KEYNOTE SPEECH, *STETSON LAW REVIEW* SYMPOSIUM 2023: ELON MUSK AND THE LAW

Justice John D. Couriel*

Thank you all for having me. I take any excuse I can get to come to Stetson, in part because of the beautiful setting, but also because it gives me a chance to brag about my future law clerk, Kathryn Alkire,[1] who is continually impressing me with not just her scholarship, but her ability to put together events like this one.

I congratulate you on having chosen so fresh and difficult a subject for this symposium. I imagine the editors of the law review sitting together, reading Elon Musk tweets, and having somebody say, "You know, we could do a whole symposium about this guy." And whether or not that's how this event came to pass, you couldn't get an AI chatbot to come up with a more comprehensive and varied array of topics than the ones on today's agenda. I'm honored to add even a little to the day.

It's important for me to say what I won't add, though. I won't say anything about matters that are or might come before our Court. I hope you won't hear in anything I say a comment about such cases, or any people or companies with interests before the courts of our state. For I do not intend to make such a comment.

I do intend, however, to give you a little something to remember. It borrows from the gospel being spread these days most prominently by Judge Jeffrey Sutton of the U.S. Court of Appeals for the Sixth Circuit. It is this: in wrestling with the key legal challenges of our times, including those you're discussing here today, don't forget to engage with the constitutions of the several states. Whether you're litigating a business dispute or the scope of free expression, chances are there are one or more relevant state constitutions with something to say about the matter.

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1. Kathryn Alkire was the Editor in Chief of *Stetson Law Review*, Volume 52.

Too often, lawyers don't look to the state constitutions. They're leaving money on the table. As Judge Sutton writes in his now soon-to-be classic book, *51 Imperfect Solutions*, lawyers who fail to think about state constitutional arguments are like shooters who take but a single free throw.[2] Imagine having two free throws at the very last second of a Sweet 16 game, taking just one, and then sitting down. You'd have people screaming for your death in places like Tennessee, Kansas, and certainly Miami—which is in the Sweet 16 this year. But that is exactly what many advocates do when they argue about the First Amendment, for instance, and not state constitutional free speech provisions. You're leaving arguments on the table that could be deployed. We see it before our court all the time.

Don't be that shooter! For better—and sometimes for worse—state constitutions are just plain longer than our federal Constitution. In Florida, it's 40,000 words to the 9,000 words of the federal Constitution. So if, say, you're considering the rights of a Delaware corporation, the residents of a company town in Texas, the owners of subterranean drilling rights in California, or maybe even the owners of beachfront property in nearby Cape Canaveral, my advice when it comes to the constitution of each state is: read the thing! You may discover an argument for your position or anticipate one from your adversary.

We'll take free speech as our primary test case in these remarks, and then turn to some other state constitutional provisions that came to mind as I considered the subject of today's symposium.

State action is at the heart of federal First Amendment jurisprudence. Consider the case the Eleventh Circuit recently identified as "pathmarking"[3] in this space: *Miami Herald Publishing Company v. Tornillo*.[4] In that case, the U.S. Supreme Court held that a newspaper's decisions about what content to publish constitutes editorial control that the First Amendment was designed to protect.[5] Thus, a Florida statute that required the paper to give equal space to any candidate against which the paper had editorialized was

2. JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 7 (2018).

3. NetChoice, LLC v. Att'y Gen., Fla., 34 F.4th 1196, 1210 (11th Cir. 2022).

4. 418 U.S. 241 (1974).

5. *Id.* at 258.

unconstitutional.[6] And in *PruneYard Shopping Center v. Robins*, the Court affirmed a decision of the California Supreme Court that held that California law protected the right to "speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned."[7] This is because the California Supreme Court's decision neither penalized the shopping center for speaking, nor compelled the center itself to speak.[8] The Court also found it important that California did not require the display of a specific message on private property.[9]

Coming to the line of cases most germane to today's conversation, in *Packingham v. North Carolina*, the U.S. Supreme Court labeled social media platforms the "modern public square," and stated that these platforms "provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard."[10] Given this significant role, the Court proceeded, on First Amendment grounds, to set aside a conviction brought under a North Carolina statute that made it a felony for a registered sex offender "to access a commercial social networking Web site."[11] *Packingham* can be read to support the idea that Americans have a First Amendment right to access these platforms in the first place.

