Less Liberty?

(rough draft/outline)

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In his excellent book, *51 Imperfect Solutions*, Judge Jeffrey Sutton examines clauses in state constitutions that are similar to clauses in the U.S. Constitution and argues that interpretations of those state clauses ought not be identical to the interpretations of their federal analogues. The right to free speech in, for example, Montana's Constitution might protect more speech than does the U.S. Constitution's First Amendment. The same goes for the right to religious liberty in Utah's Constitution. Or the right to be free of unreasonable searches and seizures. And on and on.

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

Judge Sutton's argument is appealing not just because it's well-founded, but also because it's non-partisan, at least when viewed from a traditional left-right perspective. As he points out, there are some rights that typical Republicans champion, and when state constitutions provide more robust protections of those rights, Republicans will have cause for celebration. Gun rights come to mind. So do free-speech limits on campaign finance reform. And protections against takings. And religious liberty.

But at the same time, there are plenty of rights that typical Democrats champion, giving them cause for celebration when state constitutions expand the scope of clauses similar to the U.S. Constitution's Establishment Clause, Fourth Amendment, Sixth Amendment, and Eighth Amendment, as well the interpretation of the Fourteenth Amendment that informed *Griswold*, *Roe, Lawrence*, and *Obergefell*.

In other words, under Judge Sutton's approach, when the federal Constitution doesn't preclude a state statute or a state actor's conduct, sometimes the state constitution will. This is beautifully non-partisan because Democrats won't like it when that statute or state action is favored by Republicans (religious displays; law-and-order policing; the death penalty) while Republicans won't like it when that statute or state action is favored by Democrats (gun control; campaign finance reform; regulatory takings). As Judge Sutton tells it, there are no consistent winners under his approach to state constitutions, at least not from a Republican or Democratic perspective.

When I first read *51 Imperfect Solutions*, I came away convinced of this telling, as I still am. But at the same time, I mistakenly believed that there still *was* a clear ideological winner to Judge Sutton's approach: not the left, and not the right, but instead libertarianism. That's because it seems like the government would never win when the federal constitution prevents it, while it would also not win when the state constitution prevents what the federal constitution allows. Take all the limits on state government imposed by the Fourteenth Amendment and the incorporated Bill of Rights, and *add* to them limits that state constitutional provisions impose by enlarging the individual rights that similar-but-not-identical federal provisions protect. The result is that in all instances the government can do less than it could absent the state constitutional right – a sort of one-way-ratchet in favor of libertarianism.

This one-way-ratchet would have some practical appeal, if only because there are so many other one-way-ratchets in the other direction. Whether or not 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. They include the power of public sector unions, the progressive nature of taxation, the short-term incentives that inform re-elections, and the simple calculus of policy makers in government that you win more votes by giving and doing than by taking or doing nothing, particularly when you can give and do at the expense of those outside your base or even your electorate.

For all these 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, to create an entitlement program than to end one. This helps explain why, to name just a few prominent examples, the federal government grew even under Ronald Reagan, Social Security and Medicare reform failed in the first decades of the 2000s even with Republican control of the House, Senate, and White House, and the same degree of Republican control wasn't enough to repeal the Affordable Care Act in 2017.

This type of hypertrophy characterizes state governments as well. And since there's no consensus on whether its benefits outweigh its costs, there is 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," since democratic preferences would be trumped by state constitutional limits, but rather libertarian laboratories.

Except that's not actually how Judge Sutton's theory works. My first impression was wrong. His approach to state constitutions doesn't always mean less government. To the

contrary, it opens the door to much more power than even our most statist states have ever enjoyed.

The main reason is that "rights" need not be negative rights. To be sure, the Bill of Rights has been interpreted to protect only negative rights. 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. 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. 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. From this perspective, every individual right in the Bill of Rights is best viewed as a negative right.

This, I believe, is the right interpretation of the U.S. Constitution's individual rights,[1] but it's unclear whether it's the right interpretation of state constitutions' individuals rights. And it's even more unclear whether it's how state court judges will interpret their constitutions' individual rights. Judge Sutton's invitation to interpret those rights beyond the understandings of their federal analogues may transform negative rights into positive rights. And the result of that would be, from the perspective of those skeptical of big government, a nightmare.

