

## State Constitutional Law Steps Out of the Shadows: Transcript of Selected Symposium Panel Discussions\*

### I. SCHOOL FINANCE AND EDUCATION RIGHTS PANEL DISCUSSION

#### Stephen Mazza, Interim Dean, University of Kansas School of Law:

Good morning, everyone. Welcome to the Kansas Law Review Annual Symposium. I am Steve Mazza, the Interim Dean at the KU Law School. We are honored to have with us today distinguished members of the judiciary of the legal academy and of the practicing bar. The topic of today's symposium, *State Constitutional Laws Steps Out of the Shadows*, was suggested by our own Professor Stephen McAllister who is widely known for his work as the Kansas Solicitor General and his involvement in several important state constitutional cases. Steve, working with the Law Review Symposium Editor, Joseph Hinckley, the Law Review Editor in Chief, Melissa Plunkett, and the Managing Editor, Daniel Buller, and the entire Law Review staff, has put together an outstanding program and what I think you will find to be an interesting approach to today's event. Instead of following the typical model of having a single presenter followed by a question and answer session, the program organizers opted to employ discussion panels, each having a convener and a group of panelists. As a result, I expect we are going to get a much livelier discussion of the issues this morning. So without further ado, I want to thank all the panel participants and I will turn the program over to the Symposium Editor of the Kansas Law Review, Joseph Hinckley, who will introduce the panels. Thank you.

#### Joseph Hinckley, Symposium Editor, Kansas Law Review:

Thank you, Dean Mazza. We are grateful for Dean Mazza's support of the Law Review. He has been a long-time faculty advisor to the Law Review, and we are especially grateful for his help in organizing this

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\* The following is an edited transcript of two of four panel discussions held at the University of Kansas School of Law on November 12, 2010, during the 2010 Kansas Law Review Symposium. Questions from the audience have been omitted.

symposium. I echo his thanks to Professor McAllister and his co-authors who have really provided the catalyst for this symposium today.

Today, it is my pleasure to introduce the convener of our first panel, Judge Jeffrey Sutton. Judge Sutton sits on the U.S. Court of Appeals for the Sixth Circuit. He has served on the Sixth Circuit since 2003. Prior to this, he practiced in the Columbus, Ohio office of Jones, Day, Reavis & Pogue. Judge Sutton served as a law clerk to Judge Thomas Meskill, U.S. Court of Appeals for the Second Circuit. He also clerked for Justice Powell and Justice Scalia of the United States Supreme Court. He served as the State Solicitor of Ohio from 1995 to 1998.

Hon. Jeffrey S. Sutton, United States Circuit Judge, Sixth Circuit Court of Appeals:

Thank you so much and thank you to the Law Review and the Law School for hosting this terrific event. I have the honor of convening our first panel on school funding.

We have three terrific panelists. Professor Jeffrey Shaman is a Professor of Law at DePaul University. He is the former President of the ACLU of Illinois, and he had two notable publications that caught my eye. The first was an early 1970s article saying that we should abolish bar examinations. I did not manage to read all of the article but there may be a few students interested in what his point was and whether you can get any traction with it at this stage. The other publication is that he's a co-author of the state constitutional law textbook that he, Justice Holland, Professor McAllister, and I wrote.<sup>1</sup> Our second panelist is Justice Mark Martin, the most Senior Associate Justice on the North Carolina Supreme Court. He became a judge at age twenty-nine and was the youngest judge elected to the State Court of Appeals in North Carolina history and the youngest Justice elected to the North Carolina Supreme Court in North Carolina history. Our third panelist is Professor Sanford Levinson, Professor of Law at the University of Texas, and he holds a chair in the Political Science Department there as well. He also teaches at Harvard and formerly taught at Princeton. He has written four books and 250 articles.

Each panelist is going to speak briefly about school funding litigation and state constitutionalism. I will follow up with some questions and lead a discussion among the four of us, and then I'll leave at least fifteen to twenty minutes for questions from the audience.

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1. RANDY J. HOLLAND, STEPHEN R. MCALLISTER, JEFFREY M. SHAMAN & JEFFREY S. SUTTON, *STATE CONSTITUTIONAL LAW: THE MODERN EXPERIENCE* (2010).

Professor Shaman will go first, and I will introduce his remarks by mentioning perhaps the most famous case in U.S. Supreme Court history and certainly the most famous school case in U.S. Supreme Court history. That, of course, is *Brown v. Board of Education of Topeka*.<sup>2</sup> It also happens to be a case with Kansas connections. The defendant, Topeka Board of Education, was located in Kansas, the Brown family was from Kansas, and the lawyer who defended the state in the case, Paul Wilson, was a former professor of law at the University of Kansas who wrote a book about his efforts defending the Topeka Board of Education called, appropriately enough, *A Time to Lose*, which indeed he did. *Brown* says education is perhaps the most important function of state and local governments. That proposition might be one of the few things you could get all Republicans and all Democrats in this country to agree is still true.

*Brown* held that this public service “must be made available to all on equal terms.” *Brown* eliminated one problem for equality. It removed racial barriers to an equal education, but at the same time it left in place the risk that there will be wealth-based barriers to an equal education. *Brown* eliminated de jure racial segregation but left in place de facto wealth-based segregation—economic stratification in every state in the country between wealthy suburban schools, relatively poor rural community schools, and relatively poor urban city schools. Seventeen years after *Brown*, the U.S. Supreme Court had a chance to correct that problem, the wealth-based problem. That case is *Rodriguez v. San Antonio School District*,<sup>3</sup> and I’m going to let Professor Shaman tell you what happened.

Jeffrey M. Shaman, Vincent de Paul Professor of Law, DePaul University College of Law:

First of all, thank you Judge Sutton for revealing how old I am and reminding me of the article from so long ago that I had completely forgotten about it. Aside from that, I wanted to talk a bit about two cases: *Serrano v. Priest*<sup>4</sup> and *San Antonio Independent School District v. Rodriguez*. In 1971, the Supreme Court of California decided a case entitled *Serrano v. Priest*. This represented a new era in state constitutional law; an era characterized by the rediscovery of state constitutional rights. *Serrano* presented an equal protection challenge to

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2. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1953).

3. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

4. *Serrano v. Priest (Serrano I)*, 487 P.2d 1241 (Cal. 1971).

the California system of financing public schools. Based heavily on local property taxes, the California system resulted in a wide disparity of funding from one school district to another. Under the California system, poor districts had little to spend on education while wealthier districts had considerably more.

After reviewing the system, the California Supreme Court concluded that the system of financing public schooling violated both the federal and state equal protection clauses. In so ruling, the California court found that education was a fundamental right entitled to enhanced constitutional protection. The court stated unequivocally that it was “convinced that the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a ‘fundamental interest.’”<sup>5</sup> Nothing could be more irrational, the court continued, then to have the quality of children’s education determined by the value of their parents’ and neighbors’ property. So that was *Serrano v. Priest* decided in 1971.

Two years after *Serrano*, the United States Supreme Court decided *San Antonio Independent School District v. Rodriguez* which also presented an equal protection challenge, this one under the Federal Constitution, to the Texas system of financing public schools. Like the California system struck down in *Serrano*, the Texas system was based heavily on local property taxes and resulted in substantial disparity of funding from one school district to another. In fact, in Texas, even though the poor districts taxed themselves at a higher rate than the wealthier districts, the poor districts ended up having less to spend on education, very little to spend on education, while the rich districts taxing themselves at a lower rate had considerably more.

Nonetheless, the United States Supreme Court concluded that the Texas school funding system did not violate the Equal Protection Clause of the Federal Constitution. In reaching that conclusion, the high court ruled in *Rodriguez* that under the Federal Constitution the right to an education is not a fundamental right and, therefore, was entitled to only the most minimal constitutional protection. The Court ruled that education was not a fundamental right because, as the Court said, it was not explicitly or implicitly guaranteed by the Constitution. In the Court’s view, no matter how important a right might be, it would not be accepted as a fundamental right unless it could be tied to the text of the Constitution itself.

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5. *Id.* at 1258.

It should be pointed out that this marked a momentous shift in the Court's thinking. In a number of previous decisions, the court was quite willing to recognize fundamental rights even though they could not be tied to the text of the Constitution. For example, nothing in the Constitution guarantees the right to marry, the right to procreate, the right to vote in a state election, or the right to appeal from a criminal conviction; yet the court had recognized all of these as fundamental rights and, therefore, entitled to enhanced constitutional protection.

In *Rodriguez*, though, the court was unwilling to further expand the concept of fundamental rights. The Supreme Court's unwillingness in *Rodriguez* to recognize education as a fundamental right was, I think, grounded in notions of federalism and a reluctance to intrude upon state sovereignty. While federalism concerns are always present in a case asking a federal court to strike down state legislation, the Supreme Court noted in *Rodriguez* that it would be difficult to imagine a case having a greater potential impact on the federal system than this one in which the court was urged to abrogate systems of financing public education that were in existence in virtually every state. In other words, for the Supreme Court to find an equal protection violation in *Rodriguez* would cast doubt upon the educational systems in virtually every state of the Union. The Supreme Court's concerns about federalism in the case led it to back away from any sort of critical oversight of the state educational systems. A majority of the court thought that anything other than extremely deferential review would be too much federal intermeddling with state prerogatives.

After the Supreme Court ruling in *Rodriguez*, various state and county officials in California went back to the California Supreme Court and asked it to overturn its ruling in *Serrano* on the ground that it had been countermanded by *Rodriguez*. The California Supreme Court declined to do so, noting that its previous decision had been founded on the equal protection clause of the California Constitution as well as the Equal Protection Clause of the Federal Constitution.<sup>6</sup> The California court explained that while *Rodriguez*, of course, overruled that part of the California court's decision based on the Federal Equal Protection Clause, *Rodriguez* had no effect whatsoever upon that part of the court's decision based upon the California equal protection clause, which the California Supreme Court reaffirmed.

