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## 2018 Sumner Canary Memorial Lecture: State Courts in a Federal System

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# STATE COURTS IN A FEDERAL SYSTEM

*Honorable Joan L. Larsen*<sup>†</sup>

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## INTRODUCTION

This lecture was established to honor the memory of Judge Sumner Canary.<sup>1</sup> Judge Canary spent a good deal of his time in the state court system. He was also United States Attorney,<sup>2</sup> so he spent some time in the federal system. I have something in common with Judge Canary, in that I too have served in both systems. I currently serve on the United States Court of Appeals for the Sixth Circuit, but before that I had the honor of being a Justice of the Michigan Supreme Court. That is what I want to talk to you about today.

Recent years have witnessed a renewed interest in state courts and their relationship to their federal counterparts. For example, my colleague on the Sixth Circuit Court of Appeals, Judge Jeff Sutton, has recently published an excellent book on state constitutional law entitled, *51 Imperfect Solutions: States and the Making of American Constitutional Law*.<sup>3</sup> His book, which I will discuss in more detail later, argues that state courts play a critical, though underappreciated, role in our national judicial system. I just learned today that he will be here later this academic year to discuss the book. It is an excellent book. But I will also offer a bit of a dissent in advance, so when Judge Sutton comes here, you can ask him what he thinks about my partial dissent.

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<sup>†</sup> Judge, United States Court of Appeals for the Sixth Circuit.

1. *The Sumner Canary Memorial Lecture*, CASE W. RES. UNIV., <https://law.case.edu/Academics/Centers-and-Institutes/Center-for-Business-Law-and-Regulation/Sumner-Canary-Lecture> [<https://perma.cc/2THZ-G8T2>] (last visited Mar. 27, 2019) (Judge Larsen's Sumner Canary Memorial Lecture was delivered at the Case Western Reserve School of Law on Sept. 25, 2018).

2. *Id.*

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

With those things in mind, I would like to offer some of my perspectives on the relationship between state and federal courts. I thought I would first tell you a little bit about my transition from the state bench to the federal bench and some things I noticed right away. Next, I would like to comment on the importance of state courts in our federal system and the important ways in which they can operate to improve justice in America. I will also offer a few thoughts about their limits. Lastly, I will wrap up with a few thoughts about how my experience as a state court judge has influenced the way I do my current job as a federal appellate judge.

## PART I

First, let me share a bit about my transition from state to federal court. I am often asked: what are the differences between serving as a Justice on a state's highest court and serving in the federal system as a mere intermediate appellate court judge? Before I begin, I should say that, of course, I can only speak of my own experience. Someone that serves on a different court, the Ohio Supreme Court, or any other, might have a different view. But from my experience, I noticed three things right away.

The first thing I noticed is that it is an election year, and I am not on the ballot. In Michigan, as in Ohio, we elect our judges, although the Governor holds the power to appoint judges to fill vacancies that arise between elections.<sup>4</sup> That was my situation. I was appointed to the Michigan Supreme Court in the fall of 2015 to fill a vacancy. Under the Michigan Constitution, a judge appointed to fill a vacancy must stand in the next state-wide general election.<sup>5</sup> For me, that election was in the fall of 2016 and I am delighted to say that I won my first—and last—election for public office.

So for starters, there are often differences in how one gets a seat on a state court as opposed to a federal court. Almost half the states use some form of election to select their high court justices.<sup>6</sup> Obviously, the federal selection process, consisting of nomination and Senate confirmation, is quite different. I cannot comment on current controversies, so I will not dwell long on this subject. I will pause only long enough to note two things. First, there must be some form of democratic input in the process of selecting our least majoritarian branch of government. And second, there will always be disagreement over what form that democratic input should take—whether that be election or appointment, and within those broad categories, just

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4. See MICH. CONST. art. VI, §§ 2, 23; see also OHIO CONST. art. IV, § 6.

5. MICH. CONST. art. VI, § 23.

6. See *Methods of Judicial Selection*, NAT'L CTR. FOR ST. CTS., [http://www.judicialselection.us/judicial\\_selection/methods/selection\\_of\\_judge\\_s.cfm?state](http://www.judicialselection.us/judicial_selection/methods/selection_of_judge_s.cfm?state) [<https://perma.cc/X9CC-9FNL>] (last visited Feb. 4, 2019).

precisely what the details ought to be (contested elections, retention elections, confirmation processes, or the like). There is no perfect solution to the problem of selecting who will sit in judgment of our laws, our leaders, and ourselves. We can only ask that the process be transparent and that the process be fair.