As Judge Sutton observes, his chapter on public-education funding is illustrative of positive rights. And it's so in two ways. First, it shows that state constitutions contain expressly

[1] The Thirteenth Amendment's abolition of slavery might be called a positive right, since it does not limit what the government can do. If so, it shows that some positive rights are excellent.

positive rights. For example, many state constitutions guarantee a "thorough and efficient system of public schools."[2] A majority of state supreme courts have held that the right requires, in Judge Sutton's words, "a minimum level of funding to offer an adequate education for all students."[3] The result has cost billions of taxpayer dollars in individual states.[4] And in addition to a right to education, "State constitutions contain other affirmative guarantees as well, such as environmental protection and labor and employment rights, to name a few."[5]

But Judge Sutton's education chapter illustrates a second way state constitutions can create positive rights: by being interpreted – or misinterpreted – to *imply* positive rights. 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's a textbook negative right, and a darling of libertarians. The text "Congress shall make no law . . . abridging the freedom of speech" does not require Congress to do anything, to spend anything, or to provide anything; it merely forbids Congress from limiting liberty in a certain way. And with regard to the federal constitution, that is how the right has always been interpreted.

But state constitutions also include free-speech clauses. And as Judge Sutton argues, state judges need not interpret it identically to the federal clause – which means they're free to transform the negative right that limits government power to a positive right that expands it.

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[2] Sutton p. 30.
[3] Sutton p. 30; *see id.* (plaintiffs have won 27 of 44 suits since 1989).
[4] Sutton p. 32 ("In response to these decisions, the Ohio General Assembly substantially increased public school funding, injecting 'billions of additional dollars' into the system.").
[5] Sutton p. 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 Zachin points out . . . the state constitutions contain negative *and* positive rights.") (referring to Emily Zackin, *Looking for Rights in All the Wrong Places*).

That's exactly what Justice William Brennan would have done in *San Antonio Independent School District v. Rodriguez*, the featured Supreme Court case of Judge Sutton's education chapter. 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."[6] 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." And that, as Judge Sutton is too polite to point out, was the extent of Justice Brennan's analysis – an approach to the First Amendment that would have upended nearly two centuries of precedent, cost billions of taxpayer dollars, and made the Supreme Court a sort of uber School Superintendent.

Likewise, consider the right to equal protection. Under the federal constitution, it's a limit on government action. But the plaintiffs in *Rodriguez* would have transformed it into 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. 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?"[7] 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"?

[6] 411 U.S. 1, 63 (1973) (Brennan, J., dissenting).
[7] Sutton p. 26.

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." But state courts need not, and sometimes have not. Ohio's *DeRolph* decisions required additional spending, and the state increased its construction-and-repair contributions to local school districts from $173 million during the 1992-96 fiscal years to $5.8 billion during the 2003-09 fiscal years. And that's just the increase in spending on physical structures. 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.[8] 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 the equal protection clause.[9]

Not that we need to stop at the equal protection clause. If education is a fundamental right, the due process clauses of state constitutions might 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, consider what the cost to government of health care, housing, and food might – all necessities with claims to being fundamental rights at least as strong as education's.[10]

To be sure, some state courts already read their constitutions to imply some positive rights. And I'm not saying Judge Sutton believes state courts should expand those implied rights – or even preserve them.[11] I would suggest only (1) he's providing state courts with a blueprint

[8] Sutton p. 37.
[9] *Cf.* Sutton p. 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.").
[10] Sutton p. 26.
[11] *See* Sutton p. 40 ("Nor do I mean to say that state court litigation is the best way, or even necessarily an appropriate way, to meet these challenges.").

for revenue increases that originate outside the legislature;[12] (2) it's a very expensive blueprint;[13] and (3) from a public policy perspective, the costs may outweigh the benefits, or perhaps even lead to no benefits. As Judge Sutton notes, "the literature . . . is all 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."[14]

