21ST CENTURY FEDERALISM: A VIEW FROM THE STATES

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Thank you, Judge Rao, for the introduction, and thank you to UVA for hosting. My son graduated from the University of Virginia School of Law last year and was a member of the Federalist Society, so it's great to be back with you all. Thank you for inviting me.

It's hard to find a tasteful COVID story, but let me see if this one counts. In the Fall of 2020, I was teaching at Ohio State. And if you remember, that was not an easy time to teach or to manage a law school. Ohio State was trying to accommodate live learning, hybrid, and a little of everything.

On the first day of class, we are in an auditorium about this size at Ohio State, and we have the folks that are online projected on the screen. And then I have students suitably spaced in front of me, everyone with masks. And if you've taught with a mask or spoken for a long time with a mask, you know it's not easy. Your mouth gets dry, and it's just not great, but of course necessary, certainly back then.

And just as class was about to begin, I thought to myself, "Ah, I should have brought a bottle of water. One, my mouth's going to get dry. And two, it's a great explanation for keeping your mask down for a little while." But then I remembered that Ohio State, to its credit, put together a COVID-precaution goody bag. It had instructions, Ohio State masks, wipes, and at the bottom, a bottle of

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water. So just as we're about to start, I grab it, take a big sip, and then pause, "What is that?" *Sanitizer*.

To my credit, I did not spit it out on the people in front of me. And then I'm thinking to myself, seventh grade science, "Is this one of those poisons you extract, or do you dilute it? This must be a dilution situation." I don't tell the students what's going on. It's the first day of class, and it's still within the add-drop period. Who takes a class from somebody who drinks sanitizer?

So I calmly walk out of the class. Amazingly, for all its precautions, Ohio State left the water fountains going. And so I was able to drink a lot of water, get back in, and never tell my students what happened. And let me just alert you here: I don't think you need this alert, but the sanitizer taste does not go away quickly.

Some of you are thinking, "Well, there was a silver lining, right? You just had this big shot of alcohol, and what's not to like about that?" Well, I'm not a scientist, but there must be at least two types of alcohol. Hand sanitizer has none of the properties you might be thinking of. It just tastes really bad. So congrats to UVA for getting a really smart speaker to start things off.

I want to open by thinking about state courts, state constitutions, and federalism through a few lenses. The first is that of careers. I was not able to hear Governor Glenn Youngkin's remarks yesterday, but I was thrilled to hear that he recommended careers in state government, because I do too.

My biggest break as a lawyer was becoming the Solicitor General of Ohio in the mid-1990s. It may be true, as one of the professors said in the last panel, that going to Columbus is not as prestigious as going to D.C. I'm not so sure. I guess it depends on how you define prestige. If you define prestige as getting something done, I would say going to Columbus or Richmond is more prestigious.

But put prestige aside. The real point is that the states are nimbler and are a great place to go as a young lawyer if you want responsibility. Serving as Ohio's Solicitor General was the key break in my career. Maybe more importantly, it was my favorite job. I love my

current job, but I never had a better job than being Solicitor General of Ohio. So, that's from the perspective of careers.

I'll turn now to the perspective of the rule of law. It's the rare law student that doesn't have some idealism. There can be practical reasons for going to law school, but I'd like to think most law students go to law school with some idealism in mind. They care about things like justice, rule of law, or fairness.

In this country, if you care about the rule of law, you must care about the state courts and the state constitutions that go with them.[1] In the last year for which we have numbers, 83,000,000 civil and criminal cases were filed in state courts.[2] The counterpart number in the federal courts is 400,000.[3] Eighty-three million to 400,000. If you drill down to just the criminal cases, it is 17,000,000 to 70,000.[4] With over 200 state criminal cases for every one federal criminal case, the states are where most liberties are lost or preserved and where the rule of law exists or does not.