Having been appointed and confirmed through the federal selection system, one of the first things I noticed when I arrived at the federal court of appeals is that my colleagues are really far away, and they change all the time. The judges of the Sixth Circuit, which comprises the states of Tennessee, Kentucky, Ohio, and Michigan, are geographically dispersed. We have our chambers in our home states (and often in different cities within those states) and come together only to hear oral argument in Cincinnati. And when we go to Cincinnati, we sit in rotating, randomly-selected three-judge panels.

The first of these features (geographic dispersion) is not a feature of all federal appellate courts—the D.C. and Federal Circuits are notable exceptions—but it is a feature of most of them. And it affects the way the court operates more than I had anticipated. Before I came to the Sixth Circuit, I had some form of experience inside three courts: I had been a law clerk on the D.C. Circuit; a law clerk on the United States Supreme Court; and then a Justice of the Michigan Supreme Court. And what all those courts have in common is proximity. The judges and the law clerks are regularly in one building.

Some say that familiarity breeds contempt, but that was not my experience. I found it incredibly useful as a law clerk to be able to walk down the hall and puzzle through a tricky legal question with clerks from other chambers who were working on the same case. Our work was hard, and we were fresh out of law school. Having the benefit of those different perspectives helped me help my judge. And that was made easier because we were physically together. As a justice of the Michigan Supreme Court, I found this equally true. My work was made better by the chance to discuss hard problems with my colleagues face-to-face and one-on-one.

Before I arrived at the Sixth Circuit, I was concerned that geographical dispersion might hamper the judges' ability to have meaningful discussions about legal topics. But I have been pleasantly surprised by the willingness of my colleagues to discuss cases. Although I am new to the court, my colleagues have been very welcoming, and we all seem to get along quite well. But our distance from one another does present challenges. It means that we have to make more of an effort to keep open those lines of communication. We cannot discuss a case in the hallway or over coffee or lunch because we are not together. So our communication often must take a more formal tone. We exchange memos, write emails, or pick up the phone. But there is a little barrier when you cannot just walk down the hall. You have to think more precisely about what you are going to say. I cannot decide if that is a benefit or a detriment. Obviously, it is always good to think

carefully about what you are going to say next. And having to pick up the phone, write an email, or send a memo produces that result. But on the other hand, those casual one-on-one interactions often gave me some of my best ideas. There is not much we can do about geographic dispersion. It is a feature of appellate courts that cross state lines, and it has its costs. But it also has the benefit of bringing together a group of judges with diverse backgrounds, reflecting the legal communities of the various states that make up our circuit.

A different, but related, way in which the federal courts of appeal differ from their state counterparts is that the panels, by design, are constantly changing. When we go to Cincinnati to hear arguments, we typically hear arguments over four days. And in the course of those four days, we will sit on two different panels. That means that in any given court week, I will sit with four different judges; and the next month it will be a different four; and so on. The process of drawing judges is random, so sometimes there are repeat players, which means that it could take many months, or even years, before I will have served on a panel—even once—with each of my judicial colleagues.

By contrast, supreme courts—state and federal—always sit *en banc*. And what that means, as a judge, is that you quickly get to know your colleagues, both as jurists and as people. That facilitates the exchange of ideas, not only in the informal way occasioned by proximity that I mentioned before, but also in the sense that when you sit together repeatedly, you learn what to expect. Different judges have different styles for argument and opinion writing. Some judges, for example, like to ask the first question, and others the last. Figuring out how to insert oneself into the argument and to adapt one's own style to facilitate conversation is easier in a court that convenes with the same five, seven, or nine actors each time.

The last thing that I noticed instantly upon arriving at the Sixth Circuit is the difference in the docket. In federal appellate courts, appeal is by right. That means that our court resolves every case that is presented to us—from the most jurisprudentially significant cases that will establish precedent for years to come, to cases in which the law is largely settled and, so the dispute, while incredibly important to the parties before the court, will not likely make a lasting mark on the fabric of the law. By contrast, on the Michigan Supreme Court, as with the United States Supreme Court and many state high courts, appeals are by leave only. And so, the judges not only have to decide the cases before them, but they also have to decide what to decide. That work occupied a great deal of our time.

