Toward a More Confident State Constitutionalism*

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This article is adapted from a speech Justice Markman delivered to the Florida Annual Education Conference of District Appellate Judges in Jacksonville, Florida, in January 2024.

Good morning. It is an honor to speak before this very distinguished and daunting audience on recent efforts at revitalizing state constitutions. It is an effort that has been given growing attention in recent years as a result of state court decisions, national conferences and debates (often sponsored by the Federalist Society), and new books, including two very excellent ones authored interestingly by federal Judge Jeff Sutton, chief judge of the Sixth Circuit Court of Appeals, *51 Imperfect Solutions* and *Who Decides?*[1] Most of all, however, it has been propelled by a growing number of thoughtful state jurists who have reflected upon their own courts, their own constitutions, and their own nation, and sensed that a better judicial balance should be drawn between federal and state judicial power. I am especially privileged today to speak before the appellate judiciary of *Florida* because, I believe, no serious state constitutional reforms can be achieved without the engagement and the leadership of the judiciaries of our most dynamic states. Just as New York and California once supplied leadership and direction for past efforts at revitalizing state courts and constitutions, the same today must come from states such as Florida and Texas. By these remarks, I hope I can offer some thoughts on

* Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. To join the debate, please email us at info@fedsoc.org.

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[1] Jeffrey S. Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law (2018); Jeffrey S. Sutton, Who Decides?: States as Laboratories of Constitutional Experimentation (2021).

both theory and nuts-and-bolts measures that might be considered by judges and justices of a federalist disposition. These, from the perspective of a long-serving state justice who was required three years ago by his own state's constitution to retire on account of its irrebuttable presumption of senility arising at a certain age. What better credentials could I bring to this conference? Please permit me to share several thoughts concerning the *state* of state constitutions.

I. WHY STATE CONSTITUTIONS?

Of course, the threshold question must be asked: *why* should state constitutions be reinvigorated in the first place? For what purpose? To what end? I respectfully respond: for essentially the same reasons that federalism should *generally* be reinvigorated within America. Because our constitutional balance of power has gone increasingly askew; because the American nation has become increasingly polarized; because one-size-fits-all policies increasingly do not fit a nation spread across a hemisphere; and because state constitutions have become increasingly dormant and irrelevant. And because the *virtues* of judicial federalism are reasonably clear and well-understood, encompassing the dispersal of judicial power; the facilitation of localism, diversity, and innovation; the strengthening of a judicial system that is closer to, and more respectful of, the judgments of those whom it governs; and the restoration of charters of government that served well during our nation's first century and a half to guide our growing and ascending republic. But perhaps most of all, in order to afford our fifty state citizenries more effective control over their own collective and individual destinies. As Madison observed in *Federalist 46*, the federal and state governments are but "different agents and trustees of the people, constituted with different powers and designed for different purposes." Not, he states, as "mutual rivals or enemies," but as "common" servants of the people in whom "ultimate authority" reposes.[2]

I recall reading not too long ago about a newly-enacted Florida law concerning minors attending drag shows that was promptly enjoined, as many such laws are, by a federal trial court. I know little of the experience of minors with drag shows, except that I and my two children and seven grandchildren have had little occasion to attend such shows. I have since lost sight of this matter but strongly suspect that the people of Florida whose elected

[2] THE FEDERALIST NO. 46 (Madison), *available at* https://avalon.law.yale.edu/18th_century/fed46.asp.

representatives enacted this law will never see it take effect. To me, this is a matter of considerable moment for a nation whose experiment in representative self-government was possibly the greatest legacy of its Founders. And it prompted me to reflect upon recent laws enacted by the elected representatives of the people of my *own* state. The people of Michigan have also experienced federal judicial nullification in recent years, to one degree or another, in the following realms of state policy: electoral recounts, rules of appellate procedure, sentencing guidelines, straight-ticket voting, electoral integrity measures, sex offender registration, advertising of local adult businesses, juvenile sentencing, state prisoner rights, public employee pensions, welfare entitlements, emergency municipal managers, affirmative action, legislative branch procedures, redistricting, criminal procedure, and, of course, understandings of what comprises a marriage.

There was a time in our constitutional history in which a genuinely "federal case" was one whose impact would be felt well *beyond* the borders of a single state—for instance, a national commercial dispute, a controversy with broad interstate commerce implications, or the interpretation of a far-reaching congressional enactment. There was also a time in which, as Hamilton remarked in *Federalist 83*, "state courts [possessed] concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited,"[3] rather than as has seemingly evolved, that *federal* courts possess concurrent jurisdiction in all cases arising under the laws of the several *states* of the Union. America not only survived this past era of broad state jurisdiction, but prospered. Yet during the past 75 years or so, the nearly-unwavering trend has been toward *greater* centralized power in the federal courts—producing more *uniform* judicial policies and reflecting *diminished* regard for the diversity, variety, and inclinations of our fifty states, their people, and their local constitutions. This trend has arisen for many reasons, too numerous to catalog in these remarks, although I mention in passing a few of the most obvious: an incorporated Bill of Rights; the enactment of 5,000 or so new federal criminal statutes; countless scores of thousands of new federal regulatory offenses; and ever-broadening interpretations of myriad federal constitutional provisions, many located within the Fourteenth Amendment. I recall in this regard reading many years ago of President Clinton's Solicitor General arguing preposterously before the U.S. Supreme Court that the Violence Against Women Act was constitutional and necessary because state courts and

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[3] THE FEDERALIST NO. 82 (Hamilton), *available at* https://avalon.law.yale.edu/18th_century/fed82.asp.

state prosecutors failed to accord sufficient attention to the allegations of female rape victims.[4]

State constitutions of the 18th, 19th, and early 20th centuries may not have been the inspiration for many thirty-point headlines in the local newspapers or the stuff of creative exercises in constitutional decision-making or the product of national revolution or civil war or social upheaval, as is our federal constitution. Yet these constitutions provided the backdrop for governing the everyday affairs of the American people for 150 years, just as did the similarly-unheralded and overlooked common law of our states. *State* court constitutional decisions were those of local business and commerce, of the peaceableness and tranquility of the community, of a pioneering and westward people, and of individual rights within the context of an unincorporated national constitution—in support of the ordinary and the commonplace and on behalf of a self-reliant and independent and entrepreneurial people. *Together*, our two constitutions gave rise to the greatness of our land, *neither* intruding excessively upon the parochial affairs of "we the people," in whose name both of these charters had been ratified. When perhaps the greatest constitutional scholar of the second half of the 19th century, Thomas Cooley, a former justice of the Michigan Supreme Court, wrote his classic treatise on *Constitutional Limitations*, it was principally a work focused upon the substance and evolution and contributions of our *state* constitutions.

