WHO DECIDES? DEPENDS ON WHAT THE FEDERAL GOVERNMENT ALLOWS

CLARK L. HILDABRAND & ROSS C. HILDABRAND

Who Decides? Depends on What the Federal Government Allows

Clark L. Hildabrand & Ross C. Hildabrand[1]

The familiar adage reminds us not to judge a book by its cover. But the contrast between the cover for this book, *Who Decides? States as Laboratories of Constitutional Experimentation*, and the cover for one of Chief Judge Jeffrey S. Sutton's previous books on state constitutional law[2] provides insight into what ails state constitutional law. Judge Sutton's earlier book neatly arrayed each of our fifty states side-by-side in rows. These are dignified, equal sovereigns. This book, in contrast, stacks each state into the dome of the Federal Capitol's rotunda. Instead of the *Statue of Freedom* which stands atop the real-life Capitol, topping the book's dome is a shape that looks like a fork with a handle sharpened into a spike. This is the federal power that looms over the States, ready to subsume them.

Lest that picture sound too grim, Judge Sutton's book does its best to defend the project of state constitutional law. As an advocate,[3] judge,[4] and educator,[5] Judge Sutton has stood up for the States when others would not. And his latest contribution to the conversation about state constitutional law is a graceful and enlightening explanation of the myriad ways States structure their governments. The Federal Constitution is not the only way to organize a republican government. We turn first to one of the stories Judge Sutton highlights in his book—the ingenuity of state governments adopting the plural executive model—before returning to the federal elephant in the room.

The Plural Executive Model Shows That the Federal Way Is Not Always the Best Way

For starters, our experiences as Tennesseans with family ties to the Commonwealth of Kentucky confirm that the federal unitary executive model is not always the *best* model for every sovereign. As Judge Sutton explains, "[a]t the national level, the US Constitution places all executive authority in one president."[6] "The President controls the executive-branch officers through the singular authority to choose all cabinet members, whether it's the attorney general, the secretary of defense, the secretary of state, the secretary of the treasury, the secretary of health and human services, and on and on."[7] That is not the approach of most States. All but three states use a plural executive model which entails simultaneously granting different parts of the executive

---

[1] Clark L. Hildabrand serves as Assistant Solicitor General for the State of Tennessee and previously clerked for Chief Judge Sutton. Ross C. Hildabrand attends Harvard Law School and is a member of the J.D. class of 2022. This book review reflects *only* their personal views and *not* those of the State of Tennessee or any other employer.

[2] JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018).

[3] *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 509 (1997).

[4] *See, e.g.*, Deboer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom.* Obergefell v. Hodges, 576 U.S. 644 (2015).

[5] *See, e.g.*, JEFFREY S. SUTTON ET AL., STATE CONSTITUTIONAL LAW: THE MODERN EXPERIENCE (3d ed. 2019).

[6] JEFFREY S. SUTTON, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION 147 (2021).

[7] *Id.* at 147-48.

power to different individuals.[8] Tennessee, for example, popularly elects its governor,[9] but the Tennessee Supreme Court possesses the authority to appoint the Tennessee Attorney General.[10]

While Tennessee is unique in granting its supreme court this power, one of the worst moments in its history demonstrates the wisdom of adopting the plural executive model as a check on the power of the governor. In the fall of 1978, Republican Lamar Alexander defeated incumbent Governor Ray Blanton. The Democratic governor descended further into alcoholism—"drinking vodka in the morning and by ten o'clock, he's just incomprehensible"[11]—and sold pardons to fifty-two prisoners, including twenty murderers.[12] In response, the governor-elect worked across the political aisle with the Democratic leaders of the General Assembly and Tennessee Attorney General Bill Leech, a "yellow dog" Democrat, to figure out a legal way to swear Lamar Alexander in early and thus remove the corrupt governor from office.[13] Thanks to the independent legal advice of General Leech, they succeeded in peacefully carrying out what the leader of the state senate called "[i]mpeachment, Tennessee style."[14]

Kentucky's experience in recent years further demonstrates the benefits of holding separate elections for governor and attorney general. In 2019, Kentucky's state executive elections yielded odd results. Andy Beshear, the Commonwealth's former attorney general and the Democratic candidate for governor, defeated Matt Bevin, the incumbent Republican governor, by a margin of less than 0.4%, around five thousand votes.[15] Despite that Democratic victory, the Republican candidates won every other executive election with healthy margins.[16] The reason for Governor Bevin's anomalous loss was that he had taken aggressive action to fix Kentucky's underfunded pension system. According to 2017 data, Kentucky had the worst funded pension system in the entire country with a funded ratio of only 33.9%.[17] That means the Commonwealth and its employees had failed to pay 66.1% of what they needed to sustain the pensions, which had the thirteenth highest payout per retiree despite Kentucky's low cost of living.[18] Governor Bevin

