THE RISING IMPORTANCE OF STATE COURTS

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The following is a lightly edited version of a speech by Justice Cook at Harvard Law School on April 1, 2023, at the Harvard Federalist Society's annual Alumni Symposium. Justice Cook delivered these remarks while moderating a panel titled "The Rising Importance of State Courts" which also featured Judge John K. Bush of the United States Court of Appeals for the Sixth Circuit and Boies Schiller Flexner LLP partner Jesse Panuccio.

I am honored to be here today to talk about why state courts are important and becoming more important. I hope I can bring a unique perspective. I have spent almost exactly half of my career in state court and half in federal court. Even more unique, I have just finished campaigning for the Alabama Supreme Court. And, right in the middle of my campaign, the *Dobbs* decision was leaked and then released. The fact that *Dobbs* transferred decisions about abortion from the federal level to the state level significantly intensified the interest of the voters in my race, and I think the Court will be sending other issues to the states. More than anything, *Dobbs* made me focus on the rule of law as a touchstone as I talked to people on the campaign trail. People became acutely aware of the importance of electing judicial conservatives to their state Supreme Court if they wanted a court which would say what the law *is*, rather than what it *should be*. As I told the voters (both face to face and in my television advertisements), I am "boring and predictable" and intend to remain "boring and predictable" and to approach each case with this attitude. Often, my wife came on the campaign trail and would confirm to the audience, that I am indeed "boring and predictable." Having campaigned for almost two years, I am confident that the voters of Alabama want judges who are boring and predictable; judges who do not surprise them. In fact, it may be time to rebrand originalism and simply refer to it as the "boring and predictable" approach.

Most of my early career was in state court. I spent time in rural courtrooms and tackling some large and some very small cases. There are 67 counties in Alabama, and I had cases in over 40 of them. It was a real eye-opening experience after spending three years in, some would say, the ivory tower at Harvard. Real people; real problems; real life; real solutions; real compromise; birds flying in the courtroom; depositions in front yards. It could be very personal. And, at least in the 1990s, subtle nuances were sometimes not the most effective arguments. When I began my practice in the early 90s, Alabama became known as "tort hell," and we were a poster child for the national Chamber of Commerce and the Wall Street Journal. Judicial restraint was not a

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priority for our Supreme Court. The BMW decision—the U.S. Supreme Court case placing limits on punitive damages—is an Alabama case from that time period.[1] The business community eventually fought back and hired Karl Rove to run judicial campaigns. Business eventually spent approximately $20 million in campaign contributions, but changing the composition of a state supreme court is not fast or easy. It took three election cycles to change the majority of the court to a more textualist based judiciary.

State court can sometimes be a very rough-and-tumble place to practice law. As an example, I helped a partner try a bench trial within a week or so of having passed the bar exam. We drove to this rural county for an afternoon trial. We went to lunch at the barbeque restaurant across from the courthouse. When we entered, there sat the trial judge, having lunch with the plaintiff's counsel. I do not say this to imply that this was unethical or even improper. It was not. In truth, they had lunch almost every day and had known each other for years. But this is not exactly how my civil procedure—or professional responsibility class—painted the everyday practice of law.

More recently, I have had the privilege to practice in federal courts across this country in some very large, complex cases. Federal courts work hard to get the answers right; they look carefully at nuances—but you don't always get that "personal" feel in federal court. In fact, sometimes, cases progress through summary judgement entirely on the papers—and never appear personally in the courtroom. I will also say that, in my experience, most federal courts tend to be at least somewhat hesitant to make rulings on state law, or state constitutions, or state government matters. In short, most federal judges who I know are very conscious of not overstepping their assigned role in our dual sovereignty model. And, when they do make such rulings, try to intrude as little as possible into matters of state sovereignty.

As a newly elected justice, I believe Alabama is becoming a place which has the best of both worlds—providing real remedies to real people, but also paying close attention to the nuances of complicated legal arguments. I promise you things have changed in Alabama over the last 30 years and that I will always strive to listen carefully to every argument by all lawyers from all sides.

Most of my career has been as a private practice lawyer and I am a very, very new justice. So, my perspective is mostly as an advocate.

As an advocate, I am shocked that state constitutional arguments are not made in every single case where constitutional claims are raised. As a private lawyer, my clients did not care which arguments worked; they simply wanted to win their cases.

We are in the final weekend of the NCAA Basketball tournament, and I am certain that every coach wanted two free throws for each foul and not just one. The same is true in the courtroom. First, I strongly urge advocates to make both arguments—federal and state constitution. Second, you should not assume that the wording in the state and federal constitution is the same or that the caselaw is the same. Third, do not assume that the result will be the same under both documents even if the wording and caselaw *is* the same.