Furthermore, our state constitutional inheritance was—as it largely remains today—characterized by interpretive rigor and discipline, commonsense and reasonable constructions of the law, and an emphasis upon stability and predictability of decision-making. Even during the present era of relative state constitutional dormancy and federal preemption, our state judiciaries, in my judgment, have served as mature and steadying forces, cognizant of their constitutional place and respecting the role of governors, legislatures, municipalities, and the sphere of the private. The work of our fifty state supreme courts may not impress the bench and bar and academia as particularly "sexy," or as noteworthy as the continuous discovery of new constitutional rights and entitlements, but it is a legacy, I believe, of which we here this morning can each be proud.

[4] U.S. v. Morrison, 529 U.S. 598, 620 (2000).

II. The Current Landscape

As I further survey our contemporary judicial landscape, I see much that is concerning to a person of federalist and decentralizing and "government closest to the people" inclinations. I see a stultifying uniformity of state criminal laws and procedures (and soon, I predict, increasingly uniform *punishments* in the name of "proportionality" and the Eighth Amendment). I see an almost thoroughly incorporated Constitution under the auspices of nine lawyers in black robes sitting upon a single tribunal in Washington, DC, for a tenure of life. I see a constitutional regime in which each and every U.S. Supreme Court decision incorporating a federal right must be scoured, scrutinized, and parsed by every state judge and justice of the land to ensure that each and every aspect of its footnotes, details, multi-part tests, and passing reflections is elevated as the controlling law of their own states. I see a growing line of demarcation by which federal courts decide a broadening range of questions of state constitutional moment. And I see on the High Court a growing rigidity of factions and divisions and 5-4 groupings that, at least to *this* observer, are suggestive less of the rule of *law* than of the rule of *judges*. And in the meantime, I see fifty state constitutions, several of which date back to the 18th century, and which themselves influenced the federal Constitution, that lie fallow—largely treated as an afterthought. Constitutions about which even their own bench and bar know relatively little concerning their substance, their provenance, and their historical development. But perhaps things may be different in Florida? I do not know.

I have no illusions that remedying this state of affairs will not require leadership and initiative coming most of all from the U.S. Supreme Court itself. For present constitutional distortions are not largely the result of happenstance or serendipity, but of considered federal court decision-making, which for decades has concentrated and centralized, even during occasional intervals of conservative leadership. Yet it is too facile to blame everything upon the federal judiciary, for our state judicial institutions have also been complicit—largely silent and acquiescent in response to every enlargement of federal jurisdiction. This, despite the fact that *we* who are here this morning are the principal *custodians* of the state constitutions that have become so attenuated and diminished. *We* are the guarantors and protectors of these charters and yet have largely been missing-in-action as this centralization has systematically taken place. While the reforming New York and California courts of an earlier era acted largely in *concert* with the federal judiciary of the day, state

courts today instead largely stand in a contrarian position to longstanding and continuing constitutional trends. But, at least for the present *moment*, perhaps for a few passing terms of the High Court, ours may be of a somewhat less contrarian position. For there are glimmerings of a revitalized federalist sentiment coming, not only from thoughtful federal jurists such as Judge Sutton, but from within the U.S. Supreme Court itself, reflected in such decisions as *Dobbs v. Jackson Women's Health Organization*,[5] *Rucho v. Common Cause*,[6] and (at least arguably) *Moore v. Harper*.[7] There are influential jurists and courts which may be willing to pay heed to those who speak for our fifty state constitutions.

III. Revitalizing State Constitutions

Let me briefly offer an illustrative list of ten *unilateral* actions that might conceivably be undertaken by an energetic state judiciary committed to reinvigorating its own state constitution. In these ways, and doubtlessly in others, you might in a sense *speak* to the federal judiciary and to the Supreme Court:

1. Encourage and be receptive to certified questions from federal courts, and be prepared to respond to these in a timely manner so as not to delay the underlying federal litigation. Affirmatively responding to a certified question is a show of respect for state laws and the state constitution while reflecting judicial comity with the federal judiciary. To offer a thorough and timely response is to recognize that state law issues are better resolved by state courts than by federal courts. It is to ensure that the people of the state will have controversies arising under their own laws and constitution resolved by those whose principal responsibility it is to do so, and whose interpretations will presumably be most authoritative and well-grounded. By rejecting a certified question, you cede responsibility for the interpretation of your own law and constitution to the federal judiciary. You also fail to reciprocate the comity shown by the federal court.

2. Ensure that your state bar examination reasonably inquires into state law and constitutional matters. To do so will alert those undergoing this examination that they must include such issues in their examination preparations, and that not all belongs to the realm of the federal. It may also alert law schools that they must better prepare their students for legal practice within

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[5] 597 U.S. 215 (2022).

[6] 588 U.S. 684 (2019).

[7] 600 U.S. 1 (2023).

the judicial system responsible for resolving more than 95% of all day-to-day litigation.[8] I have been told that the law school at Florida State University has just such courses. Why would you not wish to communicate to new members of your state bar a more balanced sense of professional emphasis? For similar reasons, I share Florida's lack of enthusiasm for the Uniform Bar Examination and its successor, the NexGen Bar Examination, which each disregard matters of state law.

3. Consider requiring separate filings on state-constitutional issues and federal-constitutional issues, for several reasons: to encourage argumentative clarity, to ensure that relevant arguments on each are not submitted peremptorily or as mere after-thought, and to emphasize that similar or even identical counterpart federal/state clauses are not necessarily redundancies. Relatedly, why not, as several states currently do, resolve state constitutional issues *prior* to federal constitutional issues so that the independent character of the state analysis can be further clarified and emphasized? Moreover, of course, courts of discretionary jurisdiction could also choose on appropriate occasions to grant leave *only* on the state constitutional issues.

4. When your court addresses both federal and state constitutional issues, ensure that it is made *clear* and *explicit* where you believe you have "adequately and independently" resolved an issue on state constitutional grounds so that your decision will be rendered less vulnerable to reversal by the Supreme Court. Of course, you must always adhere to *minimum* federal constitutional standards, but there will be occasions on which you are sufficiently reliant upon your state constitution to be reasonably insulated from federal review.

