ESSAYS

THE RENAISSANCE OF FEDERALISM

BY
CLINT BOLICK*

I. INTRODUCTION BY JAMES HUFFMAN**

In the following article, Justice Clint Bolick addresses a subject that should be of interest to environmental law students, practitioners and regulators. "Federalism," writes Bolick, "is the fabric of our constitutional tapestry." How particular political interests and parties view that tapestry depends, observes Bolick, on who holds power in our various governments. In pursuit of uniform national standards, those holding power in the national government tend to discount the scope of the states' powers, but when those same interests are in the national minority they contend for federalism-based limits on national authority and more expansive state and local powers.

The history of environmental regulation since the 1960s reflects this opportunistic and unprincipled (Bolick calls it situational) approach to constitutional federalism. As advocates for environmental protection gained influence on the national political stage, they were able to persuade Congress to enact an assortment of national environmental laws relying heavily on Congress's power under the constitution to regulate interstate commerce. A result was preemption of some state laws and reduced reliance on common law remedies. Objections by some states that these laws intruded on the reserved powers of the states were largely unsuccessful in the courts. But the

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Trump administration's effort to roll back many of these national laws has led to a newfound interest on the part of environmental advocates in state and local regulation.

And that, argues Bolick, is a promising reminder of the founders' wisdom in establishing federalism's vertical separation of powers. Although state powers have been steadily eroded over the last century, the shifting political consequences of a powerful national government have helped sustain bipartisan support for the preservation of significant powers in the state governments. No doubt Bolick would prefer a more principled, less situational, stance on the vertical separation of powers from both ends of the political spectrum, but he is a realist as were those who designed the federal system more than two centuries ago. The founders conceived federalism as one of many structural restraints on the abuses of power that otherwise arise, inevitably, from political factionalism.

Federalism debates are often framed as federal power versus states' rights. But Justice Bolick reminds us that it is people, not states, that possess rights. Three examples of what Bolick calls "civil-disobedience federalism" underscore the importance of federalism to individual liberties. Recent state initiatives with respect to sanctuary for immigrants, legalized marijuana and the right to try experimental drugs all are driven by concerns for individual freedom. Similar concerns for the rights of individuals arise from both environmental degradation and environmental regulation. Justice Bolick's article suggests that greater reliance on state and local governments, what he calls the "laboratories of democracy," can benefit both freedom and the environment.

II. THE RENAISSANCE OF FEDERALISM

What an honor to deliver this evening the annual lecture in honor of my long-time friend, Jim Huffman. Jim defines the term "renaissance man." I cannot imagine anyone having a bigger impact on a law school, with a career spanning four decades as a professor, dean, and founder of the environmental and natural resources program. And as far as I can tell based on his recent productivity, I think he's only about halfway through that career, notwithstanding this thing he calls retirement. His scholarship encompasses constitutional, natural resources, environmental, water, and private property rights law. He is widely published and has taught in such wondrous places as Greece, Guatemala, and New Zealand. About the only blemish I am aware of in an otherwise storied career is when some people who must not have liked Jim very much put him up for the U.S. Senate in 2010. Much as I know he would have served with distinction, I would have worried for his sanity, and I look forward to Jim's continuing leadership in

many areas of legal scholarship. Jim, my comments tonight are a humble and tiny tribute to you and your ever-growing legacy.

We recently celebrated a milestone, the 230th birthday of the greatest freedom charter in the world, the U.S. Constitution. Sometimes people justifiably wonder how relevant the Constitution is to our lives in the twenty-first century. Is it vibrant and meaningful or a mere historical relic? Certainly much of its intended relevance has faded, often and ironically at the instigation of those who take an oath to defend it. But tonight my topic involves a feature of our Constitution that is a distinctively and wonderfully American innovation that began as a philosophical abstraction yet is enormously vital and meaningful in the year 2017: federalism. Long given up for dead, it turns out that like Mark Twain's famous proclamation, happily the rumors were exaggerated.

