51 IMPERFECT SOLUTIONS

State and federal judges consider the role of state constitutions in rights innovation

Judge Jeffrey Sutton is one of our most respected and admired federal appellate judges.

He has served on the Sixth Circuit, with chambers in Columbus, Ohio, since his appointment to the bench in 2003 by President George W. Bush. He clerked for Judge Thomas Meskill on the Second Circuit and for United States Supreme Court Justices Lewis F. Powell and Antonin Scalia. And he has chaired the Standing Committee on the Rules of Practice and Procedure in the United States Courts. With this background, he is certainly an expert on the federal courts. Yet it is the state constitutions that have commanded his attention for many years, stemming from his time as Solicitor of the State of Ohio from 1995–98. This interest has culminated in his recently published book — *51 Imperfect Solutions: States and the Making of American Constitutional Law*.

51 Imperfect Solutions makes for engaging reading. Judge Sutton takes on the role of an advocate on behalf of state constitutional jurisprudence. He aims to revive this area of the law, and he seeks to persuade us that state constitutions should be at the forefront of constitutional law, giving answers that come from their own language and traditions.

Judge Sutton has many different audiences in mind for his book. He begins by taking the bar to task: Why would lawyers make just one (federal) constitutional argument, he asks, when they could make two? He then turns to those who are concerned that the U.S. Supreme Court has become too central to our political life, noting that the U.S. Supreme Court's current domination of constitutional law puts intolerable political pressure on the Court and the nomination and confirmation process — a pressure, he fears, that will end "in tears." Putting state constitutions in the vanguard, he posits, can reduce this pressure by permitting experimentation and differentiation, one of the principal advantages of a federal system. Much of the book, however, is

LEFT TO RIGHT: JEFFREY SUTTON AND DAVID F. LEVI AT DUKE LAW SCHOOL NOV. 8, 2018.

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— DAVID F. LEVI, DIRECTOR, BOLCH JUDICIAL INSTITUTE

addressed to those who see the state courts as lagging in the protection of civil rights. In an extended discussion of four areas of case law involving individual rights, Judge Sutton argues that the state courts have often developed state constitutional law in directions more protective of civil rights than the comparable decisions of the U.S. Supreme Court.

Ultimately, Judge Sutton's most important readers are the state supreme court justices who must decide how to interpret their own constitutions and whether to deviate from the U.S. Supreme Court's interpretations of similar provisions. For this reason, when the Bolch Judicial Institute invited Judge Sutton to speak on his book, we also welcomed three other distinguished judges with significant experience on state supreme courts. Participants in this remarkable judicial roundtable included **JUDGE ALLISON EID** (United States Court of Appeals for the Tenth Circuit and former Colorado Supreme Court justice), **JUDGE JOAN LARSEN** (United States Court of Appeals for the Sixth Circuit and former Michigan Supreme Court justice), and **JUSTICE GOODWIN LIU** (Supreme Court of California). What follows is a lightly edited transcript of their lively Nov. 8, 2018, conversation at Duke Law School.

— DAVID F. LEVI

LEVI: Welcome to Duke Law School. We are thrilled to have such a distinguished group of judges here. Judge Sutton, to start, why don't you tell us why you wrote this book?

SUTTON: First of all, thank you, David. Thank you to the Bolch Judicial Institute. Thank you to Duke. When you write a book, you learn who your friends are. So thank you, friends. I really appreciate this, and I'm really thrilled to be here with my friends, Joan, Allison, and Goodwin.

So why write a book on state constitutions? Well, if you were to go to the Duke Law Library and pull all the books on "constitutional law" off the shelf or go to the class taught here on constitutional law, you would see that they teach and tell half the story. The focus in constitutional law books in America circa 2018 is on the U.S. Supreme Court and the U.S. Constitution, rarely mentioning — if mentioning it all — state constitutions or state courts. That seemed like a gap worth filling.

The second reason for writing the book was that the stories we tell ourselves about constitutional law usually follow a set narrative. And in fact, for the students, this may be all you need to know to pass the bar exam on the federal constitutional law questions — States: villains; U.S. Supreme Court: heroes. If you got that right, you're going to get most answers correct, because that is the basic narrative in federal constitutional law.

Now, sadly, in American history, there's quite a bit of support for that narrative — the chapter of Jim Crow being the best example, which was brought to an end happily by *Brown v. Board of Education*. So I didn't set out to contradict that narrative.