---

[8] *Id.* at 149.
[9] TENN. CONST. art. III, § 2.
[10] TENN. CONST. art. VI, § 5.
[11] Tenn. Att'y Gen., *Making the Case- "Impeachment, Tennessee style" Part 1*, YOUTUBE (Aug. 9, 2021), https://www.youtube.com/watch?v=Sndyh0oVsqo (quotation available at 16:50-58).
[12] PHILLIP LANGSDON, TENNESSEE: A POLITICAL HISTORY 389 (2000).
[13] Hal D. Hardin, *A Day in the Life of a Country Lawyer*, 64 TENN. L. REV. xviii, xviii-xix (1996). General Leech had one of the busiest twenty-four hours possible for an attorney. In that short time span, he argued a case before the U.S. Supreme Court, celebrated the birth of a child, and deposed the governor. *Id.* at xviii.
[14] Ken Whitehouse, *Where are they now: 'Impeachment, Tennessee style,'* NASHVILLE POST (June 5, 2012), https://www.nashvillepost.com/home/where-are-they-now-impeachment-tennessee-style/article_6a516551-cbea-520f-abee-ab00b3f082c3.html.
[15] KY. STATE BD. OF ELECTIONS, OFFICIAL NOV. 5, 2019, ELECTION RESULTS 6 (2019), https://elect.ky.gov/results/2010-2019/Documents/2019%20General%20Certified%20Results.pdf (last visited Nov. 19, 2021).
[16] *Id.* at 13, 19, 25, 31, 37.
[17] Evan Comen, *Is Your Money Safe? These States Are Getting Hit Hardest by the Pension Crisis*, USA TODAY (Oct. 15, 2019), https://www.usatoday.com/story/money/2019/10/15/every-states-pension-crisis-ranked/40302439/.
[18] *Id.*

successfully stabilized the pensions,[19] but teacher walkouts throughout the Commonwealth left many thinking that he had gone too far, too fast.[20]

While Kentuckians wanted a governor with a less aggressive approach to the pension issue, they still wanted other executives to reflect the generally conservative views of the Bluegrass State. That is most evident with newly elected Attorney General Daniel Cameron. For example, General Cameron successfully defended Republican legislation that curbed the governor's executive power concerning the COVID-19 pandemic.[21] Most recently, the U.S. Supreme Court heard arguments in October regarding the Kentucky Attorney General's ability to defend a state abortion law.[22] As attorney general, Andy Beshear had left the defense of the law to then-Governor Bevin, but General Cameron wanted to intervene to defend the law after now-Governor Beshear refused to do so.[23] The Supreme Court seems inclined to respect Kentucky's plural executive model because, as Justice Kagan pointed out at argument, it "would be an extremely harsh jurisdictional rule or at least a counterintuitive rule if it ended up in a place where nobody was there . . . to defend Kentucky's law, even though there are significant parts of Kentucky's government that still want . . . its law defended."[24]

At the same time, we share Judge Sutton's inclination "that the plural executive and the unitary executive are each right for the governments that have them."[25] There are good reasons for the federal government sticking with the unitary executive model. The original reason—the President's decisive role in providing for national defense—remains a good one.[26] But a better reason is one that did not exist for the first half of our country's existence: the need to rein in the millions of federal bureaucrats.[27] Civil service laws and unrepresentative "independent" agencies have already siphoned off some of the Federal Executive's power,[28] and a plural executive would dilute his influence on federal policy even further.

---

[19] *See The State Pension Funding Gap: Plans Have Stabilized in Wake of Pandemic*, PEW CHARITABLE TRUSTS (Sept. 14, 2021), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2021/09/the-state-pension-funding-gap-plans-have-stabilized-in-wake-of-pandemic.

[20] Katie Reilly, *How Republican Governor Matt Bevin Lost Teachers and Lost Kentucky*, TIME (Nov. 7, 2019), https://time.com/5719885/matt-bevin-republican-kentucky-teacher-protests/.

[21] Cameron v. Beshear, 628 S.W.3d 61 (Ky. 2021).

[22] Cameron v. EMW Women's Surgical Ctr., P.S.C., 141 S. Ct. 1734 (2021) (granting the petition for writ of certiorari).

[23] *See* EMW Women's Surgical Ctr., P.S.C. v. Friedlander, 831 F. App'x 748 (6th Cir. 2020) (denying General Cameron's motion to intervene).