I approach this topic with a slight degree of trepidation, owing to a brief experience a few decades ago that left an enduring impression. Back in my single days in Washington, D.C., I was riding the Metro and struck up a conversation with a young woman. I was wearing an Adam Smith tie, which was a ubiquitous sartorial emblem among conservative and libertarian men in the 1980s and '90s. The woman noticed my tie and remarked, "I dated a conservative one time." She reflected for a moment, then wrinkled her nose in obvious disdain and added, "All he wanted to do was talk about *federalism*."

I took that painful episode to heart, and when I subsequently met my wife, I think I waited until our second or third date before I even mentioned federalism. Fast forward to 2017, and although I would never venture that federalism has become a sexy topic, it is definitely a salient one, perhaps more than at any time in our history.

That is because of the troubling circumstances in which we find ourselves: an America deeply and bitterly divided between red and blue, overheated with inflamed rhetoric, resulting in a paralyzed national government incapable of addressing our nation's most urgent problems.

Fortunately, our framers envisioned that most of the decisions that affect us as individuals and communities would be made not at the national but at the state and local levels;[1] and despite a steady accretion of power in the national government, that still remains largely the case.

Indeed, federalism today is playing a role that is more vitally important than ever before—as a pressure valve to allow people of sharply divergent views to effectuate different policy goals. If we can't reconcile competing viewpoints at the national level, we can each pursue policies that reflect our respective goals and values in the several states—and in the process, to borrow a bumper-sticker phrase, to coexist. And that was exactly what the framers intended.

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[1] *See* THE FEDERALIST NO. 45, at 292–93 (James Madison) (Clinton Rossiter ed., 1961) ("The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.").

Federalism is the fabric of our constitutional tapestry. When most people think of separation of powers, they think of the executive, legislative, and judicial branches, each balancing and limiting each other's powers. But even more fundamental is the vertical separation of powers, in which the states and national government also balance and limit the powers of each other.

In the original constitutional framework, states were intended to have the upper hand. The Constitution created a national government of limited and defined powers. The states retained all remaining legitimate governmental powers.[2] To underscore the point, the framers punctuated the Bill of Rights with the Tenth Amendment, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[3]

The framers believed that the states and their constitutions would be reliable guardians of individual liberty.[4] After all, the Bill of Rights derived from preexisting protections in state constitutions.

But of course that premise proved incorrect. The institution of human slavery and other freedom deprivations necessary to sustain it were effectuated under color of state law.[5] So that following the Civil War, Congress enacted the Fourteenth Amendment to nationalize the protection of civil rights where states violated them.[6] The result was a double security for freedom, with states and their constitutions continuing to provide essential protection for freedom, but with federal remedies available when states transgressed constitutional boundaries.

That is not to say that dual sovereignty has always advanced freedom. To the contrary, the Jim Crow era exemplified the widespread deprivation of freedom that unchecked state power can produce.[7] Whenever we have gotten into trouble in that regard, it is because we have confused federalism with states' rights. I confronted that confusion in a book I wrote over two decades ago called *Grassroots Tyranny*, which contains the most quoted passage from any of my books, meaning that it is the only passage I know of that has been quoted at least twice, so I guess it bears repeating.[8] "[T]he very notion of states' rights is oxymoronic. States don't have rights. States have

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2 *Id.* at 292.

3 U.S. CONST. amend. X.

4 William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 537 (1986).

5 *See, e.g.*, Robert J. Kaczorowski, *The Tragic Irony of American Federalism: National Sovereignty Versus State Sovereignty in Slavery and in Freedom*, 45 U. KAN. L. REV. 1015, 1024 (1997).

6 U.S. CONST. amend. XIV, § 1.

7 *See, e.g.*, CHARLES S. MANGUM, JR., THE LEGAL STATUS OF THE NEGRO 181–82 (1940).