So, I don't know how you can care about the rule of law and not care about what's going on in state courts. That is where so much of the action is. Every one of those cases, of course, is a case where state constitutions could make a difference. I can't resist saying that this probably explains why we have only one state court judge on the panel and two federal judges—because federal judges don't have as much to do. And the state court judges are so busy. They

1. *See* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 1–2 (2018).

2. CT. STATS. PROJECT, NAT'L CTR. FOR STATE CTS., STATE COURT CASELOAD DIGEST: 2018 DATA 7 (2020), https://www.courtstatistics.org/data/assets/pdf_file/0014/40820/2018-Digest.pdf [https://perma.cc/27VE-R97L].

3. Admin. Off. of U.S. Cts., *Federal Judicial Caseload Statistics 2018* [hereinafter Admin. Off., *Statistics 2018*], U.S. CTS., https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2018 [https://perma.cc/A5EF-7TJ6] (last visited Aug. 14, 2022) (358,563 cases filed); Admin. Off. of U.S. Cts., *Federal Judicial Caseload Statistics 2020* [hereinafter Admin. Off., *Statistics 2020*], U.S. CTS., https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020 [https://perma.cc/MU46-Z9MB] (last visited Aug. 14, 2022) (425,945 cases filed).

4. CT. STATS. PROJECT, *supra* note 2, at 7; Admin. Off., *Statistics 2018*, *supra* note 3. *But see* Admin. Off., *Statistics 2020*, *supra* note 3 (93,213 federal criminal cases filed).

couldn't possibly come to UVA for a panel, unless they are very smart—see Justice Goodwin Liu of the California Supreme Court.

You should care about state courts and state constitutions for another reason. From time to time, the United States Supreme Court puts up a big red stop sign. They just say, "We're not open for business in this particular area."[5] And that can happen with respect to so-called blue rights, red rights, progressive rights, conservative rights—keeping in mind the danger of labels. The point is, it's completely neutral.

Once the stop sign goes up, you have two options. Option A is to embrace unhappiness. But pity only works for a little while. Eventually, you're going to grow tired of not being able to act on your impulse or conviction in a given area.

Option B is to go to the states. That sometimes means state legislators, sometimes state supreme courts, and sometimes state constitutional amendments. If you think of the current era—the cases decided by the United States Supreme Court in the last decade or two, and the ones winding their way through the courts now—there are a lot of areas where there is already a red stop sign. Option B in state court is the only one available.

Examples come readily to mind. Redistricting, for instance. The *Rucho v. Common Cause*[6] decision in 2019 says the First and Fourteenth Amendments do not speak to the issue.[7] If, like me, you have a problem with extreme partisan gerrymandering, you're going to have to go to state legislatures, adopt state constitutional amendments, form commissions, and file lawsuits in state courts. This is an area where it's dangerous to believe in labels and easy categories, and state courts often don't do what you might expect. Ohio is

5. SUTTON, *supra* note 1, at 2–3.
6. 139 S. Ct. 2484 (2019).
7. *See id.* at 2499, 2505.

a good example: it's a fairly conservative state where the state supreme court has now invalidated the last two Republican redistricting lines after the most recent census.[8]

Consider a few more examples where state courts are the only available option. The Takings Clause and the *Kelo v. City of New London*[9] decision offer a similar story. Professor Mahoney has mentioned the difficulty of winning relief under the federal Takings Clause.[10] Abortion regulation is another example. Whether pre-*Dobbs* or post-*Dobbs*,[11] there is some room for state regulation of abortion. And conceivably, after-*Dobbs*, there'll be room for regulation at the state court level. School funding is also a good example.[12] Anyone who cares deeply about property rights, even outside of the Takings context, including impairment of contract, licensing, and economic liberties cases, should care about state courts. Economic liberties cases since *Williamson v. Lee Optical*[13] have been a tough hill to climb in federal court. It has been climbed some, but not a lot.[14] The same is not necessarily true in state courts under

8. Adams v. DeWine, Nos. 21-1428 & 21-1449, 2022 WL 129092, at *2 (Ohio Jan. 14, 2022); League of Women Voters of Ohio v. Ohio Redistricting Comm'n, Nos. 21-1193, 21-1198, & 21-1210, 2022 WL 1665325, at *2 (Ohio May 25, 2022). As of May 2022, the court had struck down five proposed redistricting plans. *League of Women Voters*, 2022 WL 1665325, at *1.

