# A FEDERAL JUDGE PAYS RESPECT TO STATE SUPREME COURTS

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*The following is a lightly edited version of a speech by Judge Bush at Harvard Law School on April 1, 2023, at the Harvard Federalist Society's annual Alumni Symposium. Judge Bush delivered these remarks while speaking on a panel titled "The Rising Importance of State Courts," which also featured Boies Schiller Flexner LLP partner Jesse Panuccio, and was moderated by Justice Gregory C. Cook of the Supreme Court of Alabama.*

Thank you to the Harvard Federalist Society for hosting this wonderful symposium and for inviting me to participate on this panel. I must confess, though, that when I received the invitation, I did a double take. What do I, a federal judge, have to say about state supreme courts? I am far removed from state courts. At least $75,000 and two state citizenships, to be exact.[1] Perhaps a motion for a remand is in order.[2] But at the risk of making a federal case out of this, here goes.

Like Justice Cook, I bring more experience as a lawyer than as a judge to our discussion. I was an advocate in both federal and state courts for 27 years, before joining the bench about five and a half years ago. I was in the HLS class of 1989, which means I was a 3L when Justice Cook was a 1L. Future President Barack Obama was in Justice Cook's class. So, I have this advice for the 3Ls here today: pay attention to the 1Ls. They may run the country someday.

As a federal circuit judge, I help manage the Sixth Circuit. But for reasons I will explain, Justice Cook has far more control over his jurisdiction, the state of Alabama, than I do mine. In fact, as I consider my federal judicial role, it seems that I am less the leader than a follower. How can that be so?

Well, on questions of fact, our court (like Justice Cook's) generally respects the determinations of trial courts. We review lower court findings of fact for clear error.[3] And in reviewing verdicts, we do not "reweigh the evidence, reevaluate the credibility of witnesses, or substitute our judgment for that of the jury."[4]

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[1] *See* U.S. CONST. art. III, § 2, cl. 1; 28 U.S.C. § 1332(a).

[2] *See* 28 U.S.C. § 1446.

[3] Cooper v. Harris, 581 U.S. 285, 293 (2017).

[4] United States v. Wesley, 417 F.3d 612, 617 (6th Cir. 2005).

True enough, you might say, but what about questions of law? Don't I have power because I review legal issues de novo?[5] That standard of review, I would submit, is somewhat of a misnomer. For even though we do not defer to district courts on questions of legal interpretation, we appellate judges do not have a completely free hand. Of course, we are bound by the text of the law. And in interpreting that text, we have two groups of bosses. On questions of federal law, my court is bound to follow the direction of the U.S. Supreme Court. And when it comes to state law, our bosses are state supreme courts. For questions of state law, my task is two-fold: to defer and to predict. If the state supreme court in charge of the law I'm applying has decided the legal issue, I must defer to that interpretation.[6] If that supreme court has not yet decided the issue, then I must predict what that court would do.[7]

So, properly understood, the role of a federal court of appeals judge is rather confined. I suspect, though, that many law students don't think so. They may think that we are like supreme court justices because supreme court decisions are mostly all that they read in constitutional law class. And at national law schools like Harvard, the emphasis historically has been on the U.S. Supreme Court, not state supreme courts.

This educational approach, I submit, has created a somewhat shortsighted way of looking at the law—particularly state law. If one leaves law school having a primary focus on federal law, particularly as interpreted in federal constitutional cases decided by the U.S. Supreme Court, then that perspective may hamper one's worldview. It can cause an attorney to ignore or not even be aware of viable arguments under state law.[8] And it can cause a judge to forget that state law may be a decidedly different animal than its federal counterpart. It can lead a state court to reflexively interpret a state constitutional provision to have the same meaning as the U.S. Supreme Court has given a parallel federal constitutional provision, even though the two provisions do not have precisely the same wording or history.[9] And it can lead federal judges to think they know what's best for the interpretation of state law based on their experience with federal law. It creates the risk that federal judges will start interpreting state law not for what it is but instead for what we think it should be.