[1] BMW of North America, Inc. v. Gore, 517 US 559 (1996).

If you haven't read Judge Jeff Sutton's book on the importance of state constitutional law, you are really missing something, and much of what I say today is heavily influenced by his book.[2] In fact, he uses this free throw analogy.

The Left is waking up to this. Justice Brennan—a lion of the Left—wrote a key law review article in the *Harvard Law Review* in 1977. It was entitled: "State Constitutions and the Protection of Individual Rights." The synopsis from the article is insightful, and I quote:

> During the 1960s, as the Supreme Court expanded the measure of federal protection for individual rights, there was little need for litigants to rest their claims, or judges their decisions, on state constitutional grounds. In this article, Justice Brennan argues that the trend of recent Supreme Court civil liberties decisions should prompt a reappraisal of that strategy. He particularly notes the numerous state courts which have already extended to their citizens, via state constitutions, greater protections than the Supreme Court has held are applicable under the federal Bill of Rights. . . .[3]

If a state supreme court renders a decision, we are almost always the final word, especially if we are construing our state's constitution.[4] State courts are where the action is today. State courts are where over 95% of all cases in the county are filed. According to the last numbers I have seen, there were 83,000,000 civil and criminal cases were filed in state courts.[5] The counterpart number in the federal courts is 400,000.[6] Think about it: 83,000,000 to 400,000. If you drill down to just the criminal cases, the disparity is even larger (17,000,000 to 70,000).[7]

Political groups know this. For instance, there was almost $4 million dollars spent on advertising in my Supreme Court race. Or, take North Carolina. Before the 2022 election, there was a 4-3 Democratic majority. They ruled that a constitutional amendment requiring voter ID was unconstitutional. Let me say that again slowly, they ruled that a part of their constitution,

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[2] JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018). Judge Sutton sits on the United States Court of Appeals for the Sixth Circuit.

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

[4] The United States Supreme Court rarely has any authority to review state court decisions based upon their state constitutions. Conceptually, they could decide that a state supreme court's interpretation of its state constitution (like its interpretation of a state law) somehow violates the federal Constitution. One example is the pending case from North Carolina regarding redistricting. The North Carolina Supreme Court (where Democrats held a 4-3 majority until recently) ruled that the proposed redistricting maps, drawn by the Republican Legislature, violated the state constitution. The Legislature then sought certiorari in the United States Supreme Court based upon the *independent state legislature theory*, claiming that the federal Constitution's elections clause governs over the North Carolina Supreme Court's construction of its constitution. That provision states that the time, place, and manner of congressional elections "shall be prescribed in each State by the Legislature thereof." Moore v. Harper, Docket No. 21-1271.

Regardless of the outcome in *Moore*, this type of argument is exceptionally uncommon and there is much debate over even this limited theory. Given that the North Carolina Supreme Court (with a newly constituted Republican majority) has granted rehearing in this case, it is also possible that the United States Supreme Court will not reach a result in this matter.

[5] 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].

[6] 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/statisticsreports/federal-judicial-caseload-statistics-2020 [https://perma.cc/MU46-Z9MB] (last visited Aug. 14, 2022) (425,945 cases filed).

[7] CT. STATS. PROJECT, *supra* note 5, at 7; Admin. Off., Statistics 2018, *supra* note 6. *But see* Admin. Off., Statistics 2020, *supra* note 6 (93,213 federal criminal cases filed).

approved by the people in a statewide election, was unconstitutional. It did not surprise me that in their 2022 Supreme Court election and after a hotly contested election, the people switched the court from 4-3 Democrat to 5-2 Republican.

Or, consider Pennsylvania. It is 4-2 Democratic. In a split 2020 decision regarding the hotly contested election for President, three Justices said undated mail in ballots should be rejected, while three Justices said undated ballots should count; and the seventh Justice said undated ballots should be rejected in the future but allowed in that year's Presidential election.

Or, consider Ohio. Until 2021, the parties nominated candidates but the party label was not listed on the general election ballot. After a Democrat won in the 2020 election and helped change the court balance, the legislature changed the law to put the party on ballot. Among its most contentious issues has been redistricting. The Democratic court twice rejected a Republican legislature's Congressional map, and that dispute is still ongoing.

Or, consider Wisconsin. Conservatives held a 4-3 majority (there were no party labels). In the first election after the *Dobbs* decision (April, 2023), a conservative and liberal ran for the same open seat. The main issue in the election was abortion and the liberal candidate and her supporters made abortion the major campaign issue. I believe that the total campaign spending, on both sides, will exceed $50 Million in that race. More than any other race, this election has made the election of state court judges appear like true political races for the legislature.[8] While I am a fan of the election of state court judges and federalism, I fear this trend. I wonder exactly how we can draw a line which does not mean the loss of the important respect courts need to enable us to resolve difficult and hotly contested cases.