Even though social media companies have been labeled the "modern public square," under current federal state action doctrine, they're not usually bound by the First Amendment.[12] But lately, some have argued these companies should be subject to the First Amendment as quasi-governmental actors.[13] The states of Missouri and Louisiana have filed a lawsuit in federal district court in Louisiana, for instance, alleging that "senior government officials in the Executive Branch have moved into a phase of open collusion with social-media companies to suppress disfavored speakers, viewpoints, and content on social-media platforms under the Orwellian guise of halting so-called

6. *Id.* at 243, 258.
7. 447 U.S. 74, 78 (1980).
8. *Id.*
9. *Id.* at 87–88.
10. 582 U.S. 98, 107 (2017).
11. *Id.* at 101 (quoting N.C. GEN. STAT. §§ 14-202.5(a), (e) (2015)).
12. Hudgens v. N.L.R.B., 424 U.S. 507, 513 (1976) ("It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state.").
13. *See, e.g.*, Paul Domer, Note, *De Facto State Action: Social Media Networks and the First Amendment*, 95 NOTRE DAME L. REV. 893, 923 (2020).

'disinformation,' 'misinformation,' and 'malinformation.'"[14] Now, that's a serious accusation for those states to make, but I think it shows the stakes in these cases. Relevant here, state action could be found if the government is found to be "a joint participant in the challenged activity,"[15] or if the government has "exercised coercive power or has provided such significant encouragement, either overt or covert, that the [private actor's] choice must in law be deemed to be that of the [government]."[16]

I'll mention, just briefly, the "big daddy" federal case we're all watching: the split between the Eleventh and Fifth Circuits in the *NetChoice* litigation.[17] The Eleventh Circuit partially affirmed an injunction that prevented Florida from enforcing Senate Bill 7072, a Florida statute that imposed certain content moderation restrictions, disclosure obligations, and user data requirements on social media platforms.[18] The Eleventh Circuit concluded that "[s]ocial-media platforms exercise editorial judgment that is inherently expressive," and that therefore, when platforms choose to remove users or posts, they are operating more or less like the editorial board of the Miami Herald in *Miami Herald v. Tornillo*.[19] The Fifth Circuit reasoned to the opposite conclusion, with a Texas statute that set out to do the same kind of thing with certain key differences.[20] We're waiting on the U.S. Supreme Court's take on this conflict.[21]

So far, I've set the table with U.S. Supreme Court jurisprudence about what is and isn't violative of the First Amendment. You haven't heard me talk about state constitutions. That's because the litigation, as it's playing out nationally, is not engaging in that discussion. It seems to be headed toward a resolution that, I think, is only as permanent as its consideration of the U.S. Constitution, and that does not give effect to the fifty other constitutions under which a potential litigant might make a claim.

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14. Second Amended Complaint at 3, *State of Missouri ex rel. Schmitt, et al. v. Biden, et al.*, Case 3:22-cv-01213-TAD-KDM (W.D. La. Oct. 6, 2022).

15. Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961).

16. Blum v. Yaretsky, 457 U.S. 991, 1004 (1982).

17. *Compare* NetChoice, LLC v. Paxton, 49 F.4th 439 (5th Cir. 2022), *with* NetChoice, LLC v. Att'y Gen., Fla., 34 F.4th 1196 (11th Cir. 2022).

18. *NetChoice, LLC*, 34 F.4th at 1203.

19. *Id.* at 1212–13.

20. *Paxton*, 49 F.4th at 490.

21. NetChoice, LLC v. Paxton, 49 F.4th 439 (5th Cir. 2022), *cert. granted in part*, 2023 WL 6319650 (U.S. Sept. 29, 2023) (No. 22-555).

This is what makes my current job so much fun. Never has there been a more difficult, and in my judgment, more exciting, time to be a state Supreme Court Justice. We're seeing a renaissance of what was our constitutional jurisprudence for about the first 150 years of our republic, where questions of substantial right were considered to be questions of state right, and federal questions were more limited in scope. The theory is that what state supreme courts say about the rights of their residents and citizens matters—is meritorious of recognition and respect by the federal courts. Consider how that momentum might affect free speech.

