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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

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Introduction

This lecture was established to honor the memory of Judge Sumner Canary.[1] Judge Canary spent a good deal of his time in the state court system. He was also United States Attorney,[2] 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*.[3] 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.

† 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.

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.[4] 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.[5] 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.[6] 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

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_judges.cfm?state [https://perma.cc/X9CC-9FNL] (last visited Feb. 4, 2019).

carefully about what you are going to

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,

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.[8] 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.

agencies should be given *Chevron*-type deference for their interpretations of the law.[13]

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. Tf 1,fd4pe 3.93d interCts

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)."[15]

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*.[16] There, the Michigan Court of Appeals held that sobriety checkpoints violated the Fourth Amendment to the United States Constitution.[17] The Michigan Supreme Court denied

the Michigan Supreme Court addressed a question that would come before the United States Supreme Court the very next year.[23] The United States Supreme Court case, with which many of you may be familiar, was *Kelo v. City of New London*.[24] 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."[25] 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.[26] The United States Supreme Court held that the redevelopment plans constituted a "public use" for purposes of the Takings Clause.[27]

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."[28] The United States Supreme Court took note of the *Hathcock* decision when it decided *Kelo* but was not persuaded.[29] It did, however, emphasize the role that state constitutions could play in providing greater protections for the property rights of its citizens.[30]

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.[31]

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

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."[32] 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.[33] 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,[34] federal rights guarantees have pre-empted any less-generous state analogue.[35] 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."[36]

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

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.[37] Some grant affirmative rights that are not textually guaranteed by the federal Constitution—the right to education being a prominent example.[38] 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.[39] So, if a state judge is faced with a text that replicates, or closely tracks, the text of the federal constitutional

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 ar

constitutions through the initiative process.[49] 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.[50] My state too has used this form of direct democracy to amend its constitution in significant ways.[51] 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,

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.

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permits it to answer certified questions from federal courts.[55] 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.[56]

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."[57] 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.

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* Lindenberg 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)).