So, there is a great deal of action going on in state courts today. This should not surprise us. The majority of our Bill of Rights came from pre-existing state constitutions in the 13 original states. At our nation's founding, the real need for protection was from state governments. The federal government was smaller than state governments. States ran everyday life. No one believed that the federal Constitution applied to states (and it really didn't—with a very few exceptions). Hamilton even said: "There is no need for a Bill of Rights because states would be sentinels over the rights of the peoples."

Judge Sutton has argued that it is less risky and easier for a state court to broaden an interpretation of a constitutional right. States have traditionally been our laboratories. It is part of the beauty of federalism. Allowing state courts to be the primary agents of change should hopefully improve the United States Supreme Court's decisions. It will lower the resentment from counter-majoritarian decisions at the federal level. Also, a state court can rule more broadly because it has a more homogeneous population and circumstances. Judge Sutton calls this argument the "federalism discount." State courts are much better positioned to recognize local conditions and traditions which bear on what those citizens perceive as truly fundamental rights worthy of constitutional protection. For instance, Wyoming citizens will probably be more protective of property and firearms and Utah citizens may be especially protective of freedom of religion.

[8] *See generally* Shawn Johnson, *For the first time in 15 years, liberals win control of the Wisconsin Supreme Court*, NPR (Apr. 4, 2023), https://www.npr.org/2023/04/04/1167815077/wisconsin-supreme-court-election-results-abortion-voting-protasiewicz-kelly.

Also, many states have mandatory appellate jurisdiction in their supreme courts, whereas the United States Supreme Court accepts only a tiny percentage of cases for certiorari each year. In other words, you are far more likely to make actual final, binding precedent if you go the state court route.

Also, state constitutions have different text and history, including some clauses that one may have never heard about: single subject rules, uniform law clauses, right to remedy clauses, title of bill clauses, among others. For instance, in Alabama we have the longest constitution in the United States, and we have a number of clauses that either are not in the federal Constitution, or which are notably different from the federal Constitution. Just a few examples are:

- Article I, §23: "nor shall private property be taken for private use. . . ."
- Article I, §13: "That all courts shall be open; and that every person, for any injury done him, in his lands, goods, or reputation, shall have a remedy by due process of law. . ."
- Article I, § 26: "Every citizen has a fundamental right to bear arms in defense of himself or herself and the state. Any restriction on this right shall be subject to strict scrutiny."
- Article I, §33: "The privilege of suffrage shall be protected by laws regulating elections and prohibiting . . . . improper conduct."

In addition, Alabama's constitution has an express separation of powers provision (arguably preventing certain delegation of legislative powers—Article III, §43), a one subject rule for each law (Article IV, §45), a provision preventing changing of the original purpose of the bill (Article IV, §61), and many "local" constitutional amendments which cover only one county. Standing is yet another area where states courts may reach a different result under their state constitutions than federal courts, a point which I recently noted in a special writing.[9]

One particularly helpful example which Judge Sutton's book explores is *San Antonio v. Rodriguez*.[10] This was an effort to force a constitutional right to equal school funding among school districts. The United States Supreme Court rejected this. Justice Powell reasoned that there was no right to education in the Constitution.[11] Diligent plaintiff lawyers did not give up. They brought state action in Texas state court and won, because there was language in the Texas Constitution which does discuss education directly.[12] Likewise, this happened in many other states. By Judge Sutton's count, there have now been 44 states where this type of claim has been brought and the plaintiffs have won 27 of them.[13] Plaintiffs in these cases may also have achieved results that are more broad than they could have received from the U.S. Supreme Court, given federal courts' hesitancy to order that state taxes be raised.

It is true that the dial probably moves in only one direction—more protection not less, meaning that the state court cannot restrict the protection given by federal courts under the federal constitution.

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[9] Hanes v. Merrill, No. SC-2022-0869, So.3d (Ala. 2023) (Cook, J., concurring).

[10] 411 U.S. 1 (1973).

[11] *Id*. at 35.

[12] Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989); Tex. Const. art. VII, §1 ("[I]t shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.")

[13] SUTTON *supra* note 2, at 30.