As with any court that has a discretionary docket, broader considerations come into play when deciding which cases to hear. We would think about things like: whether the legal question at issue was unsettled in our state; whether we could clarify an area of the law that had caused problems throughout the state; or whether new legislation might have affected some of our old rulings. Put simply, on the

Michigan Supreme Court, we could not fix every error that came our way. We had to focus on the cases that presented broader issues that would affect the state as a whole.

As a result, the cases we heard on the Michigan Supreme Court almost always presented a legal puzzle. If we had decided to hear a case, it was generally because something about the law needed correction or clarification. On the Sixth Circuit, we also get cases that are legally challenging—plenty of them. But we also hear cases that present no legal mysteries. These cases might not be legally challenging, but they are nonetheless hard in that they involve the painstaking work of reading through a record to make sure that the district court, or the agency, or whoever the initial decisionmaker was below, got the case right by appropriately applying the facts within the confines of a legal regime that is largely settled. These are not always the most glamorous cases. But to the people and the entities involved, they are just as important. It matters a lot in the real world—to the claimant and to the taxpayer—whether, for example, Mrs. Smith was wrongfully denied disability benefits. It also matters a lot in the real world—to the defendant, to law enforcement, and to the citizenry—whether there was probable cause to support Mr. Jones’s arrest. So on the federal appellate court, it is our job to fix every error. That is a different role, and it is not one that is less important, than the role of a state’s high court.

For better or worse, the federal courts seemed to have captured more of the public’s imagination than their state counterparts. And, of course, what we do matters a great deal. Because the United States Supreme Court hears so few cases, the federal courts of appeal are the courts of last resort for most federal litigants. But I am not sure whether as many people appreciate the significance of state supreme courts. These courts not only shape and form the common law, but they also bear the truly tremendous responsibility of being the final say on the interpretation of state statutes and state constitutions. And it is this work that I want to discuss next.

## PART II

So why does the day-to-day work of state courts matter? It seems like most media coverage is of the federal courts, and in particular, the United State Supreme Court. Why should we pay attention to the work of state courts?

The first reason is that state courts directly affect people’s lives. Judge Sutton noted in his recent book that “by one count, 95 percent of the disputes resolved by courts in this country are filed in the state courts, as opposed to the federal.”<sup>7</sup> That count makes sense because the kinds of disputes that ordinary people might have with one another typically sound in tort, contract, or real property—quintessential state

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7. SUTTON, *supra* note 3, at 184.

law topics. Moreover, most criminal law, and nearly all family law, are still the province of the states. To the extent that these subjects are common law subjects, the state courts are the law-developers (even if the cases end up being tried in federal court); to the extent that legislatures have a hand in these areas, state legislatures, not Congress, are the dominant players, the expansion of the Commerce Clause notwithstanding. And state courts, of course, have the final say on the interpretation of state legislative acts. So just in terms of sheer volume, state courts are where the action is.

Judge Sutton's new book points out another way in which state courts matter—they can be “innovators” or “dissenters” from the federal regime.<sup>8</sup> This is true in a few ways. One is that, often, state law need not conform to federal law. Judge Sutton focused his attention on state constitutional law, and I will say a few words about that. But there are other ways in which state courts need not follow in lock step with their federal brethren, even when confronting similar problems. State courts can thus “dissent” from the federal model and perhaps provide useful experience to inform a larger discussion.

One example that comes to mind concerns *Chevron* deference.<sup>9</sup> Of course, the underlying dispute over *Chevron* deference is whether, and how much, it is appropriate for the judiciary to defer to an administrative agency's interpretation of the law and whether giving such deference impermissibly divests courts of the judicial power.<sup>10</sup> Much has been said recently on this topic, and I am not here to enter the fray. But I note that this is an area in which some state courts have gone another way. That includes Michigan. In a case called *In re Complaint of Rovas against SBC Michigan*,<sup>11</sup> the Michigan Supreme Court held that agency interpretations of statutes were entitled to “respectful consideration,” but that courts still retained the primary responsibility for interpreting statutes according to their plain language.<sup>12</sup> As a result, Michigan courts are untethered from an administrative agency's interpretation of a statute and instead conduct *de novo* review of the statutory interpretation questions presented to them. And a recent decision of the Ohio Supreme Court suggested that Ohio's high court is likewise interested in the question whether state

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8. *Id.* at 21.

9. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

10. *See Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1155–56 (10th Cir. 2016) (Gorsuch, J., concurring).

11. 754 N.W.2d 259 (Mich. 2008).

12. *Id.* at 262.

agencies should be given *Chevron*-type deference for their interpretations of the law.<sup>13</sup>

The point is not to praise or condemn *Chevron* deference. Instead, my point here is that there are all sorts of ways in which state courts may accept, reject, or tinker with federal doctrine. And this might provide data to, and inform a larger national discussion about, an important legal topic.

As I mentioned at the outset, there has lately been renewed interest in the states as laboratories of constitutional law. Judge Sutton's book on this topic, *51 Imperfect Solutions*, is an excellent look at the history of state constitutional law and offers a superb discussion of some of the events that have kept state courts from developing the constitutional law of their states. The book also offers some intriguing ideas about what courts and litigants might do going forward to give state constitutions their own meaning, distinct from the federal Constitution. I cannot think of a better author for such a book than Judge Sutton, who has served over fifteen years as a federal appellate court judge and who previously served as Solicitor General of Ohio. His experience, as a federal judge and a state court litigator, makes him eminently qualified to speak on this topic.

For those who have not had an opportunity to read the book, it is an in-depth exploration of the role of state constitutional law in our nation's constitutional history. He explains how states have set both negative and positive examples that have affected the development of constitutional law. The book does this by exploring four specific areas of the law: school funding, the exclusionary rule, compelled sterilization, and mandatory flag salutes. It then offers thoughts about how state constitutional law might be taken more seriously, focusing on what judges, attorneys, state bars, and law schools can do to give state constitutional law a more prominent voice in the discussion of individual constitutional rights. Judge Sutton believes that "an underappreciation of state constitutional law has hurt state and federal law and has undermined the appropriate balance between state and federal courts in protecting individual liberty."<sup>14</sup> Judge Sutton raises many thought-provoking points: too many to address in this lecture. But I thought I would share a few thoughts in response to some of his ideas about the future of state constitutional law.

Judge Sutton's book is, in large part, a quest to figure out why state constitutions do not receive as much attention as their federal counterpart and what can be done to correct that—to encourage litigators to include the state constitutions as part of their litigation strategy, and perhaps a source of rights protection for individuals. Early

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13. State ex rel. McCann v. Del. Cty. Bd. of Elections, 118 N.E.3d 224, 231 (Ohio 2018) (DeWine, J., concurring); *id.* at 234 n.2 (Kennedy, J., dissenting).

14. SUTTON, *supra* note 3, at 6 (emphasis omitted).

in his book, Judge Sutton states that if the reader doubts the conclusion that state constitutions have taken a back seat to the federal Constitution, he or she should “[a]sk a state court judge about the frequency with which claimants raise federal and state constitutional challenges to state or local laws and the seriousness with which they raise the state claims (if they raise them at all).”<sup>15</sup>

I am that judge. During my time on the Michigan Supreme Court, arguments that the Michigan Constitution protected different rights or protected the same rights differently than the United States Constitution were few and far between. On the rare occasions in which such arguments were raised, they usually amounted to little more than throw-away arguments. Counsel might end a brief or argument by saying, essentially: “In conclusion, if you find that the federal Constitution does not require this, then you should find that the state Constitution does.” End of argument.

This was somewhat surprising, as the Michigan Supreme Court has a history of showing some willingness to rule solely under its state Constitution. The most well-known example is a case called *Sitz v. Department of State Police*.<sup>16</sup> There, the Michigan Court of Appeals held that sobriety checkpoints violated the Fourth Amendment to the United States Constitution.<sup>17</sup> The Michigan Supreme Court denied leave to appeal that decision, which meant that the intermediate appellate court ruling remained in place.<sup>18</sup> The United States Supreme Court granted certiorari and reversed, ruling that the checkpoints did not violate the Fourth Amendment to the United States Constitution.<sup>19</sup> On remand, the Michigan Court of Appeals, in what some perceived as a bold move for an intermediate appellate court, held that although the sobriety checkpoints may have been permitted by the United States Constitution, they nevertheless violated the analogous search and seizure prohibition in the Michigan Constitution.<sup>20</sup> The Michigan Supreme Court later affirmed that decision.<sup>21</sup>

*Sitz* does not mark the only time the Michigan Supreme Court has held that the Michigan Constitution provides broader protection than its federal counterpart. In a case called *County of Wayne v. Hathcock*,<sup>22</sup>

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15. *Id.* at 9.

