A NONPARTISAN NECESSITY: STATE CONSTITUTIONAL LAW AS AN EVENHANDED SOURCE OF RIGHTS

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Judge Sutton's argument for independent state constitutional analysis is above all correct. But besides that, it's critical to preserving American constitutional law because it protects personal liberties yet is nonpartisan in every way. Most obviously, it's nonpartisan from a left-right perspective; Republicans will favor some state constitutional rights (e.g., gun rights) while Democrats will favor others (e.g., establishment prohibitions). Less obviously, however, it's also nonpartisan from an up-down perspective. Independent state constitutional analysis may initially seem to favor libertarian outcomes because it often just gives state governments another way to lose—it prohibits some state action under a state constitution that the Federal Constitution otherwise permits. But that impression only rings true when considering negative rights. When taking account of positive rights, independent state constitutional analysis may in fact lead to larger state governments that can provide their citizens with those positive rights. And that possibility only increases after examining the ability of state courts to independently imply positive rights guarantees in their state constitutions. All of which is to say Judge Sutton lays out an incredibly equitable framework for courts to define the next generation of constitutional rights—relying on state constitutions.

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I. INTRODUCTION

In his excellent book, *51 Imperfect Solutions*, Judge Jeffrey Sutton examines clauses in state constitutions with parallel clauses in the U.S. Constitution and argues the interpretations of those state constitutional clauses ought not be identical to the interpretations of their federal analogues.[1] The right to free speech in, for example, Washington's Constitution, might protect more speech than the U.S. Constitution's First Amendment.[2] The same goes for the right to religious liberty in Utah's Constitution.[3] Or the right to be free of unreasonable searches and seizures in New Mexico's Constitution.[4] And on and on.

Judge Sutton's argument is undoubtedly correct. Sometimes differences in text lead to different meanings.[5] At other times, the history that informs the text differs and cuts in contrasting directions, and when it does, there is no reason to impose the federal text's interpretation on the similar-but-not-identical state text.[6]

Beyond being correct, Judge Sutton's argument is also appealing because it's nonpartisan, at least when viewed from a traditional left-right perspective. As Judge Sutton points out, there are some rights that are typically championed by Republicans more often than by Democrats. Gun rights come to mind.[7] So do

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

2. Alderwood Assocs. v. Wash. Envtl. Council, 635 P.2d 108, 117 (Wash. 1981) (holding that the Washington State Constitution provides greater speech rights on private property than does the First Amendment of the Federal Constitution).

3. SUTTON, *supra* note 1, at 17 ("Might the state courts of Utah and Rhode Island and Maryland construe a free exercise clause differently than other state courts given their histories?").

4. State v. Crane, 254 P.3d 117, 119–20 (N.M. Ct. App. 2011) (recognizing a greater expectation of privacy in one's garbage under the New Mexico Constitution than under the United States Constitution).

5. *Compare* U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."), *with* LA. CONST. art. I, § 11 ("The right of each citizen to keep and bear arms is fundamental and shall not be infringed.").

6. *See, e.g.*, Price v. Indiana, 622 N.E.2d 954, 958 (1993) ("[W]e find no persuasive precedent for the proposition that federal 'overbreadth analysis' has taken root in the jurisprudence of the Indiana Constitution. The concept of overbreadth is apparently undergirded by the notion that expression occupies a 'preferred' position within the Bill of Rights. The history and structure of the Indiana Constitution do not demonstrate such a status for expression." (internal citations omitted)).

7. For example, in the wake of *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008), several states passed "strict scrutiny" amendments to their state constitutions dictating that all state gun regulations must pass strict scrutiny review. *E.g.*, ALA. CONST. art. I, § 26(a) ("Every citizen has a fundamental right to bear arms in defense of himself or herself and the state. Any restriction on this right shall be subject to strict scrutiny."); LA. CONST. art. I, § 11 ("The right of each citizen to keep and bear arms is fundamental and shall not be infringed. Any restriction on this right shall be subject to strict scrutiny."); MO. CONST. art. I, § 23 ("That the right of every citizen to keep and bear arms, ammunition, and accessories typical to the normal function of such arms, in defense of his home, person, family and property, or when lawfully summoned in aid of the civil power, shall not be

free-speech limits on campaign finance reform.[8] And protections against takings.[9] And religious liberty.[10] But at the same time, there are plenty of rights that are typically championed by Democrats more often than by Republicans: rights against establishing religion; rights to school funding; rights against cruel and unusual punishment; and some substantive due process rights.

In other words, under Judge Sutton's approach, even when the Federal Constitution does not prohibit state action, a state constitution just might. And this is nicely nonpartisan because, as Judge Sutton tells it, there are no consistent winners under his approach to state constitutions, at least not from the perspective of the typical Republican platform or the typical Democratic platform.[11]

After reading *51 Imperfect Solutions*, this telling was, and remains, convincing. Nevertheless, there still appears to be a clear ideological winner under Judge Sutton's approach: not the left, and not the right, but instead, libertarianism.