[24] Transcript of Oral Argument at 54-55, Cameron v. EMW Women's Surgical Ctr., P.S.C., 141 S. Ct. 1734 (2021) (No. 20-601).

[25] SUTTON, *supra* note 6, at 176.

[26] *Id.* at 176-77.

[27] *See id.* at 178 ("Presidential power indeed seems to grow less unitary by the administration.").

[28] *See, e.g.*, Clark Hildabrand, *The Geographic (Un)representativeness of the Federal Reserve Board of Governors*, 34 YALE L. & POL'Y REV. 155 (2016) (documenting the dominance of the East Coast on the Federal Reserve Board of Governors and American monetary policy).

The States Have Learned to Act Like Territories Because the Federal Courts Often Do Not Treat Them Like Sovereigns

But we cannot ignore the specter that haunts state constitutional law. Judge Sutton ponders why state judges and attorneys too often interpret their own constitutions in lockstep with federal law.[29] The reason, as he concedes at points in the book,[30] is that the question of who decides usually has the following answer: the federal courts.

To use one of Judge Sutton's examples, there was no reason for Montana Supreme Court justices in a 2011 case to consider whether the Montana Constitution provided less protection for campaign speech because the U.S. Supreme Court had already broadened *federal* free speech rights in *Citizens United*.[31] The state supreme court did its best to distinguish its statute from the federal one in *Citizens United*. But "[w]hat you might think would happen next did happen next" after the court upheld the Montana law: The losing party appealed to the Federal Supreme Court, and the Court reversed the state decision.[32] "[N]othing would have changed" if the Montana Supreme Court had expended the energy to explain why its own constitution did not provide the same level of protection for campaign speech.[33]

State judges think of themselves more as judges for cookie-cutter territories than as judges for unique sovereigns because they have grown accustomed to the federal government treating sovereign States as mere territories. Sometimes this is rather literal. In July 2020, with a level of caution bordering on that of Leeroy Jenkins, a 5-4 majority of the U.S. Supreme Court declared that half the State of Oklahoma was still Indian territory.[34] That decision upset what had been settled for over a century and jeopardized decades of criminal convictions. The Court, which has never had an Oklahoman among its ranks, does not have to live with the consequences of its decision. We hope the Court reverses course in that line of cases,[35] but the fact remains that the most important political issues in our country are usually resolved not by state or local elected officials but by *federal* bureaucrats and *federal* judges.

The Federal Courts Have Facilitated the Usurpation of Local Power and Should Return Power to the States and Their Citizens

As Judge Sutton argues, the COVID-19 pandemic has highlighted the strengths of federalism. State "borders add tools and flexibility for fixing the problem."[36] If, say, Governor DeSantis's Florida had followed Governor Cuomo's lead in New York by moving "elderly men and women . . . from crowded hospitals to nursing homes," many more Floridians would have

---

[29] SUTTON, *supra* note 6, at 129-30.
[30] *See, e.g.*, *id.* at 133 (acknowledging that "we have converted the one constitution most difficult to amend (the US Constitution) and the judges most difficult to replace (federal judges) into the key change agents in our society").
[31] *Id.* at 138-40 (explaining the history of W. Tradition P'ship v. Attorney General, 271 P.3d 1 (Mont. 2011), *rev'd sub nom.* Am. Tradition P'ship v. Bullock, 567 U.S. 516 (2012)).
[32] *Id.* at 139.
[33] *Id.* at 139-40.
[34] *See* McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).
[35] *Cf.* Oklahoma v. Castro-Huerta, No. 21-429, 2022 WL 187939 (Jan. 21, 2022) (granting the petition for writ of certiorari on a related but more limited question).
[36] SUTTON, *supra* note 6, at 5.

died.[37] But, more importantly, the COVID-19 pandemic has broadcasted the raw power of the federal government. The Federal Executive has increasingly pushed its power to the outer limits of whatever federal courts allow.

Consider the nationwide eviction moratoria. First Congress and then, when the statute expired, the CDC issued nationwide prohibitions on evictions. These unprecedented intrusions into the realm of landlord-tenant relations—an area of law mostly left up to the states and local governments—amounted to a massive transfer of wealth from landlords, both large and small, to tenants, whether deserving or not. The Sixth Circuit rightly ruled that the CDC lacked that power,[38] but the Supreme Court vacillated. Despite agreeing "that the Centers for Disease Control and Prevention exceeded its existing statutory authority by issuing a nationwide eviction moratorium," Justice Kavanaugh cast the decisive vote to allow the CDC to persist in its lawless action for another month.[39] When the CDC sought to extend the illegal moratorium, the Supreme Court finally stepped in to put a stop to it.[40]

The Federal Executive then attempted to enforce federal vaccination and masking mandates that would stop Americans from voting on COVID-19 policies with their feet. As Judge Sutton opined, at least one of these mandates "likely exceeds [federal] authority" and "assumes authority to regulate an area—public health and safety—traditionally regulated by the States."[41] The federal government, in other words, is attempting to seize still more power from the States. Unless the federal courts stop such illegal actions, States and citizens will find themselves subjects of a nearly unaccountable federal bureaucracy.

