RECENT BOOK


The American federal system contains not just one constitution or just one supreme court, but fifty-one constitutions and fifty-one supreme courts with the ultimate authority to interpret those constitutions. However, this diversity is too often limited by state supreme courts instinctively following the U.S. Supreme Court’s interpretation of the Federal Constitution when interpreting their own state constitutions, a phenomenon called lockstepping. In 51 Imperfect Solutions, Judge Jeffrey S. Sutton argues that American constitutional law is richest and most protective of individual rights when state supreme courts reject lockstepping and assert independence in interpreting their constitutions. In presenting his thesis, Judge Sutton intentionally declines to analyze particular mainstream theories of constitutional interpretation, but maintains that they are all compatible with the book’s message. However, to jurists committed to textual originalism, 51 Imperfect Solutions’s call for increased state constitutional diversity may cause concern: Given that many state constitutions contain identical rights provisions — many intentionally adopted verbatim from sister states — how could a textualist interpretation find that identical texts have different meanings? Yet a proper analysis of textualism’s underlying principles suggests that such concern would be misplaced. Ultimately, 51 Imperfect Solutions promotes a state constitutional law project that is not only reconcilable with, but also beneficial to, textualism as a philosophy of constitutional interpretation.

51 Imperfect Solutions begins with a simple sports analogy: If a basketball player needs just one point to win the game and is given two

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2 See id. at 16–20.
3 See id. at 6.
4 There are, of course, differences between textualism and originalism (and multiple variations of both). See, e.g., Richard A. Epstein, Beyond Textualism: Why Originalist Theory Must Apply General Principles of Interpretation to Constitutional Law, 37 HARV. J.L. & PUB’L. POL’Y 705, 705 (2014). This piece is primarily concerned with “textual originalism,” which aims to find “the plain, objective meaning of the text as commonly understood by the intended audience . . . at the time the Constitution or amendment was enacted.” Bradley P. Jacob, Back to Basics: Constitutional Meaning and “Tradition,” 39 TEX. TECH. L. REV. 261, 268–69 (2007). This piece’s references to “textualism” should be understood as indicating this specific version of textualism.
5 See, e.g., Jones v. State, 745 A.2d 856, 865 (Del. 1999) (explaining that Delaware directly borrowed Pennsylvania’s guarantee against unreasonable searches and seizures).
free-throw shots, the player ought to take both shots. So, too, should American lawyers. When challenging state laws, citizens may vindicate their rights under both the Federal Constitution and their state’s constitution. Thus, just as basketball players would always take both shots, American lawyers should always argue for their clients’ state and federal constitutional rights. Judge Sutton further explains that state constitutions provide a greater chance to vindicate rights because state supreme courts, the decisions of which affect only one state, often feel less constrained than does the U.S. Supreme Court and have greater flexibility to tailor their interpretations to “local conditions and traditions.”

This flexibility is important because “many American constitutional issues do not lend themselves to winner-take-all solutions.” Therefore, he says, individual rights may flourish most when the U.S. Supreme Court shows restraint and the state supreme courts take a more active role. To prove this thesis, Judge Sutton structures Imperfect Solutions around four case studies of state constitutional law that illustrate different ways that states can play a vital role in developing individual liberties and American constitutional law.

The first case study involves the Equal Protection Clause and public school funding, and demonstrates how state victories can more than compensate for federal defeats. After Brown v. Board of Education, the U.S. Supreme Court quickly faced the question of whether students in poor school districts had a right to education “on equal terms” relative to students in wealthy school districts. In San Antonio Independent...
School District v. Rodriguez, the Court declined to apply strict scrutiny review to this question and consequently declined to remedy the disparities of public school funding in Texas. However, Imperfect Solutions asks: “Is it possible that the Rodriguez plaintiffs ultimately won by losing?” As Judge Sutton explains, Rodriguez spawned a flurry of litigation in state courts and compelled state legislatures “to adopt a host of additional reforms.” For example, the Supreme Court of Texas eventually held — multiple times — that the same school-funding system at issue in Rodriguez was unconstitutional under the Texas Constitution. These holdings forced the Texas legislature to craft a new school-funding system that reduced funding disparities between school districts. Thus, the story of school funding is an example of state constitutional law bringing victory out of federal defeat.