II. MORE RIGHTS

Why do libertarians seem to come out on top even under Judge Sutton's nonpartisan, independent approach to state constitutional interpretation? Because the government just gets another way to lose—if the Federal Constitution doesn't prevent some state action, a state constitution could yet stop what the Federal Constitution permits. In other words, all the limits on state government imposed by the Fourteenth Amendment and the incorporated Bill of Rights act as a federal-rights floor,[12] and state constitutions only *add* on top of that floor the enlarged individual rights that similar-but-not-identical state constitutional provisions protect.[13] In all cases, the government can do less than it could absent the state constitutional right—a sort of one-way-ratchet in favor of libertarianism.

questioned. The rights guaranteed by this section shall be unalienable. Any restriction on these rights shall be subject to strict scrutiny and the state of Missouri shall be obligated to uphold these rights and shall under no circumstances decline to protect against their infringement. Nothing in this section shall be construed to prevent the general assembly from enacting general laws which limit the rights of convicted violent felons or those adjudicated by a court to be a danger to self or others as result of a mental disorder or mental infirmity."). For a useful list of other state constitutional provisions protecting the right to bear arms, see Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 193–205 (2006).

8. *See* SUTTON, *supra* note 1, at 17.

9. *See id.*

10. *See id.*

11. *Id.* at 176.

12. Marc L. Miller & Ronald F. Wright, *Leaky Floors: State Law Below Federal Constitutional Limits*, 50 ARIZ. L. REV. 227, 228 (2008) ("One of the most widely accepted notions in American constitutional law is that the federal Constitution and interpretations of that Constitution by the Supreme Court of the United States set a 'floor' for personal liberties. State courts and state legislatures cannot properly go below the federal floor. . . . It is a position anchored not just to constitutional theory but to plain constitutional text, in the form of the Supremacy Clause, which provides that: 'This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'").

13. THE FEDERALIST NO. 51 (Alexander Hamilton or James Madison) ("In the compound republic of America, the power surrendered by the people is first divided between two distinct governments; and then the portion allocated to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time each will be controlled by itself.").

This one-way-ratchet has some practical appeal, if only because there are so many other one-way-ratchets in the other direction. Whether you think the government *should* grow, it's hard to deny that it does—at all levels, and in almost all ways—for a host of political reasons far removed from the merits of its growth. Such stimuli include the power of public sector unions,[14] the progressive nature of taxation,[15] the short-term incentives that inform elections,[16] and the simple calculus of policymakers in government that you win more votes by giving and doing than by taking or abstaining,[17] particularly when you can give and do at the expense of those outside your base or even your electorate.

For all those reasons, and many more, it is far easier to open a government office than to close one down, to hire a public employee than to fire one, and to create an entitlement program than to end one. This helps explain why, to name just a couple prominent examples, the federal government grew even under Ronald Reagan,[18] and Social Security and Medicare reform failed in the first years of the 2000s even with Republican control of the House, Senate, and White House.[19]

This hypertrophy characterizes many state governments as well.[20] And since there is no consensus on whether its benefits outweigh its costs,[21] there is

14. *The Public-Union Ascendancy*, WALL ST. J. (Feb. 3, 2010, 12:01 AM), https://www.wsj.com/articles/SB10001424052748703837004575013424060649464 ("The problem for democracy is that [public-union ascendancy] creates a self-reinforcing cycle of higher spending and taxes. The unions help elect politicians, who repay the unions with more pay and benefits and dues-paying members, who in turn help to re-elect those politicians.").

15. *The Tax Policy Center's: Briefing Book*, TAX POL'Y CTR., https://www.taxpolicycenter.org/briefing-book/are-federal-taxes-progressive (last visited Aug. 7, 2020).

16. David Dayen, *Obama Failed to Mitigate America's Foreclosure Crisis*, ATLANTIC (Dec. 14, 2016), https://www.theatlantic.com/politics/archive/2016/12/obamas-failure-to-mitigate-americas-foreclosure-crisis/510485/ (noting that "Obama the candidate ran on allowing bankruptcy judges to cut balances on primary mortgages," a very short-term incentive at the time).

17. Andrew Prokop, *In 2005, Republicans Controlled Washington. Their Agenda Failed. Here's Why.*, VOX (Jan 9, 2017, 9:00 AM), https://www.vox.com/policy-and-politics/2017/1/9/13781088/social-security-privatization-why-failed ("There's an even more intuitive reason why Bush's Social Security reform failed. . . . Bush's two rounds of tax cuts and Medicare Part D involved *giving* voters stuff—Social Security privatization instead was about *changing* benefits voters were already slated to get. . . . [T]he more people found out about it, the more people were opposed to it.").

18. Alex Park, *These Charts Show How Ronald Regan Actually Expanded the Federal Government*, MOTHER JONES (Dec. 30, 2014), https://www.motherjones.com/politics/2014/12/ronald-reagan-big-government-legacy/ ("Under Reagan, the federal workforce increased by about 324,000 to almost 5.3 million people. (The new hires weren't just soldiers to fight the communists, either: uniformed military personnel only accounted for 26 percent of the increase.) In 2012, the federal government employed almost a million fewer people than it did in the last year of Reagan's presidency.").

19. Prokop, *supra* note 17 ("The 2004 election gave President George W. Bush a second term in office and expanded Republican majorities in both houses of Congress. So soon afterward, he pledged to spend the 'political capital' he said he'd earned on a longtime conservative priority—the partial privatization of Social Security. The effort failed. . . . [C]reating private accounts for Social Security became so toxic that it was never brought to a vote in either the House or Senate.").

20. *See State of State Governments: Growing in Some States, Shrinking in Others*, AMS. FOR TAX REFORM (Aug. 30, 2019, 3:41 PM), https://www.atr.org/state-state-governments-growing-some-states-shrinking-others.