To the extent our audience includes conservatives, one might say that all of these extensions are liberal ideas—why should we care? One might point to the same sex marriage case from the Supreme Court of Massachusetts.[14] One might point to abortion—for instance, the South Carolina Supreme Court decisions, post *Dobbs*, striking down a heartbeat law based upon the right of privacy (which is in the text of the South Carolina Constitution).[15] Or, one might point to redistricting litigation in many states where some state supreme courts have held—contrary to the United States Supreme Court[16]—that partisan gerrymandering is justiciable and unconstitutional under their state constitutions.[17]

However, I believe those conservatives would be wrong. I expect that in the future conservatives will bring cases to enforce state constitutional rights. For instance:

- Free speech against various state laws and agencies.
- Free exercise of religion claims. The pandemic is a perfect example of state governments imposing incredibly restrictive rules on houses of worship. In fact, the reaction of many state courts to *Employment Division v. Smith*[18] to recognize a broader protection of the free exercise of religion than did the U.S. Supreme Court is an example of what can occur in state courts.[19]
- Economic regulations. For instance, mandatory licensing cases (making the scrutiny stricter than *Williamson v. Lee Optical*).[20]

Other examples might be rent control or other economic rules that could be construed as takings or impairments of contract rights. Perhaps the best example of a case which might come out differently under some state's constitutions is *Kelo*.[21] Or even Lochner-type economic rights. Another issue might be commercial speech protections or, election law efforts (to protect the secret ballot or election security issues).

I note the question which I have received from the audience regarding whether sending these issues to the states is good or bad. As posed, the student noted the decades of efforts of conservatives to appoint textualists to the federal courts and, especially the United States Supreme Court. Another student noted the difficulty of finding textualists for the many state court judicial positions and the difficulty of attracting qualified jurists given that the pay and

[14] Goodridge v. Dept. of Public Health, 798 N.E.2d 941 (Mass. 2003).

[15] Planned Parenthood South Atlantic v. State of South Carolina, 438 S.C. 188 (S.C. 2023) (construing Article 1, Section 10 of the South Carolina Constitution). This decision was 3-2 and the privacy provision is subject to competing interpretations, as explained in the dissent. It is possible that this decision is not the last word on this issue for South Carolina given ongoing debate the retirement of one justice and pending legislation.

[16] Rucho v. Common Cause, 139 S.Ct. 2484 (2019).

[17] Harper v. Hall, 380 N.C. 317, 868 S.E.2d 499 (2022).

[18] 494 U.S. 872 (1990).

[19] *See, e.g.*, Minnesota v. Hershberger, 462 N.W.2d 393 (Minn. 1990) (Minnesota Supreme Court originally ruled in case regarding Amish practices based upon federal constitution; after remand after release of Smith, court reached same result under its state constitution).

[20] 348 U.S. 483 (1955) (state laws regulating business are subject to only rational basis review; finding no constitutional violation for a law making it unlawful for any person not a licensed optometrist or ophthalmologist to fit lenses to a face or to duplicate or replace into frames lenses or other optical appliances, except upon written prescriptive authority of an Oklahoma licensed ophthalmologist or optometrist). An example of a contrary result is Ladd v. Real Est. Comm'n, 230 A.3d 1096 (Pa. 2020) (concluding that a licensing regime violated the Pennsylvania Constitution's right to pursue a chosen occupation).

[21] Kelo v. City of New London, 545 U.S. 469 (2005).

support may not be equal to federal court. I reject these concerns. I think there are many qualified lawyers who believe in the rule of law and are willing to serve.

More fundamentally, I reject the premise of the question. Our constitution is built on the mandate for federalism. Federalism is beautiful. It is democracy in action. It is what conservatives have been requesting for decades. As a conservative, I do not believe I should win every argument. Instead, I believe that we should have those arguments and the best argument should win the day, rather than having the result dictated from Washington. And, it may be that my argument loses in a particular state and wins in another state. In sum, I believe the decision should be local, if at all possible.

Before I sit down, I want to urge our audience to consider getting involved in the state constitutional field. Of course, I urge you to consider a state supreme court clerkship. There is also lots of room for new scholarship. I am especially thinking of research and writing on the original public meaning of many state constitutional provisions and their history. Many state justices have begun expressly calling for additional scholarship in their writings. I hope those opinions and programs like this will highlight how open this field is to young scholars looking to make their mark. In some other areas, young scholars may be drowned out by lots of other voices. However, in state constitutional law, a young lawyer may be the only voice. We often take for granted the wealth of resources to use for textualist analysis for the federal constitution, but the dearth of such resources on the state level may slow the develop of textualist analysis.

I could imagine law review articles or even treatises. Such scholarship might concern a single state, or a single subject (for instance, what type of variations exist in state constitutions on a particular subject like freedom of religion). I can even imagine a treatise or a Restatement effort to categorize the different types of clauses, given the likely connection between many of our state constitutions. I could also imagine scholarship on a framework for judges to decide such issues. For instance, should we (as Judge Sutton mentions)[22] decide state constitutional issues before federal constitutional issues?

I look forward to serving in the courts of the great State of Alabama, and as I look around this room I am optimistic about the future of not only my state, but the many others in which you will reside and, hopefully, serve.

[22] SUTTON *supra* note 2, at 178–79.