Second, Judge Sutton distills both positive and negative lessons from state involvement in the development of the exclusionary rule, which provides that evidence discovered in a warrantless search must be excluded in court. The U.S. Supreme Court first declined to incorporate the exclusionary rule against the states in Wolf v. Colorado, then reversed that decision twelve years later in Mapp v. Ohio in response to a growing number of states finding an exclusionary rule in their own constitutions. In assessing the lessons from this development, on one hand, Judge Sutton lauds the U.S. Supreme Court for waiting to learn from the states’ experimentation with their own exclusionary rules before incorporating the federal rule through the Fourteenth Amendment. But, on the other hand, he cautions that the Court may have still acted too soon: a sense that the Court had overreached led it to later create a good-faith exception in United States v. Leon. Then, because states

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17 See id. at 37–40. The Court applied only rational basis review. Id. at 40.
18 SUTTON, supra note 1, at 35.
19 Id. at 30.
21 Id. Judge Sutton cites two other benefits of losing before the national court. First, a victory in the U.S. Supreme Court would have been diluted by a “federalism discount,” see id. at 37, meaning that the ruling would have been narrower than desired and underenforced in many states, see id. at 36–37. Second, applying strict scrutiny probably would have created negative “unintended consequences” related to overregulation of schools. Id. at 37.
24 See SUTTON, supra note 1, at 60–61 (citing Mapp, 367 U.S. at 651).
25 See id. at 68–69.
26 See id. at 62–64.
rely on lockstepping, several states subsequently found the same exception in their state constitutions, which resulted in less access to the exclusionary remedy nationwide. Judge Sutton speculates that perhaps more states would have eventually found an exception-free exclusionary rule under their own state constitutions if the U.S. Supreme Court had not established one nationwide rule in *Mapp*.

Thus, the history of the exclusionary rule demonstrates that the timing of state and federal dialogue can have positive and negative implications for individual rights.

The third story is a cautionary tale: the history of forced sterilization in America. After detailing the legislatively driven rise and fall of eugenics, *51 Imperfect Solutions* contends that the U.S. Supreme Court’s emphatic endorsement of forced sterilizations in *Buck v. Bell* demonstrates the danger of strong federal rulings undermining contrary state-level legislation.

While he generally advocates for a fair amount of restraint on the federal high court, Judge Sutton concludes that here, “judicial restraint ought to be restrained.” Because of the problems of lockstepping, emphatic approvals of state laws — like Virginia’s forced sterilization law in *Buck* — by the U.S. Supreme Court can, in practice, prevent state supreme courts from objecting to those laws.

While the other case studies urge the national court to defer to state legislatures and judiciaries, the forced sterilization story demonstrates that enthusiastic approval of states’ actions can sometimes be just as devastating.

The fourth and final story in *51 Imperfect Solutions* is that of mandatory flag salutes under the First Amendment, and it demonstrates that state courts need not be perfect to effect change at the national level. In the 1940 case of *Minersville School District v. Gobitis*, the Supreme Court rejected a Jehovah’s Witness family’s First Amendment challenge to compelled flag salutes in public schools. However, the Court reversed course just three years later in *West Virginia Board of Education v. Barnette*, due in large part to several well-reasoned state supreme court opinions. While noting that both the state and federal courts should have done more to protect the Witnesses, Judge Sutton argues that the flag salute example ultimately demonstrates the need for fifty-

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28 See SUTTON, supra note 1, at 64.
29 See id. at 75–76.
30 274 U.S. 200 (1927).
31 See SUTTON, supra note 1, at 129–30.
32 Id. at 127.
33 See id. at 129–30.
34 310 U.S. 586 (1940).
35 Id. at 600.
36 319 U.S. 624, 642 (1943).
37 See SUTTON, supra note 1, at 160–69 (collecting cases).
38 See id. at 169.
one relevant sources of constitutional rights: “While two sets of protections may fail us from time to time, . . . one set of independent protections assuredly will fail us more often than two.”

51 Imperfect Solutions closes with recommendations for reviving state constitutional law. Most importantly, Judge Sutton exhorts state supreme courts to reject lockstepping as “[a] grave threat to independent state constitutions” and “a key impediment to the role of state courts.”

State courts should also prioritize state law claims over federal claims.41 State bars should put questions about state constitutional law on their bar exams.42 Law schools should provide courses on state constitutional law.43 And federal courts should certify questions of state constitutional law to state supreme courts more often.44 Ultimately, 51 Imperfect Solutions advocates for the legal profession to emphasize the relevance of state constitutional law so as to create a richer and healthier system of American constitutional law.

