Short Circuit 157

Anthony Sanders 00:06
Hello, and welcome to Short Circuit, your podcast on the federal courts of appeals. I'm your host, Anthony Sanders, Director of the Center for judicial engagement at the Institute for Justice, Happy New Year to all of you and to celebrate, we're going to do something we often do, which is not talk about the federal courts of appeals, but that other set of courts the state courts, today is a special Short Circuit with not just one, but two special guests, professors Lee Carpenter and Ellie Margolis of Temple University, Beasley School of Law. They have written an article for the NYU annual survey of American law called One Sequin at a Time: Lessons on state constitutions and incremental change from the campaign for marriage equality. It is a fascinating case study in state constitutionalism. And whatever your interest in the history it tells there are profound lessons for litigating in the state courts under state constitutions and their relationship to the Federal Constitution. You can find the article online and we'll put a link to it on our website. Lee and Ellie, welcome to both of you. And so good to have you on.

Ellie Margolis 01:16
Thanks a lot. Happy to be here.

Lee Carpenter 01:18
Yeah, thanks so much. I'm very excited to be here.

Anthony Sanders 01:21
Yes, it's so great to have you on. And as longtime listeners know, we at the Center for judicial engagement are big fans of state constitutions and independent interpretation of them by state judiciary's. We had two conferences last year on individual state constitutions, those being Minnesota and Pennsylvania. And we plan on having more conferences, once you can have conferences again, on more individual state constitutions. And the Institute for Justice itself has ongoing state constitutional efforts -- similar to the campaign described in this article -- in areas such as eminent domain and public use clauses and economic liberty and elsewhere. So when I saw and read this article, I said, we have to get the scholars on this podcast. And let's all talk. So to start things off, I'd like to go to Ellie and tell us what led you to write this article and why did you frame it the way you did?

Ellie Margolis 02:21
Okay, well, first of all, thanks again, for having us. I think we're really excited to find somebody who's interested in hearing about state constitutional laws, because there

Anthony Sanders 02:29
there are dozens of us across the country.

Lee Carpenter 02:33
There are 10s 10s, if not teens.

Ellie Margolis 02:38
So the genesis of this article was around the time that Justice Kavanaugh was being nominated to the US Supreme Court. And in the media, I'm sure you remember, there was sort of this massive freakout on the part of civil rights organizations and people interested in civil rights generally about how replacing Justice Kennedy who was a, you know, famously a swing vote on rights issues, individual rights issues at the Supreme Court with a Justice Kavanaugh would change things. And I remember sitting in Lee's office talking about this and saying, Hey, remember state constitutions, both of us are, I guess, I will say, old enough to remember a time in the previous century in the sort of 80s and 90s, when there was a lot of talk about state constitutions. And Lee had been involved in the marriage equality, litigation strategy more directly, and I had been involved a little bit marginally and sort of we started talking about, maybe this is a good time to remind people of the fact that state courts, state supreme courts are able to establish individual rights that go beyond those of the Federal Constitution. And that while certainly the landscape might change with a more conservative Supreme Court, especially in terms of individual rights, that didn't mean that it was the end of all litigation or all work towards advancing those kinds of rights. And that led us to writing this article

Anthony Sanders 04:14
that great and I love how, you know, state constitutions it's like a, it has been a big thing for about four years now since William Brennan's famous article in the 70s that I think we've even talked about before on this podcast but it both sides of the political aisle are reminded about their value every few years and I love that that this is this what you've described as caused a new reflection on state constitutions now particularly in this area of marriage equality in the fight for marriage equality. It's been a few years now since the what you discuss in your articles happened and I bet there's events look younger listeners, maybe someone else listening to this podcast who don't quite remember exactly what happened, or maybe, you know, they know the Obergefell case. But what happened before that is a little hazy. So could you Lee? Could you recount for us what that history was? And kind of some of the arc of how that story went that you that you talked about in the article?

Lee Carpenter 05:24
Yeah, sure. And, you know, I think as, as Ellie said, I had lived through some of this as an LGBTQ rights litigator, mostly in the late 90s and early aughts. Right, so I was engaged in this work, right at the time when state constitutional strategies were really the only strategies that we had. So you have to think about this as sort of prior to the 90s and aughts, right, no one was really talking in a very serious way, or and certainly wasn't like mounting any kind of a national strategy around relationship recognition issues, marriage equality issues for same sex couples. As I note in the article, there had been a couple of attempts by individual people in the early 1970s to obtain marriage licenses. And they were just summarily shot down. Those went nowhere. The only case that made it to the US Supreme Court was dismissed for one assessment of a substantial federal question, right? So the Supreme Court in the 1970s didn't even think that, you know, marriage equality was even worth talking about. They just didn't even recognize that is even invoking federal constitutional rights at all. Right.