21. *Compare* Eduardo Porter, *The Case for More Government and Higher Taxes*, N.Y. TIMES (Aug. 2, 2016), https://www.nytimes.com/2016/08/03/business/economy/rethinking-the-role-of-government-in-society.html ("The evidence throughout the history of modern capitalism 'shows that more government can lead to greater security, enhanced opportunity and a fairer sharing of national wealth.'"), *with* David W. Kreutzer, *Big*

something appealing about an approach to state constitutions that propels against big government as a check against all the factors that propel toward it—an approach that makes the fifty states not "laboratories of democracy,"[22] since popular preferences would be trumped by state constitutional limits, but rather "laboratories of liberty."[23]

III. LESS LIBERTY

The issue, though, is that Judge Sutton's theory may not really work that way, at least in some cases. His approach to state constitutions does not always mean less government.

A. Positive Rights Require More Government

The main reason for this phenomenon is that "rights" need not be negative rights.[24] To be sure, the Bill of Rights has been interpreted to protect only negative rights.[25] The government *can't* establish a religion; it *can't* deny you free exercise; it *can't* silence the press; it *can't* ban assembly or petitions; and it *can't* take away your guns.[26] And that's just the first two amendments. True, a few of the Sixth and Seventh Amendment rights might be framed as somewhat positive rights—the government must *provide* you with a criminal defense attorney, and in important circumstances the government must *provide* you with a jury.[27] But even these are better viewed as negative rights—the government is not required to prosecute you and provide a federal trial court to hear your civil claims, but if it chooses to, the government *can't* prosecute you for committing a felony without an attorney or a jury; it *can't* adjudicate certain civil claims without a jury.[28] From this perspective, every individual right in the Bill of Rights is best viewed as a negative right.

Government Tariffs Do Not Make America Great, HERITAGE FOUND. (May 20, 2018), https://www.heritage.org/taxes/commentary/big-government-tariffs-do-not-make-america-great ("The federal government does not make America great, and never has. Americans make America great, and they can best do the job when meddlers, busybodies, and crony privilege seekers in Washington get out of the way.").

22. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

23. *See* Adam J. White, *Laboratories of Liberty*, WASH. EXAMINER (June 8, 2018, 4:55 AM), https://www.washingtonexaminer.com/weekly-standard/laboratories-of-liberty.

24. Dr. Emily Zackin very helpfully defines negative rights as rights that "protect their bearers from threats that stem solely from the state itself" and only require that the "government refrain from doing something." EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTION'S CONTAIN AMERICA'S POSITIVE RIGHTS 40–41 (2013). Conversely, she defines positive rights as rights that "protect their bearers from threats that are not solely the result of a state's existence or activities" and "require the government to do or provide something." *Id.*

25. *Id.* at 4–5 ("[T]he idea that America's constitutional tradition is exceptional is grounded in considerable empirical analysis. . . . [F]ew (and arguably no) positive rights claims have ever changed the U.S. Constitution's text or the Supreme Court's interpretation of it. Thus, America's welfare state is widely believed to consist of statutory law alone . . . .").

26. U.S. CONST. amends. I–II.

27. *Id.* amends. VI–VII.

28. *Id.*

While this is the right interpretation of the U.S. Constitution's individual rights, it's unclear whether it is the right interpretation of state constitutions' similar individual rights. And it is even more unclear whether state court judges will interpret their constitutions' individual rights as negative.[29] Judge Sutton's invitation to interpret those rights beyond the understandings of their federal analogues may transform negative rights into positive rights.

B. Independent State Constitutional Analysis Could Permit State Courts to Imply Positive Rights

Judge Sutton's chapter on public-education funding is illustrative of positive rights in two ways. First, it shows that state constitutions contain expressly positive rights. For example, many state constitutions guarantee a "thorough and efficient system of public schools."[30] A majority of state supreme courts have held that such a right requires, in Judge Sutton's words, "a minimum level of funding to offer an adequate education for all students."[31] Whether for better or worse, the result has been expensive.[32] Plus, in addition to a right to education, "[s]tate constitutions contain other affirmative guarantees as well, such as environmental protection and labor and employment rights, to name a few."[33]

But Judge Sutton's education chapter illustrates a second way state constitutions can create positive rights: by courts interpreting—or misinterpreting—them to *imply* positive rights.[34] And here's where Judge Sutton's approach especially opens the door to results anathema to libertarianism.

Consider the right to free speech. Under the Federal Constitution, it is a textbook negative right, and a darling of libertarians.[35] The text, "Congress shall make no law . . . abridging the freedom of speech,"[36] does not require Congress

29. To be sure, federal courts also have a role in interpreting state constitutions. In fact, Judge Sutton proposes that federal courts address state constitutional law first in their decisions. The point of emphasizing state courts interpreting their own constitutions is that independent state constitutional analysis can give state courts a way to outflank federal courts and protect the unique rights their state constitution affords. SUTTON, *supra* note 1, at 180.

30. *Id.* at 27.

31. *Id.* at 30 (noting plaintiffs have won twenty-seven of forty-four state-constitutional challenges to their systems of funding public schools since 1989).

32. *Id.* at 32 ("In response to these decisions, the Ohio General Assembly substantially increased public school funding, injecting 'billions of additional dollars' into the system.").

33. *Id.* at 34–35 ("Third, the school-funding story highlights an essential distinction between the state and federal constitutions. When it comes to individual liberties, the U.S. Constitution is largely negative. . . . But as Emily Zackin points out . . . the state constitutions contain negative *and* positive rights." (citing ZACKIN, *supra* note 24, at 40–41)); *see, e.g.*, ILL. CONST. art. XI, § 2 ("Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law."); MO. CONST. art. IX, § 1(a) ("A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools . . . .").