9. 545 U.S. 469 (2005).

10. *See generally* Ann Woolhandler & Julia D. Mahoney, *Federal Courts and Takings Litigation*, 97 NOTRE DAME L. REV. 679 (2022).

11. *Dobbs*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022), was ultimately decided June 24, 2022.

12. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 55 (1973) (refusing to recognize a constitutional right to equal funding between and among public school districts).

13. Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

14. *See, e.g.*, Brantley v. Kuntz, 98 F. Supp. 3d 884, 894 (W.D. Tex. 2015); *see also* Golden Glow Tanning Salon, Inc. v. City of Columbus, 52 F.4th 974, 981–84 (5th Cir. 2022) (Ho, J., concurring) (suggesting there is more historical support for a federal right to earn a living than many substantive due process rights that the federal courts recognize).

state constitutions. Judge Willett wrote a great concurrence in a recent case that illustrates that.[15]

My next point concerns what we might call the scholarly or theoretical perspective: how is it, or why is it, that a state court could take a different path from the United States Supreme Court? The United States Supreme Court puts up a stop sign, "We are not open for business in that area." Reasons abound for interpreting counterpart state guarantees differently.

Some reasons are obvious from the state constitutions themselves. I do not have the authority to impose a homework assignment, but I think as a matter of conscience you should do what I am about to ask, and it takes only five minutes. Pull out Article One of your state's constitution or the constitution of the state you are planning to practice in. You will learn a lot by reading Article One.

Article One in almost every state constitution is where the drafters put rights.[16] Professor Amar has pointed out that many states at the founding had a Declaration of Rights.[17] Today, they all have a Declaration of Rights.[18] They are sometimes called a Bill of Rights.[19] You will see they are not just the familiar provisions from the federal Bill of Rights and Fourteenth Amendment. You will see a lot of unique provisions, and then you will see a lot of similar provisions but with more specific language. For example, a state provision

15. *See* Patel v. Tex. Dep't of Licensing & Regul., 469 S.W.3d 69, 92–123 (Tex. 2015) (Willett, J., concurring). "Today's case arises under the *Texas* Constitution, over which we have final interpretive authority . . . [and] nothing in its 60,000-plus words requires judges to turn a blind eye to transparent rent-seeking that bends government power to private gain, thus robbing people of their innate right—antecedent to government—to earn an honest living." *Id.* at 98; *see also* Ladd v. Real Est. Comm'n, 230 A.3d 1096, 1109, 1116 (Pa. 2020) (concluding that a licensing regime violated the Pennsylvania Constitution's right to pursue a chosen occupation).

16. *See, e.g.*, NEV. CONST. art. I; IDAHO CONST. art. I; TEX. CONST. art. I; ME. CONST. art. I; TENN. CONST. art. I; GA. CONST. art. I; FLA. CONST. art. I; VA. CONST. art. I; S.C. CONST. art. I; CAL. CONST. art. I; WASH. CONST. art. I.

17. AKHIL REED AMAR, THE WORDS THAT MADE US: AMERICA'S CONSTITUTIONAL CONVERSATION, 1760–1840, at 312 (2021).

18. Clint Bolick, *State Constitutions: Freedom's Frontier*, 16 CATO SUP. CT. REV. 15, 16 (2016).

19. *See, e.g.*, VA. CONST. art. I.

may protect free exercise, but also include a right to conscience.[20] They often have different words with a different meaning or more words, often with more meaning. That's a good reason to interpret those provisions differently from a parallel federal provision.