To explain, let me give some background. First, it is a bedrock principle that when it comes to the interpretation of state law, the buck stops with the state supreme court, not a federal court, not even the U.S. Supreme Court. For that principle we go back to 1874 and a case from a state in my circuit. In *Murdock v. Memphis* the U.S. Supreme Court declined to second guess the Tennessee Supreme Court in a state-law dispute over title to land.[10] The U.S. Supreme Court held that state

[5] *See, e.g.*, United States v. Windham, 53 F.4th 1006, 1010 (6th Cir. 2022).

[6] Allstate Ins. Co. v. Thrifty Rent-A-Car Sys., Inc., 249 F.3d 450, 454 (6th Cir. 2001); *see* Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

[7] *Allstate*, 249 F.3d at 454.

[8] *See* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 8–10 (2018).

[9] *Id.* at 174–78.

[10] *See* 87 U.S. (20 Wall.) 590 (1874).

court rulings on state law are not reviewable by federal courts.[11] This understanding is rooted in the text of the Judiciary Act of 1789, along with its amendments in 1867.[12]

This principle that state supreme courts control the interpretation of state law extends beyond the holding that federal courts cannot overturn a decision of a state court on state-law grounds. It also means that, even in federal cases, federal courts are to defer to state supreme courts in the interpretation of state law.[13] This comes up most frequently in diversity. In these cases, we are applying a particular state's law, as interpreted by that state's highest court. Consistent with the purpose of diversity jurisdiction, federal courts are involved in deciding disputes only to make sure that out-of-state litigants get a fair shake.[14] But we decide those cases always against the backdrop that state supreme courts control the interpretation of the state law we apply. This is how Federalists defended diversity jurisdiction against Antifederalist concerns about federal courts having too much power over state courts.[15]

Now, when a state supreme court has not addressed a particular question of law, we may also look to decisions by that state's courts of appeals to see if we can reasonably forecast how the state supreme court would rule.[16] *Erie v. Tompkins* confirmed that the "laws of the several states" include the decisions of the state courts.[17] Sometimes, though, we lack guidance from any state court.

For new or unsettled significant questions of state law, we can—and I have argued should—certify the question to state supreme courts.[18] If the relevant state supreme court has not yet definitively resolved an important state-law issue, a federal judge's assessment of that issue cannot escape being a forecast rather than a determination.[19] A federal court might make an inaccurate forecast and later be proved wrong if the state supreme court decides the issue the other way.[20]

Probably in response to the problem of inaccurate federal-court guesses, Florida was the first state to enact a certification procedure in 1945.[21] Today, every state except North Carolina has this option.[22] Generally, the certification process allows the state's highest court to accept and decide questions of state law necessary to the decision of lawsuits pending in federal courts and, in some states, the courts of other states.[23] The U.S. Supreme Court recognized the procedure for the first

[11] *Id.* at 627–28, 635.
[12] *Id.* at 630–33.
[13] *Erie*, 304 U.S. at 78 (1938).
[14] Lindenberg v. Jackson Nat'l Life Ins. Co., 919 F.3d 992, 995 (6th Cir. 2019) (Bush, J., dissenting).
[15] *Id.* at 995–96.
[16] *Id.* at 996.
[17] *Id.* (citing *Erie*, 304 U.S. at 78).
[18] *Id.* at 997 (citing Transamerica Ins. Co. v. Duro Bag Mfg. Co., 50 F.3d 370, 372 (6th Cir. 1995)).
[19] *Id.* at 996 (citing R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 499 (1941)).
[20] *Id.*
[21] *Id.*
[22] *Id.* at 997.
[23] *Id.* at 996.

time in 1960, has repeatedly commented favorably on it, and sometimes instructs lower courts to consider it on remand.[24]