16. 429 N.W.2d 180 (Mich. Ct. App. 1988), *rev'd sub nom.* Mich. Dep't of State Police v. Sitz, 496 U.S. 444 (1990), *aff'd sub nom.* Sitz v. Dep't of State Police, 506 N.W.2d 209, 210 (Mich. 1993).

17. *Id.* at 185.

18. *Mich. Dep't of State Police v. Sitz*, 496 U.S. at 448.

19. *Id.* at 455.

20. *Sitz v. Dep't of State Police*, 485 N.W.2d 135, 139 (Mich. Ct. App. 1992).

21. *Sitz*, 506 N.W.2d at 210.

22. 684 N.W.2d 765 (Mich. 2004).

the Michigan Supreme Court addressed a question that would come before the United States Supreme Court the very next year.<sup>23</sup> The United States Supreme Court case, with which many of you may be familiar, was *Kelo v. City of New London*.<sup>24</sup> In that case, the United States Supreme Court held that the Takings Clause of the United States Constitution did not prohibit a state from using its power of eminent domain to take private property from one individual and give it to another pursuant to an economic “redevelopment plan.”<sup>25</sup> The redevelopment plan in that case was to take people’s homes in one area of the city in order to allow other private parties to put the land to “commercial, residential and recreational uses” that would perhaps revitalize the area.<sup>26</sup> The United States Supreme Court held that the redevelopment plans constituted a “public use” for purposes of the Takings Clause.<sup>27</sup>

Just one year earlier, the Michigan Supreme Court had confronted the same issue under its own constitution and had come to the opposite conclusion. Condemning private homes in order to allow other private entities to build a “large business and technology park with a conference center, hotel accommodations, and a recreational facility” was not, according to the Michigan Supreme Court, a “public use.”<sup>28</sup> The United States Supreme Court took note of the *Hathcock* decision when it decided *Kelo* but was not persuaded.<sup>29</sup> It did, however, emphasize the role that state constitutions could play in providing greater protections for the property rights of its citizens.<sup>30</sup>

Despite this apparent willingness on the part of the Michigan Supreme Court to consider arguments that the state Constitution provides more, or different, protection than its federal counterpart, meaningful arguments to that effect were nearly nonexistent during my time on that court. And as Judge Sutton points out, failing to argue for rights protection on both state and federal constitutional grounds might be a serious disservice to one’s client, who could be forfeiting an avenue to victory.<sup>31</sup>

Yet, I also want to dissent a bit from an implicit charge that might flow from this exploration of the possibilities of state constitutional law. That is the charge that state supreme court justices, as a whole, might

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23. *Id.*

24. 545 U.S. 469 (2005).

25. *Id.* at 488–90 (citing U.S. CONST. amend. V).

26. *Id.* at 483–85.

27. *Id.* at 489–90.

28. *Hathcock*, 684 N.W.2d at 770–71, 788.

29. *Kelo*, 545 U.S. at 489 n.22.

30. *Id.* at 489.

31. SUTTON, *supra* note 3, at 19.

not have done enough in the way of what Judge Sutton calls “rights-innovating.”<sup>32</sup> And here I should make clear that Judge Sutton himself does not levy this charge or take a position on this topic.

To introduce this idea, I should state what you likely already know: state constitutions can only grant rights more generous than those protected by the federal Constitution.<sup>33</sup> Since the late 1960’s, by which time the Supreme Court had largely completed the task of incorporating most Bill of Rights protections against the states,<sup>34</sup> federal rights guarantees have pre-empted any less-generous state analogue.<sup>35</sup> So any work to be done by state constitutions in the area of individual rights would have to consist of granting protections where the federal Constitution might be thought to fall short. That is likely why Judge Sutton refers to state constitutions, and their state judicial interpreters, as having the potential to be “rights innovators.”<sup>36</sup>

But, even presuming that there are areas in which the federal Constitution could use some assistance, it is not clear to me that it is appropriate for state judiciaries, as opposed to other institutions, to be the primary innovators. Certainly, judges must take seriously any state constitutional challenge that is brought before the court and must consider the real possibility that their state charter might grant broader protections than are afforded by existing interpretations of the federal and state constitutions. But, at the same time, I do not believe Judge Sutton to be advocating that state judges invent more extensive rights from thin air.