8 *See* David Drumm (Nal), Guest Blogger, *Libertarians and the Civil War*, JONATHANTURLEY.ORG, https://perma.cc/JC3D-QBTW (March 11, 2012); Dave Thiessen, *Did America Ever Have a Period of Laissez-Faire Capitalism?*, 2 J. ECON. & ECON. EDUC. RES. 92, 98 (2001).

powers. People have rights. And the primary purpose of federalism is to protect those rights."[9]

One constant feature in debates over federalism is the frequency with which proponents and opponents switch sides, or what I refer to as situational federalism. When liberals control the national government, conservatives are stalwart and reliable supporters of federalism.[10] When the tables are turned, liberals rediscover the virtues of federalism.[11] In reality, both sides should support federalism because it extends to all the opportunity to reside in a community that best reflects our views and values.

Liberals loved federalism in the 1920s and '30s. During that period, the United States Supreme Court routinely invalidated economic regulations at the state and local (as well as national) levels. Justice Louis Brandeis, dissenting from one such decision, famously declared that

> [t]here must be power in the states . . . to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. . . . It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory.[12]

But the tune changed when Franklin D. Roosevelt became president and some states attempted to buck the New Deal tide. By 1940, after liberals took control, the Court in a case called *United States v. Darby*[13] dismissed the Tenth Amendment as a "truism."[14] When I first encountered that term in *Darby*, I had no idea what it meant, although as "isms" go, "truism" sounded pretty good. You know, as in "I'm not a communist or a fascist, I'm a truist." Turns out, the thesaurus lists truism's synonyms as "platitude," "cliché," "banality," or "bromide."[15] Hence did the Supreme Court, not for the first time or certainly the last, reduce one of the most vital components of the Constitution to a mere platitude. And there its status remained until liberals rediscovered the utility of federalism after the Warren Court ended, and conservatives rediscovered it during the Clinton years, and on and on the story goes.

But along the way, a mysterious and wonderful thing started to happen: the Supreme Court began to embrace a more coherent and consistent vision, one that recognizes federalism's core value: freedom. We recognize the dual sovereignty of states and the national government not to glorify one at the expense of another, but because that balance and competition of powers, properly enforced, advances freedom.

Several cases illustrate this evolution, but two of my favorites are relatively obscure: *Gonzales v. Oregon*[16] and *Bond v. United States*.[17]

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9 CLINT BOLICK, GRASSROOTS TYRANNY: THE LIMITS OF FEDERALISM 17 (1993).

10 *Id.* at 26, 79.

11 *Id.*

12 New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

13 312 U.S. 100 (1941).

14 *Id.* at 124.

15 *Truism*, MERRIAM-WEBSTER, https://perma.cc/4E37-GH45 (last visited July 14, 2018).

16 546 U.S. 243 (2006).

Gonzales involved a voter initiative adopted by this state's voters creating the so-called "right to die," protecting assisted suicide in certain instances.[18] The Bush Administration, which was pro-federalism (except when it wasn't), invoked the federal Controlled Substances Act to invalidate the measure.[19] The Supreme Court upheld the Oregon law in 2006 by a 6–3 vote.[20] The majority decided the case on federalism grounds.[21] Recognizing that regulation of medicine is traditionally a matter of state concern, the Court read the federal law narrowly so as not to effect what it referred to as "a radical shift of authority from the States to the Federal Government to define general standards of medical practice in every locality."[22] The decision was not only a victory for federalism but for the right to medical self-determination that the state had resolved to protect.

Five years later, the Court decided *Bond,* which has one of the oddest fact patterns I've ever read. Carol Anne Bond was a jilted spouse who discovered that a close friend had become her husband's lover and, worse than that, pregnant.[23] Effectuating a scheme of revenge, Mrs. Bond strategically placed poison on her former friend's mailbox, car door handle, and front doorknob, causing a minor chemical burn.[24] Definitely the stuff of tabloids but not a typical candidate for Supreme Court review.

Then federal prosecutors got involved and charged Mrs. Bond, among other things, with violating a statute implementing an international chemical weapons treaty.[25] Let this all be a lesson to philanderers and revenge-seekers alike.