My court had a case back in 2018 and 2019 where I argued that we should certify a novel question of Tennessee law to the Tennessee Supreme Court.[25] It was another case from Memphis, but this time a dispute over the constitutionality, under Tennessee's constitution, of a statutory cap on punitive damages, among other things.[26] What made the panel decision so unusual was that our court struck down a Tennessee statute based on the *Tennessee* constitution. No *federal* constitutional provision was involved. I dissented from rehearing that case en banc.[27] I invited our court to establish guidelines for when a panel should certify a question.[28] I think it would be a good idea for all of the circuits to establish certification guidelines, unless and until the Supreme Court provides more guidance. This will increase predictability for litigants and prevent intra-circuit splits on when certification is appropriate.[29]

Most important, I think the judicial system is generally better off when federal courts certify more questions of state law to state supreme courts. Reluctance to certify incentivizes forum-shopping between federal and state court.[30] Also, as the U.S. Supreme Court has stressed, certification can save time, energy, and resources.[31] It helps build a cooperative judicial federalism,[32] and these concerns are especially weighty when a federal court is asked to invalidate a state's law under a state constitution.[33]

The U.S. Supreme Court has cautioned against "friction-generating errors" that may result from federal courts construing new state laws that a state's highest court has not reviewed yet.[34] Finally, and relatedly, the Supreme Court has indicated that we should avoid making an *Erie* guess that would invalidate a state law where certification makes avoidance possible.[35]

Two common objections to certification are (1) that it delays the case and (2) the possibility that the state court won't take the case or doesn't want to be bothered. While delay is an issue, it is more important to get the right answer after a longer process than the wrong answer done quickly. Even if a state supreme court might not accept the certified question, we still owe it to the state to give its highest court the option to be the first court to decide an important question of that state's law. Certification is a valuable mechanism for preserving the sovereignty of state

[24] *Id.* at 996–97 (collecting cases).
[25] *Id*.
[26] *See id*.
[27] *Id.* at 995.
[28] *See id.* at 995–1002.
[29] *Id.* at 997, 1001.
[30] *Id.* at 997–99.
[31] Lindenberg v. Jackson Nat'l Life Ins. Co., 912 F.3d 348, 371 (6th Cir. 2018) (Larsen, J., concurring in part and dissenting in part) (citing Arizonans for Off. Eng. v. Arizona, 520 U.S. 43, 77 (1997)).
[32] *Id.* (citing Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974)).
[33] *Id.* (citing *Arizonans*, 520 U.S. at 79); *see Lindenberg*, 919 F.3d at 1000.
[34] *Lindenberg*, 912 F.3d at 371 (citing *Arizonans*, 520 U.S. at 79).
[35] *Lindenberg*, 919 F.3d at 1000.

courts.[36] If a state supreme court declines to decide the certified question, it shares in the responsibility for any "friction-generating error" produced by our court's decision.[37]

So, what is my point with this discussion of *Erie* and certification? It is not merely to bring back fond memories of civil procedure class. It is simply this: state supreme courts are important because, under our governmental system, they have the ultimate control over the interpretation of state law. Federal courts should not try to take this power away. We should stay in our lane.

Now I want to talk about the obverse issue: to what extent do state supreme courts have power over the interpretation of federal law? Your first response may be that, of course, state supreme courts have no such authority. Their decisions as to federal law are all reviewable by the U.S. Supreme Court, right?

That is true. But I will offer a few examples where federal courts, in fact, defer to state supreme courts in applying federal law. In fact, even the U.S. Supreme Court defers to state supreme courts sometimes when applying federal law. It happens, for instance, when federal statutory law borrows from state law.