The decision of the California Supreme Court in *Serrano II* stands as a dramatic manifestation of the independence of state constitutional law

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6. *Serrano v. Priest (Serrano II)*, 557 P.2d 929 (Cal. 1977).

from federal constitutional law. The court in *Serrano II* declared that its main concern was with California law and the full panoply of rights Californians have come to expect as they are due. While decisions of the U.S. Supreme Court are entitled to respect, they will not be followed by the California courts when the protection they afford is less than the protection guaranteed by California law. So in *Serrano II*, the California Supreme Court concluded on its own that education was a fundamental right, the school finance system amounted to a suspect classification on the basis of wealth, strict judicial scrutiny should be used, and under strict scrutiny, the school finance system was unconstitutional.

It is important to note, that in sharp contrast to a federal case such as *Rodriguez*, in a state case such as *Serrano* where a state educational financing system is challenged under a state constitutional provision, there are no federalism concerns. Not only is the state court free from federal doctrine about the meaning of constitutional provisions, but in addition to that, the state court is also free from concerns about overstepping the prerogative of some other sovereign. A state court might have concerns about separation of powers so it might decide to defer to the state legislature about a particular matter, but those are concerns about the allocation of authority among the various branches of state governments and are not concerns about federalism. As the California Supreme Court explained in *Serrano II*, while the constraints of federalism are necessary to the proper functioning of the federal courts, they simply are not applicable to a state court in determining whether its own state system of financing education runs afoul of a state constitution.

It has been almost forty years since *Serrano I* was decided, and by now, something like forty-five states have litigated school funding cases under their state constitutions; in perhaps two-thirds of them the courts have found constitutional violations. Although it still remains to be seen to what extent these rulings have actually changed the system of funding of schools in each state, I am sure we are going to be talking a bit more about that as the panel progresses.

Hon. Mark Martin, Senior Associate Justice, North Carolina Supreme Court:

Good morning. When Judge Sutton reminded me of how young I was when I became an appellate judge, I just had to sit there and think, “Well, I don’t feel quite as young as I used to.”

It is an honor to be here with you this morning. What I would like to do in my brief introductory remarks is focus on two key questions that I have confronted in the school litigation in my state. The first key

question: How is the right to education characterized in the text of the state constitution and in the decisional law? Secondly, what standard of review is applied by the courts? With these key questions in mind, I will spend my time providing a case study of educational rights under the state constitution as interpreted by the [North Carolina] Supreme Court. First, I will give you a brief background on the educational provisions of the state constitution, and then I'll discuss three relevant cases—*Leandro*,<sup>7</sup> *Hoke County*,<sup>8</sup> and *King*.<sup>9</sup>

Article I, the Declaration of Rights section of the [North Carolina] Constitution, section 15, states that “the people have a right to the privilege of education and it is the duty of the state to guard and maintain that right.”<sup>10</sup> Article IX of the constitution, in fact, is all about education.<sup>11</sup> The article requires the legislative branch to establish a general and uniform system of free public schools, provides for school funding generally, establishes a state board of education and defines its powers and duties, and includes provisions regarding higher education, the University of North Carolina system, and requires the legislative branch to maintain a public system of higher education. Most notably from article IX is section 2, which provides that the legislature shall provide, by taxation or otherwise, for a general and uniform system of free public schools wherein equal opportunity shall be provided for all students.

In *Leandro v. State*,<sup>12</sup> a decision from 1997, plaintiffs from poor school districts essentially challenged the funding scheme. The parties sought declaratory and injunctive relief, arguing that they had a constitutional right to adequate educational opportunities that was essentially being denied by funding disparities. At issue was whether the state constitution included a qualitative component to public education—in other words, in the court's words, whether that education meets some minimum standard of quality.

The court, in fact, declared that education was a fundamental right, which put us in a plurality of jurisdictions that came to that conclusion. And I quote the court: “We conclude that at the time this provision was originally written in 1868 providing for a ‘general and uniform’ system but without the equal opportunities clause, the intent of the framers was

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7. *Leandro v. State*, 488 S.E.2d 249 (N.C. 1997).

8. *Hoke Cnty Bd. of Educ. v. State*, 599 S.E.2d 365 (N.C. 2004).

9. *King v. Beaufort Cnty Bd. of Educ.*, 693 S.E.2d 655 (N.C. 2010).

10. N.C. CONST. art. I, § 15.

11. N.C. CONST. art. IX.

12. 488 S.E.2d 249.

that every child have a fundamental right to a sound basic education . . . .”<sup>13</sup> Of course, the implication of the court’s holding was that the court directed that, if on remand, based on the trial court’s finding, that in application of strict scrutiny, the defendants would have to establish that their actions and their effectuation of financing was necessary to promote a compelling governmental interest. It was interesting in the *Leandro* decision that the court actually defines what a sound, basic education represented. I do not have time to go into that now, but it was interesting that the court set out four general categories of components of education that public schools should be fulfilling.

Now this all could be contrasted, as Professor Shaman indicated, with the decision in *Rodriguez* in which the U.S. Supreme Court did not find education to be a fundamental right and thereby applied a low level of scrutiny, which we are all familiar with—rational basis review. Our decision also contrasted with the Massachusetts decisions in school funding wherein Massachusetts courts found a violation but did not base it upon education being characterized as a fundamental right, and, in fact, in a 1995 decision, *Doe v. Superintendent of Schools of Worcester*, indicated:

While the court acknowledged in *McDuffy* the importance of education and decided that the Commonwealth generally has an obligation to educate its children, the court did not hold, and we decline to hold today, that a student’s right to an education is a ‘fundamental right’ which would trigger strict scrutiny analysis . . . .

. . . .

. . . Instead, we join the courts of several other jurisdictions in holding that education is not a fundamental right.<sup>14</sup>

Back to North Carolina and two other court decisions, which I will just briefly touch on due to time limitations. *Hoke County Board of Education v. State* in 2004 involved the *Leandro* litigation coming back to the state’s highest court after essentially seven years on remand, and you could imagine the complexity of this litigation and the amount of resources that went into it. Essentially, the trial judge, in addition to finding that the funding scheme was a constitutional violation, declared a right for at-risk students to essentially a mandatory educational scheme.

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13. *Id.* at 255.

14. 653 N.E.2d 1088,1095 & n.4 (Mass. 1995).

What was interesting is when the case came back to the [North Carolina] Supreme Court in which the trial court had held that at-risk four-year-olds were entitled to education, the Supreme Court reversed that part of the remedial order. In light of appropriate deference to the legislative and executive branches in formulation of education and policy, the court declared that the trial court had gone too far in its assessment.

Now let me conclude briefly with our most recent decision in education law, *King v. Beaufort County Board of Education*.<sup>15</sup> What I want you to be thinking about is how the characterization of the fundamental right was handled in this most recent foray into educational law. The facts of *King* are straightforward. A student is given a long-term suspension for essentially engaging in a fistfight. She is suspended for the rest of the school year and no alternative education is provided to the plaintiff and she is not told why. On appeal to the [North Carolina] Supreme Court, the issue is this: Did the student have a right flowing from *Leandro*'s characterization of education as a fundamental right to alternative education? The majority held that there was no state constitutional right to alternative education. The rights there were solely statutory in nature. Nevertheless, because of the state constitutional provisions that guarantee equal access to all students, the student was entitled to know the reason for her exclusion from alternative education.

In closing, the constitutional right became very interesting in this litigation. I was not on the court at the time of *Leandro*, which was decided in 1997, but I noticed that the characterization of education as a fundamental right brought it directly in conflict with another line of cases that apply rational basis review to school disciplinary determinations. So the court somehow had to harmonize its previous characterization as education being a fundamental right, at least for purposes of school funding litigation, with the realities of school discipline and the needs of local school administrators to provide a safe environment for students.

Looking at the entire experience, it leaves you with a few thoughts that Professor Shaman touched on earlier. Even though federalism is not a concern, separation of powers clearly is a concern. Although you have checks and balances on the state level, there is an interesting relationship with the legislative branch, which essentially authorizes appropriations for the funding of the judicial branch. At remedial stages of educational litigation, many times the state courts are actually ordering the legislative branch to increase appropriations to public education, which can really

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15. *King v. Beaufort Cnty Bd. of Educ.*, 693 S.E.2d 655 (N.C. 2010).

create some conflict between branches. I look forward to further discussion.

Sanford Levinson, W. St. John Garwood and W. St. John Garwood, Jr. Centennial Chair, Professor of Government, University of Texas School of Law:

I am especially grateful to be here because in some ways I am here under false pretense. I really do not know much about state constitutional law. It is a new interest of mine. For me, this is like being a kid in a candy store and the opportunity to come here and be surrounded with people who are immersed in the topic was too good to turn down. It is also the case that if I bring any comparative advantage at all—since I have already declared that it is not comparative advantage of lawyerly knowledge—it would be wearing my other hat as a political scientist. So I will try to make some brief remarks about one of the simple paradoxes in the area of school finance. What might help to explain why many state courts have been so innovative in school finance litigation, given how different most state judiciaries are from their federal counterparts. That is, they must commonly face the electorate, whether when attempting to join the bench or in retentions elections. There is, therefore, far more electoral accountability, for good and for ill, than at the federal level. .

I presume at some point today, either at one of the sessions or private conversations, there will be some discussion of the fact that three judges were fired last week in Iowa in what seems clearly to be direct retribution for their votes in a same-sex marriage case. Judge Sutton has life tenure, which means forever; except for Rhode Island, all states have age limits on service. Discussants of federal courts, particularly the Supreme Court, tend to obsess—I think far too much—on the so-called countermajoritarian difficulty. There have, however, been some very interesting articles written about state courts that suggest the problem is not the countermajoritarian difficulty but the majoritarian difficulty. Why is it that we would ever expect state courts to be particularly sensitive to protecting the rights of politically unpopular groups when, presumably, there are voters available to chastise judges who reach out to defend the highly vulnerable and unpopular? So there is a paradox presented. The [U.S.] Supreme Court in *Rodriguez*, rightly or wrongly, rejected the opportunity to stand up on behalf of highly vulnerable children of parents of very modest means who clearly would not be protected by the state political systems and state courts stepped into the breach. So how does one explain that?

I draw a possible explanation from the work of my friend, Mark Graber, a political scientist/lawyer from the University of Maryland, who suggests—and he is writing primarily about federal courts, but I think the argument holds for state courts as well—that courts are often invited to decide certain hot-potato issues that, for a variety of reasons, the ordinary political system is reluctant to decide.