Mrs. Bond wanted to challenge the federal government's prosecution as a violation of the Tenth Amendment on the basis that this should be a matter of state criminal law rather than an international chemical weapons treaty.[26] But that presented the question that brought the case to the Supreme Court: does an individual have standing to assert the Tenth Amendment against an unconstitutional federal action?[27]

The Court answered that question *unanimously* with an emphatic yes.[28] "Federalism," wrote Justice Kennedy, "secures the freedom of the individual. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power."[29]

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17 564 U.S. 211 (2011).
18 *Gonzales*, 546 U.S. at 248–49.
19 *Id.*
20 *Id.* at 247.
21 *Id.* at 274 (discussing the "background principles of our federal system").
22 *Id.* at 275.
23 Bond v. United States, 564 U.S. at 214.
24 *Id.* at 214–15.
25 *Id.* at 215.
26 *Id.*
27 *Id.*
28 *Id.* at 213, 223–24.
29 *Id.* at 221.

Imagine that: the entire Supreme Court referring to our nation's capital as a "remote central power," to which federalism provides an antidote. As Justice Kennedy aptly described it, "State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'"[30]

The Court also has embraced in a line of cases the anti-commandeering principle, which holds that although federal law is supreme in areas within its authorized scope, the national government cannot force states to fund or implement federal laws. In a 1992 decision involving waste disposal, the Court in a 6–3 decision by Justice Sandra Day O'Connor proclaimed, "States are not mere political subdivisions of the United States. . . . Whatever the outer limits of [their] sovereignty . . . one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program."[31] More recently, in *National Federation of Independent Business v. Sebelius*,[32] even as the majority voted to uphold Obamacare, seven members of the Court ruled that Congress could not financially coerce states to expand Medicaid.[33]

Those decisions and many others illustrate both the breadth and depth of the pro-federalism consensus on our nation's highest court. I don't want to overstate this phenomenon; to the contrary, in terms of the breathtaking expansion of national power, we are still far-removed from the vision of the framers. But as a glass-half-full kind of guy, I will say with confidence that the current climate is the most favorable for federalism in any of our lifetimes.

So, what will we make of this *carpe diem* moment? The possibilities are limited only by our imagination and our passion. When my wife and I were casting about for the right place to build our lives together after too many years in Washington, D.C., we decided to sink our roots in the desert soil of Arizona in large part because it is still the land of Goldwater, with a climate hospitable to freedom. I can say that Washington never looks better than as it recedes into the rear view mirror. Others are drawn to other states for different reasons. Policy differentiation among the states is an enduring hallmark of federalism. We can see how different policy choices yield different outcomes in terms of opportunity and prosperity—laboratories of democracy, indeed.

There are many ways in which states can control their own destinies and even influence or determine national policy. One is through a constitutional mechanism they have never used: amending the Constitution, not by ratifying amendments approved by Congress, but by proposing their own. Article V of the Constitution allows two-thirds of the states to call a convention to propose amendments.[34] Some have raised concerns about a

30 *Id.* (quoting Coleman v. Thompson, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)).

31 New York v. United States, 505 U.S. 144, 147, 188 (1992).

32 567 U.S. 519 (2012).

33 *Id.* at 529, 588.

34 U.S. CONST. art. V.

runaway convention;[35] others have proposed mechanisms to prevent that.[36] But the ultimate safeguard is that thirty-eight states must ratify any proposed amendment.[37] Such an effort may never come to fruition—but even the act of coming close could have a potent effect on federal actions and policies.