So what had initially happened was that in the 1980s, as, as a number of events kind of occurred, including the AIDS crisis, sort of a sexual revolution in the United States. As all that kind of congealed, there started to be a more sort of coherent LGBTQ legal rights movement that started to that that's

starting to be put together. Originally. Originally, that movement was more focused around getting rid of sodomy laws. Right. Right. And I talked a little bit in the article about how, you know, sodomy laws, really kind of made status criminals out of LGBTQ people, right. The idea is, if you are engaged in sexual practices that are de facto illegal, then it's possible to basically say you're a criminal kind of all the time. You can be denied housing, you can be denied security clearances, all sorts of all sorts of negative things flowed from them.

So originally, the focus was on getting rid of sodomy laws. And it seemed like it wasn't going to be that hard, right there. You know, the idea that you could be prosecuted for private, intimate, consensual adult sexual conduct, you know, really seemed to fly in the face of a lot of constitutional principles. And the idea was that that would be the first thing that that, that this sort of nascent legal rights movement would do. But of course, in 1986, the Supreme Court did hear Bowers versus Hardwick, and that case really went very badly for LGBTQ people. And I talk a little bit in the article about how it's not just a bad ruling, in terms of what it's holding is it is really kind of gratuitously homophobic. And that case really made it pretty clear to LGBTQ rights litigators, that the Supreme Court was not going to be a happy place for them to go, right. There was just, you know, that opinion, oozes a sort of a hostility toward the toward equality claims of LGBTQ people.

So then the thought was, well, you know, what do we do. This was really a kind of a devastating blow for the movement, just the idea that you could be, you know, you could continue to have just your private sexual practices criminalized. And then the question was, what where do we go from here and some people started to kind of take up the idea of relationship recognition a little bit more seriously. And originally, in kind of the early 90s, the movement was not kind of wholeheartedly behind this there. There wasn't sort of a unified field theory of you know, where we go next. There were individual people and individual attorneys and individual would-be litigants who were interested in bringing relationship recognition claims, but there was no real consensus that that was the best next step.

But what happened was that in the in the turn of the 90s litigants and attorneys in Hawaii sort of made the call for everyone else, by bringing the case that began as Baehr v. Lewin and ended as Baehr v. Miike and brought a state constitutional claim in Hawaii asking the Hawaii Supreme Court to recognize marriage equality, right, and it brought it solely under the Hawaii constitution. You know, and we kind of go through that whole arc of what happened with that case, you know, what originally happened was that it was like, you win, and then you lose the Hawaii Supreme Court, you know, looked at its own constitution, and did and found that the ban on same sex marriage, you know, likely violated the Hawaii Supreme, the Hawaii constitution, remanded the case for further findings. And then in the middle of all of that, the Hawaii legends that the Hawaii legislature got together and got very upset over what was happening. And Hawaii ended up with a constitutional amendment that ended up basically ending, ending marriage equality before the case ever got resolved.

Anthony Sanders 11:22
So in a way, it won a battle and creating that precedent, but lost the battle in that state. But still, that was there was this precedent out there that had happened it at that point.

Lee Carpenter 11:33

yeah, it had happened. And they ended up sort of being able to put the genie back in the bottle in the State of Hawaii by amending their constitution. And all of that was a very kind of instructive process, right, what it taught, what it taught LGBTQ rights litigators was that you could actually leverage state constitutions that had certain characteristics, either clauses that don't exist in the Federal Constitution, or interpretive stances that are, you know, that are independent, or some combination of those things. You can actually leverage things to make gains. But it also was a good sort of cautionary tale, in that it also demonstrated that, you know, state constitutions are often much more amenable to amendment than the Federal Constitution, I've got to be really careful about that. So that sort of sparked, you know, the thinking that we can, we can actually make some incremental progress, if we pick states that, that we can bring this litigation in, that, you know, maybe pick them a little bit more mindfully than we did in Hawaii, and maybe sort of selectively go through states and try to create these state constitutional claims that basically box out, right, the Supreme Court, bring them only on state constitutional theories in states that are that whose constitutions, you know, again, have certain characteristics but aren't super amenable to be easily amended. And we can make incremental progress that way. And so the article describes how the, you know, the, the, the next state sort of to get teed up was Vermont, which brought us civil unions, which had never existed before, right. And then finally, in Massachusetts, in 2003, the Goodridge decision, which was the first state Supreme Court decision that actually led to same sex couples being able to legally married.