Local history and culture offer another explanation as to why a state court may choose to chart a different path. Think of states like Utah, Rhode Island, Maryland, and Pennsylvania; all were founded by religious dissenters.[21] It would be strange for them not to think of that history in construing their free exercise clause, potentially construing it in a more muscular way than, say, the United States Supreme Court did in *Smith*.[22] State courts have a free hand to customize constitutional guarantees to account for regional circumstances, while the United States Supreme Court may not.

The biggest areas of fundamental disagreement between state courts and the United States Supreme Court often have legitimate explanations. One explanation is that some constitutional provisions are written in the most general terms. What process is "due"? When is a search "unreasonable"? What speech is "free"? Those kinds of general terms frequently demand disagreement. It would be odd, it seems to me, to have them all mean the same thing for the whole country in fifty-one constitutions.

Here's an even better explanation for disagreement—one that applies in half the cases. Judges, appellate judges, in particular, take methods of interpretation seriously. We're not perfect, we don't always follow them consistently, but we do our best, and we do care about them.

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20. *See, e.g.*, WASH. CONST. art. I, § 11.

21. *Path to Utah Statehood*, PBS, https://www.pbs.org/wgbh/americanexperience/features/mormons-utah/ [https://perma.cc/5Q25-J325] (last visited Aug. 7, 2022); *Religion and the Founding of the American Republic: America as a Religious Refuge*, LIBR. OF CONG., https://www.loc.gov/exhibits/religion/rel01-2.html [https://perma.cc/3AVY-8NWA] (last visited Aug. 7, 2022).

22. *See* Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 890 (1990).

For all the labels out there about constitutional interpretation, federal constitutional law cases break down into two rough categories.[23] On one side, you've got formalism, fixed meaning, textualism, and originalist public meaning. On the other side, a more fluid, more evolving, more informal, more purposivist interpretive methodology. That is basically all of federal constitutional law.

Why is it worth identifying that dichotomy? Well, if the precedent at the federal level happens to be a more formal, originalist precedent, and you happen to be arguing in an informal court, a court that embraces living constitutionalism, a court that is less textual, you've just established that the federal precedent is presumptively wrong. If they take methods of interpretation seriously, they should think it's presumptively wrong. That means roughly half of the time state courts should find the relevant federal precedents not helpful.

The last reason for disagreement is that time has not been kind to all areas of federal constitutional law. Let me give you an illustration of one doctrine that you ought to be skeptical of. Think of the "tiers of review" that federal courts apply to some rights. That doctrine has grown and evolved. It started as two tiers of review and then became three with intermediate scrutiny, then we added rational basis plus.[24] By now, some say we have seven tiers of review.[25]

In a way, it looks legitimate—it's almost biblical, right? On the first day, God gave us rational basis, and the second day He gave

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23. *See* JEFFREY S. SUTTON, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION 126 (2021); *see also* Gerard Clark, *An Introduction to Constitutional Interpretation*, 34 SUFFOLK U. L. REV. 485, 486 (2001) (breaking down the modes of constitutional interpretation into two categories).

24. *See* Joel Alicea & John D. Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, 41 NAT'L AFFS. 72, 73–76 (2019) (tracing the history of the tiers of scrutiny); *see* Maxwell Stearns, Obergefell, Fisher, *and the Inversion of Tiers*, 19 U. PA. J. CONST. L. 1043, 1046–47 (2017) (arguing that there are five tiers of scrutiny, including rational basis plus).

25. R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 226 (2002) (arguing that the U.S. Supreme Court has used as many as seven different standards of review).

us strict scrutiny, and so on. But at some point, we ought to acknowledge that the tiers of review are not inevitable; they don't stem from a clause in the Constitution.[26] Something else might deserve a try. There's balancing, as Justice Stevens long advocated.[27] There's class legislation, which was the model in the nineteenth century.[28] There are other options out there. And I doubt that "tiers of review" is the only federal constitutional doctrine that has not aged well. So it seems to me that there are often good explanations for state courts to chart a different course.