So to take the most dramatic example: the *Dred Scott*<sup>16</sup> case, the most notorious case perhaps in our entire history. Mark's view is that the Congress of the United States and the President of the United States were just delighted with the prospect that the U.S. Supreme Court would try to cut the Gordian knot because, for a variety of reasons which aren't worth going in to, it was obvious that the political system of the United States broke down. And it was simply hopeless to expect Congress to resolve this issue. Now *Dred Scott* is not a notable success, but the argument that Mark makes is that you cannot blame the Supreme Court for trying because, in part, the political system *had* broken down and there was no reason whatsoever to think that it would have functioned better than the U.S. Supreme Court did, even if you could see that *Dred Scott* was disastrous in all sorts of respects.

Fast forward to school finance and it seems to me that one way of understanding these cases—as a hypothesis rather than a strongly asserted argument—is that the legislature, for a variety of reasons, was either unwilling or unable to step into what was widely recognized to be a problem, and analysts of the problem could take one of two quite different paths. One is to emphasize the problem of unequal funding, as Judge Sutton already mentioned, and the kinds of issue you might get into if you contrast some kids getting \$3000 a year and other kids getting \$8000 or \$10,000 or whatever-thousand dollars a year.

Then there is a different sort of inquiry, where somebody talking about adequate education might look around and say, “Look, if some school system wants to spend \$10,000 and build Olympic-sized swimming pools, who really cares? The real problem of our education system is that there are lots of kids who are not getting anything that could be described as adequate level of education and something needs to be done about that.” This directs the inquiry away from equal finance into trying to figure out what some sort of baseline level of an adequate education might look like. The question is this: Would legislators move on their own in doing this? There might be a variety of reasons to think

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16. *Dred Scott v. Sanford*, 60 U.S. 393 (1856).

the answer is no and that they would appreciate the intervention of courts to jog the system along.

Then, as a political scientist, I noticed some other interesting aspects about state courts in contrast to federal courts. One of the notable realities, for example, of the U.S. Supreme Court right now is that not a single Justice has ever run for public office. Nobody has been elected to anything. Justice Thomas administered a moderately important federal agency; and Justice Breyer worked on Capitol Hill; and Justice Kagan served both in the Clinton White House and as Solicitor General. But running even for dog catcher is not part of the resume of any member of the United States Supreme Court. This contrasts to lots of previous courts, the most notable example being the court that decided *Brown v. Board of Education*. Chief Justice Earl Warren was the former Governor of California and a candidate for Vice President of the United States in 1948; there were three former senators on the Court. It was a very different Court—an unimaginably different Court—from what we have today.

There are also profound differences in the frequency with which various courts actually engage with certain issues. Look at New Jersey where there have been twenty-six or twenty-eight school finance cases. Again, that is an interesting difference between at least the U.S. Supreme Court and state courts. The U.S. Supreme Court every now and then will decide a decision on a topic and then very often just forget about it for years. So some of us, for example, are interested in the issue of affirmative action in higher education. There are two decisions. One decided in 1978<sup>17</sup> and then literally twenty-five years later they got around to deciding the completely incoherent dyad dealing with the University of Michigan undergraduate program and the University of Michigan Law School.<sup>18</sup> The one thing you can say with confidence is that seven of the nine Justices of the Supreme Court believe that the split decision makes no sense, but because Justices Breyer and O'Connor managed to see a distinction, we are left with a totally confusing so-called doctrine, and the Supreme Court hasn't returned to it. Whereas, as I said, there have been twenty-six or twenty-eight school finance decisions in New Jersey. So there is far more of a dialogue among the state courts than the federal courts in this sort of issue.

I am also interested in who the state-court judges were. The Chief Justice of the Supreme Court of New Jersey during a very key period

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17. *University of California v. Bakke*, 438 U.S. 265 (1978).

18. *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

was former Governor Richard Hughes, a very savvy person. A relevant Justice in Texas when the *Edgewood*<sup>19</sup> case was decided there was Oscar Mauzy, a very active and activist Democrat who became sufficiently frustrated by the inability to get relevant legislation in the Texas legislature that he ran for the Texas Supreme Court and found the votes on the Texas Supreme Court to change the baseline of argument. The fact is, to an astonishing degree, the baseline was changed and stuck, even though the Texas Supreme Court is now completely Republican and the politics in the state certainly moved to the right. But it is still the case that *Edgewood* lives out of place.

The hypothesis I have is that members of state supreme courts are likely to be more politically savvy than members of the federal courts. Electing judges certainly has its problems—but we should not blind ourselves to certain merits as well in election systems. (There is no perfect system, obviously.) If you have to run for office, you pick up a sense of what the public wants and will bear. If you also come out of a political process, if you have been a governor like Richard Hughes or if you had been an elected Attorney General like the Chief Justice of the Kentucky Supreme Court when that court declared unconstitutional the state's public school system, then you may well be skilled in reading political tea leaves. As noted, the Kentucky Supreme Court declared unconstitutional every aspect of the existing Kentucky public school system because it did not provide a minimally adequate education.<sup>20</sup> This was in response to litigation generated by a citizens group headed by a former governor frustrated by the inability of the legislature and governor to move forward. What is interesting in Kentucky is that, unlike New Jersey where you had twenty-six or twenty-eight subsequent decisions going back and forth, in Kentucky you have only one because dynamiting the system with the support of lots and lots of political leaders was enough to change the political game in Kentucky. There was subsequent agreement on tax increases, different forms of funding; most people that are interested in education think that the court really made a difference.

Now the last hypothesis I have—and it is one of the reasons I am so glad to be here, because I am extremely interested in your own response to this hypothesis—is that people who run for state courts have a desire to do something. They are take-charge sorts of people. This does not mean they run amok because there are ways, obviously, of reining in

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19. *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989).

20. *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (1989).

people who want to do too much too quickly, but nonetheless there is a desire to make a mark and a certain sophistication that the mark, if it is going to be made, has to be made in a certain kind of dialogue with other political figures within the political system as well as ultimately with the public at large.

As a political scientist, one of the reasons I have become interested in state constitutional law is the radical differences between the very organization of the federal judiciary and the state judiciary, and some of these radical differences might help to explain why it is that state courts have been far, far more interesting and involved with the issue of school finance than the federal courts. Quite frankly, putting aside theoretical arguments about whether *Rodriguez* was right in rejecting education as a fundamental right, which I think is the dubious part of *Rodriguez*, why would we really want federal judges or members of the U.S. Supreme Court, given their likely experience (or *lack* of political experience), to monitor the nations' systems of school finance, with all of the delicate political implications that are involved? Why would we not prefer the quite often more politically experienced and sophisticated group of state court judges?

Judge Sutton:

Let me pick up where Professor Levinson left off and put this discussion back into the context of *Rodriguez*.

One very crude way to think about individual liberties and equal protection litigation at the constitutional law level is about battles between the powerful and powerless. It is hard to think of anything more important as a matter of policy than providing children access to an equal education relative to other children in a state. In *Rodriguez*, the court had a chance to do just that and did not. In the next forty years or so, however, the state supreme courts have filled the gap.

What is interesting is not that they filled that gap. What is interesting is that less has been done when it comes to other battles between the powerful and the powerless. When people try to explain why that has happened, the conventional wisdom is that state supreme courts for the most part are interpreting constitutions that can be amended by a fifty-one percent vote. So they really do not have a countermajoritarian component to them, and if you do something that is too controversial, that constitutional provision can be amended. The other consideration is that people who interpret these documents for the most part, are accountable to the electorate at regular intervals through fifty-one percent votes. So you have this process for selecting people that is majoritarian in nature with respect to a job that is at least

nonmajoritarian in nature and sometimes needs to be countermajoritarian in nature.

So picking up on Professor Levinson's point, why is it that the state courts were willing to do this? Professor Shaman and Justice Martin, do you have any reactions to what Professor Levinson said as to why in this one conspicuous area the state courts have filled the breach?

Professor Shaman:

Well, I'm not sure that I have any good answers, but I do think that Professor Levinson has identified some characteristics about state judges that I think will probably prove to be correct when you finish researching your hypothesis. I agree with where you are going.

I want to suggest a few other reasons why state judges might jump in. The first one is I think because many state judges just might have disagreed with the Supreme Court's decision in *Rodriguez* and many state judges might have thought it was blatantly wrong to rule that education was not a fundamental right. I would note that in *Serrano I* the California Supreme Court, in finding that education was a fundamental right and that wealth was a suspect classification, relied upon a number of U.S. Supreme Court decisions and then was astounded when the U.S. Supreme Court said, "No, you got our decisions wrong." The California Supreme Court came back in *Serrano II*, and said, "No, we did not get your decisions wrong, and we are going to stick with the reasoning of those prior decisions."

Another thing I want to suggest is that in *Rodriguez*, the U.S. Supreme Court was dealing with this very general constitutional provision, the Equal Protection Clause. It doesn't say anything about education. State constitutions do say things about education and sometimes some very specific things about education. Justice Martin mentions that the North Carolina Constitution states that there shall be equal educational opportunity, a uniform education, and a number of state constitutions require that the legislature provide a uniform system of education. Some state constitutions require the legislature to provide a high-quality education for all citizens in the state. When you are a state judge, how can you ignore that kind of language in the state constitution?

Judge Sutton:

That's a nice point. Justice Martin, would you like to add anything at all?

Justice Martin:

Well, it is really interesting. When you think about *Brown* and its remedial touchtone of all deliberate speed, there is no question that until the time that the U.S. government—the political branches, legislative, executive branches—were fully behind the promise of *Brown*, very little progress was made. I think if we looked at the state level in terms of educational funding, you mentioned, Judge Sutton, the reaction of the defendants to the outcome in your state; much the same in mine, and what it reminds me of is the remedial limitations of courts in many instances. Our school financing decision went on for over a decade.

Critics wonder, as Professor Levinson noted: “Did the fortunes of the school children materially improve?” In other words, were they better able to read and write and do complex mathematics? What we had in my state was similar to Ohio; even though education was characterized as a fundamental right, when the state court issued this order, the legislative leaders said, “Wait a minute, educational funding falls within our province and who are you to tell us how to fund education?” So you have this situation over time where the trial judge is ordering that funding disparities be equalized and the legislative branch is saying, “Well, maybe we will get to that at some point.”