One possible way to break the gridlock in our nation's capital might be to devolve seemingly intractable disputes to the states. Jeb Bush and I proposed exactly that in our 2013 book *Immigration Wars*.[38] Under the Constitution, Congress has exclusive authority over immigration.[39] Yet despite a desperate need to dramatically overhaul an outmoded and ineffective federal immigration policy, Congress is paralyzed. Why not delegate some portion of the visa authority to the states, so those with a need for low- or high-skilled labor can meet the demand, while other states could elect not to do so?[40] Last year Michigan Governor Rick Snyder requested 50,000 skill-based visas to help repopulate Detroit with enterprising immigrants.[41] The Cato Institute and others are championing a federalism-based immigration approach and the idea is now before Congress.[42] It breaks the mold, breaks the logjam, and provides a template for state-based reform that can be replicated in many other areas.

One of the most potentially robust features of federalism, and unfortunately one of the most overlooked, is state constitutionalism. We often talk about *the* Constitution, in the singular, but in fact we have fifty-one. Every state constitution is chock full of protections of individual liberty and constraints on government power that are completely unknown in the federal constitution. And part of the beauty of federalism is that so long as they do not violate the federal constitution, state courts are free to interpret their own constitutions differently than the U.S. Supreme Court interprets the national constitution, even where the words are identical.[43] But only in one direction: we may interpret our own constitutions to provide greater freedom than the U.S. Constitution, but not less.[44] I call this the freedom ratchet.[45]

Again, this was an idea first championed by liberals, specifically Justice William Brennan, who starting in the 1970s worried that many rights of

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35 Michael B. Rappaport, *Reforming Article V: The Problems Created by the National Convention Amendment Method and How to Fix Them*, 96 VA. L. REV. 1509, 1528 (2010).

36 *Id.* at 1555.

37 *Id.* at 1530.

38 JEB BUSH & CLINT BOLICK, IMMIGRATION WARS: FORGING AN AMERICAN SOLUTION (2013).

39 U.S. CONST. art. I, § 8, cl. 4.

40 BUSH & BOLICK, *supra* note 38, at 32–33.

41 Office of Governor Rick Snyder, *Immigration Reform Will Help Michigan's Economy Grow Stronger and to Create More Jobs for Our State*, MICHIGAN.GOV, https://perma.cc/TT6J-B4ZV (last visited July 14, 2018).

42 Reforming American Immigration for Strong Employment Act, S. 354, 115th Cong. (2017).

43 *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977) [hereinafter Brennan, *State Constitutions*].

44 Clint Bolick, Speech, *State Constitutions as a Bulwark for Freedom*, 37 OKLA. CITY U. L. REV. 1, 6 (2012).

45 *Id.*

criminal defendants recognized by the Warren Court were being eroded by a more conservative Supreme Court. He called upon liberal activists to recourse to state courts and constitutions to preserve and expand those protections.[46] They heeded the call with gusto. Within ten years, Brennan counted more than 250 state court decisions interpreting their constitutions to provide greater protections for criminal defendants than the national constitution.[47] Brennan's calls were echoed at the state level by such advocates of state constitutionalism as Oregon Supreme Court Justice Hans Linde.[48]

As Justice Brennan observed, state constitutionalism offers opportunities to conservatives as well as liberals.[49] I will share one example among many. I'm sure you all remember the infamous *Kelo v. City of New London*[50] decision in which the U.S. Supreme Court, over a passionate dissent by Justice O'Connor, upheld the City of New London's decision to use its eminent domain power to bulldoze a working-class neighborhood to make way for a Pfizer plant expansion, which by the way never materialized.[51] The Court's majority discovered that the Fifth Amendment's limitation of eminent domain to "public use" had self-amended to the much more-permissive standard of "public benefit."[52] In so doing, it removed any meaningful constraint from the power to take property from one private owner and give it to another.

At the same time that Suzette Kelo and her neighbors were losing their homes, Mesa, Arizona was serving eminent domain papers on Bailey's Brake Service and its neighbors to make way for a hardware store that wanted to expand.[53] Randy Bailey had inherited the business from his dad and wanted

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46 Brennan, *State Constitutions*, *supra* note 43, at 491 ("The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed."); Clint Bolick, *Brennan's Epiphany: The Necessity of Invoking State Constitutions to Protect Freedom*, 12 TEX. REV. L. & POL. 137, 138 (2007) [hereinafter Bolick, *Brennan's Epiphany*].