One last point. How is all of this good for federal constitutional law? First of all, if you're an originalist, it would be strange not to pay attention to state constitutions. In fact, I don't know how you can do originalism without paying attention, particularly to the development of state constitutions between 1776 and 1786.[29]

All of the key guarantees in the federal document come from one and often several state documents.[30] Cases like *Heller*, where the United States Supreme Court looked to state guarantees to interpret the Second Amendment right to bear arms, confirm that point.[31]

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26. *See* Alicea & Ohlendorf, *supra* note 24, at 73.

27. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 211–13 (1976) (Stevens, J., concurring).

28. *See* SUTTON, *supra* note 1, at 92–108, 115 (describing the class litigation model prior to *Buck v. Bell*, 274 U.S. 200 (1927)); *see also* Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindeness*, 96 MICH. L. REV. 245, 252–53 n.29 (1997) (tracing the historical use of "class legislation" in the law from the mid- to late-nineteenth century).

29. *See* Gregory E. Maggs, *A Guide and Index for Finding Evidence of Original Meaning of the U.S. Constitution in Early State Constitutions and Declarations of Rights*, 98 N.C. L. REV 779, 811 (2020) (addressing the value of state constitutions when attempting to discern the ordinary meaning of words in the U.S. Constitution at the time of its adoption).

30. *See id.* at 781 ("James Madison relied heavily on the various state declaration of rights when he drafted the Bill of Rights in 1789."); SUTTON, *supra* note 23, at 122.

31. *See* District of Columbia v. Heller, 554 U.S. 570, 584–85, 591, 600–03 (2008); *see* Maggs, *supra* note 29, at 781–82 ("The Supreme Court, for instance, has cited early state constitutions and declarations of rights in more than one hundred cases [to make claims about the U.S. Constitution's original meaning]. One example is *District of Columbia v. Heller*, where the Court held that the Second Amendment protects an individual's right to keep and bear arms. In reaching this conclusion, the Court relied, in part, on provisions in four early state constitutions that were similar to the Second Amendment." (footnotes omitted)).

The second point turns on the Brandeis model of states as innovative laboratories.[32] This is a benefit of federalism that we can all embrace. Think of it this way. If you have a difficult problem, why experiment all at once with one country, three-hundred and thirty million people, fifty-one sovereigns, and God knows how many local governments?[33] It's better to let a smaller territorial government do the experimentation. If it works, the idea can spread.[34]

Brandeis's insight applies equally to federal constitutional law and rights innovation. Do we really want a top-down model where we race to D.C. and the winner takes all? Sure, it's great when you are the winner and you constitutionalize something you love, but it leads to a lot of resentment when the opposite happens.

Why don't we let states go first? With legislation, we often start with states and then nationalize proven solutions. The same ground-up approach works for courts and the development of constitutional interpretation of general terms or the innovation of new rights. Letting states be the primary agents of change is going to improve the United States Supreme Court's decisions. It's going to lower the resentment from counter-majoritarian decisions at the federal level, because states will be leading the way. And the odds are a little higher that you're going to get to a good outcome.[35]

The Brandeis model leaves us with a broader insight: Uniformity isn't everything. And that's a point I wish we would embrace more in America circa 2022. There are many areas of public policy where there are legitimate reasons for taking a different path. And one virtue of federalism is that it allows local governments, whether states

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

33. *See United States Population 2022 (Live)*, WORLD POPULATION REVIEW, https://worldpopulationreview.com/countries/united-states-population [https://perma.cc/KE62-6DP4] (last visited Oct. 10, 2022) (stating that the United States population is currently over 338 million).

34. *See* SUTTON, *supra* note 23, at 373.

35. *See* SUTTON, *supra* note 1, at 2, 60–62.

or cities, to embrace one approach without imposing it on their neighbors.[36]

Thank you for inviting me.

36. *See* Kaytlin Roholt Lane, *Federalism, Now More than Ever*, 56 PENN. L.J. 4, 4 (2021) ("Federalism, [the Framers] believed, was the best way to ensure a harmonious union between separate states with distinct cultures and political preferences.").