that there aren't some very stark situations where some school districts have a lot less revenue.

Than others to meet their challenges and the needs of their students. It's just got a lot of moving parts and complexities in 1973, the U.S. Supreme Court refused to recognize a





fundamental right to equal education between wealthy and poor school districts. In many ways, this is the bookend case to Brown, and it looked like some of Brown's promises were not going to be fulfilled because while segregation was no longer permitted.

How much good was that doing us? If we had communities that were underserved and did not have the resources to provide an adequate education? Well, it turns out in this area, there's not just an equal protection clause or due process clause in our 50 state constitutions. They also have their own adequacy, thorough and efficient education clauses.

And since 1973 and almost these 50 years. Two thirds to three quarters of our state courts have recognized some form of constitutional protection to prohibit this kind of inequity. So it's a really great example of why our 51 constitutions offer two opportunities to shots in every state in the country for some form of relief.

And the goal is to have both protections, federal and state, but at a minimum is Jim Crow illustrates. We have a real problem when there's a double failure and that is not what happened in education equality. And I'll let Professor, Zackin, we're going to go by Emily and Jeff today. But her book, *Looking for Rights in All the Wrong Places*, is just this wonderful book that not only talks about the second shot, but talks about it as a positive right.

**A.E. Dick Howard** : [00:26:06] And I'll let Emily take it from there since she's really the one that innovated this idea.

**Jeffrey Rosen**: [00:26:12] Thank you very much for that wonderful tee up and for the description of the rights to education in your own book whose title I should accurately state, *51 Imperfect Solutions: States and the Making of American Constitutional Law*. Professor Zackin, you as Judge Sutton suggests, write in your important book that like most of the world's constitutions, state constitutions contain positive rights relating to education, labor, social welfare, and the environment.

**A.E. Dick Howard** : [00:26:47] Let's focus on education as our case study. Cause Dick Howard and Judge Sutton has set it up so well. Tell us, when the first state constitution is began to protect a positive right to education and how that evolved throughout the 19th and 20th and 21st centuries.

**Emily Zackin**: [00:27:02] Absolutely, thanks for having me. It's a pleasure to be on this really illustrious panel. Yes. American state constitutions have mentioned education and mandated that states foster education since before the U.S. Constitution. So the Massachusetts Constitution says that the state has to be involved in fostering education. And it said that before the U.S. Constitution was written.

But I think one of the really important things to remember is that when we focus on this second shot, one thing you could think is, well, it's secondary, right? It's just, our real values, our highest principles are in the Bill of Rights. And when you read that, education's not in there. And in fact, this is what the Court says in Rodriguez.

We've read it and we don't see education. And so I think from that, people have concluded, well, I guess education rights aren't among America's really most cherished rights. Really





what Americans want is just being left alone. So the Bill of Rights is sometimes described as a list of thou shall nots.

There's the state has to leave me alone. Let me say what I want. Let me practice my religion, not search my house. Just keep government away from me. And some people think, well, okay, maybe these things are in state constitutions, but surely that's secondary. But in fact, one of the things I argue in my book is that it's not secondary at all. This is a product of America's political history that we had states before we had the U.S. Constitution. And it was these states that were providing goods like education. And so if you wanted to ensure that there was a public education system, you would go to your state and say, please set that up. In fact states do.

And especially before the 1930s, did, an enormous amount of social policy provision. And so it made sense that these rights would end up in state constitutions. This is not to say that they're lesser rights, that they mean less to Americans than the rights in the Federal Constitution. It's simply that states were the ones doing this kind of governance and so the constitutions of these states then reflect these demands for goods from governor

**Jeffrey Rosen:** [00:28:54] Fascinating, Judge Sutton, another round on, on education and the degree to which state constitution, as opposed to federal constitutional interpretation may be the most promising area for reform, what's going on in the states now with regard to education and is there a diversity of views?

**Jeffrey Sutton:** [00:29:13] Yeah, I mean, it's, it's really such a rich area to illustrate the values of state constitutions, state legislation and how it really compliments, the national debate. So one way to think about our education clause is to go back to Brandeis and, you know, Brandeis has this wonderful insight of states' as laboratories of experimentation.