I did, however, think it might be worth supplementing that narrative with stories in which state courts either were the heroes — there's one story, *Buck v. Bell*, where the heroes are clearly the state courts, the villain the U.S. Supreme Court — and some other stories where it's complicated as to who the hero is and who the villain is. And it's really not even appropriate to think about it that way. It's more appropriate to think about it as a dialogue between state and federal courts, as they slowly make their way to settling the issue, if a settling of the issue is how it's going to end.

The third reason for writing the book gets to the federal judge side of me. I graduated from law school in 1990. As I've watched the Supreme Court as a practitioner, a law clerk, and now a junior varsity appellate judge, I've seen a court that basically is in a rights escalation mode. You get your rights; we get our rights. Blue rights here; red rights there.

Now in one sense, as a federal judge, I should love that path, and I should want us to stay on it. Why? Because it means we federal judges are exercising more power. If you have a government job, more power is usually better than less power. But there is one small problem: It's getting very hard for we Americans to decide who should be on the U.S. Supreme Court.

Unless you've been hiding under a rock the last few years, you must have noticed that Americans care intensely about who is on the U.S. Supreme Court, as well they should. That court is exercising plenty of power over our lives, and I think it's quite reasonable for Americans and their political leaders to care deeply about who is on the Court. Even so, I'm worried that the path we're on will end in tears. It will end either with the American people not respecting this great treasure of American government, or the American people unwilling to fill the seats on the Court, putting the justices in a position where they really can't do their job.

So how do you get off of that path — "Path A," I'll call it? "Path B" is some kind of détente — where the Court exercises less power over so many significant issues in American society. But how do you get people to engage in that détente, since we Americans prize judicially enforceable rights more than any other country in history?

Well, my idea is that we should look to the 50 state courts and their 50 state constitutions as another way of thinking about what our individual liberties and property rights should be. One oddity about American constitutional law today is we started the whole thing in the reverse. All of our constitutional guarantees — the rights guarantees — originated in the *state* constitutions.

The greatest era of constitution writing in this country — indeed, in the world — according to [Pulitzer Prize–winning historian] Gordon Wood, was between 1776 and the summer of 1787 in Philadelphia. The Philadelphia Convention was a cut-and-paste job, and the same was largely true of the Bill of Rights. They were cutting and pasting from the rights that had already been adopted in the state constitutions. How ironic that we live in a world where all we think about is the U.S. Constitution's individual rights provisions and the U.S. Supreme Court's interpretation of them, when they all originated in state constitutions and remain independently enforceable by state high courts.

Let's not forget, then, that we've got 51 high courts, including the U.S. Supreme Court, and 51 sets of constitutions. It's very hard in this day and age to find agreement about a political science policy point in America. But I'm

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confident we could get everyone in the Duke Law School community to agree with [Supreme Court Justice Louis] Brandeis's insight about the greatest virtue of American federalism. It's that a brave state can address a new problem with this experiment or that one, giving us 50 laboratories of policymaking experimentation.

You can have trial and error here, trial and error there. The results come in. Another state can adopt what's been done. Maybe we end up with several regional approaches, or maybe after all the evidence comes in, we nationalize one approach to the issue. Now what Brandeis was referring to in terms of policymaking labs was state legislatures as the policymaking incubators.

The whole premise of the book — and all I am saying today — can be reduced to this point: If we can all agree that the Brandeis insight makes sense for legislative policymaking, why in the world are we not doing exactly the same thing by treating the state high courts as laboratories of constitutional interpretation. Every one of the guarantees we care so much about is protected in one way or another in these 50 state constitutions. Why aren't we using the same approach with constitutional interpretation that we use for run-of-the-mill policymaking? Let the state courts be the first responders to new individual rights challenges premised on state constitutions.

If regional differentiation happens, all for the better. That's called a free market of ideas. The U.S. Supreme Court can watch that experiment unfold. Sometimes it will decide to nationalize one approach to the issue. Sometimes it will not. Sometimes it will decide to say, "We're going to allow some regional disparities to persist, because we think the U.S. Constitution doesn't speak to it or because there really isn't one good answer."

And that's the point of the title. Why are we insisting so often on picking one imperfect solution to individual rights in a world with so many options, albeit often imperfect options? If you have 51 imperfect solutions, it makes very little sense from my perspective to pick one of them, nationalize it, and make everybody live under it, whether it really is the best idea or for that matter a perfect idea.