47 Bolick, *Brennan's Epiphany*, *supra* note 46, at 141, 143; Brennan, *The Bill of Rights, supra* note 4, at 548; *see also* Brennan, *State Constitutions*, *supra* note 43, at 493, 500–03 (noting multiple instances of state courts offering greater protections for federal defendants while simultaneously arguing that this is a positive development of federalism).

48 *See* Hans A. Linde, *Are State Constitutions Common Law?*, 34 ARIZ. L. REV. 215, 215–16 (1992) (discussing how state courts may freely interpret their constitutions, yet they still copy common law doctrine from the federal level); *see also* Justice Hans A. Linde, *First Things First: Rediscovering the States' Bill of Rights*, 9 U. BALT. L. REV. 379, 380 (1980) (arguing that state courts confronted with constitutional law questions should examine their state constitution before looking to the U.S. Constitution).

49 Brennan, *The Bill of Rights, supra* note 4, at 550.

50 545 U.S. 469 (2005).

51 *Id.* at 473, 489; *Kelo Eminent Domain*, INST. FOR JUST., https://perma.cc/7V2W-3L7A (last visited July 14, 2018).

52 *Kelo*, 545 U.S. at 480, 489; *see Kelo*, 545 U.S. at 501 (O'Connor, J., dissenting) ("It holds that the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public.").

53 *Mesa, Arizona Eminent Domain Abuse*, INST. FOR JUST., https://perma.cc/33F4-TGHE (last visited July 14, 2018).

to leave it to his son, and he had no desire to move.[54] Had Bailey filed suit in federal court, he surely would have lost his business.[55] But instead, my then-colleagues at the Institute for Justice and I defended his rights under the Arizona Constitution, which our court of appeals construed as providing greater protection for property rights than the federal constitution—that is, interpreting it to mean what it says. Courts and legislatures in other states likewise acted to limit eminent domain to public use.[56] Cases like these illustrate that federalism is not merely some abstract constitutional proposition, but that federalism in action can have profoundly important human consequences.

One more way in which states are effectuating widespread policy change is what I might call civil disobedience federalism. These efforts involve states or local communities taking policy actions that may directly or indirectly clash with established federal authority. Some such efforts, such as sanctuary cities, may be little more than symbolic, and may legitimately be constrained when the federal government asserts its authority. But some of these efforts have effectuated national change.

One example is marijuana legalization. The U.S. Supreme Court in 2005 upheld the federal government's prohibition of marijuana even when cultivated and consumed within a single state.[57] Yet today, thirty-one states have legalized marijuana in some fashion;[58] and until recent calls for change by Attorney General Jeff Sessions, the federal government has acquiesced.[59] Whether you support or oppose such laws, they represent state efforts to adopt policies that better reflect their citizens' policy preferences than the national government.

But another such effort has eclipsed even the success of the marijuana legalization effort, and it exemplifies the vast freedom-expanding potential for federalism. Our nation produces the greatest medicines and medical technologies in the world, many of which offer tremendous potential for millions of seriously ill people. But standing between those people and the drugs that may save their lives is a vast bureaucracy, the U.S. Food and Drug Administration (FDA), whose drug approval process costs $1.4 billion and can take a decade.[60] That process includes clinical trials, but they're strictly limited and provide placebos to many participants.[61] The FDA also has a so-

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54 *Id.*

55 The use of eminent domain by the city of Mesa for the construction of a hardware store would most likely be deemed a sufficient "public benefit" under *Kelo*. *See Kelo*, 545 U.S. at 488–90.

56 Bailey v. Myers, 76 P.3d 898, 899, 903–04 (2003).

57 Gonzales v. Raich, 545 U.S. 1, 5, 9 (2005).

58 *State Medical Marijuana Laws*, NAT'L CONFERENCE OF STATE LEGISLATURES, https://perma.cc/S42L-QHKL (last visited July. 14, 2018).

