"Laboratories of Jurisprudence?: The Role of State Supreme Courts in a Federal System"[1]

Justice Jonathan Papik[2]

INTRODUCTION

Thank you for having me here today, and thank you for that kind introduction. I'm honored to be included in your Branstetter Judicial Speaker Series. When I was in law school, I greatly enjoyed when judges would come to campus. And today, as a judge, I think there is much to be gained from interaction between the legal academy and the bench, although I have to tell you that looking at the list of previous jurists who have been a part of this program is more than a bit intimidating. It's a distinguished group. If that weren't enough, I am told that, just recently, Chief Justice Roberts was here. All of that really did make me wonder, as I was preparing to come here, what I could possibly have to offer. The one thing that gives me some solace is that, based on my recollection, the majority of your previous speakers have served as judges in the federal system. My hope is that I might be able to talk today about some issues from the somewhat unique perspective of someone who serves on a state high court.

1. This essay is a lightly edited and footnoted version of a speech given by Justice Jonathan Papik at Vanderbilt Law School on November 4, 2019.

2. Jonathan Papik was sworn-in as a judge on the Nebraska Supreme Court in April 2018. Prior to his appointment, he worked in private practice in Omaha, Nebraska.

I propose to do that, somewhat ironically perhaps, by talking about the recent work of a federal judge, who I understand was here with Chief Justice Roberts: Judge Jeffrey Sutton from the Sixth Circuit. Judge Sutton wrote a book in the last year or so on state constitutional law—*51 Imperfect Solutions*.[3] In my view, Judge Sutton's book is a very interesting and very important work for those interested in both state constitutional law, federal constitutional law, and public law issues in general. Additionally, if you've ever read his opinions, you also know that Judge Sutton is simply an excellent writer. I'd commend the book to all of you.

As its title suggests, Judge Sutton argues in the book for an increased appreciation and an increased role for state constitutional law. With respect to increased appreciation, Judge Sutton argues that our legal system—from bench to bar to academy—does not give sufficient attention to state courts and state law in general, and state constitutional law in particular.[4] He points out that while most of our focus is on the U.S. Constitution and decisions of the U.S. Supreme Court, above ninety-five percent of cases that are filed in this country are filed in state courts.[5] He also makes the case that state courts and state constitutional law have, over the years, had a significant influence on federal constitutional law.[6]

Judge Sutton makes this case in several chapters in which he traces how in several discrete areas of constitutional law, including school funding, search and seizure, compelled sterilization, and compelled speech, state courts and state constitutional law have greatly influenced constitutional law at all levels, including subsequent decisions by the U.S. Supreme Court.[7] He carefully explains why, in these areas, state constitutions and state supreme courts deserve much of the credit for our current understanding of the scope of our constitutional rights.[8]

Prior to my appointment to this position and prior to reading Judge Sutton's book, I would have thought that when someone refers to state constitutional law, they are primarily referring to those provisions that are unique to state constitutions. To take an example from my

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

4. *See id.* at 6 (asserting that "an underappreciation of state constitutional law has hurt state *and* federal law") (emphasis in original).

5. *Id.* at 184.

6. *See id.* at 2 ("When the [United States Supreme Court] enforces a federal right, prior state court decisions in the area often influence the decision . . . .").

7. *See id.* at chs. 3–6 (discussing these areas of constitutional law in turn).

8. *Id.*

state, Nebraska has a one-house legislature. Our constitution sets up a process for passing statutes that is obviously much different from the federal and every other state's bicameral system.[9] Studying such provisions, how they work and how they have been interpreted, I would have thought was the essence of state constitutional law.

While such provisions can be interesting, Judge Sutton's book actually shows that much of the action and arguments in state constitutional law centers around provisions that are *not unique* to state constitutions, but rather appear in many state constitutions and in the U.S. Constitution as well.[10]

This brings me to Judge Sutton's related normative point. He argues that state supreme courts should not engage in what he calls "lockstepping."[11] By that he refers to the not uncommon practice of state courts around the country of interpreting provisions in state constitutions that are the same or even similar to provisions in the U.S. Constitution to mean whatever the U.S. Supreme Court has said the federal Constitution means.[12]

So, to take a common example, many state constitutions have a provision forbidding unreasonable searches and seizures.[13] A lockstepping approach would assume that such a provision means exactly what the Fourth Amendment to the U.S. Constitution means and would treat U.S. Supreme Court decisions as binding precedent in deciding whether a particular search and seizure was forbidden by the state constitution, rather than considering whether the state constitution provides more or less protection than the U.S. Supreme Court has said the Fourth Amendment provides.