LEVI: So that's a great way to start. Before we turn it over to our panel, could you just take a moment to talk about the structure of the book and the four areas that you focus on?

SUTTON: Yes, thank you. There are four substantive chapters. One is the *Buck v. Bell* story. You all know part of that story — the part that ends with "Three generations of imbeciles are enough." It's one of the most infamous U.S. Supreme Court decisions.

The part of that story no one knows is that the state courts invalidated several state eugenics laws before *Buck v. Bell*. And some used state constitutions to do that. The heroes of this story are the state courts.

Another story concerns school funding. In 1973, in a case called *San Antonio Independent School District v. Rodriguez*, the U.S. Supreme Court refused to use the 14th Amendment's equal protection clause to equalize ▸

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funding between rich and poor public school districts.

The stakes of the case could not have been higher, and in many ways it is the bookend case to *Brown*. At issue in *Brown* was whether to eliminate racial barriers in public education. At issue in *Rodriguez* was whether to eliminate wealth-based barriers to a good public education.

The U.S. Supreme Court said "no" in a 5-4 decision. But that was not the end of the story. Since 1973, two-thirds to three-quarters of the states have used their state constitutions to try to equalize the educational opportunities between rich and poor school districts in their states.

Another chapter concerns the *Mapp v. Ohio* story. The provocative question posed by that chapter is whether criminal defendants lost by winning *Mapp*. While the creation of a national exclusionary rule had many obvious benefits for criminal defendants, the chapter reveals some of the risks of prioritizing uniform national rights. What goes up sometimes goes down.

The last chapter is about the story of the "compelled flag salute" cases, *West Virginia State Board of Education v. Barnette* and *Minersville School District v. Gobitis*. That is a story in which the federal judges *and* the state court judges fell down on the job.

LEVI: You have put a lot of themes and ideas on the table. Goodwin?

LIU: Thank you so much, David. It's a pleasure to be here with you and Judge Larsen, Judge Eid, and of course, Jeff. I've known Jeff for a number of years and have been a long-time admirer.

So Jeff has written a great book, and those of you who haven't had a chance to read it yet should definitely read it. What I want to do is make some comments that situate his book within the discussion about judicial federalism more broadly and then extend his thesis further with a little vignette about Jim Crow and *Brown v. Board of Education*.

So, federal judges writing about state constitutions is a pretty limited genre. But he has very good company because many of you know that Justice William Brennan in 1977 wrote a seminal article, one of the most cited law review articles of all time — only 16 pages long. (Those of you who are law review editors, take note.) Brennan's article was a call for state courts to step up and make individual rights decisions independently under their own state constitutions in the face of what Justice Brennan saw as a retreat by the post-Warren court on many issues of individual rights. This article definitely had a "valence" to it. Brennan was a judicial liberal, and he was trying to maximize individual rights protections, and this article was his strategy for doing so.

The article cites some three dozen or so U.S. Supreme Court opinions in which he dissented, and he said, "State courts should look anew at these issues under their state constitutions. And by the way, I wrote dissents in all of them." Jeff is not someone whom you would describe as a judicial liberal. And so what is his book doing, then, on the same "shelf" as the Brennan thesis?

Here I think it's important to see the ways in which what Jeff is talking about extends and complicates the picture that Brennan left with us. Brennan was thinking about state constitutionalism as a second-best corrective for mistakes (in his view) made by the U.S. Supreme Court. But in Brennan's ideal world, the U.S. Supreme Court would have gotten all this right to begin with, and the states are kind of back-filling where the U.S. Supreme Court is falling down.

Jeff has a very different conception, which I think is a more historically accurate conception. First, Jeff questions the basic thesis about where — if you are an individual rights maximalist (and by the way, you could be liberal or conservative on that; it doesn't really matter) — but where would you go to maximize your individual rights? His chapters on school funding and on the exclusionary rule are very provocative in that respect. That is because he asks the question, "Are we really better off in the *Mapp* context, where we have the exclusionary rule that the U.S. Supreme Court has stepped in so heavily in micromanaging every aspect of police behavior, instead of leaving some of that up to the states?" And in the school funding contexts, he is asking, "Was the Supreme Court not correct to leave that issue up to the states? And did we get more out of the Supreme Court doing less?"

Second, even in areas where the U.S. Supreme Court ultimately will decide the issue, state constitutionalism is a way of pacing doctrinal change. "Taking your case all the way up to the Supreme Court," as they say in the movies, is sometimes too much too soon. Percolation of arguments and experiences through the federal system can inform an individual rights decision that ultimately gets made by the U.S. Supreme Court. And so state constitutions and states courts serve that function as well.