34. SUTTON, *supra* note 1, at 22–41.

35. *See* Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389, 1397 (2017) ("[T]he libertarian tradition decouples the speech right from individuals and publics . . . creating an impersonal speech right that is narrowly understood as a negative freedom from the state.").

36. U.S. CONST. amend. I.

to do anything, spend anything, or provide anything; it merely forbids Congress from limiting liberty in a certain way. That is how courts have always interpreted the right, at least in the Federal Constitution.[37]

But state constitutions also include free speech clauses.[38] And as Judge Sutton argues, state judges need not interpret those state clauses identically to the federal clause[39]—which means state judges are free to transform the negative right that limits government power into a positive right that expands it.

That's exactly what Justice William Brennan would have done in *San Antonio Independent School District v. Rodriguez*,[40] the featured Supreme Court case in Judge Sutton's education chapter.[41] Justice Brennan wrote, "Here, there can be no doubt that education is inextricably linked to the right to participate in the electoral process and to the rights of free speech and association guaranteed by the First Amendment."[42] He added, "This being so, any classification affecting education must be subjected to strict judicial scrutiny, and since even the State concedes that the statutory scheme now before us cannot pass constitutional muster under this stricter standard of review, I can only conclude that the Texas school-financing scheme is constitutionally invalid."[43]

Likewise, consider the right to equal protection. Under the Federal Constitution, it is again a limit on government action.[44] But the plaintiffs in *Rodriguez* would have transformed it into a mandate for government spending by making poverty a suspect class and then requiring the State to spend enough to ameliorate its effect on education spending.[45] Judge Sutton imagines Justice Thurgood Marshall wondering, "How could the promises of *Brown* be fulfilled . . . unless the courts not only eliminated de jure segregation by race but also curbed the effects of de facto segregation by wealth?"[46] Another way to phrase that question might be: How could Justice Marshall *not* interpret the Equal Protection Clause to require each state to raise taxes by billions of dollars to "curb[] the effects of de facto segregation by wealth"?[47]

The Supreme Court (barely, in a 5-4 decision) disagreed, and "even the most aggressive decisions of the U.S. Supreme Court have stopped short of compelling States to raise taxes."[48] But state courts need not, and sometimes have not, followed suit. For instance, Ohio's *DeRolph* decisions required additional spending for Ohio's public schools, and the State increased its construction-and-repair contributions to local school districts from $173 million during the 1992–

37. *See* ZACKIN, *supra* note 24, at 4–5.
38. *E.g.*, IND. CONST. art. I, § 9.
39. And indeed, at least some have not. *See supra* note 3.
40. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 62–63 (1973) (Brennan, J., dissenting).
41. SUTTON, *supra* note 1, at 22–41.
42. *Rodriguez*, 411 U.S. at 63 (1973) (Brennan, J., dissenting).
43. *Id.*
44. U.S. CONST. amend. XIV.
45. *Rodriguez*, 411 U.S. at 17–18.
46. SUTTON, *supra* note 1, at 26.
47. *Id.*
48. *Id.* at 38.

96 fiscal years to $5.8 billion during the 2003–09 fiscal years.[49] And that is just the increase in spending on physical structures.[50] Imagine the cost of what might be "the next generation of constitutional challenges"—the positive right to a certain class size, a minimum number of AP courses, or a football team.[51] And what about a right to a certain number of assistant coaches? And trainers? And weights and pads and helmets and uniforms? And a football field? That's reading a lot into state equal protection clauses, but it is not inconceivable.[52]

We also need not stop at equal protection clauses. If education is a fundamental right, then due process clauses in state constitutions might also create a positive right to a certain level of education funding. And, so long as positive rights can be implied from state constitutional clauses whose federal analogues guarantee only negative rights, there might be no limit to judicially-created funding floors for important government programs with claims to being fundamental rights at least as strong as education's.[53]

To be sure, some state courts already read their constitutions to imply positive rights where no explicit provision exists.[54] And Judge Sutton may well not believe state courts should expand those implied rights—or even preserve them. Nevertheless, (1) he's providing state courts with a blueprint for revenue increases that originate outside the legislature; (2) it is a very expensive blueprint; and (3) from a public policy perspective, the costs may outweigh the benefits, or perhaps even lead to no benefit.[55] As Judge Sutton notes, "the literature . . . is all over the map" on whether "there is a positive correlation"—putting aside the harder question of whether there is also causation—"between the quality of an education and the level of education funding."[56]

The question of whether to read negative rights in an aggressive manner that transforms them into positive rights is hardly new. For example, the U.S. Supreme Court famously rejected an invitation to transform the due process clause into a positive right in *DeShaney v. Winnebago County*.[57] In that case, a boy sued the State for failing to protect him from his abusive father.[58] The Court held that nothing in the language of the Due Process Clause requires the State to protect the life, liberty, and property of its citizens against invasion by private actors.[59] Specifically, the Court stated,

> The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the

49. *Id.* at 32.
50. *Id.*
51. *Id.* at 37.
52. *See id.* at 32 ("The plaintiffs in *DeRolph III* complained less about the absence of basic educational services and more about things like the failure of some schools to offer college-level courses in certain subjects and the lack of space for science labs in some elementary schools.").
53. *See id.* at 30.
54. *Id.* at 35.
55. *Id.* at 35–41.
56. *Id.* at 39–40.
57. DeShaney v. Winnebago Cty., 489 U.S. 189, 204 (1989).
58. *Id.* at 191.
59. *Id.* at 195–97.