59 Sean Williams, *Sorry, Jeff Sessions: Congress Aims to Extend Medical Marijuana Protections*, The Motley Fool (Mar. 25, 2018), https://perma.cc/9XDP-D34F.

60 *See* Jason Millman, *Does It Really Cost $2.6 Billion to Develop a New Drug?*, WASH. POST (Nov. 18, 2014), https://perma.cc/6NK7-49GV.

61 *See, e.g.*, Usha Gupta & Menka Verma, *Placebo in Clinical Trials*, 4 PERSP. CLINICAL RES. 49, 49, 51 (2013).

called "compassionate use" process for accessing potentially lifesaving experimental drugs, but the forms typically required 100 physician hours to complete, making the process inaccessible to all but a handful of people.[62] Wealthy people often could access the very same drugs in foreign countries but Americans of lesser means could not.[63] For years, advocates on both sides of the ideological divide attempted to reform this byzantine system without success.[64]

Only a few short years ago, my then-colleagues at the Goldwater Institute pondered whether it might be possible to do something about this problem at the state level. We came up with the idea of state legislation that would give terminally ill patients a right to access experimental drugs that had passed the safety phase of FDA approval, and to immunize against liability those providing such access. We called it "Right to Try."[65]

The idea was enormously audacious. Federal authority over drug regulation is firmly entrenched. Our litigators quickly concluded that defending Right to Try against the inevitable FDA challenge would be, to put it mildly, decidedly uphill.

But we had not fully factored in the breadth and intensity of public support. Right to Try was not a red idea or a blue idea, it was bright purple. Arizona voters in 2014 made Right to Try part of our constitution with nearly 80% of the vote.[66] Right to Try swept the country, and as of today, thirty-eight states—from Connecticut to Virginia, Ohio and Minnesota, California and Oregon—have enacted it into law.[67]

The effect was seismic. The federal behemoth reacted, but not at all as we expected: instead of filing a legal challenge, it dramatically reduced the amount of physician paperwork for compassionate use.[68]

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62 Kimberly Leonard, *Seeking the Right to Try*, U.S. NEWS (Nov. 18, 2014), https://perma.cc/8V22-B52Y.

63 *See, e.g.*, Rachel Bluth, *Looking for Bargains, Many Americans Buy Medicines Abroad*, NAT'L PUB. RADIO (Dec. 17, 2016), https://perma.cc/ZEB8-36TK (explaining that Americans are purchasing the same drugs they need in foreign countries for cost reasons); ROBBIN A. COHEN & MARIA A. VILLARROEL, STRATEGIES USED BY ADULTS TO REDUCE THEIR PRESCRIPTION DRUG COSTS: UNITED STATES, 2013, NAT'L CENTER FOR HEALTH SERV. 1–5 (Jan. 2015) https://perma.cc/5R94-6LSW (finding that Americans are acquiring their medications in foreign countries to save costs, and the poorest Americans are not taking their medications because they cannot afford any of the cost-saving alternatives).

64 *See* Adam Thierer & Michael Wilt, *The Need for FDA Reform: Four Models*, GEO. MASON U. MERCATUS CTR. (Sept. 14, 2016), https://perma.cc/P784-EY7N (explaining the different ways the FDA drug approval procedure could be reformed); Alden Abbott, *FDA Reform: A Prescription for More and Better Drugs and Medical Devices*, THE HERITAGE FOUND. (June 20, 2016) https://perma.cc/7MC3-38B3 (explaining that bipartisan efforts have been made to reform the system).

65 *FAQ*, RIGHT TO TRY, https://perma.cc/HJS7-SZJ4 (last visited July 14, 2018).

66 *2014 What's on My Ballot? Arizona's General Election Guide*, ARIZ. SECRETARY ST., https://perma.cc/B5SC-8DEY (last visited July 14, 2018); ARIZONA SECRETARY OF STATE, STATE OF ARIZONA OFFICIAL CANVASS (2014), https://perma.cc/W9B3-CKXP.