To achieve diversity in state constitutional law, a crucial step of 51 Imperfect Solutions’s argument is that “[t]here is no reason . . . that constitutional guarantees of independent sovereigns, even guarantees with the same or similar words, must be construed in the same way.”45 While 51 Imperfect Solutions does not address the merits of any particular interpretive theory, Judge Sutton maintains that rejecting lockstepping is compatible with all of the mainstream methods of constitutional interpretation.46 In assessing this claim, two of the interpretive methods Judge Sutton identifies lend themselves well to reaching varying interpretations of identical provisions: pragmatists may find it practical to interpret state constitutions uniquely,48 and living constitutionalists may analyze how state constitutions evolved differently than did the Federal Constitution.49 But in contrast, a textual originalist may wonder: If the texts of the constitutions are the same, ought not they mean the same thing?

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39 Id. at 170.
40 Id. at 174.
41 Id. at 178–90.
42 Id. at 193.
43 See id. at 196.
44 Id. at 197–98.
45 Id. at 174 (emphasis added).
46 Id. at 211–12.
47 Id.
48 See, e.g., 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”).
49 See, e.g., id. at 340–42 (majority opinion).
50 If two courts have interpreted identical clauses differently, then the textualist might conclude either that one of the courts is not doing textualist interpretation (which, to the textualist, is problematic) or that one of the courts has applied textualism incorrectly (which is also problematic).
This question is important to Imperfect Solutions’s thesis. Because the book presents the call for increasing state constitutional diversity as an ideologically neutral advancement, it would be problematic if the call were incompatible with what has become the lodestar interpretive method of the conservative legal movement. As Judge Sutton acknowledges, a perceived bias in state constitutional law already exists due, in part, to an argument advanced by Justice Brennan that characterizes state constitutional law as a one-way ratchet for more expansive rights. Textual-originalist jurists may thus be initially wary of the state constitutional law project, seeing it as a means for alternative theories of constitutional interpretation to circumvent narrow readings of the Federal Constitution. However, on deeper analysis, textual originalism provides at least three principles that can permit different meanings of identical constitutional provisions, and therefore reconcile textualist interpretation with Imperfect Solutions’s argument.

First, textual originalism is concerned with finding the publicly understood meaning of the text at the time it was ratified. Since state constitutions and the Federal Constitution were ratified at separate times, even a textualist could conclude that the same phrase in two constitutions had two separate meanings. For example, in State v. Walker, Justice Lee of the Utah Supreme Court wrote separately to convey the importance of interpreting the state constitution’s guarantee against “unreasonable searches and seizures” according to its meaning at the time it was ratified in 1897. Under this analysis, Justice Lee concluded that the phrase in the Utah Constitution meant something different than the U.S. Supreme Court’s interpretation of the same text in the Fourth Amendment. Textual originalism’s emphasis on the meaning of text at the time it was enacted is an acknowledgement that language and context commonly change over time. Therefore, identical textual provisions may be interpreted differently.

52 See SUTTON, supra note 1, at 175–76 (citing William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 HARV. L. REV. 489, 491 (1977)); see also id. at 175–78.
54 267 P.3d 210 (Utah 2011).
55 See id. at 221–24 (Lee, J., concurrence).
56 See id. at 224.
Second, textual originalism is concerned with finding the meaning of the text to the ratifying population.58 Because state constitutions were ratified by distinct groups of people, particular constitutional provisions may have had unique meanings to distinct linguistic communities.59 Even when one compares the Federal Constitution to that of one of the original thirteen states, the citizens of just one state (as a subgroup of the American population) might have originally understood a provision to mean something different than the American population as a whole.60 For example, in *State v. Hempele*,61 the New Jersey Supreme Court broke from the U.S. Supreme Court in its interpretation of “unreasonable searches and seizures” as applied to police searching citizens’ garbage because “[e]xpectations of privacy are established by general social norms.”62 While the court did not go on to cite social norms particular to the people of New Jersey, the reference to “social norms” indicates that a state’s unique norms may be grounds for a unique interpretation of a state’s constitution. Therefore, even if all fifty-one American constitutions were ratified at the exact same time with the exact same text, textual originalism is at least theoretically capable of giving each a unique set of meanings based upon the norms and linguistic nuances of each state.

Third, textual originalism embraces the public meaning of the document as a whole.63 Thus, identical constitutional provisions may be given different meanings based on intratextual analysis, which includes

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58 See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, The President's Power to Execute the Laws, 104 YALE L.J. 541, 553 (1994) (explaining that evidence of original meaning is relevant only if it reveals the “meaning that the text had to those who had the recognized political authority to ratify it into law”); John F. Manning, Textualism and the Equity of the Statute, 101 COLUM. L. REV. 1, 16 (2001) (arguing that textualists interpret text “according to the common social and linguistic conventions shared by the relevant community”); Lawrence B. Solum, Communicative Content and Legal Content, 89 NOTRE DAME L. REV. 479, 498 (2013) (“The original public meaning version of originalism emphasizes the meaning that the Constitution (or its Amendments) would have had to the relevant audience . . . .”).