Anthony Sanders 13:39
So here's a question for you as being involved not as a scholar, but being involved in that litigation, which is when a lot of public interest scholar or lawyers do a strategy like this, whether it's in a state or multi state or multi circuit, they look to the playbook of the NAACP in the first half of the 20th century, and the progress Thurgood Marshall and others made in litigating edge cases and various courts and then eventually getting to what happened in Brown. And then and then beyond that, what did you look to as kind of a blueprint or maybe not even a blueprint, but like a standard to go by in thinking about this strategy? Were there other earlier civil rights efforts that you looked at, in addition to what happened with Thurgood Marshall and his people or what, you know, what was a good standard to look at? Or was it more kind of you had the build the plane while flying it? Because it was just maybe a bit different than what had happened before?

Lee Carpenter 14:50
Well, I mean, I wasn't that one of the people who was litigating these cases. I was running a direct Legal Services Program at the time and so you know, I had some involvement kind of with other aspects of this, but first certainly was we're watching these cases. And this is a really litigated. I talk a lot about Mary Binauto, who is one of the premier litigators in the LGBTQ rights movement involved in basically all of these cases, except for the Hawaii case. And I think that that she, that she and others like her, who were, who were doing it, who were engaged in the strategizing, were looking as most of us ended up doing, you know, to some degree to the civil rights movement. But I also think that they were as exactly as you said, kind of building the plane while they were flying it. There wasn't necessarily all that much discipline within the movement as to exactly what was going to happen, you know, in that moment where they lost where they lost Bowers, right. And even beyond that, you know, there were always sort of these attempts to kind of get everybody on the same page, get everybody in the same room and strategize together. But that's very difficult to do. And so I think that there was sort

of the idea of what it would be nice to do, and like the timeline, under which it would be ideal to do it. But it didn't always work out that way. And so I think that, you know, Mary Binauto, and others like her, that I talked about Evan Wolfson other sort of the litigators who came up with a strategy. I think that they were trying to follow to the best of their abilities, a unified strategy with the understanding that they wouldn't always be able to keep complete discipline right within the ranks.

Anthony Sanders 16:46
Ellie, I have a question for you that didn't come up so much in the article, but I know what's going on is at the same time that the Hawaii case happened. And then the Vermont case happened, which then led to the Massachusetts case, which Goodrich which I remember was just a few months after Lawrence vs. Texas was decided which overturned Bowers leading up to Lawrence. There was also some cases under state constitutions about sodomy laws. I remember that the court where I clerked, the Supreme Court of Montana, a few years before I clerked there had a sodomy case. I believe there was one or two others. And so in a way, I there was, you know, multiple fronts going on, on LGBTQ issues under state constitutions leading up to you know, both to Lawrence vs. Texas and to Goodridge and beyond. Um, could you talk a little bit about maybe what the what was going on at the state level? Maybe not just with marriage equality, but and also why these certain states were the states that happened on why it was Vermont? why it was Massachusetts and not, you know, others where you, you might guess, could have been litigated?

Ellie Margolis 18:09
Yeah, sure. So you're absolutely right that there was ongoing litigation in states trying to undo state sodomy laws under state constitutions. One important thing to remember about federalism and the role of the case like Bowers versus Hardwick is that Bowers said it was constitutional for states to criminalize sodomy. But that doesn't mean a state court supreme court couldn't find it unconstitutional under its own state constitution, to criminalize sodomy. So there was certainly effort to do that. And I think, you know, during this whole period of the sort of mid 80s, through the early aughts, there was a lot of movement on the social side to create greater acceptance for the LGBTQ community and that the litigation strategy, you know, it's sort of it's a chicken and egg question, whether cultural changes open courts to be more amenable to these claims, or the court decisions were driving greater cultural acceptance.

Anthony Sanders 19:12
As we say here, the court of public opinion, I mean, that absolutely was going on at the same time.