Judge Sutton makes a number of arguments in opposition to lockstepping. One of his arguments is that it is far from obvious why a state constitution which was written and adopted by different people at a different time for a different sovereign should mean the exact same thing as the U.S. Constitution.[14]

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9. NEB. CONST. art. III, § 1.

10. *See* SUTTON, *supra* note 3, at 1 ("In our federal system, nearly every state and local law must comply with two sets of constraints, those imposed by the Federal Constitution and those imposed by their state counterparts, as it is the rare guarantee of any significance that appears just in [one] . . . .").

11. *Id.* at 174.

12. *Id.*

13. *E.g.*, CAL. CONST. art. I, § 13; N.Y. CONST. art. I, § 12; TEX. CONST. art. 1, § 9.

14. SUTTON, *supra* note 3, at 174.

He also argues that the country as a whole benefits from innovation in state courts.[15] He points to his case studies as evidence.[16] And he argues that the benefits of state court innovation are available only if state courts are willing to interpret state constitutions differently than the U.S. Supreme Court interprets analogous federal provisions.[17] While Justice Brandeis wrote many years ago of states serving as laboratories of democracy, Judge Sutton would like to see state courts serving as "laboratories of jurisprudence."[18]

I should point out that Judge Sutton makes clear that he is not arguing for state courts to engage in a particular method of constitutional interpretation, whether that be originalism, living constitutionalism, or something else entirely.[19] He argues that proponents of any school of constitutional interpretation can and should consider employing that method to independently construe provisions in their state constitutions.[20]

Judge Sutton's anti-lockstepping argument is certainly an interesting one for state supreme courts to consider. As someone who sits on a state supreme court, it's certainly given me a lot to think about. In particular, I've thought about why, notwithstanding Judge Sutton's cogent arguments, state supreme courts might nonetheless follow a lockstep approach.

I think those potential reasons are interesting on their own, but I think they also provide some insight into the role of a judge on a state high court as a general matter. So I'd like to take the bulk of my time today to talk about reasons why state supreme courts might follow a lockstep approach in interpreting their state constitutions and to offer some commentary about those reasons.

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15. *See id.* at 203 ("By telling the stories of landmark rights disputes from the perspective of the federal and state constitutions as well as the federal and state courts, this book illustrates the role the States can play, and have played, in protecting individual rights.").

16. *See id.* (describing some of these case studies).

17. *See id.* ("In both settings [school funding and search and seizure], large numbers of States insisted on change even after the U.S. Supreme Court permitted continuity.").

18. *See id.* at 216 (noting Justice Brandeis's use of the "laboratory metaphor for policy innovation" and asserting that a "ground-up approach to developing constitutional doctrine allows the [U.S. Supreme] Court to learn from the States").

19. *See id.* at 6 ("The book tries . . . not to take sides on what the state and federal courts *should* have done in construing [constitutional] guarantees.") (emphasis in original)).

20. *See id.* at 216 (asserting that a greater role for state courts in developing constitutional doctrine is "useful" to both "pragmatic justices interested in how ideas work on the ground . . . [and] originalist justices interested in what words first found in state constitutions mean").

I. ELECTIONS

I'd like to start by talking about an attribute of state courts that is often the first to be discussed when comparing state judiciaries and the federal judiciary. It's also an attribute that some might argue is at least a partial explanation for a lockstep approach. And that is the fact that most state court judges, unlike their federal court counterparts, are subject, in some form and at some time, to the will of voters. This takes a number of different forms of course. In some states, there are nonpartisan contested judicial elections.[21] In others there are partisan contested elections.[22] In my state of Nebraska, we follow a form of the Missouri Plan under which judges are appointed by the governor, but are required to stand for periodic retention elections.[23]

People obviously hold strong feelings about whether and to what extent it is appropriate for judges' futures to be determined by a popular vote of any kind. And it is certainly not my aim to weigh in on that particular debate today. I would, however, like to offer a few thoughts on the view that the lack of life tenure might have an effect on state court judges' interpretations of their constitutions.

I think the argument for this view goes something like this: parties arguing for a state court to interpret a state constitutional provision more broadly than a federal counterpart will usually be articulating a counter-majoritarian position, and thus judges who have to be approved by a majority of voters to remain judges will be reluctant to find such a right.

With full appreciation for this concern, however, I'd like to push back a bit on the notion that we should assume state court judges will, on the whole, act in this manner.

I recognize there is empirical and probably even psychological research that would tell me about the effect having to stand for election has on state court judges,[24] and I don't have competing research I can

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21. *E.g.*, ARK. CODE ANN. § 7-10-102 (2019); GA. CODE ANN. § 21-2-138 (2020); IDAHO CODE § 34-905 (2020).