Now what he was referring to was state legislatures as the laboratories of experimentation. And I think there are very few people that think he's wrong about that. You have a new problem, like educational quality, data privacy, opioids, no one knows the answer, so we try different things. I think the thing Emily and I are both trying to get people to think about is remember that our state courts can also be laboratories of experimentation. And one thing that those experiments that trial and error can do is sometimes the trial and error will help us realize there really are three or four different approaches. They're all equally strong. They all have equal vices. There really is no winning insight that ought to be nationalized.

Other times you will generate a con a census you'll generate a winning insight that ought to be nationalized. And Professor Zackin and I have not talked about this, but I suspect we both agree that educational equality and education funding is, is very tricky. It's a very tricky thing to sort out.

We know we've had national legislation with economic support and some economic, some standards. But I probably am on the side that says, we're still looking for that magic Eureka insight that is worth nationalizing. It's not because we don't appreciate their very serious equity problems, but sometimes if you nationalize too early, and this is actually the thesis of



my chapter in 51 imperfect solutions about school funding, if you nationalize too early, you run the risk of losing by winning.

In other words, the national standard, because it's national, because it has to apply to 330 million people. Thousands of school districts actually might be too low. It might be too ungenerous, but because it's a national rule, people will hesitate to go beyond it. So one of the things that's very tricky is going back to Brandeis.

When have you gotten the insight that needs to be nationalized? And when do you stick with trial and error? And for me the last 50 years have been very positive. I think there's a lot of really great insights that the state courts and even state legislatures have developed, identified. But I'm not sure, speaking for me that, I don't know that this is one of those situations where you could say, aha, they've now proved Rodriguez was wrong. And we now to read to revisit Rodriguez, but theoretically, that is how this should work. The U.S. Supreme Court puts up a stop sign, they say, we don't think there's a national right here.

Let the states experiment. And if the experiment really generates winning insights importable to other states and eventually the national government, whether Congress or the U.S. Supreme Court, why then you've got this dynamic federalism where at some point the U.S. Supreme Court could reconsider Rodriguez.

For me that that insight has an emerged, but I'm probably on the slightly stingy side, federal innovation of rights. So I can imagine reasonable responses in the other direction.

**Jeffrey Rosen:** [00:32:48] Fascinating, Professor Zackin, what are your thoughts about how state courts today are grappling with the Rodriguez question? And are you more optimistic than Judge Sutton that there might be some kind of consensus that could be nationalized eventually?

**Emily Zackin:** [00:33:01] Well, I fear I'm more pessimistic, I think if I had a magic wand, Rodriguez would have come out here. I wish that there had been a federal right to education. And I think that wouldn't have foreclosed states from interpreting their own state constitutions as having even rights above and beyond the national minimum. But I think these can work in tandem and pull in the same direction. I think what we saw instead was that as the federal Supreme Court shut that door, people turn to their states and they said, well, if that one door is shut at the federal level, maybe there's a second chance here.

Maybe states, we can do it through states. I think from the perspective of equality or educational equalization, that's not quite as good. It's more efficient to have a single voice at the federal level saying we're going to enforce some kind of minimum, but it's certainly better than that. And here. I think that because I'm a political scientist, I think this has an important lesson about federalism, that one of the nice things about our federal system is that it gives the losers another point of entry, another way to kind of keep fighting and kind of keeps the losing side in the game.

And so, although the federal Supreme Court says, we just don't see it. We don't think the 14th Amendment has the right to education or even anywhere in the country. The U.S.



Constitution people who said no, there must be a right to this, had another venue that had this sort of state level option. And they kept this kind of politics, this movement for educational equality alive. I think that's a very valuable thing about state level politics and American federalism generally.

**Jeffrey Rosen:** [00:34:31] Thank you so much for that. Judge Sutton, you introduced the question of state courts and public schools, and also Brandeis, the laboratories of democracy metaphor. I was struck by Justice Breyer's, memorable sentence in the recent Mahoney decision, "American public schools are the nurseries of democracy," that seemed to invoke his Justice Brandeis, as well as Tocqueville's suggestion that, "the American jury is a gratuitous public school where citizens can learn their rights." My question to you is, one of the case studies you give in your book, *51 Imperfect Solutions* is mandatory flag salutes under the First Amendment, and shows that state courts don't have to be perfect to affect change at a national level.

Is there a similar free speech debate about online free speech in state courts based on state constitutions? And our state courts coming to different conclusions about where to draw the line between on and off campus speech online in ways that the Supreme Court might draw on?