Third, what really comes out in the book is that this is not, as Justice Brennan imagined, a politically liberal device. We can talk about all the usual individual rights guarantees that Brennan wanted to talk about, but we can also talk about things like gun rights. We can talk about the reaction to *Kelo v. New London*. We can talk about the more stringent scrutiny that some state courts have given to economic due process rights. There are all kinds of ways in which the valence of that issue can skew more conservative or more liberal, and it need not be one or the other.

And so I think Jeff provides a nice balance to help us see the ways in which this is really a strong feature of our constitutional system rather than just, as Brennan seemed to describe it, a one-way liberal ratchet. I think that has been a very significant contribution to our understanding about judicial federalism.

I want to just say a word now about state constitutions and open up a topic for the four of us to discuss about how state constitutions are supposed to be read.

Now that we say that there ought to be some kind of state constitutionalism, how should it be done? In order to understand this, I think, you have to understand the nature of state constitutions, which I've come to understand a whole lot better in my current role. I think of state constitutions as having at least four types of provisions in them. State constitutions, many or most of them, are quite lengthy. And they're larded with many provisions that are, as one observer has called it, "really just legislation dressed in constitutional garb."

These provisions are not the high-vision structure of government and individual rights guarantees. These are things like — and I'll read you a couple of them — Alabama's Amendment 492, which promotes the sale of catfish. The one I like the most is Florida Constitution Article 10, Section 21, titled "Limiting Cruel and Inhumane Confinement of Pigs During Pregnancy."

We see provisions like that in state constitutions, and they do get stature in the sense that, in the hierarchy of laws, they are the highest law and so you have to apply them in the usual way. But that's not what we really think about when John Marshall was saying "[I]t is a Constitution we are expounding." He wasn't talking about pigs during pregnancy.

The second type of provision you might find in state constitutions are rights or structure provisions that are specific to the state. I'll give a couple examples. California, for example, has an express privacy provision; among the inalienable rights enumerated in our constitution is privacy, and that's different from the federal constitution. And there is case law built on that language.

Another feature is that in California we don't have a unitary executive. We have elected offices for attorney general separate from that of governor as well as other executive functions. In those areas, of course, state courts need to be attentive to the particular state texts and histories that define these very state-specific provisions.

Third, state constitutions have provisions that are similarly worded to federal guarantees, but — despite their similar wording — have very distinctive state histories. One example is the jury trial guarantee. The Sixth Amendment has a jury trial guarantee. We're all familiar with it. The ▸

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Supreme Court in *Duncan v. Louisiana* in 1968 held that this jury trial guarantee does not extend to petty offenses and many misdemeanors.

The Maine Supreme Court in 1974 said that the very similarly worded jury trial guarantee in the Maine Constitution *does* extend to petty offenses. And it did a very elaborate job of tracing the particular history of that provision as it exists in Massachusetts — which used to encompass Maine — and showed that despite the federal cutting and pasting of that provision, the original provision that it adopted *did* apply to petty offenses.

But the fourth category is the one that I'm most interested in, which are those provisions of state constitutions that tend to mirror the federal and don't have any particular state-specific meaning. Most of Jeff's book concerns provisions of this type where state and federal courts are essentially construing the same thing — if not the exact same language, the same constitutional concept. And why, you might ask, does our constitutional structure contemplate this kind of redundancy in interpretive exercise? Why two bites at the same constitutional apple?

I think understanding this question is very central to understanding the role of state constitutionalism in our overall structure, because that really is, in my view, the way in which state and federal courts are brought into conversation about our most important rights. If state decisions were siloed by the specific texts or histories of state constitutions, they could be easily distinguished. They wouldn't necessarily need to inform the federal constitution.

Take some obvious examples — the same-sex marriage decisions, the *Goodridge v. Department of Public Health* decision all the way up to *Obergefell v. Hodges*. The state and federal courts were largely talking about the same thing. When our Supreme Court in California in 2008 issued its marriage decisions interpreting the California equal protection clause, there wasn't an equal protection concept that was specific to California. We were talking about the same equal protection concept that everyone is talking about, but we interpreted it differently. And that decision then informed others in the state courts and the federal courts.