Professor Levinson:

A publication that I am inordinately pleased by was to have a letter to the editor in *The New Yorker* a couple of weeks ago. It was a response to a short column written by Nicholas Lemann talking about the new movie that has recently come out—*Waiting for Superman*, written about education—and he had a sentence that stated the Constitution nowhere mentions education. So I quickly sat down and wrote a letter pointing out that it is true only if you think of the U.S. Constitution, but every single state constitution mentions education one way or another.

For me, this underscores the really terrible way that we teach something called American constitutional law in this country because everybody assumes that the only constitution in town is the U.S. Constitution. That is false, and there are really notable differences between the national Constitution and all of the various state constitutions. One of the clichés that I taught our students is that the U.S. Constitution does not have any real vision of positive rights. But, as a matter of fact, every state constitution does have a vision of positive rights at some level, most dramatically with education but not only with education. There are other state constitutions that have much more robust notions of welfare rights, but even very, very well-educated and

sophisticated people like Nick Lemann do not know that because we just do not teach it. It is not part of the dialogue.

I agree completely with Professor Shaman that if one is on a state court and you are given a patch of text that says, as in Massachusetts, one should cherish public education and the College in Cambridge in order to provide a citizenry that can enact the vision of a republican form of government, then you have to sit up and take notice. There is no such language, obviously, in the U.S. Constitution, and so you have to argue using the Equal Protection Clause.

Justice Martin:

Let me make one other comment if I could, Judge Sutton. If we have these remedial obstacles, where does that leave us in the federal courts, federalism concerns, state courts, and separation of powers concerns? I would strongly argue that even when we have remedial obstacles, the aspirational value of these decisions are too much to be ignored. Query whether the national government would have eventually fully supported equal rights for all children if the U.S. Supreme Court had not made its pronouncement. In the same way, I think state supreme courts can very much fulfill that aspirational function of setting a standard, and so the public can plainly see that the courts have set a standard, and it really puts the other branches of government on notice with a greater degree of accountability. So I think there is great value in these decisions.

Judge Sutton:

The way I might put it is I think there are some types of individual liberties—equal protection, for example—forms of litigation where it is really a majoritarian, countermajoritarian argument. In other words, it may be that the majority of people elected to the state legislature chose not to do something but the will of the people is still to do it.

So, for example, in the Ohio school funding case, there are 611 school districts in Ohio and 500 or so supported the plaintiffs in the case. What did that mean? The real battle is a populist battle. The 100 wealthiest school districts—suburban school districts—thought that they had a great system, and the only thing that is going to come out of this litigation is higher taxes. So in that sense, at the school district level, it was majoritarian.

That takes me to the next topic. In Ohio today, the lowest spending school district spends about \$5000 or maybe it is up to \$6000 per student per year. If you happen to live in a wealthy suburb, it is probably going to be \$17,000 to \$18,000.

If you grow up in Appalachia, southeastern Ohio, you are going to be at the \$5000 to \$6000 end. If you happen to have the good fortune to have been born into a family in Upper Arlington or Bexley, you are going to be at the higher level. If there is one thing most Americans think should be true in this country, it is that everyone should have an equal start in life—an equal opportunity to be what they want to be and to do something productive.

So in all of these school funding cases, that has been one of the key missions of the plaintiffs—to try to close those gaps. It has not happened. While there has been a lot of success in raising the floor, I do not know of a state, whether it was through a legislature or a state court case, that has been able to meaningfully close the equity gap. I am curious if any of the three of you think it is something that can be done or if you disagree with me that it is a problem. Anyone have any reactions to that?

Professor Shaman:

I think it is politically impossible to get close to perfect equality, to perfectly close the gap, but I think a lot can be done to reform the system. Some of the systems are just so egregiously disparate that they cry out for reform. I wanted to talk a little bit about the Texas system which, of course, was the subject of the *Rodriguez* case, and I think when *Rodriguez* was decided, the disparity between Alamo Heights and Edgewood was something like \$567 per pupil per year versus about \$300 per pupil per year.

Judge Sutton:

I think it was even greater than that.

Professor Shaman:

After *Rodriguez* it had gotten much, much worse. By 1989, when the Texas Supreme Court finally struck down the system in Texas, the wealthiest school district had over \$14 million of property wealth per student while the poorest district had approximately \$20,000 per student. That was a 700 to 1 ratio disparity. The 300,000 students in the lowest wealth schools had less than 3% of the state's property wealth to support their education while the 300,000 students in the highest wealth district had over twenty-five percent difference. In Alamo Heights and Edgewood, the disparity had increased—Edgewood now had \$38,854 in property taxes per student. Alamo Heights—which by the way is in the very same county as Edgewood—had over \$570,000 per pupil. That is

just a disgrace, that kind of disparity. The Texas Supreme Court struck that down. I think someone was saying before, was it you Judge Sutton, that Alamo Heights and Edgewood today are pretty equal in funding?

Judge Sutton:

As of a couple of years ago, they are not just equal but the poorer district, Edgewood, is the one that has a little more. Now, unfortunately, I think that might be a function of what is going on demographically in those two school districts. I am pretty confident that if you go throughout Texas that you are going to find some very high-spending districts. But it has improved.

Professor Shaman:

That is right and that illustrates, I think, that because of the politics of this, there is never going to be equality of funding. But I think we can in many states or some states drastically improve the situation. Kentucky is another state that I think has done a good job of equalizing things to a fair amount.

Professor Levinson:

The classic defense of judicial review is Alexander Hamilton's *Federalist* No. 78. If you read that carefully you discover that what he is concerned about is that if we ever do become a truly democratic system—and that is not number one of Hamilton's priorities—then the majority of the have-nots will use their political power to redistribute and take from haves. So the argument for strong judicial review is to protect property. Hamilton is unapologetic and very candid about that.

So what we are dealing with, as you point out, is the struggle between haves and have-nots; to the extent the have-nots are a majority then it is not surprising that most of the public schools systems in Ohio would be in favor of litigation that would have redistributive consequences, and therefore it is not surprising that those school systems in wealthy areas would be very upset. In Texas, one of the responses to the supreme court decision there was to label it the Robin Hood case, but that has double meanings. If you are part of the poor, then robbing the rich to give to the poor is not such a bad program.

It has other overtones as well. I do think, paradoxically or not, one of the things that might explain why state courts have been willing at least to bring this issue to the fore of public attention is because it does have majority support in class terms and then the really crucial issue is the remedy. What you learn in the first year in law school is that it is not

that difficult to spin out theories of rights. The real job of judging is to figure out the remedies and that is where the negotiations take place and that is why there have been two dozen cases in New Jersey or a dozen cases or so in Texas to try to figure out where the curves intersect as to some degree of redistribution that does not just seem to be too much where you would lose support. You would throw the judges out; it is fascinating.

Compare this to same-sex marriage in state constitutional law. To my knowledge, there have been no attempts to amend education provisions in state constitutions, while there are scores of states that have passed amendments relating to same-sex marriage. No attempt has been made to strip the state constitutions of any notion of a right to education.

Judge Sutton:

Think about how difficult that would be. That is almost as difficult as taking away the right to vote for judges.

Justice Martin:

All I would add is that when you look at areas that courts have traditionally had authority and then you take a step over and look at the economic model about how schools are funded and the great reliance upon local property taxes, I do not think you can construct a way to make it more inequitable in terms of how schools are funded.

Judge Sutton:

I do not want to put you on the spot, Justice Martin, so if you do not want to answer this then I will try to answer it. Could the supreme court just say, "Okay, listen. Enough of this cat and mouse game. There are two things that will solve these problems. Thing one, get rid of the equity gap. We are not having local school districts. We are having a state system; there is a department of education and everyone gets the same amount of money. There is no such thing as school districts. Everyone gets the same amount of money and that is what we are doing. Now if you don't like that, you, the legislature, have a second option—impose a \$1 billion tax increase. You get to pick." Could a state supreme court do that? I am giving them options.

Justice Martin:

Going back to the economic model, courts have generally applied very low standards, minimal standards of review, for economic regulation and taxation, and that is viewed as a political branch function.

If you want to wave a magic wand and overlook the history and the evolution of how education has been financed in the country, I think on a normative level, we could come up with a lot of better solutions to it. I think the real challenge for us is, since we cannot just eliminate entirely the history of it, how can courts be a partner in that dialogue to try to make the necessary improvements? Clearly, if you had a true unified system where you had a state-level appropriation based upon the number of students in various school systems, you could equalize it very quickly.

Professor Shaman:

We could have something short of that. Let the various districts retain their local school districts and have control over everything except funding and just have the state either take over the local property taxes or let the counties do it and then pay it all into state.

Judge Sutton:

In that model, would you prohibit the local school district from raising additional funding? Let's just say the parents decided: "The state is going to give us \$6000 per student a year but we are going to create a local 'education fund' and it will be a private fund and over time it will have lots of money and we will supplement it by \$1000 or \$2000 per year." Would you allow that?

Professor Shaman:

I do not know if I would allow that. That is a possibility. I mean there are two variations of that model. You could have the adequacy model where everybody is to pay everything into the state and then some school districts are allowed to raise some more, or you could disallow that and have complete equity. But I think either of those systems would be a lot easier to administer and less threatening to the local school districts than saying, "We're just going to have one state board of education and take everything over."

Judge Sutton:

After the first Ohio Supreme Court decision, the legislature essentially said, "Okay. The court has ruled. One way to solve the problem is to raise X amount of money. So we are going to do this; we are going to put an option on the next ballot to raise the sales tax by a penny, which would raise about a billion dollars a year." The proposal failed. The court decisions had the support of the populace. No one was trying to amend the constitution. No one was throwing the Justices out.

Even when 500 school districts out of 600 supported this tax increase, it still failed

Professor Shaman:

I would point out that, although you are absolutely right that these reforms have the support of the populace, they don't have the support of the people who control the legislature and that is exactly what happened in my state of Illinois. We had a coalition of school districts composed of Chicago and the inner-city schools and the down-state schools in the rural areas, which have very low funding, versus the wealthy suburban school districts around Chicago. The legislature was just unwilling to change the situation.