5. In addressing criminal appeals in which you anticipate non-trivial habeas filings, undertake even in your boilerplate orders of denial to explain in at least some minimum detail why the appeal has been denied. Do not assume that what was obvious to your court will be equally obvious to the federal court. Also, take care to respond to *every* prong of a multi-pronged criminal appeal in order to avert both unwarranted habeas review as well as de novo review of the missing appellate issue.

6. Avoid lock-stepping state and federal constitutional provisions. There is no reason for you to bind forever your interpretations of your state

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[8] Court Statistics Project, *Federal and State Caseload Trends*, https://www.courtstatistics.org/court-statistics/state-versus-federal-caseloads (last visited Apr. 5, 2024) ("Between 2012 and 2022, an average of 98.5% of U.S. court cases were filed in state courts. Only 1.5% were filed in federal courts.").

constitution to federal court interpretations of a distinctive constitution. Your constitution is an *independent* source of law, with its own precedents, context, and history, and you are the *independent* guarantors of that constitution. To lock-step is effectively to delegate interpretive responsibility over *your* constitution to non-state courts. Further, it suggests, warrantedly or not, that you have chosen to forego the kind of reasoned and thorough exercise of judgment you *owe* to your own constitution, and that message will be understood clearly by your own bench and bar. I am aware that there is some lock-stepping *required* by the Florida Constitution,[9] and of course this must be respected by your courts. But it is nonetheless an unusual command that the authority of *Florida* judges to say what the Florida Constitution means should expressly be delegated to *non*-Florida judges—*not* by the operation of the Supremacy Clause of the federal Constitution but by the operation of the state constitution. As one scholar has remarked, it is to impose upon your own courts a "constitutional voyage without direction."

7. Understand clearly where there *is*, and where there is *not*, an obligation of deference to the Supreme Court and other federal tribunals. For instance, where Florida courts address questions of jurisprudence, rules of interpretation, professional and ethical standards of conduct, and the architecture of state government, including its separated powers, checks and balances, doctrines of delegation, rules of administrative law, and "political questions," there might well be *no* obligation to abide by federal determinations, including those of the Supreme Court. The same might also be true of defining secondary constitutional terms and standards such as "reasonableness," "rational basis," "clear error," and "totality of the circumstances," as to which your own courts might well retain considerable if not plenary authority and discretion. And, of course, many state constitutional provisions are spelled out in considerably greater detail than federal counterpart provisions and may also be largely subject to your own best legal judgment. You are also typically free to depart from federal constitutional interpretations of lower federal courts, although, of course, you may find these to be persuasive. On one occasion that I recall, the Michigan Supreme Court explicitly disagreed with the Sixth Circuit concerning the meaning of the "fair cross-section" requirement of the Sixth Amendment; we issued a conflicting opinion and were ultimately upheld by the Supreme Court.[10]

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[9] FLA. CONST. art. I, § 17 (excessive punishments); *cf.*, art. I, § 12 (searches and seizures).

[10] Berghuis v. Smith, 559 U.S. 314 (2010) (affirming People v. Smith, 463 Mich. 199 (2000)).

8. Judge Sutton has spoken thoughtfully in his encouragement of state courts and justices, on appropriate occasions, to consider writing separate opinions raising concerns about the application of Supreme Court federal constitutional interpretations to state counterpart provisions.[11] *Not* to reject or repudiate these interpretations—for they must be honored under the Supremacy Clause—but to argue respectfully and thoughtfully that a *better* state constitutional rule, and hence a *better* resolution of the underlying case, might have been possible and appropriate, but had been foreclosed by decisions of the Supreme Court. In other words, state judges might point out that there were reasonable *alternative* interpretations of their state constitutions that were in better accord with their language, context, history, and purpose.

Why might such an argument be offered? Perhaps in order to make *thinkable* what today is largely *unthinkable*: that states and their constitutions can be trusted to render reasonable constitutional judgments. Or at least to make *thinkable* that the most *expansive* understandings of incorporation—that every jot-by-jot and bag-and-baggage detail of an incorporated right must apply indistinguishably within each of the fifty states—could be relaxed to allow some greater measure of state court judgment and flexibility in the interpretation of its own constitution. And thereby to reinitiate what Justice Brennan once described as the "conversation" he sought between the Supreme Court and state courts.

Consider, for example, the national conversation—and debate—that might be encouraged if multiple state courts were to urge upon the Court greater deference to state constitutions and illustrate how better results might reasonably have been obtained under those constitutions. As Justice Brennan further observed, the most dynamic era of incorporation of the Bill of Rights occurred within merely a seven-year period from 1962 to 1969, during which time the Supreme Court issued nine incorporating opinions.[12] Is it, and should it be, forever inconceivable that a similarly dynamic era of judicial counter-reform— committed to the *restoration* of judicial federalism—might someday be initiated? State courts, in other words, could offer the Court at least some *glimpse* of what such an era might look like through an accumulation of opinions in which they spoke frankly to the Court of the character, the attributes, and the potential of their state constitutions, reminding the Justices of their historical contributions and why "we the people" of Florida

[11] Oral presentation by Judge Sutton, Federalist Society conference, Park City, Utah (July 2022).

[12] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 493 (1977).

might possess distinctive attitudes from those of New Jersey or California on significant issues of law as to which a single and uniform national policy might not be indispensable. Has any current Justice ever served as a member of a state court or as a custodian of a state constitution? Might not some tempering of the Supreme Court's national influence also yield some tempering of the increasingly harsh and divisive Senate judicial confirmation process? And indeed, might it not yield some tempering of the growing political polarization of red and blue states and their citizenries?

9. Engage in outreach efforts on behalf of state constitutionalism, inviting relevant arguments to be made by the bench and bar and seeking out the perspectives of amici and scholars for the same purpose. On the basis of this same outreach rationale, you might also consider bench-bar conferences, CLE and CJE programs (such as this one), and a variety of other means by which to communicate your court's interest in uplifting its state constitution. Perhaps too your state might see fit to render more accessible, and better organized, the debates, legislative histories, and leading decisions giving meaning to your state constitution.

10. Finally, do not overlook state procedural, evidentiary, administrative, and professional and ethical reforms and initiatives that may be suggested by, or otherwise be compatible with, your state constitutions. These might include, for example, parallel but separate briefing procedures for federal and state constitutional arguments as mentioned earlier; reforms to assist juries in their truth-seeking responsibilities; ensuring effective post-appellate opportunities for raising claims of actual innocence; and rules generally to expedite the litigative and appellate processes. State courts are largely sovereign in these and other of their supervising and superintending responsibilities.