22. *Judicial Selection in the States*, NAT'L CTR. FOR ST. CTS. (last visited Mar. 12, 2020), http://www.judicialselection.us/judicial_selection/index.cfm?state= [https://perma.cc/35JK-U43Y] (including Alabama, Illinois, Louisiana, New Mexico, New York, Pennsylvania, Tennessee, and Texas).

23. NEB. CONST. art. V, § 21.

24. *E.g.*, Joanna M. Shepherd, *The Influence of Retention Politics on Judges' Voting*, 38 J. LEGAL STUD. 169 (Jan. 2009); Alicia Bannon, *Rethinking Judicial Selection in State Courts*, BRENNAN CTR. FOR JUST. (2016), https://www.brennancenter.org/sites/default/files/publications/Rethinking_Judicial_Selection_State_Courts.pdf [https://perma.cc/4XUU-ZSG4]; Andrew Cohen, *An Elected Judge Speaks Out Against Judicial Elections*, ATLANTIC (Sept. 3, 2013), https://www.theatlantic.com/national/archive/2013/09/an-elected-judge-speaks-out-against-

cite to you today to directly refute those claims. But I do have a few reasons why I'm skeptical about claims that state court judges, by and large, follow a lockstepping approach simply because they may be subject to an election or retention vote.

Part of my skepticism comes from several pieces of admittedly anecdotal evidence in the form of specific judicial opinions some states that neighbor mine in the last decade or so. I believe these cases are evidence for my point, but I believe they are also useful to give you a sense of what an anti-lockstepping approach can look like.

In 2009, the Iowa Supreme Court decided a case, *Varnum v. Brien*, in which same-sex couples who had been denied marriage licenses brought an action challenging a state statute prohibiting the issuance of marriage licenses to same-sex couples.[25] In a unanimous decision, the Iowa Supreme Court held that Iowa's statute violated the equal protection clause of the Iowa Constitution.[26] It struck the language limiting marriage in the statute and ordered that the "remaining statutory language must be interpreted and applied in a manner allowing gay and lesbian people full access to the institution of civil marriage."[27] For context, this opinion was decided six years prior to *Obergefell v. Hodges* and three years prior to President Barack Obama publicly expressing support for same-sex marriage.[28]

Moving geographically to the South and West, earlier this year in a case called *Hodes & Nauer v. Schmidt*, the Kansas Supreme Court upheld a trial court's temporary injunction enjoining the enforcement of a statute prohibiting the performance of abortion by means of Dilation and Evacuation.[29] It did so by concluding that the Kansas Bill of Rights protected a right to personal autonomy that included the right of women to decide whether to continue a pregnancy.[30]

Why do I mention these examples? To be clear, it's not because I'm weighing in on the question of whether any of these decisions was correct as a matter of state constitutional law. I bring them up instead

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judicial-elections/279263/ [https://perma.cc/M2ZE-DRRS]; Adam Liptak, *Judges Who Are Elected Like Politicians Tend to Act Like Them*, N.Y. TIMES (Oct. 3, 2016), https://www.nytimes.com/2016/10/04/us/politics/judges-election-john-roberts.html [https://perma.cc/29QS-HZPU].

25. 763 N.W.2d 862 (Iowa 2009).

26. *Id.* at 907.

27. *Id.*

28. Obergefell v. Hodges, 135 S. Ct. 2584 (2015); ABC News, President Obama—Gay Marriage: Gay Couples 'Should Be Able to Get Married'—ABC NEWS EXCLUSIVE, YouTube (May 9, 2012), https://www.youtube.com/watch?v=kQGMTPab9GQ ("I think same-sex couples should be able to get married.").

29. Hodes & Nauser, MDs, P.A. v. Schmidt, 309 Kan. 610 (2019).

30. *Id.* at 624.

because of what they might tell us about what the judges who decided these cases were considering or not considering.

I think it's safe to say that it would be hard to find topics on which a populace is likely to hold stronger feelings than issues of marriage and abortion. And, I don't have specific polling data to back this up, but I'm fairly confident that in these particular midwestern states at these times, the results reached by these courts would not have been overwhelmingly popular amongst the general population.

Another reason I'm skeptical that state court judges, as a class, are likely to stick to a lockstepping approach due to the ballot box is my own, admittedly limited, experience. Before expressing interest in the position, I thought some self-evaluation was necessary about whether, if I were to be appointed, I would follow the law wherever it led, even if that result were unpopular. I concluded I would do so. After serving a year and a half, I'm now more convinced that I can do that for two reasons, that you will know require some unpacking as soon as I say them: the job is not that great, and the job is too good.

Even hearing myself say the job is not that great makes me a little uncomfortable, so I'll unpack that first. To be clear: I love the job, I'm honored to do it, I'm grateful to be appointed, and I hope I get to do it for a very long time. That said, I don't think the job is so great that it would be worth allowing my views to be influenced by the prospect of the populace disagreeing with them.