> State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text.[60]

Although *DeShaney*'s facts are heartbreaking, its holding is among the most consequential in the U.S. Reports: voters might require the State to act. Interest groups might as well. So too might the forces of inertia, which ensure that what begins rarely ends—that while good ideas for new government programs can lead to their creation, bad government programs rarely die. But by holding that the Due Process Clause does not require state action, *DeShaney* ensures federal courts will not be among the many other accelerants on the size of the local, state, and federal government.

Of course, the distinction between state action and inaction is a notoriously murky one, if only because the distinction between any act and omission is often difficult to draw. When a person sits motionless on the beach and allows the rising tide to drown him, is he acting?[61] Is the government acting when the court enforces a racially restrictive covenant?[62] What about when the government requires you to buy health insurance?[63]

Nevertheless, federal courts have recognized that although the act-omission distinction is difficult, it is important, because the alternative is terrifying.[64] If all inaction is action, then everything is state action, including the most private parts of our lives. The slope here is slippery, and it leads to the vast expansion of a State that already includes "hundreds of federal agencies poking into every nook and cranny of daily life."[65]

While some may find this appealing, libertarians do not.[66] Whatever else might be said about the political winners and losers of divorcing state constitutional interpretation from federal constitutional interpretation, it is safe to say that libertarians are not always among the winners. If state constitutions, like some foreign constitutions,[67] can be read to eliminate the state action requirement that undergirds U.S. constitutional law, the result will not be a libertarian paradise.

60. *Id.* at 195–96.

61. *See* Cruzan *ex rel.* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 296 (1990) (Scalia, J., concurring).

62. Shelley v. Kraemer, 334 U.S. 1, 12–13 (1948).

63. *See generally* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

64. *See, e.g.*, *id.* at 657; Cruzan, 497 U.S. at 296 (Scalia, J., concurring).

65. City of Arlington v. FCC, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting).

66. *See* David Boaz, *Are Libertarians Anti-Government?*, CATO (Apr. 16, 2010, 11:22 AM), https://www.cato.org/blog/are-libertarians-anti-government; s*ee also infra* Part IV.

67. *See, e.g.*, Constitution of the Republic of South Africa, May 8, 1996, ch. 2, § 8(2) ("A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."); Mark S. Kende, *The South African Constitutional Court's Embrace of Socio-Economic Rights: A Comparative Perspective*, 6 CHAP. L. REV. 137, 140 ("The first issue addressed in any South African rights case is whether there has been an infringement of one's constitutional rights. Interestingly, state action need not always be present.").

Libertarians are also unlikely to celebrate another area where state constitutional law and federal constitutional law already diverge: standing. As every fed-courts student knows, Article III courts can hear only "cases and controversies."[68] If a plaintiff has not suffered a concrete injury, or a particularized injury, or if the injury is not actual or imminent, or if there is no causation, or if the court cannot redress the injury, then the plaintiff cannot sue.[69] This takes the federal government—specifically, the federal courts—out of the business of adjudicating countless private disputes.

But unlike federal courts, "[a]n overwhelming majority of states provide some exception to their constitutional standing requirements, meaning that the requirements are not 'irreducible' as in *Lujan*."[70] In some states, standing requirements are discretionary, even when those requirements are constitutionally grounded.[71] And although strict standing requirements sometimes prevent a plaintiff from limiting what the government does, they frequently prevent a plaintiff from making the government regulate, as in *Lujan*[72] and *Massachusetts v. EPA*,[73] or prevent a plaintiff from expanding the effect of federal regulation, as in *Spokeo v. Robins*.[74]

C. Independent State Constitutional Analysis Could Encourage State Courts to Imply Positive Rights Atextually

Finally, not only does independent state constitutional interpretation permit state courts to imply expansive, and possibly erroneous, positive rights in their constitutions, it may also *encourage* those implications by freeing state courts from the restraint a lockstep approach currently imposes—textualism.

Judge Sutton argues independent state constitutional interpretation comports with any interpretive method,[75] and his point is sound. "[P]ragmatists may find it practical to interpret state constitutions uniquely, living constitutionalists may analyze how state constitutions evolved differently than did the Federal Constitution,"[76] and textualists may embrace the differences in text, history, local public meaning, and structure of various state constitutions.[77] So the issue is not that Judge Sutton's approach favors atextual interpretation. Instead, it merely abides atextual interpretation if the state constitution under scrutiny allows it, regardless of the Federal Constitution's commands.

68. *See* U.S. CONST. art. III, § 2.

69. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).

70. Wyatt Sassman, *A Survey of Constitutional Standing in State Courts*, 8 KY. J. EQUINE, AGRIC., & NAT. RESOURCES L. 349, 353 (2015).

71. *Id.*

72. *Lujan*, 504 U.S. at 562.

73. Massachusetts v. EPA, 549 U.S. 497, 526 (2007).

74. Spokeo v. Robins, 136 S. Ct. 1540, 1550 (2016).

75. SUTTON, *supra* note 1, at 211–12.

76. *Recent Book: Jeffrey S. Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional* Law, 132 HARV. L. REV. 811, 815 (2018).

77. *Id.* at 818.

The reasons the Federal Constitution permits only textual interpretation are well trod, but a few of them deserve repeating here for purposes of comparison. To start, textualism stems from the Federal Constitution's separation of powers: Article I vests "*all* legislative" power in Congress.[78] Article II vests "*the* executive" power in the President.[79] And Article III vests "*the* judicial" power in federal courts.[80] The vesting clauses do not vest "some" power in any branch; they vest all of one power in just one corresponding branch. As a result, the Constitution distinguishes "the judicial" power from the legislative and executive powers and commands that federal courts may not usurp legislative power by amending the Constitution through atextual interpretation, just as Senators may not bring criminal charges against thieves, and prosecutors may not grant summary judgment to toxic tort claimants.[81] Instead, the Constitution's separation of powers insists that federal courts employ textualism when interpreting federal law—the Constitution first of all.