IV. First Principles of State Constitutionalism

There are also fundamental discussions of first principles that must accompany any strengthening of our state constitutions. Most importantly, in my judgment, how *do* we, and how do we *not*, give meaning to these documents? My own simple response is that we do so as we have *always* given proper meaning to such documents: by the responsible and conscientious application of our "judicial power," typically the *only* power conferred upon the judiciary by our federal and state constitutions. This power is only rarely defined within these documents except for the occasional state-by-state addition to, or subtraction from, the power, such as Florida's lock-stepping provisions or Michigan's grant of authority to its state supreme court to issue advisory

opinions concerning the constitutionality of newly-enacted statutes prior to their effective date at the request of the governor or legislature. Apart, however, from such individual variations, the "judicial power" customarily encompasses the power to resolve actual cases and controversies within the court's jurisdiction; the power of judicial review; the power to determine and to administer the procedures of the judicial process; and the power to punish contempt of court. Moreover, the judiciary exercises these authorities within the constraints of a system of separated powers and checks and balances. And thus, in accordance with *Marbury v. Madison*, it is empowered only to pronounce what the law *is* and not what it *ought* to be, for the latter authority belongs to a coordinate branch.[13]

In other words, courts assess by application of the "equal rule of law," and through reasonable rules of interpretation, what the law and constitution *mean*. For, as Justice Frankfurter once summarized, the "highest example of judicial duty is to subordinate one's *personal* will and one's *private* views to the law."[14] We do this, of course, by examining the language and the context of the law; its structure and organization; its manifest purposes; its relationship with other provisions of the law and with related laws; its grammar, punctuation, and syntax; its precedents; and its proper legislative history. We thereby examine the *law* and not our *consciences*. And we do so because we have each taken an *oath* to "this" constitution, as most state preambles provide; because we have each taken an oath to a constitution ratified in the name of "we the people" and their posterity and not to a personal constitution; because we each act within the confines of a system of separated and checked powers; and because there is no alternative means by which to give faithful meaning to such a document of law than by respecting and deferring to its language. All so that the people themselves may look to the words of their own constitution and have some reasonable comprehension of their rights and responsibilities. It is not a *mechanical* process of interpretation—and good judgment and experience are best required—but it is also not a *free-for-all*. And if it is the equal rule of law we *seek*, and the arbitrary rule of judges we seek to *avoid*, we must interpret our state constitutions in accord with such principles and in conformity with the judicial power. We are each the

[13] Marbury v. Madison, 5 U.S. 137 (1803).

[14] Jeffrey S. Sutton, *Remembering Justice Scalia*, 69 STAN. L. REV. 1595, 1599 (2017) (quoting Tom C. Clark, *Mr. Justice Frankfurter: "A Heritage for All Who Love the Law,"* 51 A.B.A. J. 330, 332 (1965)).

custodians and guardians of our state constitution, but not its authors or drafters.

Why do I set forth these Judiciary 101 observations? You are experienced and accomplished jurists and all of you are well aware of your own authority and of the limitations upon this authority. I do so only because there are voices—often quite thoughtful and committed *federalist* voices—which differ in some respects and whose views concerning the judicial power must also be considered respectfully in the construction of state constitutions.

Some contend, for example, that the state constitution differs from the federal constitution in determinative ways. The state constitution is typically a lengthier document; it customarily contains more detailed and elaborate provisions concerning such matters as schools, libraries, roads, taxation, zoning, and municipal authority; it tends to be easier to amend, both by the legislature and sometimes directly by the people themselves; it is a charter of a general and not a limited grant of power; its legislative history is often more obscure and difficult to identify; it may tend to read in a less elevated "statutory" manner than in a more elevated "constitutional" manner; and, of course, it is subject to interpretation by judges whose selection, retention, and tenure are very different from those of judges who principally interpret the federal Constitution.

I would emphasize instead that what our two constitutions possess in *common* is the traditional and historic judicial power each exclusively confers upon the judge as well as the overall "separation of powers" context within which that power must be carried out. And thus, to me, it matters not that you or I have been elected or appointed; that our term is for a period of years or for a lifetime; or that there are myriad substantive distinctions between our two constitutions. For the positive law set forth by these companion charters of representative self-government must, I believe, be accorded meaning by the same *rules* and *tools* of interpretation, by the exercise of the same "judicial power" that has always defined our constitutional systems.

And therefore I am in respectful disagreement with those who assert, for instance, that state constitutions "better serve to vindicate" individual rights because state judges and justices possess greater "flexibility" to interpret the law in accordance with their own state's distinctive "culture, geography, and history."[15] To me, if state constitutions, in fact, reflect more diversely upon such matters—as indeed, they all certainly *do*—it is because their *framers* have

[15] SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 1, at 17.

taken these differences into account in the formulation of these constitutions. Not because of some greater or lesser flexibility belonging to their *interpreters*. In my quarter of a century on the appellate bench of Michigan, all but four of those years on its highest court, I never once viewed myself as possessing greater or narrower interpretive *discretion* than my federal trial or circuit court counterparts as an arbiter of our *state* constitution, but only as possessing a greater *obligation* to get the law right as the *final* arbiter of that constitution. And I possessed no greater interpretive flexibility in pronouncing the law in Hillsdale than I did in Detroit, Holland, or Sault Ste. Marie, with each of *their* very distinctive and defining "cultures, geographies, and histories." As to each, I possessed only the "judicial power," awesome as it is, in the vindication of rights and the construction of laws. And as to each, I was equally *constrained* by the limits of that same power.

V. Holy Grail Constitutionalism

But greater flexibility of interpretive authority is not all that should be avoided in the course of revitalizing our state constitutions. What should also be avoided is the temptation to discover in these constitutions dubious new rights and responsibilities by the application of questionable theories of contemporary federal *constitutionalism*. To succumb, in other words, to what the late Professor David Currie of the University of Chicago Law School once characterized as the "incessant quest for the judicial holy grail," which he defined as the "discovery of a clause that lets [judges] strike down any law [they] do not like."[16] And as a result, to expand upon the judicial role and to enlarge the judicial power at the expense of the more accountable and representative branches of state government. To accord greater authority to public officials who have been appointed at the expense of public officials who have been elected by the people. To strengthen the branch comprised exclusively of lawyers and elites at the expense of those branches closer to the people. In practical terms as well, to pursue this holy grail would also confer upon the state judiciary a "second bite of the apple"—after the first bite by the federal court—to strike down state laws and public policies duly enacted by the people's representatives and which breached no genuine federal or state constitutional prohibition.