I want to end with just one further illustration of this dynamic that I think Jeff's book illustrates so well, and it really takes on the one bugaboo that Jeff began with, regarding why it is that we so disfavor state courts and prefer the federal courts when it comes to individual rights protection. And that is the narrative of Jim Crow and the road to *Brown*. Many people who have read *Plessy v. Ferguson* — a case about rail cars — know that one of the principal authorities upon which Plessy relied was a Massachusetts high court decision called *Roberts v. City of Boston*. *Roberts* was a school desegregation decision upholding the "separate but equal" standard. It was written by Chief Justice Lemuel Shaw, one of the greatest jurists of his time. And that cemented, in a way, the "separate but equal" principle.

What is lesser known, however, is that despite *Plessy* and despite *Roberts*, between the period from about the mid-1800s to 1900, there were several dozen state court decisions about school segregation. More than half of those cases granted relief to the black plaintiffs, largely on state constitutional or statutory grounds, within the confines of *Plessy*. And then, during the same period, there are about 10 reported federal decisions, and five

granted relief. So state courts did not fare badly during that period.

And many of you learn from your constitutional law courses and textbooks the progression of the road to *Brown* starting with the higher education cases — one from Missouri which led to another one in Oklahoma then Texas and the rest. What is lesser known is that, prior to the Missouri decision, the very first NAACP victory in a higher education case occurred in the state of Maryland. One of the first cases Thurgood Marshall litigated was a case called *Pearson v. Murray*, in which the Maryland high court ordered the integration of the University of Maryland Law School for having denied admission to a very qualified black plaintiff. The *Pearson v. Murray* decision was the central precedent that the U.S. Supreme Court then relied on in the Missouri case in 1938, which then became the pillar of *Sweatt v. Painter* and other cases that led to *Brown*.

Last data point: *Brown*, you remember, was actually four consolidated cases — one from South Carolina, one from Virginia, one from Kansas (which was the lead case, *Brown*), and one from Delaware. The Kansas, South Carolina, and Virginia cases all came from federal district courts. All three of those cases denied relief to the black plaintiffs; the courts, upon finding that the schools were separate and unequal, ordered an equalization remedy and said to the black plaintiffs, "Well, you'll have to wait and see. You'll have to wait for the facilities to 'catch up.'"

The Delaware case, however, was a state court case. Delaware Chancellor Collins Seitz, at the trial court level, visited the schools and rendered a holding that the schools were unequal and segregated, and the end of the inequality could *not* be remedied immediately, and thus ordered the desegregation of the schools. And that decision was upheld by the Delaware Supreme Court.

And so finally, in 1955, when the U.S. Supreme Court rendered its disposition in the *Brown* cases, it reversed the three federal district courts and affirmed the one state high court. I think that alone should give us pause in thinking about who are the heroes and who are the villains in our conventional story about state courts and federal courts.

LARSEN: So I will probably touch on a few things that have already been touched on, but I'm going to make it a little more — maybe a little more practical.

One of the things that Judge Sutton talks about in his book is he, sort of, laments the fact that litigants don't take their two free throws. To use his example, you come up to the line, and you have two free throws, and you only take one. Well, why would you do that? Any Duke fan should know that you shouldn't do that, especially if you're playing Michigan.

He argues you should take both of your free throws — one being your shot at the federal constitutional bucket and the other being the shot at the state constitutional bucket. And he says, if you ask any state judge, they will probably tell you that people often don't take the second shot. And from my experience, that is definitely true. If we got arguments based on the Michigan Constitution, aside from the provisions that were unique to Michigan, it would usually go something like, "Here are all my arguments about why I should win on the federal constitution. Oh, and if you don't buy that, then just find that I win on the state constitution," but with no reasoning about why the state constitution might be different.

So it's easy to, sort of, blame the lawyers, I guess. But I think about this, and I think, well, if I were a lawyer arguing a case, or if as a judge it had been seriously presented to me, what tools would I use to figure out how the Michigan Constitution differs? And there, I largely come up empty.

Now, that's not always going to be the case. In Michigan, we had a case — I wasn't on the court at the time — a year before the *Kelo* decision called *County of Wayne v. Hathcock*. So without guidance from the U.S. Supreme Court, the Michigan Supreme Court had to decide the meaning of "public use" under our takings clause. The Michigan Supreme Court decided that you could not tear down people's homes in order to put up a shopping mall. That was not a public use. The U.S. Supreme Court, the year after that, in *Kelo*, cited the decision and said, "Thanks for your advice, but we're not going to go that way."