In line with upholding this separation of powers, textualism also ensures federal courts honor the legislative compromise inherent in the Constitution.[82] The Constitution was difficult to ratify in the first place,[83] and it erects obstacles to passing amendments—such as a bicameral legislature and a supermajority requirement in each house.[84] These barriers ensure that the Constitution's text reflects compromise and true majoritarian will.[85] Federal courts, therefore, should not circumvent that compromise through atextual interpretation.[86]

78. U.S. CONST. art. I, § 1 (emphasis added).

79. *Id.* art. II, § 1 (emphasis added).

80. *Id.* art. III, § 1 (emphasis added).

81. *See* Evans v. Jordan, 8 F. Cas. 872, 873 (Va. Cir. Ct. 1813), *aff'd*, 13 U.S. (9 Cranch) 199 (1815) ("To [the legislative] department is confided, without revision, the power of deciding on the justice as well as wisdom of measures relative to subjects on which they have the constitutional power to act. Wherever, then, their language admits of no doubt, their plain and obvious intent must prevail."); THE FEDERALIST NO. 47 (James Madison) ("The judges can exercise no executive prerogative, though they are shoots from the executive stock; nor any legislative function, though they may be advised by the legislative councils."). For a discussion of federal courts' role in relation to the other branches, see John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 5 (2001) ("In our constitutional system, it is widely assumed that federal judges must act as Congress's faithful agents.").

82. Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) ("We are governed by laws, not by the intentions of legislators. As the Court said in 1844: 'The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself.'" (quoting Aldridge v. Williams, 44 U.S. (3 How.) 9, 24 (1845))).

83. *See* U.S. CONST. art. VII ("The Ratification of the Conventions of nine [of thirteen] States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.").

84. U.S. CONST. art. V ("The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution . . . ."). The Constitution also endorses legislative compromise in other ways. *See* U.S. CONST. art. I, § 7 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States . . . .").

85. *See* John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1314 (2010) (construing the constitutional obstacles to passing laws and stating, "the bicameralism and presentment requirements of Article I, Section 7 approximate a supermajority requirement, thereby giving political minorities extraordinary power to block legislative change.").

86. Hrubec v. Nat'l R.R. Passenger Corp., 49 F.3d 1269, 1270 (7th Cir. 1995) ("[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice-and it frustrates rather than effectuates legislative

These justifications for textualism only directly apply to federal courts under the strictures of the Federal Constitution. Under a lockstep approach, however, state courts interpreting their own constitutions would, well, lockstep—in theory, they would employ textualism just as federal courts do.[87] And even though textualism has not won every heart and mind,[88] courts are overwhelmingly textualist.[89]

But if state courts follow Judge Sutton's approach and engage in independent state constitutional interpretation, they may find that textualism is not required under their state's constitutional regime. At some level, the justifications for textualism stemming from the Federal Constitution will not similarly stem from every state constitution.

First, not all state constitutions require separation of powers in the same way the Federal Constitution requires it. True, most states have explicit separation of powers provisions in their constitutions,[90] and those provisions could restrain state courts even *more* than the Federal Constitution restrains federal courts.[91] But there are ten states that do not have explicit provisions.[92] What's the implication of those states omitting an explicit separation of powers provision while almost all other states include one? It is possible those state constitutions require less separation of powers than even the Federal Constitution.[93] Then there is Wyoming, which has a constitutional provision that explicitly allows the comingling of powers in some cases.[94] Should that provision grant Wyoming

intent simplistically to assume that whatever furthers the statute's primary objective must be the law." (quoting Rodriguez v. United States, 480 U.S. 522, 525–26 (1987))).

87. *Cf.* Harvard Law School, *The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg&feature=emb_title ("I think we're all textualists now in a way that just was not remotely true when Justice Scalia joined the bench.").

88. *See, e.g.*, Ken Levy, *The Problems with Originalism*, N.Y. TIMES (Mar. 22, 2017), https://www.nytimes.com/2017/03/22/opinion/the-problems-with-originalism.html.

89. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 16 (2012) ("Even judges without textualist convictions habitually open their opinions by stating: 'We begin with the words of the statute.'").

90. G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 14 (1998) ("Currently, forty state constitutions expressly mandate a separation of powers . . . .").

91. *Id.* at 14–15 ("What then, is the effect of constitutionalizing the separation of powers? Some state courts, loath to hold that the constitutional language has no effect, have suggested that the state provisions must impose a more stringent separation than is established by the federal Constitution."); G. Allen Tarr, *The Separation of Powers and State Constitutions*, at 2, https://statecon.camden.rutgers.edu/sites/statecon/files/publications/talk.pdf (last visited Aug. 7, 2020) ("The Federal Constitution offers what might be termed a relaxed version of the separation of powers."). *But see* Dye v. State *ex rel.* Hale, 507 So. 2d 332, 349 (Miss. 1987) (Sullivan, J., concurring in part and dissenting in part) (interpreting the Mississippi Constitution to allow commingling of legislative and executive powers because it "best serves our state today.").

92. John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 TEMP. L. REV. 1205, 1236 n.109 (1993) ("The ten states without express separation of powers provisions are Alaska, Delaware, Hawaii. Kansas. New York, North Dakota, Ohio, Pennsylvania, Washington, and Wisconsin. All ten, however, explicitly vest legislative, executive, and judicial powers in those three branches.").