Ellie Margolis 19:18
But that's one of the things where I think the state constitutional strategy can really come into play because state supreme courts. Because of the nature of state constitutions can be a little bit more responsive to cultural change. And, and not just national change, but the culture and the legal environment within a particular state in a way that is different from the Federal Constitution. So to get more specific about some of the ways that that happens, in these cases, and in other cases. You know, people don't often learn a lot about state constitutions in law school, but one of the things that you could read our article or you know, plenty of other work or some of the work that you guys do about that is that, you know, state constitutions are all different from each other. And they, many state constitutions

originated before the Federal Constitution. So for instance, you know, the many of the colonial states, Massachusetts, Virginia, Vermont, they have provisions in their constitution that predated the US Constitution, that it can often be the source of rights. So those are states to look to. State constitutions have provisions that aren't in the federal constitution at all, either that pre date or post date, the Federal Constitution, and state constitutions are more easily amended, as Lee was saying, in various ways, some very easily by simple ballot initiative, others take a multi year process. So one of the reasons that Vermont was chosen, as part of the marriage equality strategy is Vermont has a multi year process for amending the Constitution, which would have allowed more time for litigation to avoid the problem that Hawaii ran into, which was that the constitution was amended before the court had an opportunity to weigh in again,

Anthony Sanders 21:20
which I think is one reason it's blissfully the shortest state constitution in the country. Vermont's I think if you add up the number of words,

Ellie Margolis 21:28
yeah. So you know, and, you know, states, other states fall everywhere in between. So part of I think, part of the reason we wrote this article in terms of thinking about how to think about state constitutional litigation, strategically for advancing any kind of rights initiative. And I think one of the interesting things that people don't think about a lot is it's really it really doesn't have a political valence in terms of it favors, conservative goals or favors, right, liberal goals, it's really that, you know, state constitutions just operate a little bit differently than the Federal Constitution. And part of that is understanding. I think two things, one, how state constitutions can be amended, because that weighs into litigation strategy. I guess three things, what the state constitutional provisions are whether the state has provisions that will address the issue that you're interested in, working on how that constitution can be amended, and some degree how the state Supreme Court works, because in states where Supreme Court judges are elected, they tend to be much more politically responsive to the environment, the political and cultural environment of the state, where the state supreme court justices who are appointed to multi year or permanently 10 year terms aren't necessarily responsive in the same way. So all of those things weigh into making a decision about which state to choose and how to approach the litigation,

Anthony Sanders 23:03
you might call elected judges more living constitutionalists, if you will.

Lee Carpenter 23:11
There's another thing that I'd like to add to that to that calculus, which is public engagement, right around a particular issue. You know, partly because of the, you know, instances where you have an elected judiciary, let you know, all elected officials to feel pressure from, you know, pressure from the public to do one thing or the other. But also, you know, public opinion is very, very important, because most constitutional amendment processes involve the state legislature to some degree, right. So there is there's a real sort of very kind of a democratic kind of conduit in the amendment process that goes right to the people writing this to the state legislatures. So one of the things that, that folks who had litigated these cases, the case in Vermont talked about was the sort of the civic engagement of the LGBTQ community there. That's something that Beth Robinson talks about, who was one of the who

was, you know, an LGBTQ community member in Vermont, also was one of the litigators in Baker, and is now on the Vermont Supreme Court. Right. So that's one of the things that Beth Robinson talked about was how sort of deeply engaged Vermont's LGBT and LGBTQ and allied communities were around these issues. And how willing folks were in Vermont, to really kind of, you know, take the show on the road and go on these sort of public education campaigns, kind of introducing the LGBTQ community to people who would become allies. So that's not just to kind of create goodwill, it also has a very kind of a very pragmatic goal. Right, which is to, to some degree, tamp down the possibility of some giant public backlash to something that the court may do. That gets directed at a state legislature and puts pressure on the state legislature to amend away a decision made by a state Supreme Court.

Anthony Sanders 25:21
Right. Right. I look going back to the history, as you recount the article after 2003 with the Goodrich decision, which was a real game changer, because it was the first one to have full marriage equality in a state. There were a few ups and downs for a few years in state courts not even talking about constitutional amendments. Right. And so, you know, a few states, I remember when New York's highest court ruled against the plaintiffs there. And then there were a couple other states that went along the way described maybe what the reason for that was, was it just, you know, a matter of litigators, marching to a state, see if this one will work, or see if this one will work. And this, of course, could happen on any issue, or was it that there was a building of a consensus? And so I think when things turned around and when California's Supreme Court ruled in 2008, which then had its own thing, prop eight after that, but we can ignore that for the moment. What, you know, what was the reason for that kind of up and down period, either from a public relations standpoint, if you will, or from a, you know, a state nuts and bolts state constitutional viewpoint?