II. DUAL SOVEREIGNTY AND STATE CONSTITUTIONS PANEL  
DISCUSSION

Stephen R. McAllister, Professor of Law, University of Kansas School of Law, Solicitor General of Kansas:

Our final panel is on a topic that has been in play all day long, and before I get to the topic, I want to introduce the four panelists. I think we have met all of them but one during the course of the symposium. On the far end we have Judge Sutton who convened the School Finance Panel this morning. Next to him is Chief Justice Rebecca Berch from Arizona, and she has not been on a panel yet today but has been looking forward to this panel. She was a long-time faculty member at Arizona State University law school. She has been Solicitor General of Arizona. She has served as a Justice of the Arizona Supreme Court for approximately eight years and is now that court's Chief Justice. She brings a wealth of experience in all sorts of ways with respect to state constitutional law. Professor Michael Berch you met in the previous panel from the Arizona State University law school. And then, Minnesota Justice David R. Stras who is quite an accomplished University of Kansas law graduate—one of my former students and I am very proud of what he has done.

This is our group for this final discussion, which is titled *Dual Sovereignty*, and it probably seems like the least interesting of the four. What is particularly controversial or catchy about dual sovereignty? I thought I would start with just a word about what we even mean by dual sovereignty. I think what we mean is this system we have been talking about all day long. Really, there are two levels of government. There are more than that, but there are two major levels in the American

system—the federal government and the states. We are focusing on the states, but the states only operate in the context of a greater, in some sense, overall national government. In many ways, the topics we have discussed throughout the day implicate the relationships between these two sovereigns.

The federal government, of course, is a government of enumerated powers under the U.S. Constitution; it is only supposed to have what it is given. The states operate from the presumption that they have general police powers to do anything and everything. So it would hardly be surprising, for example, that their constitutions cover all sorts of topics, some of which the federal government does not address and the Federal Constitution does not address.

The state constitutions, both as an idea and in reality, actually predate the U.S. Constitution, going back to the Revolutionary War era. When the U.S. Constitution was adopted, it acknowledged the relationship with the states in ways that have continued to play out and evolve over time. Some of the arguments you heard today were probably being made 200 years ago. They may still be made 200 years from now in terms of what is the appropriate role for the states? What is the appropriate role for the federal government? What I want to do is just briefly touch on a fundamental theme of dual sovereignty.

One point that is clear is if the federal government speaks and there is a question asking whether the U.S. Constitution allows something and the Supreme Court says it does not let the state do this or someone does have this right, what is very clear in our system is that the supremacy clause controls. Federal law “wins” any conflict. So a lot of the discussion here has surrounded the question: Can the state courts find additional rights or more expanded views of rights under their state constitution? It tends to be a one-way street in that respect. The states cannot say, “We want to give fewer rights than the U.S. Constitution protects.” In theory they can say that, but it would be unenforceable. And in that sense, it is a one-way street, this concept of dual sovereignty. The supremacy clause makes that clear. There are a lot of ways the two sovereigns interact. I teach those in constitutional law, and I do not want to begin to get into all of that.

What I thought we would do for this panel is begin with Professor Berch who has a few words to say, and then I think Chief Justice Berch wants to say a few words to him. After that, we will go to some questions and further discussion.

Michael Berch, Alan A. Matheson Professor of Law, Sandra Day O'Connor College of Law, Arizona State University:

My interest in the subject of this symposium was sparked by the Arizona Supreme Court's decision in *Berger*.<sup>21</sup> In the previous panel discussion, I spent a considerable amount of time recounting the facts and relevance of that decision to the development of a coherent body of state constitutional law. My essay that is included in the Law Review's publication renders in greater detail my thoughts on the subject. But for now, I should merely restate what is necessary for an understanding of this presentation. Morton Berger was sentenced to a term of two hundred years—ten years for each count—for possession of twenty photographs of child pornography. By statute each count has to be served consecutively, without the possibility of parole, pardon, or commutation. This was the minimum sentence that could be imposed.

Berger raised the issue of the federal and parallel state cruel and unusual punishment provisions but for some reason did not pursue the state claim before the Supreme Court.

As a profession of law teachers, where did we go wrong? I started to research the subject of raising state constitutional claims and was appalled to find so many examples where practitioners had failed to raise the issue in the lower courts or to pursue the claim before the appellate courts. I noticed with grave misgiving that state courts were not excusing the waiver of the state constitutional issue. After more soul searching, I came up with what I consider a modest proposal—for me it is modest—to change the adversarial structure, if you will, of our system, and I will spend a moment on what that structure would be. I recognize that there are some disadvantages, but I also recognize a few salient advantages, not the least of which is the doing of justice. My accompanying essay develops these points in much greater detail.

Briefly, the proposal encompasses the following approach: state supreme courts—and by that I mean the highest appellate courts—should more liberally note sua sponte issues of unraised state constitutional law in serious state criminal proceedings, where the issue may raise doubt, or the resolution may raise doubt, on the conviction or the severity of the sentence. That is really what it comes down to. So it does change the normally operative rule that if you do not raise a state constitutional question in the lower courts and preserve the issue throughout the appellate channels you (or should I say ) your client is out of luck. I

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21. *State v. Berger*, 134 P.3d 378 (Ariz. 2006).

believe the courts should be more responsive to the needs of the justice system and adopt a more liberal attitude to excusing the waiver.

I understand that this should not ordinarily be imposed as a judicial duty. This is not something that will be a violation of federal constitutional rights if it is a state constitutional right that has not been raised. I understand these things. On the other hand, it would present a monumental attitude change to our judicial system. To me, it is important that we are not just here as an umpire calling balls and strikes. We are here to do justice, especially when it involves a state constitution that governs the entire polity and not just the litigants. This is not only a binary dispute.

Now, U.S. Supreme Court Justice Antonin Scalia comes right out and says that they will not resolve an issue not adequately briefed or argued, and that this is the premise of our adversary system. But I think we have to do a couple of things before we just hook, line, and sinker swallow it. One, compare what scholars say in other legal systems. The civil law system is not a bad one. I know several judges believe you should not raise it in domestic dispute. They give a lot more power to the judiciary to control and shape the proceedings even to the point of examining witnesses.

I am not suggesting going that far, but I am suggesting that other systems exist on this planet. Consider the fact that courts should not be obliged to decide a case in accordance with the wishes of the parties (no matter the violence to the orderly and correct evolution of the law). What about the belief of the court system as a dispenser of fairness and justice? I know some will say: "Well, fairness and justice is to decide a case that is fairly set forth within the framework of the issues presented by the parties," but I do not go along with this—at least not in serious criminal proceedings. Are there other considerations that are ends in and of themselves that would counsel hesitation in excusing the waiver? Party presentation—how important is that? We keep hearing that, but yet when the court does not want party input or does not care—*Erie v. Tompkins*,<sup>22</sup> *Marbury v. Madison*;<sup>23</sup> come immediately to mind—then it does not bother them and they pull out the label that this is too important to let it go because it relates to subject matter jurisdiction or standing or justiciability or something else. I just cannot buy this hypocrisy. But isn't the cruel and unusual punishment clause a limitation on the power

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22. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

23. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

of the legislature? That systemic problem certainly fits in with the other categories previously mentioned.

And then labeling. I love the labeling. This goes to subject matter jurisdiction. Well, you know, yeah, it does. So what else? I mean, tell me more. Tell me more. My concern relates to Morton Berger who is languishing in prison for two hundred years, perhaps, just perhaps because of the failure to pursue a state constitutional claim.<sup>24</sup>

I also understand the apprehension of an appearance of impropriety. If the court reaches out, it has an ax to grind. Supposedly it can no longer be neutral. But it's too late, as far as I'm concerned, to say the courts do not take an active part when they want to. All I have to cite is *Bush v. Gore*.<sup>25</sup> That is the only cite I have to give you. When they want to decide, they know what to do and how to do it. So, it is too late in the day to register a principled objection. The courts indulge in these practices already.

Now, let me then proceed to describe how it might work in practice. First of all, the court can bury the issue. I think they did in *Twombly*<sup>26</sup> and *Iqbal*<sup>27</sup>—certainly *Twombly*. The opinion overturned *Conley*<sup>28</sup>, a fifty-year precedent, they did it. No one saw it coming. But in dissent Justice Stevens remarks: "This was not raised. This was not argued." So when they want to raise something they do it. Why does the profession not get it? It is anarchy out there! They raised it themselves! And they never gave the parties a chance to brief and argue the point.

Now there are things that we can do and one of the Justices mentioned this. We can ask the parties to brief it. That is a good way of handling it. In other words, "I see counselor, a good cruel and unusual punishment clause issue, do you want to raise it?" Well, my wife, Chief Justice Rebecca Berch, did it in a previous case. They asked counsel to raise it. If an advocate does not respond or responds inadequately the judge may report that person to the state bar under the Judicial Ethics Rules.

Hon. Rebecca White Berch, Chief Justice, Arizona Supreme Court:

One quick clarification—they didn't refuse. They said the language was the same as the federal and they said, "We see no principal reason to

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24. See *Berger*, 134 P.3d at 388.

25. *Bush v. Gore*, 531 U.S. 98 (2000).

26. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

27. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

28. *Conley v. Gibson*, 355 U.S. 41 (1957), *abrogated by Twombly*, 550 U.S. 544.

think that the Arizona Supreme Court would interpret the Arizona provision any differently from the federal.”

Professor Berch:

You are so correct. So you can ask the parties to brief the case. You ask amicus to do it. The judges and their clerks can research the law. I think our law school is considering opening a clinic in anticipation of being requested by the Arizona Supreme Court to submit amicus briefs on state constitutional law issues.

Now, a word on unintended consequences. My proposal may have an effect on ineffective assistance of counsel claims—to the extent that the court may liberally raise the issue sua sponte. But it is pretty hard to argue ineffective assistance of counsel because when was the last time ineffective assistance of counsel ever won? Go back to *Strickland*.<sup>29</sup> It is a loser in most cases anyway, so let’s not let it block the path to the needed reforms.