**Jeffrey Sutton:** [00:35:31] Yes I love that question and I love Justice Breyer's opinion. Well, our historical story about mandatory flag salutes during World War II, I would say has two lessons. Less one in my view is you can't trust the Courts. It's, it's very dangerous to live in a society where we Americans decide that liberty, equality are only protected in the state or federal court state or federal constitution.

I mean, eventually it has to be a character virtue and the people that's going to protect these things over the long haul. And the message of the flag salute story is that in *Gobitis* at the U.S. Supreme Court and the state court decisions in the early parts of World War II, everybody dropped the ball.

Everybody was focused on the patriotic zeal of beating Germany and against anybody that wanted to have a dissenting voice, happily the federal and state courts turn around. And I think that's where the laboratories helped a little bit. I think it helped when it came to *Barnette* that by the time of *Barnette*, a lot of state courts had criticized *Gobitis* said you got that wrong.

Use their state constitution. Just the kind of dialogue that I think we ought to have. Now let's shift to Justice Breyer's opinion today. And boy, I taught seventh grade geography for two years before going to law school. I'm married to a seventh grade English teacher. We've had three children.

Let me promise you, we understand this debate and I'll tell you what we really understand is how complicated it is. And if we got 25 parents in a room, we would probably have 35 perspectives on this issue. And you know, this is a great example to me, where I thought the Court simultaneously did its job of explaining the national role, the national backstop, but then just as you quoted Justice Breyer, less states and federal governments, state and



federal courts, state and federal constitutions, some latitude to work through this because I mean, if there's one thing we can all agree about free speech is going to have some slightly different permutations in a school world, particularly if you're in voluntarily their local parental versus outside of school. And then of course you have youth versus adults. And so it's just a very sensitive area. And then when you add to it, our new technologies I don't even know what to do. I mean you know, I talked to my kids.

I'm not sure they believe in privacy anymore. They seem privacy seems to be another word for loneliness. So, you know, it just seems everybody wants to let the world know what they're doing and that's a shifting norm. And shifting constitutions, state or federal have got to account for shifting norms and clearly the internet, Snapchat and alike are creating, shifting norms.

Right? Boy in a world like that as a federal judge, I say all hands on deck. I want all 10,000 judges in this country, working through this, being sensitive. Don't think there's necessarily a one size fits all solution at the outset, be humble and you know, God bless experimentation.

**Jeffrey Rosen:** [00:38:39] God bless experimentation, Brandeis couldn't have said it better. And that expression of humility in the face of a very difficult social, technological and cultural solution is exactly what state, constitutions and pluralism are designed to encourage. Professors Zackin can you cast any light on the way that state constitutions have treated free speech rights over time and then you might perhaps introduce another of the big topics that you explore in your book, namely, the treatment of state constitutions and social welfare or climate change legislation.

**Emily Zackin:** [00:39:13] Oh, sure. Well, one thing I wanted to underscore from Judge Sutton's comments that I totally agree with is this laboratories of experimentation idea can evoke sort of the idea that these are insulated hermetically sealed boxes, where people go off and not sometimes people read state constitutions, and they think what weird, strange idiosyncratic doc.

But instead, as Judge Sutton, I think really beautifully illustrates in his work that this is a whole countries we're working to figure out these problems. So these are national political debates, like free speech and, and how to understand free speech and the internet. Being worked out through state level institutions, both constitutions and legislatures and courts.

And so I think one of the things I'm often writing in response to is the idea that state constitutions are their own strange state level state specific things. And I say, no, no, no, it's just a second level of the federal government and national constitutional controversies are worked out at the state level, through state courts and state constitutions.

So I think laboratories is right and that we're all working on it. But they're not sealed off they're there. We're looking to, they're looking to each other and even in the drafting of state constitutions. State constitutional convention delegates would bring with them copies of other state constitutions.



They would say, well, Ohio says this and Montana says that that there's a real sort of synthetic quality to this experimentation. Okay. And then about environmentalism. Yeah, so one of the cases in my book is about environmental politics. And I mostly look at rights added to state constitutions in the 1960s and 1970s. Rights to a healthy environment, to clean air and clean water.

And one of the reasons I find that case so interesting and that I selected it is that the sixties and seventies were a heyday of national policymaking, especially on the left. So there was a sense that most things could be fixed, among lefties, the federal government could fix them. And, the environmental protection agency gets set up and lots of federal regulations are passed.