Lee Carpenter 26:42
Well, I mean, I think that you know, in any incrementalist campaign, right, you're going to pick the shots, you that you think you have the best chance at making first, right? And I do think that that Vermont, and Massachusetts were picked because they were probably the best bets, right? I am not a New York's or, you know, Maryland State constitutional scholar. But I think that, again, this is part and parcel of sort of the downside of these sort of incremental state by state, state constitutional campaigns, which is you're going to lose sometimes, right? It's not just one big case, you bring the case, Whoopie win. And it's, you know, yay, it's victory and confetti for everyone. It's like there are going, you know, there are 50 states, you're not going to win all 50. If it was such a slam dunk that you were going to win all 50, then the US Supreme Court probably would have weighed in already, because

Anthony Sanders 27:36
we are all Federalists.

Ellie Margolis 27:40
And again, all state constitutions are different. So not Yes, have the same language that support the results. And not all state courts have a jurisprudence of their own, interpreting their own constitutions in a way that suggests they're willing to depart from the Federal Constitution, a number of state Supreme Courts have explicitly said basically, they're going to follow the Federal Constitutional jurisprudence. So for example, in equal protection claims, they will use the tiers of scrutiny that the Supreme Court has

set up even though the state constitution doesn't necessarily have language that supports or requires that. So you know, in states that follow the Supreme Court, you're going to get a result like that's consistent with Supreme Court precedent, in a way you might not in a state where the court is willing to look outside of that jurisprudence and find other ways to interpret their constitutional provisions.

Lee Carpenter 28:39
Right. And even in states where you where the interpretive approach sounds like it's going to mirror the federal interpretive approach. It sometimes doesn't. Right. So in so one of the things I always find so fascinating about Goodridge is that it purports to use rational basis review, right, it talks about rational basis review, and then the level of scrutiny that it actually, you know, directs at the state's rationales for banning same sex marriage is far greater, right, then that's kind of, you know, the debt really deferential and rational basis,

Anthony Sanders 29:13
real rational basis.

Lee Carpenter 29:16
actually asked rationality and actual rational basis, right. It's what I would imagine rational basis probably should involve, right. But it's viewed. And I think this was something that was in one of the dissents in Goodridge was like this isn't rational basis. This is clearly something a lot more toothy than rational basis review. If you look at the at the Hernandez case from New York, it's far more deferential. So, you know, you can have two states that both are purporting to use you know, something like rational basis review, but when the state has a history of you know, their version of rational basis review being much more toothy than another state's. So, you know, you could have two states that say they're using the same interpretive approach that that come out with these, you know, irreconcilable, you know, opinions that just seem to be looking at completely different sets of facts and apply and completely different, you know, levels of scrutiny, whereas, right, so, I mean, that's one of the things that I think is, is difficult and vexing to so many people about state common law, right. I mean, there are so many different facets to you know, what makes one state constitution different from another, that it becomes really dense and extremely complex. Very quickly, you know, I always think of state constitutionalists, as being like the veterinarians of law, in that. In that I don't understand, right, why they are seen as being, you know, like, far, far more, you know, the scholarly, complicated people, because they have to know so many different things. You know, I always say this, when I take my dog to the vet, like, how, how is it that veterinarians don't get paid like five times what doctors get paid, because they have to be able to treat a lizard and a parakeet, and, you know, my dog? Whereas doctors only have to know about humans? So that's kind of always how I think about it. You know, it's really, there are so many different aspects of it that I think that I did a lot, a lot of lawyers, and I think a lot of legal scholars are just like, this is really just, it's just a lot, right?

Anthony Sanders 31:35
Yeah. And it's a lot. I mean, this, this is a whole other subject that I've written about. And we could talk about another time of why scholars don't pay more attention to state constitutional law. And sometimes I think it comes down to bang for your buck, if you're gonna, you could write an article about 50 states, that's a lot of work. You could write one about one and maybe get it published in a regional Law

Journal. Or you could write about what's going on at the US Supreme Court and get it in a nice journal. And you know, everyone will maybe even read it. And what? Oh, sorry.

Ellie Margolis 32:09
Oh, I was gonna say, I think it's a little bit of a vicious circle in the sense that, I think for that reason, and other scholars write more about the Federal Constitution and law schools focus more on the Federal Constitution, both for that reason, and because the most law schools are training lawyers, training students to go potentially to multiple states, not just the state that the law school happens to be in. So they tend to focus more on a federal approach and federal law. So then, that's what students are familiar with. And they go into practice. And that's what they're comfortable with as lawyers, so they don't think to look for or make claims under state constitutions. And so there's not as robust or developed state constitutional law, and then there's less to write about and sort of around and around. Absolutely.