The next unintended consequence may seem purely academic. What is the stare decisis effect of the decision? You know what that means. An opinion affects, that is has precedential consequences for, other pending and future disputes. If the court has not received reasoned briefs, it may stray from the true path of the law. Well, maybe you should forge another doctrine. Let me submit this proposal. We provide that these decisions have lesser precedential value than others. Some courts already have a custom that unexplicated opinions, per curiam decisions, and unpublished opinions may fall into this category. So the decisions that are handed down by courts without elaboration from the parties have lesser stare decisis consequences than perhaps other opinions. I do not mean to push this point on traditionalists. I am only making a suggestion.

How should we adopt the liberality principle of excusing waivers of state constitutional rights? Maybe we should do it by rule. We have Rule 52 of the Federal Rules of Criminal Procedure that adopts plain error for the lower courts. So we have that. Why not for state supreme courts? They have their own rules. So we can do that. I would give the prosecutor a chance to reply. I certainly would. One of my colleagues thought that lower courts should be given the chance in the first instance to rule on the state issue. Give it back to them! Say, “You’ve got twenty days. Tell us your reaction to whether this is cruel and unusual.” I don’t mind that. I’m not trying to railroad anyone here, but I would basically

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29. *Strickland v. Washington*, 466 U.S. 668 (1984).

say that after a sufficient period of time the appellate court should decide the case. Remember as to questions of law the review is de novo. So I fail to see the need for the lower courts to decide the question of law in the first instance. And if there are factual issues in doubt, it is questionable whether the waiver will be excused in the first instance.

Other points to touch upon briefly. We have fundamental error in capital cases. We have pro se cases where we do a more searching review for error. I would say a lawyer who has proven himself so inept in a particular case abandons the client. Treat the defendant as pro se and review the case accordingly, at least with respect to the unraised state constitutional issue. There are reasons not to reach out. Fairness to your adversary—I have already tried to handle that. Give the adversary an opportunity to respond. Avoidance of constitutional issues—if you decide an issue you may make a mistake. Better to put the person away for 200 years? But that itself may be a gross miscarriage of justice—a mistake that has been exponentially compounded.

Again, I would basically say have a dialogue with the lower court and do it. I really think it would be a healthier system. I feel better and cleaner when I go to sleep that something has been done that is right. So the bottom line is this: tell these parties to brief the issue if it is that important.

Chief Justice Berch:

I learned this morning during the second session that marriage is a momentous act of self-determination. I have been self-determined, I guess. I also learned about mixed marriages. Ours is one. We do not come from similar backgrounds, and we are not of similar parties. And our poor daughter is an independent.

As a former teacher of legal method, I am a fan of process. I think that if each of the parties in the system plays its part according to the script and does it well, that by and large the right things will happen. And that if the system needs changed, the system should be changed in a considered way. Even as we discussed at lunch, we have new constitutional conventions and we reconsider fundamental systems. I am not opposed to that, but I am also not yet convinced that this system that we have is broken.

This leads me to some of my concerns with the proposal advanced by the very creative guy whose comments preceded mine. He proposes that “state supreme courts should more liberally note sua sponte—and decide—unraised issues of state constitutional law in serious criminal

proceedings when those issues may cast doubt on the conviction or the severity of the sentence.” Is that a fair recap?

Professor Berch:

Perfect.

Chief Justice Berch:

I have a few thoughts, and I hope this does not turn into a session of the old show: *Can this Marriage Be Saved?* The suggestion just made by Professor Berch amounts to a fundamental attack on the adversary system as we know it. We count on the parties to raise claims that they deem best, and provided that a defendant is mentally competent, we do not interfere. Thus, in our system, choosing which claims to make and which defenses to raise is the prerogative of the party and not of the court—except, of course, in the federal system, where the federal courts retain the right at any time to raise issues that relate to subject matter jurisdiction or preliminary issues such as standing, etc.

By way of full disclosure, I think Michael [Berch] mentioned it, but we—appellate courts—may consider unraised state and federal constitutional issues in fundamental error review in capital cases. We have capital punishment in Arizona, and we do fundamental error review of the record. So this suggestion is not totally unprecedented, even in Arizona. We do aspects of the kinds of things suggested.

He also proposes a rather fundamental change in the role of judges. Actually being a judge, frankly, is occasionally dull. So a change in the role of judges sounds like it could be fun for a while. I work on a terrific bench. Some of the people here know my colleagues. They are very smart. They are very good issue spotters. Could they spot more issues than the criminal defense lawyers have raised in most cases? I suspect they could. Frankly, my law clerks occasionally come to me and ask, “Why didn’t counsel in this case raise this issue?” These are people just out of law school by a few months.

And they may be right. I often can’t tell why counsel didn’t raise a particular issue, but I have to assume that they considered the unraised issue and rejected it for some reason, such as that it undercut what they perceived to be a stronger issue or opened the door to examination of other issues—such as a defendant’s prior criminal history or mental health—that the defendant would rather not delve into. Or maybe they raised the issue at the trial court level, lost on it, and decided not to seek review on that issue.

But it changes the role of the judge to try to conceive what issues or claims a party might have chosen to bring had it thought of the particular issue the judge now mentions. I wonder if it would turn judges into advocates—which gets me back to my initial point that allowing or requiring courts to raise state constitutional claims for criminal defendants fundamentally changes the nature of our adversary system. After all, if a judge proposes in a case that the defendant should have raised a particular state constitutional issue, doesn't the judge then have to explain and defend that new theory as well? That makes the judge an advocate, not an impartial jurist.

Michael [Berch] mentioned Justice Scalia's position that courts should not address issues that not only are not raised but not argued. He disagrees with Justice Scalia—on this and other things—and suggests instead that judges should be permitted, or in serious criminal cases required, to raise claims that the parties failed to raise. It's a bold stretch from the status quo. The Professor's suggestion anticipates that the courts would come up with constitutional theories for the defense only. Now this may perhaps skew the system in favor of the defense. To maintain courts' valued impartiality, would courts also raise additional charges or claims that we think the prosecution should have brought? I have seen a few cases in which I wondered why the state filed the particular charges it did. But we all recoil at the thought that the court should be recommending other or additional charges. But isn't that the fair flipside of what is being suggested here? Why should courts become an advocate for one party but not for the other? The Professor gives no principled reason for courts to advocate for only one party.

If we are going to brainstorm and have some fun with this suggestion, why stop short? What about raising state constitutional claims on behalf of victims? And why raise only state constitutional issues? Why not raise any state statutory and rule-based claims and defenses that the defendant should have raised that may affect the conviction or sentence? Hearsay objections? Objections to improper jury instructions? If the goal is to provide "justice," why stop short?

Should this duty apply for defendants in all criminal cases or only for those charged in serious cases? If only for "serious" cases, how should we define serious? All felonies? Any crime carrying a sentence longer than six-months? Is that serious enough?

If the judges are not to advocate for these new theories that the judges have raised, must we appoint counsel to represent the defendants on these new theories? If so, where does the money for that come from?

And why would we limit this new-found obligation to criminal cases? There are many very important civil cases. We talked about

school funding this morning. And consider health care, prisons, and disability issues. There may be civil cases in which the issues may exceed in importance the sentence meted out to one defendant in one criminal case. Should judges advance state constitutional or other claims in civil cases if we deem the case sufficiently important?

As with many proposals, the devil is in the details. At each step, as we face each issue, we must determine where to draw these lines.

I do like the idea that we could ask the parties to brief state constitutional issues raised by the court. But that opportunity already exists, and such requests have been made. Michael [Berch] mentioned one case in which the judges of the Arizona Supreme Court were deadlocked two to two (because we were short one member on the court). We asked for re-argument in the case and asked the parties to brief the state constitutional law issue. Defense counsel responded, "Arizona's provision is the same as the federal provision. We don't see why you would interpret it any differently." I was crushed by their response. Since they had failed to make a good argument, should the court have made it for them?

At one point, Michael mentioned that the duty of judges to *sua sponte* raise state constitutional claims finds support in the oath that state court judges take to support the constitution and laws of the state. While that is true, I don't think anyone envisioned that such an oath would require judges to raise claims on behalf of the parties. And remember that the same oath requires judges to support the state laws. So that would support my expansion of Michael's theory to include claims based on (mere) state law—as opposed to the state constitution—that is, if the duty arises from the oath judges take, then the oath would bind judges not only to make state constitutional claims but claims based on state law as well. If we are going to ask judges to be advocates for the parties, have them be really good advocates and raise all the relevant claims and defenses.<sup>30</sup>

There may be some problems with doing so. A few years ago, a case came to my court—it was a civil case—and all the way along the parties argued it under subsection C of the applicable statute. We got the case, we looked at it, and one justice said, "Wow! It is a really tough case under subsection C. I really think it falls under subsection D." The opinion was written under subsection D. I dissented, and said, "It is

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30. If the court then fails to raise a state constitutional claim that is identified later—say by the circuit court of appeals—may the state court judges be found to have rendered ineffective assistance? Can they be liable for malpractice?

really up to the parties to raise their own issues and claims. This one was never raised. We should not be acting as attorneys for the parties.” We found out later that the parties had not wanted to raise D because there were enough votes in the legislature to overturn a case or rule based on that subsection. There had already been a bill introduced to that effect. So the parties did not want the case decided on D. That is why they chose to not raise that section, and we messed everything up for them. So I think we spawn unintended consequences and problems when we take judges out of the role that they are supposed to play.

Michael [Berch] mentioned [U.S. Supreme Court] Justice Brandeis’s wise dictate that courts should avoid deciding constitutional issues unless necessary to the disposition of the case. This new theory certainly cuts against this well-established position.

I was a court of appeals judge before I became an Arizona Supreme Court Justice, which provided good training. It teaches judges not to write too broadly because whatever you have written may come back to bite you. Justice Brandeis was a smart judge. There is much wisdom to the position he espoused—that reaching out to decide constitutional issues when you do not have to can come back to bite you. Raising and deciding extra issues is also not terribly efficient. We have learned through trial and error that as cases progress through the system and issues get raised and discussed and vetted at each level, it is often not till the later stages that the theories and arguments really gel. Every student has had this experience in moot court. By the time they get to their final argument, they have the “aha” experience of having it all come together. They think, “I wish I had known this the first day. This is what I should have been arguing.” It is a revelation.

This also happens to lawyers as they litigate a case through the system. By the time the case arrives at the state supreme court, the federal appellate court, or the U.S. Supreme Court, they have their arguments crystallized and sharpened. To have us raise some issue *sua sponte* at the supreme court level creates risks and may jeopardize arguments that the parties have decided they wish to focus on. I fear we would not necessarily know what we do not see.