And so I didn't want to leave readers with the impression that it was only in the 19th century that people cared about state constitutions. And then once the federal government got bigger, got more active after the new deal, forgot about them. I wanted to say, look, stay constitutions remain relevant even for people who are also interested in federal level policymaking, even they're not losers, they're making headway at the federal level and still they turn to their state constitutions and they add these environmental rights. And one of the reasons is that states control a lot of land. They control reservoirs, they control state forests.

And so people are really trying to tell their state legislatures through these constitutions. Here's how to manage these things. And another reason is that movements are really interested in creating visible banners for their movement. And rights are excellent banners for movement building. And so when you put in a state constitution, we have the right to a healthy environment.

Then, then the next thing that movement does, the environmental groups that got that right into the constitution do is they publish newsletters and they say, we have this right. And we got it in there and they go to the state legislature and they say, we have this right. We have this right, do something.

And I think this also underscores one of Judge Sutton's points about. How we don't just trust courts. That rights enforcement is really a multi-branch project and social movements use all of the tools at their disposal, not just litigation to do this kind of rights enforcement.

**Jeffrey Rosen:** [00:42:30] Thank you so much for that. The Q and a box is full of excellent questions.

There's one from Fred Dougan. Please define what the Virginia framers meant by the term happiness. I have to take that one just because I'm writing about it now. Although of course, Professor Howard could cast a wonderful light on it. When the framers talked about happiness, they had in mind not feeling good, but being good.

"Virtue is the foundation of happiness," said Jefferson citing Epicurus and Franklin and Adams and Washington, again and again, insisted that only by mastering our unreasonable passions like anger, jealousy, and fear. Could we achieve the classical virtues of temperance,



moderation, prudence, and fortitude that were the foundation of happiness, which they defined as flourishing.

It comes from Aristotle's, *Nicomachean Ethics* only by a virtue or excellence can we achieve long-term wellbeing, which consists in fulfilling our potential and serving others. So it's really important to see that connection between virtue and happiness after all, they thought that without individual self government, the government of the self, we couldn't achieve collective self-government, that is government, democratically with others.

Crucial question and great to see it's all in that provision of the Virginia Declaration, which we read and which Professor Howard...

**A.E. Dick Howard** : [00:43:52] Could I interject? To Virginia

**Jeffrey Rosen**: [00:43:55] Please do, teach more about that crucial question about virtue and happiness. Yes, please.

**A.E. Dick Howard** : [00:43:59] I'm still working on virtue and happiness. So I'm not going to help you there but since we started out with Virginia, it's a nice segue to something Emily was emphasizing. So Jefferson and Madison great Virginians, of course, maybe the two greatest agreed on almost everything politically, but disagreed starkly on how often constitutions should be amended. Jefferson had the view that each generation ought to be able to reinvent itself, have a new convention, start a new figure out what was fundamental, what wasn't, what new structures should be developed.

Madison was very anxious about that approach and thought longevity was the key, that would lead to veneration. And what that led to is a world in which the U.S. Constitution is almost impossible to immense three-quarters of the states required almost all the state constitutions required just 51%. Why is that so important with things like environmental rights, labor rights, education rights?

Well, since 1776, the states, because it's so easy to amend constitutions. Offer this incredible set of evidence and proof as to what Americans want. And we just see through each era, is they add labor protections and the progressive ever environmental protections in the sixties and seventies, education in the 19th century.

Whereas the U.S. Constitution is still largely fixed in an 18th century mode. Whether that's good or bad? I don't know. The one thing I know is important is if you're going to have a federal constitution fixed in 18th century America, it is awfully nice to have easily amendable state constitutions enforced by state courts.

And, but for that easy amendability, Emily would not have been able to write her book, because that book is all about constitutions that you could amend by adding say direct democracy and all of these other innovations. But what's so fascinating is the divide between this national approach and the state approach.



It looks like the Grand Canyon at this point, it just gets farther and farther apart. And I think it's good. I think they can still compliment, compliment each other, but you have to wonder sometimes if it might be unhealthy.

**Jeffrey Rosen:** [00:46:15] Professor, second is it good or unhealthy? Judge Sutton makes the case for why it's good since the federal constitution is so hard to amend. And yet there are charges that constitutions like the California Constitution, which is so easy to amend by initiative. Just as a whole bunch of constitutionalized rules that shouldn't reach the constitutional level. So what do you think?