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*.[15] There, a boy sued the state for failing to protect him from his abusive father. The Court held that nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. 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 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."[16]

Although *DeShaney*'s facts are heartbreaking, its holding is among the most consequential in the U.S. Reports. Voters might require the state to do expand. Interests 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

[12] *Cf.* Origination Clause of U.S. Constitution.
[13] *See* Sutton p. 38 ("a state court is more likely to have success in prodding dollars out of one legislature than the U.S. Supreme Court would have with fifty legislatures").
[14] Sutton p. 39.
[15] 489 U.S. 189 (1989).
[16] *Id.* at 195.

programs rarely die. By holding that the due process clause does not require state action, *DeShaney* ensures that the 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 beach and allows the rising tide to drown him, is he acting?[17] Is the government acting when the court enforces a racially restrictive covenant?[18] What about when the government requires you to buy health insurance?[19]

Nevertheless, federal courts have recognized that although the act-omission distinction is difficult, it is important, because the alternative is terrifying. If all inaction is action, then everything is state action, including the most private parts of our lives. Consider, for example, an informal battered women's support group held in the basement of a house. Does it violate the equal protection clause's ban on gender discrimination if the host turns away a man who wishes to join? Under current law, the host does not need to satisfy intermediate scrutiny – or any scrutiny – because there's no state action. But once we define all inaction as action – by, for example, noting that the host can only exclude if the state is willing to enforce trespass laws – state action arises. 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."[20]

While some may find this appealing, they don't include libertarians. Whatever else might be said about the political winners and losers of divorcing state constitutional

[17] Cruzan (Scalia, J., concurring).
[18] Shelley v. Kramer.
[19] NFIB v. Sebelius.
[20] *City of Arlington v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting).

interpretation from federal constitutional interpretation, it's safe to say that libertarians aren't always among the winners. If state constitutions, like some foreign constitutions,[21] can be read to eliminate the state action requirement that undergirds U.S. constitutional law, the result will not be a libertarian paradise.

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." If a plaintiff hasn't suffered a concrete injury, or a particularized injury, or if the injury isn't actual or imminent, or if there's no causation, or if the court can't redress the injury, then the plaintiff can't sue. 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*."[22] In some states, standing requirements are discretionary, even when those requirements are constitutionally grounded.[23] 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* and *Massachusetts v. EPA*, or prevent a plaintiff from expanding the effect of federal regulation, as in *Spokeo*.

To be sure, when state courts interpret state constitutional provisions more robustly than the federal analogues, they will not always, or even usually, interpret them to expand the size and power of governments. My point so far has been merely that it will *sometimes* happen. And to that I would add that when they do, there's reason to fear they will do so in a way that creates

[21] *See, e.g.* South African Constitution.
[22] Wyatt Sassman, *Constitutional Standing in State Courts*, at 353 (2015), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2977348.
[23] *Id.*

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).[24] But state judges are often elected, meaning they are chosen by, and accountable to, majorities. This may go some way toward explaining why federal courts were more amenable to desegregation suits in the 1950s than were state courts, *and* why state courts were more amenable to school-funding suits in the 1990s and 2000s than were federal courts. Judge Sutton calls this the "gentler side of federalism."[25] But the decisions aren't 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. 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 wealth minority in states like Ohio in the 1990s. But the latter is still a fairly 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.

[24] Property owners weren't a majority until the 1940s. https://dqydj.com/historical-homeownership-rate-in-the-united-states-1890-present/
[25] Sutton p. 34.

I'm not suggesting 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 haven't recently fared well in state courts.[26]

Recently, 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. If state courts begin to selectively interpret state constitutional provisions far more robustly than their federal analogues – from standing, to 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's 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 doesn't require state action, potentially transforming into constitutional commands the anti-discrimination statutes used against the owner of Masterpiece Cakeshop. Reasonable people will disagree about whether those results would be good or bad, and it's not the purpose of this essay to weigh their costs and benefits. However, regardless of who has the better argument, the result could be more "rights" but less liberty.

[26] See, e.g., Masterpiece Cakeshop.