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[16] David P. Currie, The Constitution in the Supreme Court: 1789-1888, 346-47 (1985).

What are some of these holy grail provisions and theories? You are cognizant of most of these, but fertile academic minds continue to labor in the pages of our legal journals and amicus briefs in pursuit of ever more innovative and creative theories by which *democratic* judgments can be supplanted and replaced by the non-majoritarian judgments of judicial and academic elites. These include the supposed constitutional right of privacy; arbitrarily determined new protected classes under the Equal Protection Clause; the Ninth Amendment; fundamental rights conceptions of the Fourteenth Amendment; substantive due process; rational basis analysis; the Privileges or Immunities Clause of the Fourteenth Amendment; the relaxation of state-action requirements of the Fourteenth Amendment; the adoption of so-called positive constitutional rights; and judicial determinations of what constitute "disproportionate" criminal sentences under the Eighth Amendment.

Indeed, if you promise not to reveal this to anyone, I will share with you what is truly the most expansive, and overlooked, of all holy grail provisions, in both our federal and state constitutions. It is called the Preamble. The Florida Preamble, for instance, speaks of "securing the benefits of liberty," "perfecting government," and guaranteeing "equal political rights." What conceivable judicial policy preference could not comfortably fit within these terms if they were to be given substantive meaning?

These holy grail provisions tend to be notable mostly for their broad, vague, and standardless language, typically applied in circumstances far removed from their historical context and purpose, and each with considerable potential for furthering the interests of those who would impose their own public policy agendas upon the people without the inconvenience of actually having to *persuade* democratic and representative majorities. These provisions tend also to possess in common the potential for the perpetual judicial "discovery" of new rights that rely *heavily* upon the consciences and inclinations of the judge and only *lightly* upon the intentions and purposes of the constitutional framers. Such provisions tend to encourage what is effectively the "rule of judges," rather than the "rule of law," a disembodied sense of "justice" rather than "justice under law." Often, a holy grail provision can be identified, as with the Ninth Amendment, by the sudden discovery—centuries after its drafting—of its revolutionary potential as the source of alleged new constitutional rights and entitlements. At other times, as with the right of privacy, it can be identified by its putative derivation from *multiple* constitutional provisions—the alleged constitutional right to contraception was discovered within the alleged constitutional right of privacy on the basis of

eight separate constitutional provisions in the Supreme Court's *Griswold* decision.[17] Thus, the holy grail provision may be found *anywhere* or *everywhere* within the Constitution, but, properly understood, it may also be found *nowhere* within it. As Judge Robert Bork once remarked, these provisions typically "specify no particular freedom, but merely assure us, in sonorous phrases, that they, the judges, will know what freedoms are required when the time comes."[18] If one judge, for example, can discern in the "right of privacy" abortion, contraception, and euthanasia rights, another can just as easily discern parental, non-vaccination, and home-schooling rights.[19]

Take a closer look, for example, at the Privileges or Immunities Clause of the Fourteenth Amendment that has now lain dormant for 150 years. It is emblematic of what is at stake in holy grail constitutionalism. The clause *did* once have real meaning—likely, in my judgment, conferring equal state rights upon newly-emancipated slaves after the Civil War. The new rights of the emancipated were defined by the existing rights enjoyed by the non-emancipated, largely the white citizenry, and this assemblage of rights differed on a state-by-state basis. Although most contemporary observers believe, as I do, that the Supreme Court subsequently erred in its reading of the new constitutional provision,[20] there is utterly no consensus today on what the clause genuinely signifies. Nonetheless, efforts are continually undertaken to invest the provision with new definition and force, indeed almost *any* definition and almost *any* force. Diverse scholars and academics, for example, have

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[17] Griswold v. Connecticut, 381 U.S. 479 (1965).

[18] ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 118 (1990).

[19] When I write of the constitutional holy grail, I am invariably reminded of the following exchange I witnessed some 45 years ago as Counsel for the Senate Judiciary Committee. President Jimmy Carter's appellate judicial nominee was being probed by one Senator at his confirmation hearing, "Sir, if a decision in a particular case was required by law or statute and yet that offended your conscience, what would you do in that situation?" The nominee paused briefly and then answered, "Senator, I have to be honest with you. If I was faced with a situation like that and it ran against my conscience, I would have to follow my conscience." The nominee proceeded to explain the standards by which he would replace the law of the land with his conscience. "Senator, I was born and raised in this country and I believe that I am steeped in its traditions, its beliefs, and its philosophies, and if I felt strongly in a situation like that, I feel that it would be the product of my very being and upbringing. I would have to follow my conscience." To my mind, however, for a judge to render decisions according to his or her conscience, however elevated and refined that conscience, rather than in accord with the law, is *itself* unconscionable. Nonetheless, the judicial nominee was very soon thereafter confirmed.

[20] The Slaughterhouse Cases, 83 U.S. 36 (1873).

purported to discern in the clause the following new constitutional rights—all, of course, to be determined by courts "when the time comes":

- the guarantee of "positive rights to public benefits"
- "minimum welfare standards"
- "welfare state rights"
- the "obligation of equal treatment"
- "educational equality"
- "redistributive mutual aid policies"
- "natural rights"
- "overcoming the limitations of the 'state action' requirement"
- "common-law rights"
- "sexual rights"
- "healthcare rights"
- "distinctly personal rights"
- the ability to "respond to economic disparity"
- "natural and inalienable rights"
- "fundamental rights"
- "union rights"
- "equal standing rights in the national political community"
- the right to redress "violations of customary international law"
- "rights to opportunities to make the most of our lives"
- "silent and unenumerated rights"
- "privacy rights"
- "economic rights"
- "rights of felons"
- "fundamental rights contained in the Northwest Ordinance"
- "private law rights"
- "the rights of citizens of free governments"
- "all of the rights in the Bill of Rights"
- "unincorporated rights"
- "unenumerated fundamental rights"
- "international human rights"
- "rights stemming from our obligations to our communities"
- "rights drawn from our affirmative entitlements"
- "social and economic entitlements necessary to make national citizenship meaningful"

To name a few. Perhaps it is not surprising that Judge Bork described the Privileges or Immunities Clause as an "inkblot," a "Rorschach test," and

"inscrutable,"[21] while Justice Antonin Scalia characterized it as the "darling of the professoriate,"[22] and other legal critics have labeled it "confused, utterly uncertain, virtually boundless, shadowy, a blank check, murky, mysterious, and standardless."[23] But to those in search of the constitutional holy grail, the clause's utter malleability and pliability and sheer uncertainty are its *strengths*. These promise to assist in the continued elevation of government by judiciary and in the continued evisceration of the republican form of government guaranteed by Article IV of our Constitution.