Do we appoint a state constitutional law counsel? That’s one proposal Michael has made, and, by the way, Arizona State University Law School has indicated a willingness to look into this. I like the idea that if we want to ask litigants to address a new state constitutional issue at the supreme court level, we might be able to turn it over to scholars as good as Paul Bender at Arizona State University Law School who might give us some feedback on what our state constitution is supposed to mean. This is a great idea and funding is there. So I do not want to

squelch these kinds of creative ideas. But I don't want to embrace these ideas without a lot of additional discussion and refinement.

Just as a party has a right under *Faretta*<sup>31</sup> to defend himself, even if it is not a very good idea and even if the case is very serious, the party also has a right *not* to raise certain claims. Can we force such a self-represented defendant to raise certain claims that the court has identified? Consider that occasionally, in murder trials or child sex abuse cases, defendants may not want to go to trial or to present mitigation because they do not want to expose the victims or their families to the facts of the crimes again. I think they have the right to make that choice, and we do not have the right to say to them that they must present any claims or defenses in particular.

Finally, I will close with that easy out of judges: the ethical rules. Whether your state has its own set or follows the ABA model canons of judicial conduct, each jurisdiction has rules that provide that, in our system, lawyers are the advocates. The judges are supposed to be impartial arbiters of the cases that come before them. We are supposed to be neutral. We are supposed to be fair. If we step into that role of advocate, fun as it might be, we divert from our role and lose our neutrality; we lose that higher moral and ethical ground in deciding the case. We tarnish the appearance of impartiality that helps ensure confidence in our judicial system.

So, as you can see, the theoretical side of me loves this debate. We have great dinnertime conversations over ideas like this. But the judge side of me quakes at such a proposal, at least until it is really fully vetted.

So that is my response to the proposal to have courts sua sponte raise state constitutional law issues in serious criminal cases. I am sure we will continue this particular conversation over many dinners.

Thank you very much for letting me speak here. I've enjoyed the opportunity to think about this bold new idea—and to speak out in a small attempt to protect the role of the courts and judges in our system.

Professor McAllister:

Well, I think what I would like to do is invite Judge Sutton or Justice Stras to comment and weigh in here. One of the questions which we have struggled with in terms of the case book and getting schools to teach state constitutional law is why has state constitutional law typically seemed to develop so much more slowly, or sometimes not at all, than

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31. *Faretta v. California*, 422 U.S. 806 (1975).

federal constitutional law? If that is an accurate assessment, why are lawyers and state supreme court justices perhaps reluctant—if that is part of the explanation—to rely on the state constitution and interpret the state constitution?

Judge Sutton:

Well, there are so many things you could say about the question of why state constitutional law is undeveloped. I think the lockstep problem really has a lot to do with what is going on here, and it might be worth giving a defense of lockstep to try to see why the courts are doing what they are doing. I think one defense—though I do not believe in it—is life's a lot easier if you are a state supreme court justice and you have one analysis and not two. What judge wants to multiply her work?

I keep hearing this notion that New Mexico, when it adopted an unreasonable search and seizure provision, was modeling it after the U.S. Constitutional provision. There is not a single individual liberty guarantee in the Bill of Rights or the Fourteenth Amendment that was modeled after the U.S. Constitution. All of the individual liberty guarantees in Bills of Rights were adopted from—modeled after—state provisions.

Nothing came from the federal government. Those liberties all came from state provisions. Then when you factor in that the U.S. provision applies to 300 million people, fifty states and so forth, it really seems strange to think that they should automatically mean the same thing in a state with 5 million people. But the best reason for getting rid of lockstep and embracing dual sovereignty is one I think all law students should understand by about spring of the first year—and certainly by the end of their law school career—and that is the number of constitutional issues that have indeterminate, or at least ambiguous, components to them.

It is difficult to maintain that the Equal Protection Clause foreordained three tiers of review—strict scrutiny, intermediate, rational basis—or that all of the free speech tests are the only ways to think about the issue. The U.S. Supreme Court was doing the best it could do, but the oddity to me—from the perspective of American advocates and law professors—is why they do not embrace that uncertainty by allowing the states to try different approaches. One way of looking at it is, “Gee,

it is very difficult to figure out what the words due process mean. They did their best. Why shouldn't we try to do our best?"

It often is apples to oranges to compare Arizona to the U.S. Supreme Court, and that is something I do not understand. What I think the state courts should do is look, as an original matter, at what their provision meant.

Hon. David R. Stras, Associate Justice, Minnesota Supreme Court:

Well, I want to go back to some of the basic comments that I brought up in the last panel, and they respond somewhat to Judge Sutton's issue. In the five months I have been on the court, it has not ceased to amaze me how uncreative lawyers are about state constitutional issues. Even when they are raised, they are often raised in a footnote or they are raised at the very last paragraph after the lawyers have spent ten pages on the federal constitutional standard and they said, "Oh, by the way, if we lose under the federal constitutional standard, you ought to consider whether the state standard should be different," without giving us any argument.

Then sometimes I get really interested in something they have said because maybe there is some different language in the state constitution, and so I will ask them in oral argument, "Well, does this language mean anything different? What's the significance of this language?" They are very reticent to say much of anything. It is sort of like, "Well, you know, it is kind of like the federal standard," and they really do not have an answer. For whatever reason, lawyers are just very hesitant. Maybe it is because it is not taught in law schools, but lawyers are very hesitant to go down that road, which I think is a shame. And it probably supports the purpose of this conference today, which is to urge folks to look into state constitutional law and urge law schools to teach state constitutional law. I think that is one of the issues.

One other reason—I do not think it is laziness or that state judges are trying to make their lives easier. There are a couple of things that I have noticed. One is the judges are hesitant about creating unintended consequences, muddying up the law, or creating problems. A lot of state judges want to move incrementally and sometimes that leads to moving too incrementally but, nonetheless, that is an issue.

Also, I think judges want to distinguish state constitutional law for principled reasons, the text or the drafting history or the state has a different custom. But in a lot of states—at least the opinions I have read—the use of state constitutional law is more reactive. Judges do not like what the U.S. Supreme Court did, and so rather than reading the text of the state constitution, they just say, "Well, we don't like what they did, so we are going to impose a more liberal rule." So I think that

sometimes judges could be suspicious of one another as to what the reasons are for reading a state constitution differently unless you present the principled argument. So all of those may be reasons why state constitutional law is moving more slowly than federal constitutional law. The premise of the question is exactly right. I think there is no doubt that state constitutional law is moving more slowly.

Professor McAllister:

Comments from Arizona?

Chief Justice Berch:

I agree that state constitutional law is developing more slowly [than federal constitutional law], for all the reasons that have been suggested. Primarily, the lawyers are not raising these issues, and when you question them about it, they do not articulate a reason why the analysis under the state constitution should differ from that under the federal constitution.

Judge Sutton:

Can I add one point? Justice Brennan wrote a landmark law review article<sup>32</sup> in the *Harvard Law Review* in 1977, and his basic point was that state constitutions should be used to obtain individual liberties results that could not be obtained under the Federal Constitution.

There is one downside to the article: the whole premise of state constitutionalism is a results-only one. Justice Stras's comment resonated with me—that sometimes people think you are just playing a game by invoking the state constitution and that is not the way this is going to work. It will not succeed if that is the way people perceive it. Whereas, people should say, “Wait a second. The language is different. The history is different. We are Alaska. Privacy provisions are going to be a little different in Alaska. Or Utah, where free exercise of religion provisions are going to be a little different and mean a little something different in Utah from the U.S. Supreme Court.” It seems to me that would be much more effective.

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32. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

Professor Berch:

I think you are right, and it would be much more effective if scholars would just assist. But if that article were addressed—and I think it was—to lawyers, all lawyers think about is results and they still do not come through. I mean we are talking about from 1977, almost forty years ago, and a lot of others, Hans Linde and others, I think came before this one. So while I agree, the focus should have been different, the message has not been carried to the lawyer. I do not know why. It is very depressing.

Professor McAllister:

Let me ask you about that. Having been a lawyer, although not one that typically raises state constitutional questions but usually fends them off for the state not wanting a rule different than the federal rule, how do you go about interpreting a state constitution? For the U.S. Constitution at this point, you have all the *Federalist Papers* and you have 200 years of case law and lots of different provisions, but my sense is that in many states that is not really available for the lawyer or for the justices. So how do you go about interpreting a state constitution and what advice do you have? We have a lot of students in this room. So now they know to look to the state constitution, but how are they actually going to brief an issue that gets the state court interested and takes it seriously that this is something they should think hard about?

Professor Berch:

Well, in Arizona it is interesting. We had some of these provisions in 1886, and then in 1910, and we copied them from Washington and made minor changes. So there is a good record. There really is a good record there. Other states may not have such a record, but at least you know from whence it came and you have judicial decisions of these other states. Language—I mean you do not have to read Hart and Sacks to know that anytime you have a provision, the first thing to do is look at the provision. I think the text means something.

Originalism is a 1791 concept when we talk about the Federal Bill of Rights. When you talk about the 1910 Arizona Bill of Rights, it is what was done in 1910. So you have a whole different perspective. I would just plea that anytime you have a statute, you have the same problems of construction, you have the same interpretive problems, and you have to look at the words and you have to look at the context. What is the history of the times? Arizona had some labor disputes at the time. Maybe that is the reason why we allow people to have guns in defense of

themselves. You have to look at the real history and not just the legislative history, but the real history of the times. I think that is what to do.

Justice Stras:

I agree with Professor Berch. You use the same methodology with state and federal constitutional law. Whatever your methodology is—at least I use the same methodology with respect to the Federal Constitution as I do with respect to the state constitution. You may have a little less information because you do not have as much evidence of drafting history and things like that. On my first five months on the job, it has really struck me how many unresolved federal constitutional issues there are. For example, when does double jeopardy apply in the plea context? So you start with a text, but for me it is really about using the same methodology. Now, maybe I am wrong about that and maybe it will evolve over time, but the problem has been that some judges have not been willing to use the same methodology that they have used with respect to the Federal Constitution with respect to their own state constitutions and maybe that is a lack of awareness, but I use the same methodology.