**Emily Zackin:** [00:46:36] I think there are trade offs. So I think that one really excellent thing about having a flexible easily amended constitution is this democracy promoting feature. And in fact, I saw a number of times when courts were issuing decisions that people didn't like, they said fine, we can just overturn our state high court by putting the thing we want directly in the constitution.

I think that's really appealing from a democracy promoting perspective. The people are speaking. And in cases where there's direct democracy, where you can change the constitution without even asking the legislature, just through an initiative and referendum process, I think that's the clearest example where the people can speak aside from and to, and against their elected representatives or their courts.

I think though that there are downsides. So one downside to having an easily amended constitution is that it does not as good a job of protecting minoritarian rights. And that if a whole majority wants to see something, they can just put it right in the constitution. And sometimes that means that minority rights get trampled.

And so I don't have an answer to which is better, but I think it's probably best to look at the strengths of these flexible constitutions and then their weaknesses too. Oh, one thing I also wanted to add is that the you at the text of the U.S. Constitution is very stable. It's been amended very few times.

It's very hard to change. On the other hand, the meaning of the U.S. Constitution has changed over and over and over again. That's actually proved quite flexible, at least the lived meaning or the political meaning as the Supreme Court has interpreted and reinterpreted it as doctrine has accreted and morphed. The meaning of the U.S. Constitution is actually, I would say, as flexible as the text of state constants.

**Jeffrey Rosen:** [00:48:11] Well, that's a great point. And one dramatic example of how the text of the U.S. Constitution has evolved is the due process clause. And before the panel started, Judge Sutton, you were saying that the Supreme Court's doctrine of substantive due process, which let's desegregate for our friends, it's not intuitive, that the Due Process Clause of the Fifth and 14th Amendment says that no state, as well as Congress can deprive individuals of liberty without due process of law. The Supreme Court has interpreted that flexibly to mean that there are some liberties that are so fundamental that they can't be deprived even with due-process.





They're fundamental rights they're called. This is called substantive due process. And this gives the Supreme Court a lot of leeway to basically decide on its own, which rights it thinks are so fundamental that they can't be deprived. Now, Judge Sutton, talk about the evolution of the Due Process Clause at the state level, and you tantalizingly said they said that you had a deal that you wanted to see if Professor Zackin would take when it came to substantive due process in the state constitution.

**Jeffrey Sutton:** [00:49:13] Well yes, thank you. Well let me put, before I propose the deal, let me put a few cards on the table so, you know my perspective. And my perspective is to be fairly grouchy about substantive process as a federal judge it makes me very nervous that life tenured federal judges would have authority to innovate new rights. You know, you have to ask yourself how often have substantive due process decisions at the federal courts and inconsistent with the policy preferences of the judges who are making those decisions.

And that's not rule of law. That makes me nervous. In fact, in one of my opinions, I actually say it would be more fair and more neutral to roll the dice before a substantive due process decision than to have the actual judge decide whether he or she thinks such a rights should exist. So I'm fairly stingy about the idea, but I'm also trying to be humbled that I could be wrong.

Number one, and number two. Recognize this reality for better or worse, we have had substantive due process for quite a long time. One idea here is to use the state's, state court state legislatures, to help legitimize at least some types of substantive due process interpretation. The key thing that substantive due process allows the federal court to do is to amend the Constitution by interpretation.

Now that should make someone nervous. You get nominated, confirmed, become a life tenured federal judge, but they don't give you an eraser pen or pen that allows you to add words to the Constitution. That's not part of the situation. The key thing you do by amendment by interpretation is you avoid you sidestep you and run the three quarters of the state's requirement. So to me, the only way to legitimize substantive due process is to give it some linkage to proof that norms have shifted in the states to that kind of super majoritarian in degree. And I think this is very helpful, whether it comes to innovating new rights, one might see Obergefell, as an example of something that got to the three quarters.

You can still say, as grouchy Judge Sutton says, not the way it should be done, but if we're going to do it, it does seem to me a lot more legitimate when the federal court, as Justice Kennedy did in Obergefell, acknowledges this norm shifting in the states, which crews, it's not just the individual views of the justice.

It has objective proof elsewhere. This also can be useful for deciding what substantive due process precedents to preserve. In other words, if you announced the decision and we still can't get a super majority, I think the Court, the federal courts just have to acknowledge that what they did really has some legitimacy because they sidestep the three quarters.