The people of Nebraska, wisely in my view, have set judicial salaries at a level where I think they can attract good candidates, but I can tell you that my colleagues and I are not are getting fabulously wealthy from this job. The job has some prestige, yes, but not much outside of the State Capitol, the local law schools, and maybe a bar association event. All in all, I just don't know that the pay or prestige should prompt anyone to be motivated by anything other than their view of what the law requires in a given case.

Perhaps more importantly, the job is too good. There are not a lot of legal jobs where it is your job to, with complete independence and impartiality, apply law to facts. There are no clients, partners, supervisors, donors, or anyone else to factor into your calculus. In my view, and I'm guessing this is the view of many of my colleagues in state courts around the country, this is the best part of the job. If I had to account for whether the public would approve of the result in a particular case, in my view, I would not only be acting contrary to my oath, the job would be much less enjoyable.

I recognize that's only my view, but I suspect it's the view of many others in my position. And accordingly, I'm skeptical that the prospect of the ballot box is a significant explanation for lockstepping.

I also think there are some more plausible explanations that I'd like to explore.

II. THE WAY WE THINK ABOUT FEDERAL CONSTITUTIONAL LAW

One of the issues Judge Sutton discusses in his book is that in order for state supreme court judges to find state constitutional rights, *litigants* have to present them with state constitutional law arguments.[31] He acknowledges that litigants often pass up the chance to do so, and either only invoke the federal constitution or invoke both the state and federal constitutions, but assume that they must mean the same thing.[32] He argues that is an especially poor litigation strategy, analogizing it to a basketball player who is awarded two free throws, but who opts to take only one.[33]

I wonder, however, whether the way we have come to think and talk about the U.S. Constitution and the U.S. Supreme Court might have something to do with what Judge Sutton argues is an underutilization of state constitutional law arguments.

We are conditioned to think about the U.S. Constitution first and foremost long before we think about going to law school. Think back to your elementary or middle school civics classes. I'm guessing you might remember talking about the constitutional convention, certain specific provisions in the Articles and in the Bill of Rights, and certain framers of the U.S. Constitution. Unless your classes were different than mine, I'm guessing you can't remember much discussion of how your state constitution was formed or what it includes. I'm afraid that in most cases this focus continues if you choose to go to law school.

This focus on the U.S. Constitution and the U.S. Supreme Court makes some sense. It would be hard to argue that the U.S. Constitution is not *the* most important piece of legal authority in our country. It applies across an entire country in a way that state constitutions do not. And, perhaps more importantly, when there is a conflict between the U.S. Constitution and state constitution, the U.S. Constitution controls.[34] At the same time, however, I think it's quite plausible that this focus might lead lawyers seeking to establish a constitutional

31. *See* SUTTON, *supra* note 3, at 7–10, 174 ("At all times, a litigant who targets the validity of a state or local law at a minimum ought to consider the possibility that a state constitutional claim should be added to the mix.").

32. *See id.* at 7–10, 16 (discussing this flaw in practitioners' logic).

33. *See id.* at 7–10 ("Why is it that when we switch from American basketball to American law, we see American lawyers regularly taking just one shot rather than two to invalidate state or local laws (or state or local executive branch action) on behalf of their clients?").

34. U.S. CONST. art. VI, § 2.

right to focus exclusively on the U.S. Constitution and to neglect state constitutions.

I also wonder if the way we have come to think about the U.S. Supreme Court and the justices who serve on it might have an effect on litigants' passing up the opportunity to make an independent argument based upon a state constitution and, perhaps, even the likelihood of a state court judge to be persuaded by such an argument.

If a litigant is arguing that a governmental action or omission violated their constitutional rights, and they wish to argue that a state constitutional provision means something different than a similar federal constitutional provision, in many cases that litigant will have to argue that a U.S. Supreme Court decision interpreting a similar federal provision is merely persuasive authority. Likewise, if a state supreme court judge is to decide that a state constitutional provision similar or identical to a federal constitutional provision has a different meaning, that judge may have to explain why a U.S. Supreme Court decision does not control. As lawyers and judges familiar with the Supremacy Clause, we are not accustomed to thinking that a U.S. Supreme Court decision interpreting the Constitution is merely persuasive authority.

But not only is that not a familiar position, I wonder if the way we have come to think about the U.S. Supreme Court influences a litigant or a court's willingness to consider taking the position different from that adopted by the U.S. Supreme Court.