Chief Justice Berch:

History and context are lots of fun and are fertile sources of information. The history and context of Arizona's constitution show that it was written in 1910, so post the original Bill of Rights, but pre-incorporation. We know that when our founders were drafting the Arizona Constitution, they wanted to create some affirmative rights for the citizens, and we have a pretty good verbatim record of some of the conversations.

Those conversations provide interesting insight, but there are times when the founders simply said, "Here's what Washington did. We should just do that." Everybody says aye and they move on. So lawyers look at what Washington did and get the history of the Washington provision. But we [on the Arizona Supreme Court] are not bound by that—or by what the Washington courts have said about their parallel provision since the time of its passage. We look at where we were at that point in our history and what we think the provision meant to the drafters of the Arizona constitution. And we also look at similar provisions from across the nation.

Who else has similar provisions? We have found that the ones from Washington were also used in Montana, a few of them were used in

Texas, a couple seem to have come from Florida. By the way, our constitution is very detailed in some areas, and it gets into things like gun rights and private property rights, education rights—including higher education rights to tuition as nearly free as possible—intimate associations, privacy, and other areas. It is full of affirmative rights. I would encourage all of you to read your state constitution. It is likely a fun document rich in history and probably a fertile source of claims that you can bring up on behalf of your clients.

Justice Stras:

The Minnesota Constitution is interesting because, being an agricultural state, we have a ton of agricultural provisions in our constitution. My guess is, and I am not sure about this because I have not read the Kansas Constitution lately, but my guess is Kansas has a lot of agricultural-type provisions as well. I do not know if that is true or not, but it is very interesting because state constitutions do cover a lot of things that are unique to the particular state. We have a number of taxation provisions—which are different from federal provisions—restricting state authority to tax certain entities like churches and houses of worship. So it is really interesting to see that divergence between the state and the Federal Constitution.

Professor Berch:

Let me ask a question of the Chief Justice if I can, and I do not know the answer. This has nothing to do with my crazy idea. I am finished with that for a while. When you become an Arizona attorney—and I forget because it has been so long ago when I took the oath—you obviously take an oath that you have read the rules of professional responsibility and you take an oath you will uphold the constitution and the laws of the State of Arizona and the Federal Constitution. Is there anything else more specific?

Chief Justice Berch:

Yes—I hate to answer Michael's off-the-cuff questions. Every lawyer who takes the Oath of Admission in Arizona also affirms that he or she has read the Lawyer's Creed of Professionalism of the State Bar of Arizona. The oath contains the general provisions to faithfully and impartially discharge the duty to adhere to the Constitution of the United States and the constitution and laws of the State of Arizona and to follow the rules of professional conduct. But it also references the Lawyer's Creed, which is much more specific.

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Professor Berch:

Well, why don't you have them certify that they have read the Constitution of the State of Arizona?

Chief Justice Berch:

I think I will do it as a matter of judicial education and training.

Professor Berch:

Maybe they should not practice law unless they have read the constitution, because I believe many have not read it.

Chief Justice Berch:

Maybe they should have read it during their three years of training at ASU Law School.

Professor Berch:

I think you are right on that one.

Judge Sutton:

I was just going to say one other thing. I mean the fact that there is not much there for a lawyer is not necessarily bad.

Chief Justice Berch:

It provides a certain freedom.

Judge Sutton:

Exactly. There are histories and there are people who have not looked at them and that is exciting. That is an opportunity for the lawyer. Your job at that point is to come up with a pragmatic answer; something that wins for your client, that will work for the next case, and makes sense.

Professor McAllister:

To make sure I am clear, would you say there is or is not any difference between interpreting the U.S. and the state constitutions, and if there are differences, what are they?

Judge Sutton:

Perhaps elected judges should be more aggressive in interpreting the provisions. There is more room to be practical and pragmatic.

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Professor Berch:

One more thing that you might want to think of—and it has been some time and you will help me with federal courts—but maybe another problem with the state constitution is we do not have the dialogue with the federal courts. We always talk about dialogue when it is diversity, as you know. State law governs, but there is a dialogue with the federal courts. Some time ago in the *Pennhurst*<sup>33</sup> case the Court said that you cannot grant injunctive relief against the state official for violating state laws, including the state constitution. I assume they do not get into this area at all. If there is no way that a federal court is going to get into state law, even for a damage action because they either abstain or certify the question to the state court, then there really is not a dialogue and maybe that is a shame. Maybe it would be better if, once in a while, the federal court would look into the state constitution and say it means this. Then, of course, the state court does not have to follow it, but then the dialogue starts.

Judge Sutton:

Could we raise it sua sponte?

Professor Berch:

Oh, come on. Alright. That is just another point.

Professor McAllister:

Well, if you think that state judges either have or, in fact, might be more aggressive in interpreting the state constitutions, what are the advantages or disadvantages to that more aggressive view—or a robust view—of rights under the state constitution? Is it all on the plus side that that is just good for the people of the state or are there downsides to the state or state courts? As we have heard Justice Martin talk about North Carolina, many states—Kansas tends to be a lockstep state—there must be something that attracts the justices to that kind of an approach. What do you see as the pluses or the negatives of an aggressive versus a lockstep approach?

Chief Justice Berch:

I think Judge Sutton started us off well by talking about the lockstep approach and the advantages that it has. It is easy and it makes training

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33. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981).

the police officers easy and so forth. None of that, frankly, really moves me. I think that we have a very specific constitution. It would be fun to interpret it more often. But the parties have to raise the issues. We have on a couple of occasions asked them to brief such issues, and they have not done a very good job. They have not been very creative about saying, “Although this language looks the same [as that in the federal constitution], Arizona’s worker’s compensation scheme was motivated by the mining industry,” which actually is true in Arizona. There is a lot of history and background. There are a lot of things that we could do, relying on our own constitution, to better protect our own people. Now, I have to say, when you were making your comment that *state* judges should be bolder, I thought you spoke like a true federal judge.

Judge Sutton:

I know. It is a very fair point.

Chief Justice Berch:

On the other hand, until this last election,<sup>34</sup> by and large, retention elections in the states have almost always resulted in retention of merit selected judges, so in some ways, we have had quite a bit of job security—though not lifetime tenure. Even when there were campaigns against merit selected and retained judges, they tended to sway the voting by only three or four points. I now think, after recent elections and some of the recent elections campaigns, there are going to be more issue-based campaigns against merit-selected judges. I agree with Judge Sutton’s point that judges have agreed to adhere to the constitution and laws of their state and have a duty to do that. If they are unwilling to do that, then this is not the job for them. A judge should be willing to give up this job and go back into private practice or go back to wherever he or she came from.

In terms of interpreting state constitutions, do I wish that we were more active about it and that lawyers were more interested in raising such issues? Yes. Arizona’s constitution is a fascinating document with a great history. If you take one thing with you from this conference, read your state constitution, have some fun, brainstorm it with others in your office, call your law professors (they will probably still talk to you on the

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34. In Iowa’s November 2010 retention election, voters threw out three state supreme court justices involved in a ruling that would have allowed same-sex marriage in Iowa. A.G. Sulzberger, *In Iowa, Voters Oust Judges over Marriage Issue*, N.Y. TIMES, Nov. 3, 2010, available at <http://www.nytimes.com/2010/11/03/us/politics/03judges.html#>.

phone after you get out of here and have clients). Talk to them about claims that might be raised. It is a brand new field. It is fertile. It is fun. Go for it.

Justice Stras:

To add to the prior point, I think that it is likely that with what happened in Iowa with the retention election in light of the principle of unintended consequences—the unintended consequence we are likely to see is exactly the opposite of what Judge Sutton advocates for, which is, when you move out of lockstep, you open yourself up to really vicious attacks because then it can look as if you are making up rights. If federal law has not given you these rights, then it looks like the state judges—even if it is based on a principled ground, some sort of textual hook, the drafting history, or whatever it may be—you have opened yourself up to attack. It looks like you are an activist judge even though you may not be. Perhaps we are going to see the exact opposite. We are going to see even slower movement of state constitutional law rather than quicker movement, which is very, very unfortunate.

Professor McAllister:

Does that suggest that Justice Brennan's article may have created an impression, perhaps, that state constitutional law really is not constitutional law? It is just a policy preference that differs from what the Supreme Court of the U.S. has said? Or do we consider state constitutional law as truly a coequal form of constitutional law to federal constitutional law?

Chief Justice Berch:

It is one of those Hart and Sacksian types of questions. That is, it is in the eye of the beholder what it means. One could argue that federal constitutional law is not constitutional law either—that we are sort of making up what these terms mean as we go along. It all strikes me as judicial law because we are trying to figure out what words mean that really have no prior definition. Is it a different kind of interpretation? I am not really sure it is. I think it is more directed. I think we have more words to work with. I think we probably have a little more guidance in our state constitutions, which tend to be longer [than the federal constitution]. In many states, they actually have less guidance historically, but more guidance in terms of what the documents themselves actually say.

Judge Sutton:

I think some people look at state constitutional law and they say it is really not constitutional law because when they think of constitutional law they think of the great individual rights cases, and they are all countermajoritarian. Then they learn a little about state constitutional law, and they learn that most state constitutions can be amended with a fifty-one percent vote. That does not sound very countermajoritarian. The people who interpret the document are elected by a fifty-one percent vote. That does not sound very countermajoritarian. They do not have life tenure. But some of the most important parts of constitutional law are the structural provisions. In that sense, the U.S. Constitution and state constitutions are exactly the same and just as important in terms of setting up the structure of government.

When it comes to the individual liberties guarantees, it may be that the U.S. Constitution has a defect and so do the state constitutions. The U.S. Constitution's defect may be that it is too hard to amend and the state constitutions' defects may be that they are too easy to amend.

The average American, I suspect, would take the view that when they think of a judge that they want on their state supreme court, they want someone who every now and then is going to do what the people do not want. They actually think that is what part of judging is—that it is a nonmajoritarian job and that they do not think it is good for judges to just put their finger in the wind and see which way the winds are blowing and then interpret the clause.

I still think there is that tradition. It is an area where we benefit from the fact that most Americans think of state and federal judges as the same, as both doing countermajoritarian work.