Anthony Sanders 32:59
Although there isn't a response to that, which is you could require a comparative state constitutional law class, which precious few schools do. it was it was an elective when I was at the University of Minnesota, which a few people nobly took and I failed to which I will admit. Ellie on that point, a deeper question for you about how state constitutions of course, have different language. Many of them have these clauses going back to George Mason about, you know, excuse me, they're often called Locke and liberty clauses that have a more expansive language than just say, a due process clause and protect substantive liberties. There's all kinds of other language and state constitutions. And yet, you look at some of these states that say interpret, for example, one of these Locke and liberty clauses, and they call it their Equal Protection Clause or their due process clause. They just kind of slap a new name on it, and then import whatever the case law is, even when someone some innovative litigator, brings up says, okay, the language is different here. So let's look, look at that closely. It seems like they often slink back into what has been, as the US Supreme Court said about similar stuff, what other states said about it. And it's a lot of hard work to get state supreme courts to take their own state constitutions seriously, not just because of the lockstep doctrine, which as you said, that's when they just look to what the US Supreme Court does. But even when the language is different. There's this centrifugal force about doing what the other courts have done. Why do you think that is like that? These are smart people. They're not lazy. They do a good job and other parts of the law. What is it about this, you know, trying to harmonize state constitutions when obviously, the drafters of the Constitution were not into harmony?

Ellie Margolis 34:58
Yeah, that's a really good question. And I don't purport to have any kind of an expert answer on it. I think that part of it is, look, you know, we legal analysis is based on a system of precedent. And lawyers are trained to follow precedent. And that's how not just lawyers, but judges learn to do their work. And so when you look to precedent, the precedent that's there is primarily US Constitutional, US Supreme Court jurisprudence. And so when they're looking for something to cite, right, it's a lot harder to develop a new vocabulary or a new analytical framework for assessing a claim than to use one that already exists. And it's not, I wouldn't at all say it's laziness, I don't think it is that at all. But it's just much more challenging and difficult to break from that should sort of existing model and come up with a new

framework or a new way of thinking about the analysis. And there's a good amount of state precedent in most states already following the Federal Constitution. So state Supreme Court judges who are inclined to do that now will also have to break potentially with their own state precedent. So that's a lot of weight on the side, or centrifugal force, as you say, on the side of following the US Constitution. But I do think they're in I mean, there are a number of cases in the last 20 years, where state Supreme Courts have established rights under their own constitutions beyond the Federal Constitution. So it's not impossible. Outside of the marriage equality context, it's been done. It's done quite a bit in federal in, sorry, criminal law. Right, the Pennsylvania Supreme Court just a couple of weeks ago, issued an opinion establishing greater rights against warrantless searches of automobiles, than the US Constitution provides. In the area of education, the state Supreme Courts have gone a lot further than the Federal Constitution, which doesn't provide any kind of right to education. And there's certainly more examples of it. And I mean, I think part of our hope in writing this article is the more it's in the conversation, the more that lawyers think about it, and bring the claims and state Supreme Courts have to confront and contend with these issues. Hopefully, it will loosen up a little bit, and we'll start to see more.

Lee Carpenter 37:35
Yeah, and I think also, you know, again, this kind of goes back to this cyclical problem of students in law schools, not learning common law, right? Not learning state common law, you know, everybody having to learn federal common law in the first year. So everybody has some grounding in that, and then virtually nobody ends up with any kind of like a really coherent grounding in state common law. Then it's like who's bringing these claims? And how are the claims being framed? I think that very often and no, and I haven't done research on this. So maybe I'm wrong about this. But my suspicion is that more often than not rights litigators will put in a federal claim when there is a federal claim to be there. Right. And it's certainly in things like right to an education, you know, that that's going to be a state common law claim. But if it's something like a search and seizure, right issue, for example, um,

Anthony Sanders 38:25
yeah, I mean, it's malpractice. If you don't throw in your federal claims,

Lee Carpenter 38:29
right. So you're gonna put in the federal claim, then you're done. You're just

Ellie Margolis 38:33
to piggyback on that a lot of state Supreme Court jurisprudence says that if there is a state and federal claim, and if this claim can be resolved under federal law, first, that's what the state court will do. Right. And not reach the state claim.