So sometimes it does work that there are tools that you can use to trace back to the original meaning of "public use." But often that won't be the case. So if you think about the traditional tools of constitutional interpretation — we talk about text, we talk about history, and we talk about precedent — many of the texts, at least in the one category that Justice Liu talked about, are going to be the same. So the federal constitution borrowed those provisions from the pre-existing states, and then the new states borrowed those either from the federal constitution or from their older state siblings.

And if you're borrowing the exact language, there's a pretty good likelihood that you wanted the words to mean the same thing. Otherwise, why wouldn't you have used different words? So it is often the case, I think, that people meant the words to mean the same thing. Now, it could be that ▸

either the state courts or the federal courts at some point took the wrong path. They started to interpret those words that shared a common meaning the wrong way. And the state courts could be a corrective but, of course, only in one direction — because of the Supremacy Clause, states can never guarantee fewer rights. They can only be more generous. But as Judge Sutton points out in his book, the whole reason for the U.S. Supreme Court incorporating many of the rights in the federal Bill of Rights against the states was that the states were not sufficiently protective of individual rights. And so what is the likelihood that when you're a state judge and you're interpreting a provision that is worded the same as the federal constitution, you had a history, but your history was probably under-protective of the right? That's why it was incorporated in the first place.

And so the chances that when you have an identically worded provision, you're going to come up with something where the states can do something differently than the federal government — it seems to me like those chances are slim. Now there will certainly be cases. I think *Kelo* is an example. The petty crime example that Justice Liu gave under the Sixth Amendment is an example. But I don't think there will be that many under the traditional tools of constitutional interpretation.

Now some of you in the room might be saying, well, I don't like those traditional tools. I'm not into text, and I'm not into history. I'm not an originalist. I'm a living constitutionalist. And so there, there's a lot of space for judges to be more protective. Truly, there is.

But I also think we need to think a little bit about ways in which state constitutions differ from the federal constitution in terms of the interpretive question. So two of the big pillars of living constitutionalism, as a theory, are that the federal constitution is really, really old and that the federal constitution is nearly impossible to amend. And given those two things, we need the judges to be able to make sure that the Constitution can keep up with an evolving society.

Now the facts supporting these two pillars hold true with respect to some state constitutions. So I believe Massachusetts has the oldest constitution that is still operating in the world today. I think it was 1780, perhaps. But that's obviously not true of all of our states. We have two states that came into the union in 1959.

We also have states much more likely to go into convention as a way to amend their constitutions. So Georgia was the fourth state admitted to the Union, but it also has, I believe, the newest constitution — it was adopted in the 1980s. Michigan's constitution is from the middle of the 1960s. States are much more likely to convene and update their constitutions through democratic means.

About half the states also have the ability to amend their constitutions through direct democracy, and that's how you get to the pregnant pig provisions of the Florida Constitution, which Justice Liu referenced. And so if you have the ability to do things like that to amend your constitution through the ballot process — which is not something you can obviously do with the federal constitution — it makes me wonder whether state judges should think a little bit differently about their role than federal judges do, even those who ascribe to the living Constitution.

So those are my thoughts about the interpretive question, and I'll turn it over to Judge Eid.

EID: Well, thank you so much for having me here. It's just been great to be here with you all. This is such a great panel. And thank you all for coming. I can't believe how many have turned out for a state constitutional law talk. So thank you for your interest.

I just want to take up where you left off, because Colorado is an initiative state. I don't know if any of you have been following, but we have amended our constitution 150 plus times. We love state constitutional law in Colorado. And so we are really one of the super active states on the constitutional front. And I just want to start by really thanking Judge Sutton for bringing this topic to everybody's attention. Because I do think it's very important if you're from Colorado.

I also just wanted to say that this has consequences for you all. I'm going to tell my cautionary tale. I think Judge Sutton has heard this. I hired a wonderful intern. This person is not from Duke. But this person got an assignment to research something and write a memo. They came back and presented their 30-page memo to me. And I looked at it and thought, "Oh, no, they didn't check the state constitution!" Colorado had just passed a very lengthy constitutional amendment on this topic, and this person hadn't cited it at all.

And so it changes the dynamic of how you do work — at least in Colorado. You've got to check the constitution first. And I think that's exactly what you're talking about. There are things in the Colorado Constitution you wouldn't imagine, but you need to look at it in one of these very active constitutional states.