In summary, I do not consider the pursuit of the constitutional holy grail to suggest the *promise* of the state constitution movement, but rather its *ensnarement* and eventual *demise*. It cannot merely be the elevation of state *courts* that federalists pursue, or even the elevation of state *constitutions*, but the elevation of state *constitutionalism* as well. Thus, *reasonable* and *faithful* and *disciplined* understandings of these documents are required, not application of the worst and borrowed *deformations* of federal constitutionalism—the very deformations that have already rendered federal courts the primary effective expositors of state law and constitutions. If it is among the purposes of a revitalized judicial federalism to reset the balance of authority between federal and state courts—and between federal and state constitutions—and to enhance opportunities for the people of our fifty states to govern better their own affairs and to determine more effectively their own destinies, it is difficult to see how mimicry by state judiciaries of aggressive and concocted federal theories of the judicial power will further these ends.

For these reasons, I do not join in the celebration of such assertions of state constitutionalism as that which resulted in striking down the licensure of eyebrow threaders in Texas on the grounds of so-called substantive due process and the legislative second-guessing entailed in rational basis review.[24] Although my libertarian instincts are buoyed by one less unnecessary regulation, my constitutional instincts are not. And I do not celebrate either the decision of a court of my own state effectively nullifying a longstanding anti-

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[21] BORK, *supra* note 18, at 166. *See* Stephen Markman, *The "Judicial Holy Grail": Why the Supreme Court Should Not Revisit the Privileges or Immunities Clause*, THE HERITAGE FOUNDATION (May 31, 2016), https://www.heritage.org/report/the-judicial-holy-grail-why-the-supreme-court-should-not-revisit-the-privileges-or.

[22] Transcript of Oral Argument at 7, McDonald v. City of Chi., 561 U.S. 742 (2010) (No. 08-1521).

[23] *See* Markman, *supra* note 21.

[24] Patel v. Tex. Dep't of Licensing, 469 S.W.3d 69 (Tex. 2015).

abortion law two years ago under the same state constitutional guise.[25] For decisions of these sorts typically and necessarily lack any genuinely *independent* applications of their state constitution for the obvious reason that there is probably not a single one of these constitutions with due process clauses whose language or histories even remotely suggest any substantive application, much less any coherent standard for this application. Rather, such decisions merely afford state courts a pretext to strike down disfavored legislative enactments by the people's elected representatives on the basis of a federal constitutional theory itself devoid of legitimate foundation. Moreover, if there *has been* any analysis, it is likely to be entirely derivative of the federal analysis. The best contemporary state constitutional decisions—and there *are* a growing number of these (many addressed thoughtfully in Judge Sutton's two books and in the Federalist Society's *State Court Docket Watch* series)[26]—are free from reliance upon federal holy grail theories and instead rely upon close analysis of the language and history of the state constitution.

VI. Miscellaneous Observations

A. State Diversity

Although, as I have remarked, I believe it is inapt in matters of constitutional interpretation to exercise the judicial power differently on account of state "cultures, geographies, and histories," there are many things nonetheless that make Florida *Florida* and Michigan *Michigan* that are *properly* taken into judicial account: the distinctive language and focus of their constitutions; the distinctive laws and administrative practices of their legislative and executive branches; and their distinctive *common laws*. Indeed, the historical contributions of our fifty state common laws (Louisiana partly excepted) have often been overlooked in the same way as have our fifty state constitutions, for they largely address what some dismiss as the ordinary, the mundane, and the pedestrian. Yet these fifty bodies of "judge-discovered-and-articulated" law have largely evolved over the years and decades (and even centuries) in accordance with the longstanding customs and practices of the states and their people, on the basis of "culture, geography, and history." For example, the common law of shoreline property rights and beach-walking has been a matter of

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[25] Planned Parenthood of Michigan v. Att'y Gen. of Michigan, No 22-000044-MM (Mich. Ct. of Claims Sept. 7, 2022).

[26] *See generally State Court Docket Watch Archive*, FEDERALIST SOC'Y (last visited Apr. 5, 2024), https://fedsoc.org/scdw/archive.

attention over the years in Michigan, while undoubtedly less so in Nebraska, whose common law of agricultural nuisance may well be more developed. Both our fifty state constitutions and our fifty state common laws are jewels of our system of judicial federalism, and yet both have sometimes been the subject of neglect and inattention by state judiciaries.

More careful attention should also be given to the sometimes-casual adoption by state courts of American Law Institute restatements in pursuit of a *common* common law. Increasingly, such restatements have tended to reflect the *prescriptivism* of the legal professoriate rather than the *descriptivism* of real-world customs and practices. Justice Scalia has described such restatements as reflecting mostly the ALI's own *aspirations* for what the common law *ought* to be,[27] while Justice Thomas has succinctly rejected a Restatement offered to the Court because it "lacks support in the law."[28] These efforts to nationalize our various and diverse common laws are redolent of efforts during the 1940s and 1950s to draft a model state constitution. Such efforts eventually faltered on the grounds that there was no *single* constitutional model appropriate for *all* of our states.

B. Justice Brennan

I am one who is underwhelmed by the "judicial federalism" of Justice William Brennan, which gained traction after being propounded in a *Harvard Law Review* article in 1977, and which still has its enthusiasts. His theory was summarized by the law review itself as follows:

> 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 on state constitutional grounds. [But] Justice Brennan argues that the trend of recent Supreme Court civil liberties decisions should prompt a reappraisal of that strategy. He notes that numerous state courts have already extended to their citizens by state constitutions *greater* protections than the Supreme Court has held are applicable under the *federal* Bill of Rights. He discusses, and applauds, the implications of this new state court activism for the structure of American federalism.[29]

[27] Kansas v. Nebraska, 574 U.S. 445, 475-76 (2015) (Scalia, J., concurring in part and dissenting in part).

[28] *Id.* at 483 (Thomas, J., concurring in part and dissenting in part).