And that is the central problem with modern jurisprudence. Judge Sutton posits a question for the reader: Would you trade five of the worst federal court "decisions over the last seventy-five years that invalidate state or federal laws on federal constitutional grounds" if someone with opposing political views got to do the same?[42] We would take that trade in a heartbeat. While we cannot speak for everyone, we think many in Tennessee would give up *Citizens United* or *McDonald v. Chicago* if it meant the State could decide for itself whether to redefine marriage or whether to stop the abortion of unborn Tennesseans.

But neither we nor the States get to decide; only the U.S. Supreme Court gets a choice. Sadly, the Court has grown accustomed to its power to set policies for the entire country and, in past decades, has shown little interest in reining in the federal bureaucracy in its backyard. Nine unelected Justices—really just a majority of five—determine what your rights are and what rights are important enough to enforce. The right of Protestants to sing praises to God in their own

---

[37] *Id.* at 6.
[38] Tiger Lily, LLC v. U.S. Dep't of Hous. & Urban Dev., 5 F.4th 666 (6th Cir. 2021).
[39] Ala. Ass'n of Realtors v. Dep't of Health & Human Servs., 141 S. Ct. 2320, 2320-21 (2021) (Kavanaugh, J., concurring).
[40] Ala. Ass'n of Realtors v. Dep't of Health & Human Servs., 141 S. Ct. 2485 (2021) (per curiam).
[41] *In re* MCP No. 165, 20 F.4th 264, 264, 285 (6th Cir. 2021) (Sutton, C.J., dissenting from denial of initial hearing en banc). The U.S. Supreme Court stayed that vaccination-or-testing mandate in an opinion that leaned upon Judge Sutton's writings. *See* NFIB v. Dep't of Lab., 142 S. Ct. 661, 664-65 (2022) (per curiam) (quoting *In re* MCP No. 165, 20 F.4th at 264, 272, 274 (Sutton, C.J., dissenting from denial of initial hearing en banc)); *see also id.* at 667 (Gorsuch, J., concurring) ("The central question we face today is: Who decides?").
[42] SUTTON, *supra* note 6, at 24.

churches, clearly covered by the Free Exercise Clause: not worth the Court's time.[43] The right of nonbelievers never to have to see a public-school official praying to God, despite the long history of prayers in Congress and at government meetings: essential.[44] The Founders never intended our Republic to become a country not of laws but of five Justices. No one hoped for a nation where most major domestic policy decisions turn on federal fiat instead of local deliberation.

Perhaps for that reason, we always find a little comfort when we drive up to Kentucky to visit our relatives. Somewhere along the way there is a government building with a large cross planted in its front yard for all the world to see. This is not a war memorial in a D.C. suburb or anything else, to the best of our limited knowledge, the Supreme Court's jurisprudence would approve of.[45] It is simply a cross standing as a reminder of Christ's sacrifice for the sins of fallen man. A federal court would likely rule this display of religiosity unconstitutional, as the Supreme Court has previously ruled that a Kentucky county cannot display the Ten Commandments without a secular purpose for the display.[46] That cross stands as a reminder that we once lived in a different country—a country where *all* citizens had a say on the issues of the day, not just five Justices in a swamp on the Potomac River.[47] We hope that *Who Decides?* will remind the Court that it can[48]—and should[49]—entrust more decisions to the States and their citizens.

---

[43] *See* S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716 (2021) (allowing the California governor to prohibit singing in churches while allowing singing in film studios).
[44] *See* Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634 (2019); Lee v. Weisman, 505 U.S. 577 (1992); Engel v. Vitale, 370 U.S. 421 (1962). *But see* Town of Greece v. Galloway, 572 U.S. 565 (2014).
[45] Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019).
[46] McCreary Cnty. Ky. v. ACLU of Ky., 545 U.S. 844 (2005).
[47] We encourage all to follow the U.S. Constitution.
[48] Dobbs v. Jackson Women's Health Org., 141 S. Ct. 2619 (2021) (granting the petition for writ of certiorari).
[49] Kennedy v. Bremerton Sch. Dist., No. 21-418, 2022 WL 129501 (Jan. 14, 2022) (granting the petition for writ of certiorari).