We have a constitutional provision banning public funding for the 1976 Olympics. Because the state just did not want the Olympics to come. We didn't want people to move to Colorado or

You can't just come in and say, "The Supreme Court is wrong." You've got to come up with some reason, some justification for the Colorado Supreme Court to look at the state constitution differently than the federal constitution.

– JUDGE ALLISON EID, U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT

even see Colorado, because when you come, you stay, right? And so literally, we have a provision banning funding for the '76 Olympics, and, shockingly, the '76 Olympics did not come to Colorado, and we have not had them since.

But I use that as an example just so you get a flavor of how many things are in the constitution in Colorado and how robust the state constitutional conversation is in Colorado. This book, as you point out, is really focused on those provisions that are parallel — where you have a state constitutional provision and a federal counterpart in that discussion.

But I just wanted to say when you go to Colorado and you talk about state constitutional law, you're not talking about that. You're having a discussion today about what happened Tuesday with all of our constitutional ballot initiatives. So it's a different topic.

All right, the second point, I think, just picking up on Judge Larsen's point is — well, I'll start with chapter seven of the book, which is entitled "What State Court Judges Can Do." And of course, as a former state court judge, I'm not going to like that chapter. And I think the book puts a lot of emphasis on what state court judges can do.

And I push back a little bit on that, because as a former state court judge, state court judges do exactly what federal court judges do. You look at text and history — and I'll just read our standard from the Colorado Supreme Court in a case called *Curious Theater Company v. Department of Health*. And I didn't write this case, but I was on the court so at the time enjoyed it. And I'll just read this passage.

"This court is the final arbiter of the meaning of the Colorado Constitution, and as such, it is certainly within its power to determine that the state constitution places restrictions on legislative action even greater than those imposed by the federal constitution." And then we go on and say, "[W]e have, however, generally declined to construe the state constitution as imposing such greater restrictions in the absence of textual differences or some local circumstance or historical justification for doing so."

I read that just because that is the standard. It's a pretty high burden. The court goes on to say you can't just come in and say, "The Supreme Court is wrong." You've got to come up with some reason, some justification for the Colorado Supreme Court to look at the state constitution differently than the federal constitution.

And I just put that out there because that's the argument you all — when you go out and practice — will have to make. And that's a burden. That's work that you all will have to do. As judges, we look at those arguments, but you all have to make them. We don't make the arguments just, kind of, sua sponte. So I just call that out. I read that. It's a tough burden, I think, to me.

LEVI: Great comments. Jeff, any thoughts in response?

SUTTON: Let me just say a couple of really quick things.

Here is a 15-minute assignment. Go read the state constitution of the state in which you plan to practice law. Don't read the whole thing. They're very long. Just go to the individual rights section. You will be surprised at how often the language varies from the federal constitution. ▸

Utah v. Strieff, an important Fourth Amendment case from a couple of years ago, helps to illustrate my point. It was a state prosecution. Strieff's lawyer — a good lawyer, by the way — raised only the federal constitutional claim, and won in the state supreme court. Justice Tom Lee wrote the decision, a 5-0 decision for Strieff. It got reversed in the U.S. Supreme Court. Strieff now sits in jail, or once sat in jail, because his lawyer did not know about the state constitutional guarantee. I suspect that at least three members of that court would have ruled for Strieff on the state constitutional ground.

The Utah constitutional phrase is the same on reasonable searches and seizures. Judge Larsen and Judge Eid might be right that a lot of states want to lock step. They're free to do it. It's a big country, though it diminishes any state court that does it reflexively.

The Warren Court was the one that identified, developed, and muscularized all of these rights. But there's not as much rights innovation now. If the U.S. Supreme Court says, "No," there is one option left. You're not going to amend the federal constitution, realistically.

You may try to change the composition of the Court. That's a couple-decades process. You've got one option left, the state guarantee.

The lock-stepping is not the state courts' fault. It's the lawyers' fault, and it's the law schools' fault. The law schools aren't teaching it, leaving us without separate doctrinal language or separate theories of state constitutional law.

LARSEN: The Fourth Amendment is always the easy one to go to, because the question is, "Is this unreasonable?" It's a balancing test. Sure, people are going to balance differently. But it's not a hard constitutional line like the right to jury trial.

SUTTON: How about this? We'll do state constitutionalism only in criminal law. How about that? That's half the cases. There are 84 million state court cases in a year and 350,000 federal cases in a year.