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

To put it in somewhat different terms, after more than a decade of Justice Brennan's philosophy of "selective incorporation" in the ascendancy on the Warren Court—imposing upon each of the fifty states an obligation of exact adherence to the details of his Bill of Rights opinions—this considerably slowed under the Burger Court, and Justice Brennan found himself increasingly in *dissent* in similar decisions. As a result, he chose to remind state judges that his more recent opinions, regrettably for him now only *dissents*, could nonetheless be elevated as *state* constitutional law because there was nothing to prevent state constitutional provisions from being interpreted *more* broadly than their federal counterparts; they just could not be interpreted *less* broadly. While doubtlessly a correct understanding of the "supreme law of the land," the "conversation" Brennan sought to initiate with state judges was rarely embraced because few jurists of a conservative or even a moderate perspective were enticed to *expand* upon his already far-reaching constitutional understandings with new understandings of their own constitutions that were even *further* afield from what they viewed as reasonable interpretations. Even Justice Fortas decried Brennan's approach to incorporation as "slavish,"[30] while Justice Harlan took issue with its "jot-by-jot" obliteration of traditional federalist values.[31] Justice Brennan offered a one-way-only constitutional federalism, deeply unattractive to state jurists possessing a more constrained understanding of both the federal and state constitutions. To many, he was less a pioneer of state constitutionalism—as he has sometimes been portrayed—than a principal architect of its modern decline. Where state constitutions once mattered greatly in governing the affairs of the American people, they matter considerably less today, in large part because of his theory of selective incorporation.

C. The Michigan Supreme Court

Although my own state has recently succumbed to substantive due process in nullifying Michigan's abortion law, there have also been a number of better-grounded displays of state constitutionalism by the Michigan Supreme Court in recent years. The court, for example, relied upon the language of the state constitution's express separation of powers clause to strike down a broad emergency delegation of legislative authority to the governor during

[30] Bloom v. Illinois, 391 U.S. 194, 214 (1968).
[31] Duncan v. Louisiana, 393 U.S. 194, 181 (1968).

the Covid-19 pandemic.[32] The court relied upon the language of the state constitution's takings clause to hold that state eminent domain must pertain to a public *use*, such as the construction of a road or library, and not to a mere public *purpose*,[33] the latter standard adopted by the U.S. Supreme Court.[34] The court relied upon the language of the state constitution's taxation provisions to strike down a progressive tax on pensions.[35] And the court held that a foreclosure sale constituted a taking under the state constitution to the extent that a county retained any surplus beyond the actual tax liability of the property owner, a decision later adopted by the U.S. Supreme Court.[36] Each of these decisions relied upon ordinary and straightforward understandings of long-established state constitutional provisions, and each, in my judgment, illustrated the potential of reliance upon state constitutionalism.

D. The Appeal of State Constitutionalism

While the state constitution movement has been most enthusiastically embraced by conservative state jurists, there is no reason why it should not also hold appeal for more liberal state jurists. Not merely because there remains the undisputed Brennanesque potential for defining state constitutional provisions more broadly than their federal counterparts, but also because of what some may view as their more democratizing aspects. These encompass, in particular, the "direct democracy" institutions of the initiative and referendum processes for enacting state constitutional change—evidenced in recent years in such areas as electoral redistricting, abortion, taxation, and drug legalization. Furthermore, opportunities afforded under state constitutions to address, and to experiment with, everyday matters of local and municipal governance may also hold appeal across the philosophical spectrum. In short, the revitalization of state constitutions offers no guarantee of conservative policy outcomes, but only that state judiciaries and state constitutions will gain in influence and come increasingly to reflect the diverse and local perspectives that characterize the fifty states and their people. It is not the pursuit of a conservative, liberal, libertarian, or progressive constitution

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[32] In re Certified Questions, 505 Mich. 332 (2020); *see also* Stephen Markman, *Remarks on* In re Certified Questions, 15 NYU J.L. & Liberty 587 (2022).

[33] Wayne County v. Hathcock, 684 N.W.2d 765 (2004).

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

[35] In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38, 489 Mich. 954 (2011).

[36] Rafaeli v. Oakland County, 505 Mich. 429 (2020). *See* Tyler v. Hennepin County, 598 U.S. 631 (2023).

that most animates the state constitution movement, but the prospect of a restored constitutional architecture that better reflects the intentions of our federal and state framers. There is no reason that the revitalization of our fifty state constitutions should be viewed exclusively as a conservative undertaking; rather, it is the restoration and elevation of the values of federalism and decentralization that are so desperately needed today by a nation in search of consensus, tranquility, and union.

As the custodians of your state constitutions, you must engage in this revitalization in a positive spirit. Yes, these constitutions may sometimes encompass trivialities such as specifying the time and place for the sale of alcoholic beverages or the proper use of overdue library fines. Yes, these constitutions may sometimes encompass idiosyncrasies such as identifying the location of a new state capitol with a surveyor's precision or providing the contours of a ski trail. Yes, these constitutions may sometimes encompass the obscurities of long-forgotten reforms such as those reflected in some of the 800 or so amendments to the Alabama Constitution. Yes, these constitutions may sometimes encompass the detail and specificity of a supplemental or continuing appropriations bill. And yes, these constitutions may sometimes lack the enspiriting language or the rhetorical grace of the federal Constitution. However, as a result of what these constitutions *do* encompass—what you must not forget—they have served well their states, their people, and their nation. They have influenced our federal Constitution in important ways; they have reflected faithfully the interests, the concerns, and the values of our states; and they have governed as we have gained our prosperity, enjoyed our freedoms, and experienced the growth of our institutions of stable self-government. Moreover, despite contemporary challenges, these constitutions have served also to preserve the integrity of our federalist system and the rich variety of American statehood.

When I think of Florida from 1500 miles distant, I think of oranges, amusement parks, space flights, pythons in the Everglades, ocean beaches, hurricanes, tourism, retirees, the panhandle, cigar-making, Cuban refugees, the Fountain of Youth, college football, and hanging chads, and I also think of Orlando, Miami, Naples, and Tallahassee. Is it *possible* that such a state might have developed its own norms and standards and interests and politics over time that may implicate its own constitution in distinctive ways? Of course it is, and each of you should be proud to have been afforded the opportunity and responsibility to speak on behalf of that constitution. It is healthy that we are *united* by the common values of our federal Constitution,

but it is also healthy and liberating that we are *differentiated* by the distinctive values of our state constitutions. For in part, our states are subordinate to the Union, and in other part, they are sovereign and responsible for governing their own affairs. Certainly, state identities no longer vary to the degree that they once did, but it is buoying nevertheless that they are not yet altogether identical or fungible.

