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Who Defends: Judge Sutton's Vision and the Challenge of a Plural Executive

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It's no secret that this is a perilous moment for American democracy. We're nine months out from a deadly attack on the U.S. Capitol, launched with the explicit goal of disrupting the peaceful transfer of power following the 2020 presidential election. Congress appears gridlocked on basic questions of debt and spending, and the possibility of a default before the end of the year remains a live one, with the covid pandemic still ongoing. The U.S. Supreme Court is facing an unprecedented legitimacy deficit in the eyes of the public. Election experts warn that future American elections, including the 2024 election, are at serious risk of subversion or outright theft. Surveys reveal that a significant majority of Americans believe our democracy is in serious peril.

In light of all of this, it's tempting to focus on our national institutions, both to diagnose dysfunction and to seek solutions. But the interlocking crises we face also make this an important moment for looking to state and local law and governance. State and local governments are important players in the unfolding national stories described above; they also provide alternative approaches to governance and institutional design that warrant consideration in the context of a federal system under serious strain. In some instances developments in the states supply important antecedents or context for understanding the current moment in American life. And as scholars like Miriam Seifter and Jessica Bulman-Pozen have shown, attending to state law may provide conceptual and practical tools for challenging antidemocratic moves, in ways that may have both state and national impact.

Against this backdrop, Judge Jeffrey Sutton's recent book, *Who Decides? States as Laboratories of Constitutional Experimentation*, provides an important overview of various aspects of state constitutional design. It's a sprawling exploration of structure and the allocation of power in the states, with deep dives into state judiciaries, legislatures, executives, local governments, and amendment processes. There's much to discuss in each of the chapters, but I'll limit myself to one topic here: the role and authority of various state officials in the context of state and federal litigation.

One of the clearest and best-known instances of federal-state divergence is in the design of the executive branch. While the federal constitution vests the executive power in "a President," who alone is elected, together with the vice president, the vast majority of states elect not only a governor but a number of other state officials, including, in most, an attorney general. (Forty-three states elect their attorneys general; in Maine the attorney general is chosen by the legislature, in Tennessee by the state supreme court, and in the remaining five by the governor.) The dominant state model of an independent attorney general stands in stark contrast to the federal attorney general, who is presidentially appointed and serves at the pleasure of the president. Despite different selection mechanisms, state attorneys general do resemble the federal attorney general in many ways: they advise on pending legislation; counsel state agencies; provide written opinions; and represent the state in litigation. When it comes to litigation, state attorneys general may serve more than one role: as counsel to state officials who are named in lawsuits, and as parties when they themselves are named defendants in challenges to laws they enforce. (They are also, with increasing frequency and in increasingly high-salience cases, in the affirmative posture of initiating lawsuits against private parties, the federal government, or other state officials.)

Although the attorney general is typically in the position of defending state statutes when they are challenged in court, at times attorneys general have opted not to defend state laws. I've suggested [elsewhere](#) that where there's no state-law obstacle to their doing so, state attorneys general should be free to decline to defend laws they conclude are unconstitutional. But the decision to do so carries consequences for the continuation of litigation. That is, *who defends?*

Woven through Judge Sutton's book are state-court disputes and other sorts of stories from the states. A number of them feature clashes between different state officials over the fact or direction of litigation—perhaps unavoidable in the context of plural executives. In one such dispute, Georgia's governor sued the state's attorney general, seeking to end an appeal in a redistricting dispute. State statutes and constitutional provisions pointed in different directions over who should prevail in the event of a litigation conflict between these two constitutional officers. In the end, the state supreme court declined to resolve the ultimate question of relative authority. Instead it relied on a provision of law that seemed to grant the attorney general the authority over this particular dispute, sidestepping questions both of governor/attorney general authority, and of any separation-of-powers problems raised by the legislature's involvement in the dispute.

Reading this description, and others, drives home how carefully state courts have approached questions of relative authority in litigation of this sort—and, by contrast, how thinly reasoned the U.S. Supreme Court's treatment of similar disputes has been. Indeed, in related contexts, when faced with questions regarding authority to appear on behalf of the state or to defend state laws, the Court has shown itself remarkably uninterested in the details of state institutional design choices and relevant state-law principles. This was on particular display in *Hollingsworth v. Perry*, the federal litigation over the constitutionality of California's Prop 8. In that case, the U.S. Supreme Court held that Prop 8's proponents could not defend the initiative in federal court, despite the California Supreme Court's conclusion, in response to a certified question from the Ninth Circuit, that the proponents were "authorized under California law to appear and assert the state's interest in the initiative's validity." Despite this unanimous conclusion, the U.S. Supreme Court found that the ballot-initiative proponents were not "agents" of the state for Article III purposes, and thus could not defend the initiative in federal court. As Justice Kennedy protested in dissent, "Article III does not require California, when deciding who may appear in court to defend an initiative on its behalf, to comply with the Restatement of Agency or with this Court's view of how a State should make its laws or structure its government."

Just last week, the Court heard arguments in *Cameron v. EMW Women's Surgical Center*, a case presenting the question whether a state attorney general, after seeking and obtaining dismissal from a case, can intervene following an appeals-court loss. The questions in the case are largely questions of federal jurisdiction, but embedded within the case are questions of power and authority under state law. But the justices' [questions](#) during last week's arguments suggested no real interest in grappling with those questions or understanding the state-law dynamics. Chief Justice Roberts mused generally that "once the [health] secretary is out of it, Kentucky maybe ought to be there in some form, and the attorney general is the one that wants to intervene." Justice Breyer, without referencing any specific provision of law, asked "First, the Republicans are in, then the Democrats are in . . . for the first time, we have an Attorney General who thinks it's a pretty good statute-- if Kentucky law allows him to make the argument, why can't he make the argument?" Again, in this case, the federal-law questions seem actually to be most relevant. But it is nevertheless important for the Supreme Court to understand the state-law context and various officials' authority as it decides the case.

There's much in the book that I wanted to see more of: the description of state analogues to the federal independent counsel statute feels cursory, for example. There's also very little discussion of crucially important questions of state election administration—in particular the mechanisms by which states devolve election

administration to local authorities, and the role of state courts in interpreting election-related statutes and state constitutional protections for voting rights. The latter two issues could prove highly significant to a future presidential election, in light of the argument advanced by the Trump team in 2020 that the “independent state legislature doctrine” gives state legislatures alone the power to run federal elections.

Still, the book manages both broad coverage and real depth. This makes it an invaluable resource, both in its own right and as a starting point for future explorations of important questions of constitutional structure in the states.