59 See Cont'l Can Co. v. Chi. Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund, 916 F.2d 1154, 1157 (7th Cir. 1990) (Easterbrook, J.) (“Successful communication depends on meanings shared by interpretive communities.”); Lee & Mouritsen, supra note 57, at 827 (“It would not be unusual to find that a use of a word that is common in one speech community . . . is quite rare in another.”).

60 Frederick Schauer, Statutory Construction and the Coordinating Function of Plain Meaning, 1990 SUP. CT. REV. 231, 251 (explaining that “members of linguistic subcommunities” share “linguistic understandings of those subcommunities”).


62 Id. at 802 (alteration in original) (quoting Robbins v. California, 453 U.S. 420, 428 (1981) (plurality opinion)).

63 See, e.g., Smith v. United States, 508 U.S. 223, 241 (1993) (Scalia, J., dissenting) (“[T]he meaning of a word . . . must be drawn from the context in which it is used.” (quoting Deal v. United States, 308 U.S. 129, 132 (1939))); Carpenter v. McMann, 817 S.E.2d 686, 688 (Ga. 2018) (Grant, J.) (explaining that state constitutions must be interpreted according to “their text, context, and structure”).
considering unique structures of sentences and the entire document.\textsuperscript{64} For example, while several state constitutions contain virtually identical Blaine Amendments, which prohibit state funding of religious institutions,\textsuperscript{65} those provisions may be interpreted differently if a particular state constitution also contains a broader establishment clause.\textsuperscript{66} Such juxtaposition may also lead a textualist to interpret an establishment clause more narrowly to avoid creating redundancy. Thus, even identical constitutional provisions may have different meanings based upon differences in the documents as wholes.

Not only is Judge Sutton’s exhortation to reject lockstepping permitted by textual originalism, but such a rejection will also likely increase the methodology’s prevalence for two reasons: First, the U.S. Supreme Court has often deployed interpretive methods other than textual originalism when interpreting the Federal Constitution.\textsuperscript{67} Thus, states following nonoriginalist interpretations in lockstep do not even purport to be finding the original public meaning of the text and limit the opportunities for textual analysis. Second, even when the Court utilizes textualist principles to interpret the Federal Constitution, lockstepping disregards that state’s particular history, linguistics, norms, and intratextual analysis,\textsuperscript{68} whereas textual originalism requires state-by-state, individualized analysis. Thus, textualists ought to happily reject constitutional lockstepping.

Because textual originalism attempts to determine the meaning of the text (1) at the time of ratification, (2) to the members of the ratifying community, and (3) in relation to the document as a whole, each of these aspects provides room for differences in constitutional interpretation. This is a crucial step in affirming Judge Sutton’s claim that \textit{51 Imperfect Solutions} presents an ideologically neutral argument for rejecting lockstepping and advancing state constitutional law. Furthermore, textualists ought to embrace the book’s argument as a way of furthering their interpretive school’s principles of strict adherence to text, history, and holistic analysis. Ultimately, \textit{51 Imperfect Solutions} presents an argument that all who care about the project of promoting state constitutional law should embrace.

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\item[\textsuperscript{64}] Akhil Reed Amar, \textit{Intratextualism}, 112 HARV. L. REV. 747, 748 (1999); see also, e.g., District of Columbia \textit{v.} Heller, 554 U.S. 570, 577 (2008) (Scalia, J.) (assessing the grammatical structure of the Second Amendment). The analysis can be even more complex if a phrase is used multiple times within the same document. For example, “due process of law” appears in both the Fifth and Fourteenth Amendments and thus may have a different meaning than “due process of law” in another constitution. See Amar, supra, at 789.
\item[\textsuperscript{65}] See, e.g., CAL. CONST. art IX, § 8; GA. CONST. art. I, § 2, para. VII.
\item[\textsuperscript{66}] See, e.g., CAL. CONST. art. I, § 4.
\item[\textsuperscript{67}] See, e.g., Trop \textit{v.} Dulles, 356 U.S. 86, 101 (1958) (interpreting the Eighth Amendment according to “evolving standards of decency”).
\item[\textsuperscript{68}] See, e.g., Hof \textit{v.} State, 625 A.2d 370, 373 n.3 (Md. 1993) (relegating Article 22 of the Maryland Declaration of Rights to a footnote because it is “in pari materia with the 5th Amendment”).
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