E. A Critique of State Constitutionalism

Professor James Gardner, now of the SUNY at Buffalo Law School, has made an insightful critique of the *state* of state constitutionalism, which I quote here at some length:

> After reading dozens of state constitutional decisions, you have absolutely no sense of the history of the state constitution. You do not know the identity of the founders, their purposes in creating the constitution, or the specific events that may have shaped their thinking. You find nothing in the decisions indicating how the various provisions of the document fit together into a coherent whole, and if you do find anything at all it is a handful of quotations from *federal* cases discussing the *federal* Constitution. You are able to form no conception of the character or fundamental values of the people of the state and no idea how to mount an argument that certain things are more important to the people than others. If you have found state court decisions "departing from the federal approach to the corresponding federal provision," you have no idea why the courts departed from federal reasoning; at best, you are left with the vague impression that the courts simply thought the dissents in analogous federal cases more persuasive. But nothing in these state opinions gives you any idea of what you, as an *advocate*, could say to convince the state courts once again to reject the federal approach as a matter of state constitutional law. To treat [the state constitution] as an independent charter of sovereign government.
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> There is also the poverty of state constitutional discourse, by which I mean the lack of a language in which participants in the legal system can debate the meaning of the state constitution. Further, to the extent that such a state constitutional discourse exists, its terms and conventions are often borrowed wholesale from federal constitutional discourse, as though the language of federal constitutional law were some sort of *lingua franca* of constitutional argument generally . . . . By constitutional discourse, I mean a language and set of conventions that allows a participant in the legal system to make an intelligible claim about the meaning of the constitution . . . . When I refer to "federal constitutional discourse" and "state constitutional

> discourse," I refer to a language and set of conventions that allow participants in the legal system to make intelligible claims about the federal and state constitutions, respectively . . . . It is also the means by which participants in the legal system debate among themselves the meaning of the document.
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> Like Sherlock Holmes' dog that did not bark in the night, [state courts' silence on their Framers such as Adams, Jefferson, Madison & Mason] seems significant; the court treats the state constitution, when it treats it at all, as some kind of a-historical and author-less text. . . . Independence of [the state constitutions] is ultimately illusory . . . . One searches the state court's decisions in vain for any indication of differences; there is no discussion of the state's founding history, no mention of its constitution's framers, and no suggestion that the fundamental values or character of the people of the state differ in any way from those of the people of the nation] . They often seem to have done so in a way that is so idiosyncratically result-oriented as to provide little basis for further intelligible debate about the *nature* of the differences between the two documents that account for the court's departures from federal norms.[37]

In fairness, I note that Professor Gardner's observations were, in fact, written more than thirty years ago, but they remain fresh and relevant. Any revitalization of your state constitution will not occur overnight, but it will not occur at *all* if that constitution is not viewed by its state judiciary—its principal defender and expositor—as a truly independent and unique document, given proper meaning only by your most thoughtful and conscientious scholarship. These are not second-class constitutions, to be defined exclusively by comparison and contrast with the federal constitution, or whose provisions are *presumed* to be equivalent with those of the federal Constitution. Rather, the Florida Constitution has evolved over 180 years against the backdrop of everything that is, and everything that has ever been, *Florida.* It is altogether logical and expected that Floridians would have thought differently during that time about many constitutional matters and the necessities of responsible constitutional government. Floridians, as with the citizens of every other state, have always been entitled to dissent from national orthodoxies and to respond to common challenges with their own best exercise of judgment. Doubtless, too, perhaps there have been flukish circumstances, extraordinary

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[37] James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992), *available at* https://repository.law.umich.edu/mlr/vol90/iss4/3.

and charismatic political figures, and catastrophes and crises that have influenced the Florida Constitution in idiosyncratic ways. Or else for 101 other reasons, Floridians may simply have been outliers on assorted propositions of constitutional government, at odds with New York, New Hampshire, and New Mexico, and other states. None of these circumstances require either apology or justification, but are all due the fullest respect by the courts of your state.

F. State and Federal Judges

I remarked earlier that our federal and state constitutions are distinguished by the interpretations of judges who are *selected* and *retained* by very different methods. To some, these methods evidence—quite wrongly, in my judgment—that federal judges are more independent and state judges more compromised. I have interviewed and studied the background files of many hundreds of *federal* judicial candidates as coordinator of the judicial selection process for President Ronald Reagan. And I have also known many hundreds of *state* jurists with whom I have served during my 25 years on the appellate bench in Michigan. I have been blessed in both regards to have been familiar with jurists from *both* of our two judicial systems. And at least in my opinion, there is *no* discernible difference in their competency, their character, or their sense of professional and ethical obligation. Yes, state judges are sometimes faced with temptations that arise from campaigns and elections, but federal judges too are sometimes faced with temptations that arise from the *absence* of democratic accountability that arise from campaigns and elections. Yet each of these jurists, as I have witnessed them, do their best—as is their duty—to overcome these temptations by force of character and sense of obligation. Federal judges are most strengthened by their tenure and tradition, and state judges by their proximity and accountability to the people. They can each be proud of their respective legacies.

VII. Conclusion

In sum, we must enhance the role of state courts, elevate the influence of state constitutions, and strengthen the foundations of a responsible state constitutionalism. It is necessary that we do *all* of the above. This must be done by giving *faithful* meaning to our state constitutions, and by treating these as genuinely *independent* sources of constitutional authority, each with their own distinctive premises, purposes, provisions, and histories, and not as mere appendages of the federal Constitution. What is most necessary in achieving

this is not a more powerful state judiciary, mimicking the most dubious jurisprudential aspects of the federal judicial power at the expense of the representative processes of self-government, but a judicial system in which a better equilibrium is established between federal and the state authority. We must seek this balance in order to further the values, and to fulfill the promise, of judicial and constitutional federalism. Thank you very much.

Other Views:

- William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 493 (1977), *available at* https://www.jstor.org/stable/1340334.
- JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018), *available at* https://global.oup.com/academic/product/51-imperfect-solutions-9780190088811.
- Clint Bolick, *Principles of State Constitutional Interpretation*, 54 ARIZ. ST. L. J. 771 (2022), *available at* https://arizonastatelawjournal.org/wp-content/uploads/2022/02/01-Bolick.pdf.