Perhaps it's always been this way, but the U.S. Supreme Court occupies a very high place in our legal culture. In our constitutional law classes and many of our other classes, we read and debate their decisions. The most coveted legal job in the country might be serving as a justice on the U.S. Supreme Court, but a close second is a job in which a fairly recent law school grad spends one year working for a Supreme Court Justice. How coveted? As of last year, some law firms would pay a *$400,000* hiring bonus to a Supreme Court clerk.[35] Supreme Court confirmation hearings dominate the news. In June, millions of people—lawyers and non-lawyers—log on to something called SCOTUSblog so that they can read about what the U.S. Supreme Court has decided at the earliest possible moment.[36]

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35. *$400K for SCOTUS Clerks: A Bonus Too Far?,* YAHOO! FINANCE (Nov. 14, 2018), https://finance.yahoo.com/news/400k-scotus-clerks-bonus-too-175311270.html [https://perma.cc/DCE8-HHCQ]; Staci Zaretsky, *$400K is Now the Official Market Rate for Supreme Court Clerk Bonuses*, ABOVE THE LAW (Nov. 15, 2018), https://abovethelaw.com/2018/11/400k-is-now-the-official-market-rate-for-supreme-court-clerk-bonuses/ [https://perma.cc/7D4Q-RRCP].

36. *Supreme Court of the United States Blog*, SCOTUSBLOG (last visited Mar. 12, 2019), https://www.scotusblog.com [https://perma.cc/C5B2-3HBR].

And this is to say nothing of the individual justices themselves. Just last month, Justice Ginsburg was awarded a $1 million prize for her influence on philosophy and culture.[37] News accounts of recent public appearances by Chief Justice Roberts have reported that he has "joked" that Justice Ginsburg is a "rock star."[38] I'm not sure that's a joke, and I'm not sure she's the only one on her court.

My former boss, Justice Gorsuch, recently wrote a book that climbed up *The New York Times* bestseller list.[39] Justice Sotomayor has written a best-selling memoir *and* a best-selling children's book.[40] I think it's fair to say that, before his passing, Justice Scalia attained celebrity status.

I don't mean to criticize any of this. In fact, it's probably not a bad thing for our nation's civic health that there is so much interest in what the Supreme Court does and what its justices have to say.

But I also think that it is plausible that our view of Supreme Court justices might filter its way into leading those who litigate and decide cases in state court to reflexively accept whatever the U.S. Supreme Court has to say. I think many lawyers pursuing a constitutional challenge might, when they discover a Ginsburg, or Scalia, or Breyer opinion interpreting a constitutional provision, simply assume it must mean what they have said it means and give no further thought to whether that provision or a similar one might have a different meaning in a state constitution. And, many state supreme court judges might be inclined to do the same.

This brings to my mind Justice Jackson's famous line about the U.S. Supreme Court that "[w]e are not final because we are infallible, but we are infallible only because we are final."[41]

On the question of state law generally and state constitutions specifically, however, the U.S. Supreme Court is not the final authority. So, while I think our collective view of the U.S. Supreme Court might contribute to more lockstepping, I'm not sure that's a very good reason for a lockstepping approach.

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37. The Associated Press, *Ruth Bader Ginsburg to Receive $1 Million Berggruen Prize for Philosophy and Culture*, NBC NEWS (Oct. 23, 2019), https://www.nbcnews.com/news/us-news/ruth-bader-ginsburg-receive-1-million-berggruen-prize-philosophy-culture-n1070621 [https://perma.cc/VU9G-2QQJ].

38. Andrew Chung, *U.S. Supreme Court Not Politicized, Says Chief Justice Roberts*, REUTERS (Sept. 24, 2019), https://www.reuters.com/article/us-usa-court-chiefjustice/us-supreme-court-not-politicized-says-chief-justice-roberts-idUSKBN1WA08F [https://perma.cc/H8JV-E9YL] ("Roberts also drew laughs and cheers from the crowd when, in a nod to liberal Justice Ruth Bader Ginsburg's growing celebrity, he called her a 'rock star.' ").

39. NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT (2019).

40. SONIA SOTOMAYOR, JUST ASK!: BE DIFFERENT, BE BRAVE, BE YOU (Jill Santopolo ed., 2019); SONIA SOTOMAYOR, MY BELOVED WORLD (2013).

41. Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

III. CHALLENGES OF ALTERNATIVES TO LOCKSTEPPING

But even if there is a *willingness* among state court litigants and judges to consider whether the text of state constitutional provisions have independent meanings, I think there are still other factors that can make it difficult to engage in the kind of constitutional innovation Judge Sutton argues for.

I discussed earlier the fact that each of us probably knows more about the federal constitution than our own state constitution. I think it's also true, however, that in general the federal constitution is more *knowable* than most state constitutions.