And even after decades, the decision still hasn't been accepted, I guess the last point, and this is why I hope Professor Zackin and I can reach maybe a deal, is a little bit of an



exaggeration. But I think we both recognize that if you look at the broad scope, all of American history, substantive due process can be used for very conservative goals, very progressive goals, very in the middle goals.

And so whatever we do as Americans, please don't take the simple route of substantive due process for me, but not for the, I mean, that's, that's silly and strikes me, as well to go back to you, Jeff, not a recipe for happiness or for that matter virtue.

**Jeffrey Rosen:** [00:52:43] Ha, wonderful, well Professor Zackin, what do you think of Judge Sutton's deal?

I hear him proposing a willingness to entertain the possibility of substantive due process at the federal level guided by state constitutional development in saying that federal judges should not recognize new substantive due process right unless they've been recognized in state constitutions and decisions. And in deciding which substantive due process precedence to maintain, they should see whether or not a consensus has developed in the states, if I've properly stated the deal, would you take it?

**Emily Zackin:** [00:53:14] I don't know that I would go that far. Although I see the logic, I think this makes sense. I think that the downside of course, again, is if you think rights should not be subject to majoritarian decision-making. So, one way of thinking about rights is that even if most people haven't accepted them, they still exist and courts are there to protect them.

And if that's your view, that there are some things that no matter how many people want to take them away from you. They shouldn't be taken away and that courts should be there to protect you, then that wouldn't be a great deal. On the other hand, I think that heroic view of counter majority decision-making is pretty fictional.

We very rarely see it and much more often, and here's where I am in complete agreement with Judge Sutton, we see actually majoritarian decisions coming from the bench. And so substantive due process in the early 20th century was entirely conservative. It was a kind of union busting, no minimum wage, laissez faire, liberalism kind of provision, and the left hated it.

And then by the 1960s, when substantive due process is a way to get to privacy, and reproductive rights, then the left is all for it. And so I do absolutely think there's been this switch and it's been political and partisan, and it doesn't in real life, substantive due process hasn't been just a kind of simple human rights story. It's been much more complicated and much more partisan.

**Jeffrey Rosen:** [00:54:40] Thank you so much for that. Well, for what it's worth, Judge Sutton, I will take the deal or at least I would, if I were allowed to have opinions as a young overconfident law student. I wrote a note saying that the U.S. Supreme court should look to state constitutions in deciding which rights were natural and on enumerated and noted Justice Scalia's opinion that they should do the same thing in deciding which rights, which forms of punishment have become cruel and unusual under the Eighth Amendment. So it sounds like a good compromise.



**Jeffrey Sutton:** [00:55:11] Jeff, it sounds like you're the source for both Emily's and my work cause

**Jeffrey Rosen:** [00:55:15] Not at all, hardly. It was a juvenile effort, but rooted in the same instinct that if you're going to try to discern the traditions and collective conscience of our people. As Justice Harlan grandly said, you should actually look to concrete examples of texts and debates on the ground, which is what both of your work has centrally reminded us of.

Well, we have just enough time for closing statements in this fascinating debate. So Judge Sutton, the first one is to you, why are state constitutions important and why should Americans care about it?

**Jeffrey Sutton:** [00:55:51] Well first of all, thank you again for inviting us, just really enjoy being on the program. It's wonderful to be with Professor Zackin, who I've never met, but I've relied on her books so many times, so it's really wonderful to be here. And thank you, Jeff, to you and your team for having some programs about state constitutions. I mean there's a massive education gap. The last time there was a study on this,

52% of Americans didn't even realize their state had a constitution. And, well, I don't think the voluntary attendance this virtual program allows me to do this, I'd like to impose a very short assignment that is enforceable only by healthy conscience and other feature of virtue. And that is to just spend five minutes tonight before you go to bed reading article one of your constitution, your state's constitution.

Most states, the only exceptions I'm aware of are Colorado and New Mexico, there may be one or two, but most states in article one, the first article, that's where they put their bill of rights, their declaration of rights, their individual rights.

What does that tell us? It tells us that the American people, when they first started doing this before 1789, and since, have prioritized individual rights, whether liberty quality property, we should, we should go back and look at those rights. Look at the language that's often different from the federal. It's often more protective than the federal. And you know, when a gerrymandering decision, like say, Rucho, comes down, that perhaps you don't agree with it. The U.S. Supreme Court, maybe like me, you think gerrymandering has been just so hurtful to American democracy, compromise and so forth. You regret that decision.