Lee Carpenter 38:47
So you know, so I think probably there are state constitutional claims that are that are being presented to courts, in concert with federal constitutional claims, the Federal Constitutional claims may be better articulated, maybe, you know, maybe kind of more front and center. And then there are these interpretive approaches, just as Ellie said that it's like, well, I shouldn't touch the state constitutional plan, if I can resolve this under the Federal Constitution, which strikes me as pretty, pretty nonsensical,

you know, somebody who, who also clerked at, you know, at an appellate state court. I don't understand why you wouldn't touch the state claim first, because you were a state court and only touch the federal, you know, touch the Federal Constitution, you know, as a backstop.

Anthony Sanders 39:36
And that's the point. That's the point where you and judge Sutton on the Sixth Circuit agree, you know, but I'm sure you guys don't great agree too often. But on that point, he says in his book from a couple years ago that yeah, I think Oregon does that. And you also say in your article, maybe another state or two but that the rest have this federal first policy, which again, is pretty weird when you're a state court and you're the primary arbiter of this one constitution.

Lee Carpenter 40:04
Why wouldn't you do that?

Ellie Margolis 40:06
Yeah. Hans Linde, who was an academic and then became a justice on the Oregon Supreme Court, wrote an article and argued for what he called the primacy approach, which was to decide the state claim first, if there were dual claims, and he and a few other judges like Sutton, have advocated for that. But it clearly has not sort of taken widespread hold, at least as of yet.

Anthony Sanders 40:30
I think Justice Stevens maybe said that a few times, too, when he was on the on the court, although I think he was a bit of a lonely voice and reminding state courts that they could do that. Um, maybe we could, we could close by we talked a bit about already, but the lessons that you have, near the end of your article, of three things to keep in mind when you're doing a campaign across states on an issue. And I think this could probably be true, whether you're an organization that's doing this litigation across states as can be on some issues, or just, you know, attorneys who pick the ball up in their respective states, but look to what has happened recently elsewhere. Number one, is the amendment process that you need to be careful about that because it can reverse what has already happened. we've, talked a bit about that. The second is provisions looked at provisions that are different than in the US Constitution. What across the span of this history, Lee, we've taken it kind of up to the brink of the California decision. But there were a few more after that, what seemed to work, when, you know, the language was different, and what where was it where it was, you know, it was an equal protection clause in a state constitution that was similar to the federal?

Lee Carpenter 42:03
Well, I think I talk about, you know, Vermont's common benefits clause, which is very different than the equal protection clause. And it really talks about how all of the people, you know, should the government is for the benefit of all the people that nobody should be excluded from, you know, the protections or the liberties that the that are offered. That's an interesting one, states that have ERA's built into their, their constitution with

Anthony Sanders 42:35
Equal Rights Amendment,

Lee Carpenter 42:37
right. That mandate, strict scrutiny for sex discrimination, maybe other forms of discrimination. There are state constitutions that have rights to privacy that are codified. So there's actually several kinds of state constitutions that have sort of codified, you know, Supreme Court interpretations of the Federal Constitution. So things like, you know, the right to privacy being built into a state constitution, you know, and then looking for things that are directly relevant to whatever, you know, your area of, you know, of interest is. So, for example, the, you know, we were talking a lot about how the education access and, and the right to an adequate education are areas of litigation that have really, you know, used state constitutions quite a lot, because there's kind of no analog in the Federal Constitution, but there may be states that have that have personal property rights that are articulated differently or more robustly. So those are the things you're going to look for not only generalized rights provisions that seem to be framed very broadly, but also look for things that are specific to your area of you know, of interest. So, you know, that's what I would, that's what I would say, in terms of, you know, looking at individual state constitutions and the text of the Constitution. The other thing, of course, is to really do a little bit of research on how your state Supreme Court interprets your state constitution. Right. I mean, I remember doing this, you know, as a somebody who was litigating for queer people in Pennsylvania, right, you know, asking, you know, can we use this weird provision in the Pennsylvania constitution? Right, you know, I've used the, the Pennsylvania uniformity clause, you know, that deals with taxation, right to try to make claims for LGBT people in Pennsylvania. You've got to just you've got to look also just beyond the text and figure out how does the State interpret its constitution? Is it a lockstep state? Is it going to interpret, you know, in lockstep with whatever the Federal Constitution does? Is it much more independent minded? How does that work so it requires doing actually some kind of deep dives into your own constitution or the Constitution in the state in which you're trying to litigate. And also, you know, again, looking beyond the text and into the interpretive approach.