If someone wants to learn about the history of the federal constitution, there is no shortage of resources to do so. We have records of the constitutional convention in Philadelphia. We have the Federalist and Anti-Federalist Papers. We have great new resources like ConSource, a free online library of original historical sources related to the Constitution. And there is no shortage of scholarship produced over the last two-plus centuries interacting with these materials.

Similar materials may be available regarding some state constitutions. But with respect to many others, that's not the case.

Where there is a relative lack of contemporaneous source material, it's more difficult to make an argument for an independent state constitutional right. While not every judge may use historical sources the same way or accord them the same weight, I think it is fair to say that most judges feel more comfortable interpreting the meaning of a constitutional provision if they have some understanding of the history behind it and how it would have been understood at the time. This sentiment was captured by Justice Kagan when she said during her confirmation hearing, "We are all originalists."[42]

This seems especially true to me if a party is arguing that the state constitutional provision should be interpreted differently than a federal constitutional provision has been interpreted by the U.S. Supreme Court. State court judges might be open to being convinced that a state constitutional provision should be interpreted differently than the U.S. Supreme Court has interpreted its federal counterpart if some textual or historical case can be made for the different interpretation. Without such evidence, it will be considerably more difficult.

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42. *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 62 (2010) ("And I think that they laid down—sometimes they laid down very specific rules. Sometimes they laid down broad principles. Either way we apply what they say, what they meant to do. So in that sense, we are all originalists.").

In most cases when original sources are unable or difficult to discern, a good lawyer or judge would look to precedent, but I fear that with respect to many state constitutions, that too may be hard to come by. James Gardner wrote an article on state constitutional law in the 1990s and had this to say about hoping to find materials to support a state constitutional argument in state court precedent:

> When you undertake this research, here is what you are likely to find. After reading dozens of state constitutional decisions, you have absolutely no sense of the history of the state constitution. You do not know the identity of the founders, their purposes in creating the constitution, or the specific events that may have shaped their thinking. You find nothing in the decisions indicating how the various provisions of the document fit together into a coherent whole, and if you do find anything at all it is a handful of quotations from federal cases discussing the federal Constitution. You are able to form no conception of the character or fundamental values of the people of the state, and no idea how to mount an argument that certain things are more important to the people than others. If you have found state court decisions departing from the federal approach to the corresponding federal provision, you have no idea why the courts departed from federal reasoning; at best, you are left with the vague impression that the courts simply thought the dissents in analogous federal cases more persuasive. But nothing in these state opinions gives you any idea of what you, as an advocate, could say to convince the state courts once again to reject the federal approach as a matter of state constitutional law.[43]

Now this is a critical view, and I'm sure a case could be made that there are state high courts that have developed a robust and useful body of state constitutional law. But I think Professor Gardner was certainly correct insofar as he was highlighting a general difference between state constitutional law and federal constitutional law.

And I think this may be one of the strongest explanations for why the lockstep approach is so common. The raw materials that we are used to using to *do* constitutional law are often not the same at the state level as they are at the federal level. And if those raw materials are not available, it will feel much more principled to state courts to use the available body of precedent at the federal level.

IV. PARTIAL DEFENSE OF LOCKSTEPPING

One final reason I'd like to offer as to why a lockstep approach is so common might be the simplest of all: perhaps at least some of the time, similar constitutional provisions in U.S. and state constitutions *should* be interpreted to mean the same thing. In some states that is quite clear as state constitutions themselves provide that state constitutional standards are to track federal standards.[44] In some cases that is quite clear as state constitutions themselves provide that certain

43. James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 765–66 (1992).

44. SUTTON, *supra* note 3, at 76.

state constitutional standards are to track federal standards.[45] Many of the provisions that appear in the U.S. Constitution and commonly appear in state constitutions are terms that were not conjured out of thin air, but legal terms of art often with a common law heritage. Some have contended that if the framers of state constitutions wished to deviate from those well-accepted meanings, they would have said so.[46] It's also important to remember that many of these provisions were included in state constitutions *before* the corresponding federal provisions had been found to apply in state courts via the doctrine of incorporation.[47] Given this timing, it was not clear that the federal constitutional provisions would apply in state courts, and so it's certainly more plausible that framers and ratifiers of state constitutions *did* wish to make sure that the same federal standards applied in state courts.

Judge Sutton makes a compelling case that state courts should not reflexively interpret their state constitutions in line with the U.S. Constitution. I think an equally persuasive argument could be made that state supreme courts should not reflexively dismiss the possibility that a state constitutional provision that mirrors a federal constitutional provision should be construed in a similar fashion.

V. OTHER AREAS OF INNOVATION

Whether one ultimately agrees with Judge Sutton's argument on lockstepping, I think almost all would agree that his book has given

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45. *See e.g.*, FLA. CONST. art. I, § 12:

> Searches and seizures.—The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

46. *See* People v. Pickens, 521 N.W.2d 797, 806 (Mich. 1994) ("If the convention or ratifiers had intended to alter the meaning of this provision, we can presume 'they would have done so by express words.' ").