67 *FAQ*, *supra* note 65.

68 *See* Peter Lurie, *A Big Step to Help the Patients Most in Need*, FDA VOICE (Feb. 4, 2015), https://perma.cc/NXM7-WPTP.

Because drug manufacturers are reluctant to cross the FDA and jeopardize their massive investments in the drug approval process, few drugs have been made available through Right to Try.[69] But the results thus far are promising. In Texas, Dr. Ebrahim Delpassand saw tremendous results from a clinical trial for a drug, widely available in Europe, to treat the neuroendocrine carcinoid cancers that took Steve Jobs's life.[70] But once the clinical trial ended, he could no longer make those drugs available to his patients.[71] Using Right to Try, he has treated dozens more, many of whom have lived beyond the months they were originally given.[72] Other patients with fatal diseases ranging from Lou Gehrig's Disease to pancreatic cancer eagerly await a reprieve as well.

The idea has so reverberated that this summer the U.S. Senate voted *unanimously* to enact it into federal law.[73] The bill awaits action in the House.[74] If passed, the chances are great that some of the people in this room, or our loved ones, will one day benefit from the right to try drugs that just might save their lives.

Think about this: maybe one way to break the Washington logjam is to incubate ideas in the states, absorb the political blowback, and then pass them on to Congress to ratify as federal law. It's not the normal way of getting things done in Washington, but right now the normal way is to not get things done at all. Applied in this way, federalism may be more important than even the framers imagined.

I've talked about a number of recent state-based innovations and you can surely think of more. Certainly I do not support all of them, nor do I mean at all to suggest that states have greater latitude in our federalist structure than they do. Indeed, as a justice, I am oath-bound to honor the constitutional boundaries between federal and state law. In several instances, I have had to apply federal precedents I don't like, even though occasionally I've felt impelled to write separately to blow off some steam about doing so.[75]

But my message is this: we all have a personal vested stake in federalism. We cannot have red-state federalism without blue-state federalism, nor blue without red.

As Americans we have a native yearning to find opportunities wherever they might be. Every year, many idealistic young people go off to our nation's capital to help change the world. Conversely, Horace Greely once

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69 Clint Bolick, *Federalism Rediscovered*, HOOVER INSTITUTION (Nov. 9, 2017), https://perma.cc/97PM-8P2G.

70 *Id.*

71 *Id.*

72 Starlee Coleman, *U.S. Senate Approves Right to Try*, GOLDWATER INST. (Aug. 4, 2017), https://perma.cc/9D3S-HAVH.

73 *S.204: Trickett Wendler, Frank Mongiello, Jordan McLinn, and Matthew Bellina Right to Try Act of 2017*, CONGRESS.GOV (last visited July 14, 2018), https://perma.cc/4ZZF-HYBH.

74 The bill became law on May 30, 2018, after this speech was given. *Id.*

75 *See, e.g.*, State v. Valencia, 241 Ariz. 206, 210–12 (2016) (Bolick, J., concurring).

famously recommended, "Go West, young man!"[76] Perhaps the advice today should be, "Stay home, young person, stay home." Not in your parent's house, I should hasten to add, but in the community you know. If you really want to change the world, you may have a better chance of doing that in Phoenix, or Portland, or Texas, or Wyoming, or North Carolina, or even—in the rare instance where the stars align exactly right—in my native New Jersey. Whatever happens or doesn't in our nation's capital, we can get things done in the states.

Despite the challenges it omnipresently faces, our Constitution at 230 is doing remarkably well. In so many respects it is as vibrant and resonant today, if not more so, than the day it was born. Federalism is especially alive and well. But federalism, like every part of our Constitution, is not self-executing. Federalism is only what we make of it. Let's seize the day.

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[76] Thomas Fuller, *"Go West, young man!"—An Elusive Slogan*, 100 IND. MAG. HISTORY 231, 231–32 (2004).