Anthony Sanders 45:09
One thing I heard, not too long ago, from a justice on a state Supreme Court that's had many, many different constitutions as some states have is there, there's very little scholarship on some of the specific provisions, especially if, say it, it was drafted in constitution number five, and now we're on number eight. But it's the same as number five, but no one ever did a paper on, you know what happened at number five's convention. And so when the case gets to the Supreme Court, and then it's time to do the work on it, no one's done that legwork before. And it's very hard for the you know, in a 30 day timeline to get that research done for a brief. And so that that one thing I've seen is that you, you kind of need the scholars to get that work done ahead of time on some of these issues.

Ellie Margolis 46:00
Yeah, that's a really important point. And again, that's part of what I think causes the slow adoption of new ways of thinking about state courts can offer.

Lee Carpenter 46:10
Anthony, You said you were on the you were a clerk at the at the Montana Supreme Court

Anthony Sanders 46:17

That's right. It was the best 11 month vacation of my life. No, we worked hard.

Lee Carpenter 46:21
No, of course. And I clerked at the Appellate Division in New Jersey. And I think that our experiences may have been somewhat similar in that, you know, as a clerk, you're doing your best to kind of, you know, make sense of something that's pretty complicated for someone who is probably not that far out of law school. Asking a state Supreme Court, to engage in this amount of scholarship and research on a tight timeframe, right, using the limited resources that are available to most state supreme courts, with virtually you know, no help from those of us in academia. It's really you know, seriously though, it's a really heavy lift. I mean, if you were if you take yourself back to those days, when you were clerking, you would be looking for a precedent and you wouldn't find any, and you would be looking at the text of your constitution and getting really confused, because you realized you're like five constitutions in, right. And then you would be looking at like the interpretive approach, and you'd be looking at all the different things that you know, maybe your state Supreme Court is supposed to look at, right? The history of the convention, what was said at the convention, the text of the company, like all of it, and then you would be confused and probably terrified, and you would, and you would turn to scholars, right. And that's where you would hopefully be able to find some foundational information about how you should look at your state constitution. And I think what's really unfortunate and where we do a disservice to everybody else, as scholars is, there's just as you've said, there's just not a lot there. Because the incentives are all away from writing about state constitutions. If I write about the Pennsylvania State Constitution, I'm not ending up in a fancy journal. Right? And that's just that's really unfortunate. But, you know, if I try to write about all the state constitutions, um, I will drive myself insane, that article will never get finished, no matter, you know, I mean, Ellie is a tremendously awesome person to write an article with, but we would need like, 20 more people to write that article, and it wouldn't ever get done. So I think, again, you know, this sort of under development is sort of the responsibility of all of us in, you know, all of us in law. And we all have to do a little bit more work to try to say like, you know, we have to do more.

Anthony Sanders 48:52
And on the other hand, if there's any law students listening, who are looking for a topic for their journal article, and you want to hone in on some random state constitutional provision, you write an article that you might be the only one you might get cited in the state Supreme Court one day, so yeah, there's maybe some incentives for you.

Ellie Margolis 49:14
One other big picture lesson that we haven't really touched on in all this with a state constitutional strategy is one of the frequent critiques of this kind of work or sort of thinking about federalism and incrementalism and different straight state strategies is that you then result in different people in different states having different rights. You have one set of rights if you live in Pennsylvania and a different set of rights if you live in Missouri, right. So and that's true. That is partly the nature of federalism and exists at some level for all of us all of the time. I think one of the things that I encounter with law students is that are often very surprised when they learn how different, some basic things like rights around getting a driver's license or qualifying for state benefits are very different based on the state that you live in. So, probably there's some, there's a degree of difference that's tolerable all the time, but with really significant rights. And I think this is part of the marriage equality story, it becomes

very apparent very quickly, that having a right in one state that significantly changes the right that you don't have in another state creates a lot of problems. It creates problems of tension between states. And, you know, for people who move from one state to another, and then that can lead to more of a push towards a unifying federal rule in a way that doesn't take away the rights that have already been given in the states that have given them so even, you know, you're not necessarily going to win every state, as Lee said, in a state constitutional strategy. But if you win enough of them, then that both can sway public opinion and push the federal courts to recognize the right on a federal level.

Anthony Sanders 51:14
Why I think that's a great point to end on. Ellie that, you know, part of this is the beauty of federalism, but part of it is, at times, you know, people might argue about what the specific right is, but part of it is a failure of the federal courts to enforce the US Constitution and especially the 14th Amendment, which is a nationalizing amendment, after all, so I think everyone can take a lot of lessons from what we've discussed today and again, thank both of these wonderful scholars for coming on short circuit. We will be back next week with a more standard podcast about the now neglected federal courts of appeals, but for now, I'd ask all of you to get engaged.