47. *See* State v. Schwartz, 689 N.W.2d 430, 441 (S.D. 2004) (Konenkamp, J., concurring):

> It was not until the middle of the Twentieth Century, following a series of Supreme Court decisions, that most of the Federal Bill of Rights became applicable to the states by incorporation through the Fourteenth Amendment. Thus, the adoption of many of the provisions of our State Bill of Rights in the Nineteenth Century may have reflected an intention primarily to duplicate corresponding federal provisions.

those of us responsible for interpreting state constitutions much to think about. I'd like to talk about one thing it's led me to consider as I start to wrap things up.

Judge Sutton's book focuses exclusively on state constitutional law, but constitutional law is not the only area of the law in which state courts are confronted with either texts or doctrines with federal law analogs.

It's not the only area in which it is very common for state courts to follow the approach taken by federal courts or the U.S. Supreme Court. And it is also not the only area in which state courts could take innovative approaches and lessons could be learned from those approaches.

In fact, I wonder if in some of these other areas, it would be possible to achieve some of the benefits of innovation Judge Sutton hopes to see but without some of the same difficulties I've discussed with respect to constitutional law. I'd like to briefly mention just a couple of those areas.

One of those areas is administrative law. As the federal administrative state has grown over the last century or so, so have a number of doctrines of deference whereby courts will defer to the decisions of administrative agencies. This deference comes in different forms and with different names. *Chevron* deference requires courts to defer to agencies' interpretations of ambiguous statutes.[49] *Auer* or *Seminole Rock* deference requires federal courts to defer to agencies' interpretations of their own ambiguous regulations.[50]

During this time in which the federal administrative state has grown, so too have administrative agencies at the state level. And many state courts have followed the lead of the U.S. Supreme Court by adopting deference doctrines as well. So, for example, in my State of Nebraska, sometime in the late 1970s, our Supreme Court started citing *Seminole Rock* and its progeny for the proposition that courts should not review agencies' interpretations of their own regulations de novo, but should defer to agencies' interpretations of their regulations so long as those interpretations are reasonable.[51] It did so without

49. Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 843–44 (1984).

50. Auer v. Robbins, 519 U.S. 452, 461 (1997) ("Because the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation' . . . ."); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945) ("But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.").

51. Melanie M. v. Winterer, 862 N.W.2d 76, 86 (Neb. 2015); Wagoner v. Cent. Platte Nat. Resources Dist., 526 N.W.2d 422, 425 (Neb. 1995); Dep't of Banking & Fin. v. Wilken, 352 N.W.2d 145, 148 (Neb. 1984).

extensive analysis of what seems to me a fair question: as a matter of Nebraska law, where does this come from?[52] And, for many years, thereafter, it has been repeated and followed. Nebraska is not alone in adopting federal administrative deference doctrines.[53]

At the same time, there has been a great deal of debate at the federal level about the legitimacy of these doctrines of administrative deference. The U.S. Supreme Court debated those questions with respect to *Auer* or *Seminole Rock* deference in a case last term called *Kisor v. Wilkie*.[54] The debate seems likely to continue after *Kisor* as the U.S. Supreme Court appears to have limited but not eliminated *Seminole Rock* deference.[55] As part of that debate, arguments are made about how the administrative state would function without such deference doctrines. Here, perhaps, is a place where states could have served and could serve as laboratories of administrative law.

I would also mention statutory interpretation as another area where state courts can and do serve as useful innovators. In my court, we decide far more statutory issues of first impression than constitutional ones. Many of the statutes we interpret are similar to or explicitly patterned after federal statutes. When we have such cases, parties will often cite U.S. Supreme Court or lower federal court opinions interpreting those statutes. Often, parties cite such cases and contend we should follow them because a federal court has interpreted similar language favorably.

Some commentators have made the case, however, that there is a meaningful difference between statutory interpretation at the federal level and statutory interpretation in many state courts. At the federal level, the argument goes, statutory interpretation principles are not "law" in the sense that there is not one methodology that governs all statutory cases.[56] Sometimes legislative history is relied on. Sometimes

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52. I raised some of these questions in a concurring opinion in *Prokop v. Lower Loup Natural Resources District*, 921 N.W.2d 375, 399 (Neb. 2019).