There are thirty-two state constitutions that, like Florida's, have a free speech clause that differs in a significant way from the First Amendment.[22] Some have argued these clauses can "be naturally read as expanding the free speech right beyond that in the First Amendment and potentially to private actors."[23] They're right—and Florida is a case in point. Our free speech clause provides:

> Every person may speak, write and publish sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions and civil actions for defamation the truth may be given in evidence. If the matter charged as defamatory is true and was published with good motives, the party shall be acquitted or exonerated.[24]

If those words sound different to you than the First Amendment's—they are! And yet, our court in *Department of Education v. Lewis* said the rights Floridians have under Article I, Section 4 of the Florida Constitution are coextensive with our rights under the federal First Amendment.[25] Of course, the free speech protections afforded by our Constitution are no *less* robust than those afforded under the federal Constitution. But I find in the text no suggestion—none—that the protections are coextensive. Our court's decision in *Lewis* does not engage with the

22. Elijah O'Kelley, *State Constitutions as a Check on the New Governors: Using State Free Speech Clauses to Protect Social Media Users from Arbitrary Political Censorship by Social Media Platforms*, 69 EMORY L.J. 111, 119–20 (2019).

23. *Id.* at 121.

24. FLA. CONST. art. I, § 4.

25. 416 So. 2d 455, 461 (Fla. 1982).

constitutional history of Article I, Section 4. We've had six constitutions to date in Florida.[26] There's no reason to think their history tracks with that of the First Amendment to the U.S. Constitution, or that the First Amendment doctrines developed in the mid-twentieth century by the U.S. Supreme Court speak to a text that wasn't before the creators of those doctrines.

On this question, were we to unfasten ourselves from the federal doctrine and retake our authority to interpret the text of our own constitution, we'd be in good company. Several states have interpreted the free speech provisions in their constitutions to apply against private actors. And the U. S. Supreme Court has approved of state courts applying state constitutional free speech protections against private actors—that is indeed what happened in *PruneYard*.[27] In New Jersey, the state Supreme Court has applied free speech protections in that state's constitution to private actors such as homeowners' associations[28] and a private college.[29] New Jersey's constitutional provision says, "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right"—language somewhat similar to Florida's.[30] The Pennsylvania Supreme Court has applied the free speech provision in that State's constitution against a private college.[31] And in Washington, a plurality of the state Supreme Court concluded that the free speech protection in that state's constitution did not include the same state action requirement as the First Amendment.[32] Other states, it should be noted, have rejected the application of state free speech protections against private actors. That's the case in Michigan and Connecticut.[33]

Many state Supreme Courts have endorsed interpreting state constitutional provisions in light of the textual differences between those provisions and the First Amendment. The one

26. *See* TALBOT D'ALEMBERTE, THE FLORIDA STATE CONSTITUTION 3–19 (2d ed. 2017).

27. 447 U.S. 74, 88 (1980).

28. *See* Dublirer v. 2000 Linwood Ave. Owners, Inc., 103 A.3d 249, 260 (N.J. 2014); Mazdabrook Commons Homeowners' Ass'n v. Khan, 46 A.3d 507, 510 (N.J. 2012); Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 929 A.2d 1060, 1071-72, 1076 (N.J. 2007).

29. State v. Schmid, 423 A.2d 615, 633 (N.J. 1980).

30. N.J. CONST. art. I, ¶ 6.

31. Commonwealth v. Tate, 432 A.2d 1382, 1390-91 (Pa. 1981).

32. Alderwood Assocs. v. Wash. Env't Council, 635 P.2d 108, 115-16 (Wash. 1981).

33. *See* Woodland v. Mich. Citizens Lobby, 378 N.W.2d 337, 357-58 (Mich. 1985); Cologne v. Westfarms Assocs., 469 A.2d 1201, 1210 (Conn. 1984).

that's closest to us geographically is Georgia. In *Maxim Cabaret, Inc. v. City of Sandy Springs*, Justice Nels Peterson noted in a concurrence, "The text of the Georgia Constitution's Speech Clause is quite different from the Speech Clause of the First Amendment," and argued that the Georgia Supreme Court should interpret the state's provision "in the light of the Georgia Constitution's language, history, and context"—not the U.S. Supreme Court's free speech case law.[34]

It's fair to say this is an area of constitutional litigation that is largely unexplored. And I hope I'm speaking to a room full of advocates who, in litigating about these questions in the digital age, will think about—or at least check—what the relevant state constitutional provisions might supply you. I think it will open doors for you and open arguments that might catch your adversary off guard. And hopefully, it will lead to a richer state constitutional common law, developed through the rough and tumble of litigation the way our federal First Amendment has over the last hundred years.