All fair. I understand the point. Just remember that's not the only recourse. State courts like Pennsylvania and North Carolina has shown that they can come up with judicially enforceable prohibitions on gerrymandering. State legislatures, state constitutional amendments have developed compromise that have moved the ball positively.

So, you know, when the U.S. Supreme Court puts up a stop sign, that's not the end of the matter. And that's true, whether it's a negative or a positive, right. As Professor Zackin has so helpfully shown. And I also last of all, think it's a great source of innovation when we have a new problem. I mean, even the pandemic illustrates this. Did we really want to have one rule for all primary education across the whole country at the outset? That's a national only approach. We didn't know what we were doing and you have to be humble in the face of



that kind of threat. And while there's lots of in perspective, illustrating state and federal governments over the last year and a half, I think we can agree some experimentation was useful. And we probably are still in that mode because it's so hard to figure out this difficult problem.

**Jeffrey Rosen:** [00:58:37] Thank you so much for those inspiring words. And thanks for that really meaningful homework. We The People, National Constitution Center friends, please answer Judge Sutton's call and read your state constitution.

And if you do and want to write to me [jrosen@constitutioncenter.org](mailto:jrosen@constitutioncenter.org), and let me know what you learned from it, then we'll know that you did your homework. Professor Zackin, the last word in this great discussion is to you, why are state constitutions important, why should our listeners care? And do you have any homework for them as well?

**Emily Zackin:** [00:59:08] Oh, thank you both for inviting me and Judge Sutton has been such a generous reader of my work for so many years. It's a pleasure to be in conversation with you. I guess my thought, my closing thought is the thing I closed my book with, which is to say that, ideas about who we are really shape who we can become.

So one value in reading state constitutions, as Judge Sutton says, there's this pluralism and a richness there's so much in there. They're a reflection of decades and centuries of political demands on government. That to read them, gets us out of the bind of thinking, we only want this small set of things from our government, we've only tried this small set of things. And from being stuck in this sort of rigid idea about what the U.S. Government is and what our constitutional rights and ideals and fundamental values are. And so I echo Judge Sutton in urging people to look at their state constitutions and to do it, to kind of liberate our imaginations about what America might be, where we might go. And based on, you know, all of the many myriad things we've tried and asked of our governments in the past,

**Jeffrey Rosen:** [01:00:12] To liberate our imaginations of what our governments might be, what a beautiful way to put it and to close this inspiring discussion. National Constitution Center friends, thank you so much as always for taking an hour out of your day, to educate yourself about the U.S. Constitution by learning about state constitutions.

And in addition to the homework that Judge Sutton gave you of reading your state constitution, my homework is please read our guests wonderful books. Judge Sutton's, *51 Imperfect Solutions: States and the Making of American Constitutional Law* and Professors Zackin's, *Looking for Rights and all the Wrong Places: Why State Constitutions Contain America's Positive Rights*. Thanks also to Professor A.E. Dick Howard for his inspiring words about the Virginia Constitution and just for good measure, read the Virginia constitution as well, both the 1776 version and the 1971 version. And just to show that you've done your homework, write to me and tell me what you've learned. Thank you so much, Judge Jeffrey Sutton, Professor Emily Zackin and Professor A.E. Dick Howard. Thanks We The People friends, and look forward to seeing everyone again.

**Jackie McDermott:** [01:01:22] This episode was produced by me, Jackie McDermott, along with Tanaya Tauber, John Guerra, and Lana Ulrich, it was engineered by the National



Constitution Center's AV team. If you're interested in learning more about state constitutions, check out some of our past programs featuring Judge Jeffrey Sutton.

Judge Sutton visited the national constitution center in 2018 to discuss his book *51 Imperfect Solutions* with Jeffrey Rosen. We'll link to that program and others you might like in our show notes and you can check out the rest of our past programs, including videos, podcasts, and more in our media library at [constitutioncenter.org/constitution](https://constitutioncenter.org/constitution).

Join us live in register for upcoming online programs at [constitutioncenter.org/debate](https://constitutioncenter.org/debate). Check out our upcoming annual Supreme Court term review on July 8th, where a panel of court Watchers we'll break down the biggest cases of the term by joining live. You'll get access to resources shared during the program, and you can submit your constitutional questions to the panelists throughout the conversation as always please rate, review and subscribe to live at the national constitution center on apple podcasts.

Or follow us on Spotify and join us back here next week. On behalf of the national constitution center. I'm Jackie McDermott.