53. *See* Cook v. Glover, 761 S.E.2d 267, 271 (Ga. 2014) (following *Chevron* doctrine by requiring the court to give great weight to the statutory interpretation adopted by the administrative agency); Kentucky Occupational Safety & Health Rev. Comm'n v. Estill Cty. Fiscal Ct., 503 S.W.3d 924, 927–28 (Ky. 2016) (adopting the *Chevron* deference doctrine when reviewing an administrative agency's statutory interpretation); Powell v. Hous. Auth., 812 A.2d 1201, 1214 (Pa. 2002) (applying *Chevron* deference in reviewing an administrative agency's statutory interpretation).

54. 139 S. Ct. 2400 (2019).

55. *See id.* at 2423 ("Still more, we agree with Kisor that administrative law doctrines must take account of the far-reaching influence of agencies and the opportunities such power carries for abuse . . . we have taken care today to reinforce the limits of *Auer* deference.").

56. *See* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1754–55 (2010) ("Methodological stare decisis—the practice of giving precedential effect to judicial statements about methodology—

it is shunned. Sometimes text takes primacy. On other occasions, purpose. Sometimes Justice Breyer writes statutory opinions his way. Sometimes Justice Scalia wrote them his way.

As Abbe Gluck, a professor at Columbia Law School and a leading scholar of statutory interpretation, has pointed out, this is not the case in many state systems. Rather, in many states—and Professor Gluck identifies Oregon, Michigan, and Wisconsin as examples—rules of statutory interpretation are treated as law which courts are bound to follow.[58] The specific rules that each state has adopted may vary, but the way those rules are treated is largely the same. As a result, there may be arguments about how the statutory interpretation methodology is employed, but there are far fewer arguments about what the methodology should be. Again, my aim is not to endorse this or any other interpretive approach, but to highlight an area outside constitutional law in which state courts can and have taken innovative approaches.

Not only have state *courts* produced innovative approaches to statutory interpretation, so too have individual state court judges. Here, I'd just like to quickly mention Judge Thomas Lee from the Utah Supreme Court. Judge Lee has issued a number of concurring opinions over the years in which he has employed something called "corpus linguistics," which could be a lecture topic of its own.[59]

To quickly summarize, corpus linguistics involve the use of linguistic databases to attempt to determine the plain and ordinary meaning of statutory texts. Judge Lee's approach has attracted academic interest and some other courts have also taken note. The Michigan Supreme Court has employed it in deciding a statutory case[60] and, within the last year, some federal court judges appear to have taken an interest; the Sixth Circuit has ordered parties to submit supplemental briefing using the methodology[61] and some of its judges have debated its usefulness in concurring opinions.[62]

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is generally absent from the jurisprudence of mainstream federal statutory interpretation, but appears to be a common feature of some states' statutory case law.").

58. *Id.* at 1756 (contending that several state supreme courts "have exercised interpretive leadership: they have imposed both on themselves and on their subordinate courts, controlling interpretive frameworks for all statutory questions").

59. *E.g.*, Richards v. Cox, 450 P.3d 1074, 1085–92 (Ut. 2019) (Lee, Associate C.J., concurring in part and concurring in the judgment); Brady v. Park, 445 P.3d 395, 427–32 (Ut. 2019) (Lee, Associate C.J., concurring in part and dissenting in part); State v. Rasabout, 356 P.3d 1258, 1271–90 (Ut. 2015) (Lee, Associate C.J., concurring in part and concurring in the judgment).

60. *See* People v. Harris, 885 N.W.2d 832, 839 (Mich. 2016) (describing the use of data from the Corpus of Contemporary English).

61. Wright v. Spaulding, 939 F.3d 695, 700 n.1 (6th Cir. 2019).

62. Wilson v. Safelite Grp., Inc., 930 F.3d 429, 439–48 (6th Cir. 2019) (Thapar, J., concurring in part and concurring in the judgment) (Stranch, J, concurring).

I have my own questions about corpus linguistics, but if not for Judge Lee, I probably wouldn't even know it existed. I think it's fair to say Judge Lee's opinions employing it have led to a discussion of issues that probably would not have happened had he simply interpreted statutes in the same way they are interpreted by the U.S. Supreme Court.

CONCLUSION

I'm afraid this just scratches the surface of areas beyond constitutional law in which state courts can serve as innovators and laboratories. Likewise, much more could be said about Judge Sutton's proposal and the role of state courts in a federal system. I hope, however, that this has been an interesting perspective for you on the topic of Judge Sutton's book and also an interesting perspective into the kinds of unique issues state supreme courts face.

But beyond academic interest, I think there is a good chance familiarity with this topic could serve practically useful to many of you. Thanks to Judge Sutton's important book, the response to it, and other developments, I suspect that many of you will have the chance in your careers to either argue that state law should mirror federal law in a given case or that it should be construed differently. Others of you, I hope, will produce scholarship on innovative state court jurisprudence. In any case, I look forward to seeing your contributions as the next chapter is written on the role of state supreme courts in a federal system. Thank you.