Speech, of course, is not the only area where state constitutions are relevant to the topics in today's symposium. Here are just two brief examples. Article I, Section 6 of the Florida Constitution provides Floridians with a constitutional right to work:

> The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike.[35]

If you're Elon Musk deciding where to put a gigafactory, constitutions with provisions like this may weigh significantly in the business decision. What you'll find when you look up this and similar provisions of state constitutions is that—again—they aren't well developed.[36] Lawyers are not using these provisions as

34. 816 S.E.2d 31, 39, 41 (Ga. 2018) (Peterson, J., concurring).

35. FLA. CONST. art. I, § 6.

36. *See, e.g.*, Suzanne Tzuanos, *Unenforced Contracts and the Illusion of Bargaining: The Broken State of Florida Public Employees' Constitutional Rights*, 24 U. FLA. J.L. & PUB. POL'Y 295, 298 (2013). *But see* Coastal Fla. Police Benevolent. Ass'n v. Williams, 838 So. 2d 543, 548 (Fla. 2003) ("This Court has deemed the right to collective bargaining to be of a

much as they might, in both federal and state cases. Whenever I get on this hobby horse, one of the answers I usually get is, "Well, yes, but I'm primarily a federal court practitioner. What does any of this mean to me?" The answer is—if you believe in pendent jurisdiction—plenty! There's absolutely no reason to leave your state constitutional argument on the cutting room floor. Consider doing your part to develop that case law and grapple with its implications for the business and labor communities.

Another provision of the Florida Constitution that is almost completely undeveloped is Article II, Section 7, the Natural Resources Clause: "It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise and for the conservation and protection of natural resources."[37] This isn't a statute—this is our constitution! The Natural Resources Clause, on its face, would seem to make it unconstitutional for there to be inadequate provision for the abatement of air and water pollution and of excessive and unnecessary noise. I can't find any litigation of this; there are almost no reported cases that apply it.[38] If you're advising the Boring Company or SpaceX about its operations in Florida, they might like to hear some creative arguments on this score.

I'll conclude with a lesson from my time in private practice. More often than not, your client—especially if you're a litigator, but even for corporate lawyers—would rather never have met you. This is a hard truth for lawyers to accept. You've studied hard, you're smart, your parents are proud of you, you've won awards. Your client doesn't care about any of those things. Your client is interested in solving his or her problem. And more often than not, the lawyer that gets hired isn't the most academically distinguished lawyer, or the one who won this award or that, or

fundamental character and has applied a strict scrutiny test to any action which tends to undermine this right.") (citation omitted).

37. FLA. CONST. art. 2, § 7(a).

38. Cases applying the Natural Resources Clause tend to treat it as evidence of state policy. *See* Sierra Club v. Brown, 243 So. 3d 903, 911 n.9 (Fla. 2018); State v. Davis, 556 So. 2d 1104, 1107 (Fla. 1990) ("Florida law makes clear that the protection of the environment, including all forms of marine life, is a primary policy of the people and the legislature of Florida."). *See generally* Clay Henderson, *The Greening of Florida's Constitution*, 49 STETSON L. REV. 575, 586–592 (2020) (surveying the origins and judicial treatment of the Natural Resources Clause).

who wrote the most trenchant law review articles. The lawyer who gets hired is the one who comes up with a solution to the problem that the client hasn't heard before.

State constitutional law frequently supplies answers to problems. And for that reason alone, to the practitioners in the room, I say: pick up the sword. Develop these areas of the law. And to the academics in the room: write about these things. Explore them. As state constitutional law comes to inhabit our national jurisprudence in a way it did not during the twentieth century, it can speak to some of the most important challenges of our time. Not just challenges that are near and dear to us as scholars and students, but challenges we face as users of social media, and challenges faced by the companies we're talking about today. These are hot topics. But imagine if a similar amount of interest were paid on all the fronts I've given you a sampling of today. Hopefully, this sampling has whetted your appetite—or at least not put you to sleep.

I am so grateful that I get to be with you here today. I look forward to answering any questions you have. And I look forward to speaking with you at lunch about the wonderful symposium you've come here to have. This is a really, really special opportunity, and I'm grateful for it. Thank you.