That, then, puts front and center the question of interpretive method. To make the question a little more concrete, I ask myself: what tools would I have used as a Michigan Supreme Court Justice to figure out whether a litigant was entitled to additional protections under the Michigan Constitution? What legal sources would I have looked to? If we want judges to deploy the traditional tools of constitutional interpretation—the big three being text, history, and precedent—then we have to ask ourselves first, how available these sources will be as they pertain exclusively to state constitutional law, and second, how likely they will be to yield an answer that is both different and more generous than the analogous federal constitutional right.

Sometimes, of course, the text will just be different; there are written provisions in many state constitutions that have no federal analogue. Some state constitutions, for example, contain “single

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32. *Id.* at 21.

33. *See id.* at 14–15, 63.

34. *See* McDonald v. City of Chi., 561 U.S. 742, 763–66 (2010).

35. SUTTON, *supra* note 3, at 12–15.

36. *Id.* at 19.

subject” rules.<sup>37</sup> Some grant affirmative rights that are not textually guaranteed by the federal Constitution—the right to education being a prominent example.<sup>38</sup> But often, state rights mirror federal rights—or in older states, it is the other way around, as federal Bill of Rights protections were often modeled on the rights protected in the pre-existing state constitutions.<sup>39</sup> So, if a state judge is faced with a text that replicates, or closely tracks, the text of the federal constitutional right, she must ask herself: what are the chances that this language means something different? It might, of course. But if we are talking about a cognate provision—particularly one worded nearly identically or using a legal term of art (i.e. *ex post facto*)—then there is a decent argument that when the federal Constitution borrowed the phrase from the state constitution, or vice versa, the drafters and ratifiers of the borrowing constitution would have understood the provision to have the meaning that it had in the original document. That is likely why the constitution used a borrowed term, instead of saying something different. And if that is right, we would not expect to see divergence in state and federal constitutional meaning.

Of course, it could be that the provisions shared the same original meaning, but the judges of one court or another later strayed from that meaning in the course of deciding cases. If the federal judges were the ones to stray, then we might see room for state courts to correct the error. But, of course, state courts can only correct errors that fall in one direction; they can only be more generous than the federal constitutional right. And here I am a little bit skeptical that there are many state constitutional rights that are being *under-enforced* relative to both their original meaning and to the interpretation given to their federal cognates. That is because, as Judge Sutton explains in his book, it was “the States’ relative *under-protection* of individual rights” that lead the Supreme Court to incorporate the federal bill of rights against the states in the first place.<sup>40</sup>

There are exceptions, of course. The example of the *Hathcock* and *Kelo* cases I just mentioned is a good one. There, the Michigan Supreme Court interpreted the phrase “public use” according to its original public meaning in the Michigan Constitution and concluded that its meaning was narrower than the one the United States Supreme Court would ascribe to its federal counterpart the next year in *Kelo*. But I am not sure how often a similar pattern will obtain.

What if you do not buy the premise of the argument I have just outlined? What if you think that judges ought not limit themselves to the traditional tools of constitutional interpretation but instead should

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37. See, e.g., MICH. CONST. art. IV, § 24.

38. See, e.g., MICH. CONST. art. VIII, § 2.

39. See SUTTON, *supra* note 3, at 8.

40. *Id.* at 14 (emphasis added).

seek to infuse the constitution with contemporary meaning? That is a viewpoint popular among some judges, law students, and members of the academy when it comes to interpreting the federal Constitution. But that view rests largely on two pillars that are not always, or perhaps even often, found in *state* constitutions, as opposed to their federal counterpart. The first of these pillars is that constitutions are old; and the second is that they are nearly impossible to amend through democratic processes.