93. TARR, *supra* note 90, at 15 ("[G]iven the inclusion of separation-of-powers provisions in many state constitutions, what implications—if any—should be drawn from the fact that a state's constitution-makers chose not to include such a provision?").

94. WYO. CONST. art. II, § 1 ("The powers of the government of this state are divided into three distinct departments: The legislative, executive and judicial, and no person or collection of persons charged with the

courts the freedom to take on some legislative or executive powers if the occasion calls for it?[95] The answer to these questions is only a maybe,[96] but encouraging independent constitutional analysis gets state courts one step closer to consolidating power and eschewing textualism when construing state constitutions.

Further, not all state constitutions bake legislative compromise so deeply into their state government's DNA. For example, Nebraska doesn't have a bicameral legislature,[97] and Indiana takes the wind out of its presentment requirement by permitting the legislature to override an executive veto with a bare majority vote.[98] It is also easier for most states to amend their constitutions; in Arkansas, a bare majority vote by both houses of the legislature suffices to put a constitutional measure on the ballot for a public vote.[99] For this reason, states have outright replaced their constitutions almost 100 times, and state constitutions have been amended 443 times more frequently than the Federal Constitution.[100] Accordingly, in states where legislative compromise is less central, textualism is not so critical to preserving the legislature's work, be it laws or constitutional provisions. And this is especially true in the many states where judges are elected, as the will of elected judges may not be as inherently antithetical to legislative compromise as the will of appointed judges is in the federal system.[101]

exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.").

95. TARR, *supra* note 90, at 14 ("[M]any of these constitutions anticipate that the state may not maintain a strict separation of powers, permitting departures from it if authorized elsewhere in the constitution.").

96. Though it's not a "never." *See Dye*, 507 So. 2d at 349.

97. NEB. CONST. art. III, § 1 ("The legislative authority of the state shall be vested in a Legislature consisting of one chamber.").

98. *See, e.g.*, IND. CONST. art. V, § 14 (" (A) In the event of a veto while the General Assembly is in session, [the Governor] shall return such bill, with his objections, within seven days of presentment, to the House in which it originated. If the Governor does not return the bill within seven days of presentment, the bill becomes a law notwithstanding the veto. (B) If the Governor returns the bill under clause (A), the House in which the bill originated shall . . . reconsider and vote upon whether to approve the bill. . . . If, after such reconsideration and vote, a majority of all the members elected to that House shall approve the bill, it shall be sent, with the Governor's objections, to the other House, by which it shall likewise be reconsidered and voted upon, and, if approved by a majority of all the members elected to that House, it shall be a law.").

99. ARK. CONST. art. XIX, § 22; *Legislatively Referred Constitutional Amendment*, BALLOTPEDIA, https://ballotpedia.org/Legislatively_referred_constitutional_amendment#Number_of_legislative_sessions (last visited Aug. 7, 2020) ("Ten states allow a referred amendment to go on the ballot after a majority vote in one session of the state's legislature."). *But see* TENN. CONST. art. XI, § 3 (requiring the Tennessee General Assembly to approve a proposed amendment in two successive sessions, and in the second such session, the proposed amendment must earn two-thirds approval).

100. THE NBRE/MARYLAND STATE CONSTITUTIONS PROJECT, http://www.stateconstitutions.umd.edu/index.aspx (last visited Aug. 7, 2020) ("There have been almost 150 state constitutions, they have been amended roughly 12,000 times, and the text of the constitutions and their amendments comprises about 15,000 pages of text."); *see also Constitutional Amendments from 2006 Through 2019*, BALLOTPEDIA, https://ballotpedia.org/Constitutional_amendments_from_2006_through_2019 (last visited Aug. 7, 2020) ("From 2006 through 2019, a total of 933 constitutional amendments were proposed and put before voters. Of this total, voters approved 671 proposed changes to state constitutions.").

101. *See Judicial Selection: Significant Figures*, BRENNAN CTR. (May 8, 2015), https://www.brennancenter.org/rethinking-judicial-selection/significant-figures ("39 states use some form of election at some level of court.").

So what happens if state courts are able not only to imply positive rights in their constitutions but to do so without the constraints of textualism? Maybe nothing. Even if a particular state constitution does not require textualism, a state court could still choose to use it based on extra-constitutional rationales.[102] Or, it is possible that atextual interpretive methods would not lead to any more implied positive rights than textual methods would.

But it is also possible that the floodgates could open for state constitutional positive rights and their concomitant government growth. Moreover, a wider range of state constitutional clauses could come into play. For instance, the Lockean provisions at the front of many state constitutions[103] could provide the impetus for implying just about any right, even though the U.S. Constitution's preamble has been held unenforceable.[104]

D. More Rights Could Mean Less Liberty

Despite all of this conjecture, when state courts interpret state constitutional provisions more robustly than their federal analogues, they will not always, or even usually, interpret them to expand the size and power of governments. But it will *sometimes* happen.[105] And when it does, there is reason to fear they will do so in a way that creates tension with some of the most important purposes of the Federal Constitution, even when they stop short of violating the Supremacy Clause. That reason is the majoritarian pressure on many state courts.