About half of those state cases are criminal law cases. I'd be satisfied if every state court in the country just took seriously the criminal procedure constitutional protections in its state, including the reasonableness and thus balancing choices apt for each state.

LARSEN: It's balancing, and I think people could come out differently, sure.

LIU: I think the quote Judge Eid read from *Curious Theater* really encapsulates well what the nature of the challenge is. What Judge Eid read is what I would think of as the dominant conventional view out there, which is that state courts adopt the posture that when they are construing an identically worded guarantee, they don't feel at ease departing from a U.S. Supreme Court decision that's on point — even if they are free to do so — unless they can find some textual difference, state-specific history, or some local circumstance that justifies a departure.

My personal view is that this is wrong. This is a wrong way to understand the federal structure. It's a wrong way to understand why it is we have state courts, for a number of historical reasons. As Judge Larsen and Judge Sutton both observed, the provisions themselves in state constitutions were put there by people who wrote words that then informed the federal constitution, which in turn informed various subsequent state constitutions.

So just historically speaking, if you're an originalist, the states have as much ownership of the meaning of these words as the national court would.

But more importantly, I think, for present-day purposes just pragmatically, the notion that we would entrust one single court with the one right answer to all these problems is antithetical to the basic postulate of federalism. We have lots of redundancies in our constitutional structure. In fact, they make things inefficient. That's a key feature of our Constitution.

But that also is a way in which our structure provides channels for conflict — not necessarily in order to settle conflict for all time, but rather to manage it and to ensure that everybody, even the losing side of conflicts, continues to be part of the process. That could not be more important than it is now in the way that we're going in this country. And so the idea that you have state courts that are disagreeing with what the federal court does doesn't strike me as an affront to the rule of law or undermining the objectivity of the constitutional decision-making process.

I'll just give you a couple examples. I already gave you the same-sex marriage example. Consider, as an another example, *Batson v. Kentucky*. That's the case about peremptory strikes being unlawful when they are motivated by race. In a case called *Swain v. Alabama* some 10 or 20 years prior to *Batson*, the U.S. Supreme Court had said, "You can't prove racial discrimination in jury selection on the basis of the strikes against the jurors in that particular case — there has to be a broader pattern." Well, a number of state courts disagreed — just flat out disagreed — with that holding of the U.S. Supreme Court and said so in state court decisions under their state constitutions. They did not cite any particular state specific

factors or historical idiosyncrasies or whatever. They just disagreed.

If you go to *Batson v. Kentucky*, you see the U.S. Supreme Court citing these state court decisions under state law for the basic proposition that *Batson* then establishes. It's the same story with respect to *New York Times v. Sullivan* and the actual malice standard. You will see that decision, not coincidentally, was written by Justice Brennan. It cites about 10 state court decisions under state constitutional law to say that the actual malice standard is the correct standard under federal law.

This cross citation of these cases could not occur if state courts were solely in the business of siloing their state decisions on the basis of state-specific considerations. Federal courts could so easily say, "We don't need to pay attention to that, because the state court itself says we're different. And so it doesn't necessarily inform what the federal provision means." This doesn't happen — the distinguishing away of state decisions — when state and federal courts are engaged in a common, interpretive enterprise, interpreting the same texts and concepts when it makes sense to do so.

SUTTON: I just want to emphasize one thing that Goodwin said, which helps to think about this in a balanced way. So when the U.S. Supreme Court uses state court decisions as a basis for a federal ruling, the U.S. Supreme Court justices that use them are probably going to be justices that embrace a similar method of interpretation. A state court originalist decision is going to be appealing to a Justice Scalia, while a state court living-constitutionalist decision would be more appealing to a Justice Brennan.

Keep in mind one other possibility. If the U.S. Supreme Court decision is originalist, and the state court happens to have a majority of living constitutionalists, the state court should not lockstep. That makes no sense. The state court's method of interpretation denies the possibility of looking at it the same way the U.S. Supreme Court did.

And the opposite's true. If you have a living-constitutionalist U.S. Supreme Court decision and you're a state court judge getting the same issue under the state guarantee — it makes no sense that you would presume the U.S. Supreme Court's right if you are an originalist. You should presume the opposite if you take methods of interpretation seriously.

LEVI: We are at the end of our time and will need to leave this debate over "lockstepping," as Judge Sutton calls it, somewhat unresolved. I thank the panel for doing such a great job of illuminating these issues for us. I think we'd be prepared to let the four of you pretty much decide everything. Let's give them a big round of applause.

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