As to the first, yes, some state constitutions are old. As mentioned previously, the federal Constitution borrowed most of the Bill of Rights *from* rights protected in the state constitutions that pre-dated it.<sup>41</sup> And a few of those state constitutions still govern their citizens today. Massachusetts, for example, is still governed by its Constitution of 1780.<sup>42</sup> Scholars have claimed that the document is the “oldest functioning written constitution in the world.”<sup>43</sup> But, of course, that is not the condition of all our states. Both Alaska and Hawaii came into the Union only in 1959,<sup>44</sup> and Hawaii governs under a Constitution adopted in convention even more recently, in 1978.<sup>45</sup> Other states too have adopted new constitutions in conventions of relatively recent vintage. Michigan, for example, although granted statehood in 1837, has remade its Constitution several times, most recently in 1963.<sup>46</sup> Georgia’s Constitution of 1983<sup>47</sup> is one of the nation’s youngest constitutions, even though Georgia was the fourth state admitted to the Union.<sup>48</sup> Although by no means exhaustive, these few examples illustrate that at least some state constitutions are both younger and easier to amend than the federal Constitution.

Indeed, in nearly half the states, including Michigan and Ohio, the people themselves can play a direct role in amending their state

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41. *See supra* note 39 and accompanying text.
  42. *See* *Wheatley v. Sec’y of the Commonwealth*, 792 N.E.2d 645, 648 (Mass. 2008); *see also* S.B. Benjamin, *The Significance of the Massachusetts Constitution of 1780*, 70 TEMP. L. REV. 883, 884 n.5 (1997).
  43. LAWRENCE M. FRIEDMAN & LYNNEA THODY, *THE MASSACHUSETTS STATE CONSTITUTION* 3 (2011).
  44. Act of July 7, 1958, Pub. L. 85-508, 72 Stat. 339 (establishing Alaska as a state); Act of Mar. 18, 1959, Pub. L. 86-3, 73 Stat. 4 (establishing Hawaii as a state).
  45. *See* *State ex rel. Anzai v. City & Cty. of Honolulu*, 57 P.3d 433, 435–36 (Haw. 2002).
  46. *See* *People v. Nutt*, 677 N.W.2d 1, 11 (Mich. 2004).
  47. Georgia’s latest constitution was ratified in November 1982 but went into effect on July 1, 1983. *See* *Googe v. Fla. Int’l Indem. Co.*, 422 S.E.2d 552, 554 n.7 (Ga. 1992); *Carpenter v. State*, 297 S.E.2d 16, 17 (Ga. 1982).
  48. Andrew Glass, *Georgia Enters the Union: Jan. 2, 1788*, POLITICO (Jan. 1, 2017, 11:28 PM), <https://www.politico.com/story/2017/01/georgia-enters-the-union-jan-2-1788-233087> [<https://perma.cc/T8KA-82SJ>].

constitutions through the initiative process.<sup>49</sup> This means that if the citizens of such a state are unhappy with the rights or protections provided by their constitution, they have a direct means to change it. You are probably familiar with the many significant measures that have recently been added to Ohio's constitution through initiative, including provisions regarding minimum wages, crime victims' rights, and redistricting.<sup>50</sup> My state too has used this form of direct democracy to amend its constitution in significant ways.<sup>51</sup> I am not here to take a position on these initiatives or even to comment on the merits of direct democracy as a form of constitutional amendment. I only note that when thinking about how judges should interpret a state constitution, one needs to consider the whole landscape. Even if one adheres to the so-called "living Constitution" school of thought when it comes to interpreting the United States Constitution, it does not plainly follow that the approach is suited to the interpretation of state constitutions, which may be both younger and more amenable to democratic change.

### CONCLUSION

I thought I would conclude with some thoughts about how my time serving on a state court has influenced my thinking about the role of a federal judge. It probably comes as no surprise that my state court experience comes into play most often when we are exercising supplemental or diversity jurisdiction and, therefore, applying state law in federal court. Serving on a state court has heightened my appreciation of and respect for the ways in which each states' law may differ. When applying state law under supplemental or diversity jurisdiction, a federal judge should be careful not to step on the toes of another sovereign.

There are a few ways that a federal judge can exercise caution when reviewing state law. The first is just to try to get a handle on the nuances of state law. There is sometimes a tendency in the legal profession to think of "the common law" as a monolith. That is more or less how we teach the common law in law school. Your torts book, for example, probably included a collection of cases on discrete topics—say, for example, proximate cause or premises liability—that were pulled from a variety of jurisdictions. They were chosen by the casebook editor or your professor because they illustrated a concept and maybe because their facts were memorable. But in most law schools these days,

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49. *Initiative and Referendum States*, NAT'L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/chart-of-the-initiative-states.aspx> [https://perma.cc/988F-UBAY] (last visited Feb. 4, 2019).