Federal constitutional rights protect minorities, be they political minorities (free speech), religious minorities (establishment and free exercise), property owners (due process and takings), criminal defendants (right to remain silent, to counsel, to a jury) or racial minorities (equal protection).[106] But, as stated, state judges are often elected, meaning they are chosen by, and accountable to, majorities.[107] This may go some way toward explaining why federal courts were more amenable to desegregation suits in the 1950s than were state courts,[108] *and* why state courts were more amenable to school-funding suits in the 1990s and 2000s

102. *See, e.g.*, NEIL M. GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 132 (2019) ("Using preexisting, neutral, and objective interpretive tools like these ensures that the people can discern with some certainty what the law demands of them. It prevents, too, any agent of the government from twisting statutory terms to help those with deep pockets or harm the least among us. Celebrities and traitors alike are subject to the rule of the last antecedent or the rule that inclusion of one thing implies the exclusion of others. Rules of grammar play no favorites.").

103. IND. CONST. art. I, § 1 ("WE DECLARE, That all people are created equal; that they are endowed by their CREATOR with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness. . . .").

104. Jacobson v. Massachusetts, 197 U.S. 11, 22 (1905) ("Although th[e] preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the government of the United States or on any of its departments.").

105. *See, e.g.*, SUTTON, *supra* note 1, at 41.

106. Property owners weren't a majority until the 1940s. PK, *Historical Homeownership Rate in the United States, 1890–Present*, DQYDJ, https://dqydj.com/historical-homeownership-rate-in-the-united-states-1890-present/ (last visited Aug. 7, 2020).

107. *See Judicial Selection: Significant Figures*, *supra* note 101.

108. *See, e.g.*, Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 495 (1954).

than were federal courts.[109] Judge Sutton calls this the "gentler side of federalism."[110] But the decisions were not so different.

Both dealt a blow to minorities—it's just that the losing parties in state court were different kinds of minorities. The plaintiffs of the 1950s who failed in state courts were the African American minority in segregated schools, whereas the defenders of the 1990s status quo who lost in state court were the wealthy minority in affluent schools.[111] True, the political forces arrayed against the African American minority in segregated states in the 1950s were far stronger than the political forces arrayed against the wealthy minority in states like Ohio in the 1990s.[112] But the latter is still a popular class to take political aim at, as the framers knew well from experiences like Shays' Rebellion and economically catastrophic debt relief by politically pressured state legislatures.[113]

This is not to suggest that the wealthy lack political power or that they are removed from the process that elects judges. But not every minority is as powerful as the wealthy. Take, for example, religious minorities, who have not recently fared well in some state courts.[114] States with socially progressive majorities have used the power of the State—and of the state courts—to penalize them for acting according to their conscience.[115] If state courts begin to selectively interpret state constitutional provisions far more robustly than their federal analogues—from standing and state action to substantive due process and equal protection—they will be able to do so in a way that wields state power on behalf of the majority against the minority. That is true for potential decisions requiring the minority of individuals who pay the majority of income taxes to pay for positive rights to constitutionally guaranteed levels of funding for education, health care, and housing; potential suits against unpopular corporations by potential plaintiffs without standing under *Lujan*; and potential suits against religious minorities that reimagine the equal protection clause in a manner that does not require state action, potentially transforming into constitutional commands the antidiscrimination statutes used against the owner of Masterpiece Cakeshop. People will disagree about whether those results would be good or bad, and it is not the purpose of this essay to weigh their costs and benefits. Regardless, however, of who has the better argument, the result could be more "rights" but less liberty.

109. SUTTON, *supra* note 1, at 34.
110. *Id.*
111. *See* San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1, 4–6 (1973); *Brown*, 347 U.S. at 486–88.
112. *See generally* SUTTON, *supra* note 1, at 22–41.
113. *See id.* at 32.
114. *See, e.g.*, Masterpiece Cakeshop v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719, 1723 (2017).
115. *See id.*

IV. CONCLUSION

So, does this exception swallow the rule? Does the possibility that state courts will interpret their constitutions so broadly, and to include so many positive rights, overwhelm the otherwise libertarian state-constitutional ratchet constraining government?

No.

From an historical standpoint, states were never meant to be libertarian havens. They have always been places where government could grow, or shrink, depending on the citizens' choice. The founders—particularly the Anti-Federalists, but even the Federalists compared to most modern American political ideologies—were suspicious of the federal government but not state governments.[116] The same founders who wrote the exceptionally negative Bill of Rights also wrote positive rights to education into state constitutions[117] and established state religions.[118] In essence, Judge Sutton's argument for independent state constitutional analysis could spell either fifty-one libertarian paradises or fifty-one libertarian nightmares, and that directly tracks with the founders' conceptions.

What's more, it is exactly the succor an America fractured on so many political fault lines needs. Judge Sutton's thesis is not only nonpartisan from a left-right perspective but also from an up-down perspective, which makes it all the more captivating.

116. ZACKIN, *supra* note 24, at 12 ("[W]hile the Bill of Rights may reflect a suspicion of the federal government, we cannot infer from this document that even its drafters were suspicious of all government.").

117. MASS. CONST. ch. V, § II ("[I]t shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns . . . .").

118. N.H. CONST. of 1792, art. VI ("As morality and piety, rightly grounded on evangelical principles, will give the best and greatest security to government, and will lay in the hearts of men the strongest obligations to due subjection; and as a knowledge of these is most likely to be propagated through a society by the institution of the public worship of the Deity, and of public instruction in morality and religion; therefore, to promote those important purposes the people of this State have a right to empower, and do hereby fully empower, the legislature to authorize, from time to time, the several towns, parishes, bodies corporate, or religious societies within this State, to make adequate provisions, at their own expense, for the support and maintenance of public protestant teachers of piety, religion, and morality.").