50. See OHIO CONST. art. II, § 34a (minimum wage); *id.* art. I, § 10a (crime victims' rights); *id.* art. XI (congressional redistricting).

51. See, e.g., MICH. CONST. art. I, § 26 (affirmative action restriction).

you likely were not taught the particular tort law of Ohio, Michigan, or Tennessee. Instead, you learned basic ideas about tort law, and you probably did not pay that much attention to where the cases came from. That is how I learned torts anyway. And that is probably the way we need to teach law in a legal climate that is mobile and increasingly national. We need to teach the broad concepts and let practitioners learn the nuances as they settle into a locality.

The trick as a federal judge, who deals with the law of many states, is not to forget that there likely are nuances to learn. I think my experience serving on a state court has made me more sensitive to the need to understand the subtleties of the various states' law. Of course, I will not always get it right. But I do think that my experience on the state court has made me more attentive to the search for details than I might have been otherwise.

This is also a good thing to remember for those of you in the audience who are litigators or would-be litigators. The lawyers who regularly practice in a state are often our best guides to those nuances of state law. So, as a litigator who may practice both in state and federal court, please do not assume that the federal judges will already be familiar with the unique aspects of the governing law in your state. Please use your experience and expertise to educate us and help us do our jobs.

Sometimes, of course, state law will be truly unsettled. When federal courts encounter an unresolved area of state law, they need to be particularly careful. After all, state courts should have the primary responsibility for deciding questions of state law. There are a few solutions to the problem of unsettled state law. The first is the certification process. The Supreme Court has encouraged certification when federal courts are faced with novel state law questions, noting that certification puts the state law question "directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response."<sup>52</sup> Another reason in support of certification is that it "helps build a cooperative judicial federalism."<sup>53</sup> Certification allows the federal courts to respect the state's ability to interpret and control its own state law, permitting those sitting on the state's highest court, who presumably have the best understanding of the law within their state, to address new legal questions first.<sup>54</sup>

Certification, however, is not without its own wrinkles. First of all, it may slow things down. Secondly, some states are unwilling or unable to answer certified questions. For example, there is a dispute on the Michigan Supreme Court about whether the Michigan Constitution

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52. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 76 (1997).

53. *Lehman Bros. v. Schein*, 416 U.S. 386, 390-91 (1974).

54. *Arizonans*, 520 U.S. at 76.

permits it to answer certified questions from federal courts.<sup>55</sup> But to the extent the certification procedure is available, it seems to me that we should be amenable to using it in order to respect the rights and abilities of the states to control the interpretation of their own laws.<sup>56</sup>

When certification is not available or practical, a federal court may have to determine, on its own, what a state court would do when faced with an unanswered legal question. If we have to do that, the Sixth Circuit caselaw says that we “must make the best prediction, even in the absence of direct state precedent, of what the [state’s highest court] would do if it were confronted with [that] question.”<sup>57</sup> Here, we need to be careful. We need to make sure that we are stepping into the shoes of the state’s highest court, rather than stepping on its toes. If we incorrectly predict the result could be that we have a law of Ohio that obtains in federal court and a law of Ohio that obtains in state court. The litigators among you know that that will lead to rampant forum shopping—at least until the matter is brought back to our attention so we can bring the question in line with state court decisions.

Reviewing state law as a federal judge is inevitable. But exercising caution, whether that be by certifying the truly unsettled questions to the state court, or just by paying attention to the nuances of state law, federal judges can respect the rights of the state courts, as independent sovereigns, to interpret their own laws in accordance with the constitutional design.

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55. *See, e.g., In re Certified Question from U.S. Court of Appeals for the Ninth Circuit*, 885 N.W.2d 628, 634 (Mich. 2016) (Young, C.J., concurring); *In re Certified Questions from U.S. Court of Appeals for Sixth Circuit*, 696 N.W.2d 687, 687 (Mich. 2005).

56. *See Lindenbergh v. Jackson Nat. Life Ins. Co.*, 912 F.3d 348, 371 (6th Cir. 2018) (Larsen, J., concurring in part and dissenting in part).

57. *Combs v. Int’l Ins. Co.*, 354 F.3d 568, 577 (6th Cir. 2004) (internal quotation marks omitted) (quoting *Managed Health Care Assocs., Inc. v. Kethan*, 209 F.3d 923, 927 (6th Cir. 2000)).