A noteworthy example is the Federal Tort Claims Act.[38] The FTCA borrows the state tort law "of the place where the act or omission occurred," with some modification for no strict liability or punitive damages.[39] Also, when federal law provides no rule of decision for actions brought under 42 U.S.C. § 1983, such as a statute of limitations or tolling, Congress—in § 1988—has instructed federal courts to refer to state statutes.[40]

Another example involves cases under the Armed Career Criminal Act (ACCA).[41] That statute provides for sentencing enhancements if a defendant has committed three prior violent felonies or serious drug offenses.[42] Often, these prior convictions are state crimes whose scope and details have been developed by state courts. Federal courts compare the elements of the state crimes to ACCA's definition of a "violent felony" or "serious drug offense."[43] We are bound by how states have defined their crimes, which sometimes means the elements will not match or be too broad to be a violent felony, even if the name of the crime sounds like it would qualify as such.[44] (An "aggravated" robbery for example, may be a violent felony in one state but not another.) Federal courts are not authorized to expound on the particulars of these state offenses. Instead, we must determine how the state supreme court would rule.

Finally, habeas review of state criminal conviction is another important area where federal courts defer to state courts. Here again, a federal statute controls a lot of the procedures, and specifically how federal courts will defer to state courts. That statute, the Antiterrorism and

[36] *Id.* at 999 (citing Haley v. Univ. of Tenn.-Knoxville, 188 S.W.3d 518, 521 (Tenn. 2006)).
[37] *Id.* (citing *Arizonans*, 520 U.S. at 79).
[38] 28 U.S.C. §§ 2671–80.
[39] *Id.* at § 2674.
[40] 42 U.S.C. §§ 1983, 1988.
[41] 18 U.S.C. § 924(e).
[42] *Id*.
[43] United States v. Batey, No. 22-5339, 2023 WL 2401193, *1 (6th Cir. Mar. 8, 2023).
[44] *See id.*; Descamps v. United States, 570 U.S. 254, 257 (2013).

Effective Death Penalty Act of 1996 (AEDPA),[45] requires federal habeas courts to defer to a state-court interpretation of federal constitutional law, if it is reasonable.[46] In other words, even if we think the state courts got the interpretation of federal constitutional law wrong, we deny habeas relief so long as that interpretation was within the realm of reasonableness. Determinations of factual issues by state courts are also presumed to be correct, unless the petitioner can rebut them by clear and convincing evidence.[47] In both cases, the Supreme Court has told us that if a state court does not explain its decision, federal courts should "look through" to the last related state-court decision that does provide a rationale.[48] Here again, state courts and their decisions are vital to the federal case being decided by federal judges.

In these varied areas, federal courts have long had the obligation to defer to state supreme courts in the interpretation of not only state law, but also federal law.

In recent years, state courts have again realized how large, and thus important, their role is. Maybe we have my colleague Chief Judge Jeff Sutton to thank for this, at least in part, because of the excellent books he has written on state constitutional law.[49] Of course, the legal landscape has changed also. Decisions of the U.S. Supreme Court are driving this renewed interest in state supreme courts. Cases like *Dobbs*[50] highlight that state courts have the final say on some of the most impactful areas of the law.

As increased attention falls on state supreme courts, there is commensurately more interest in how members of those courts are selected or elected. States choose their highest court judges through elections, appointments, and some hybrid methods. Twenty-six have some form of gubernatorial appointment, with twenty-one of these states restricting the governor to appoint from a list of candidates prepared by a commission or board, while governors in the other five states (including Massachusetts) are not so restrained.[51] In two states, South Carolina and Virginia, the legislators select the judges.[52] In the remaining twenty-two states, direct elections are held.[53] Thirteen of these states have non-partisan elections, and eight attach partisan labels. Michigan has a unique system in which candidates are chosen at political party nomination conventions, but the general election is held without partisan labels.[54] Ohio did this too until January 2022, when it switched to the partisan general elections.[55]

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[45] Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 15, 18, 19, 21, 22, 28, 40, 42, 49, and 50 U.S.C.).

[46] 28 U.S.C. § 2254(d).

[47] *Id.* at § 2254(e).

[48] Wilson v. Sellers, 138 S.Ct. 1188, 1192 (2018).

[49] SUTTON, *supra* note 8; *see also* JEFFREY S. SUTTON, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION (2022).

[50] Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228, 2284 (2022).

[51] *Partisan Election of Judges*, BALLOTPEDIA, https://ballotpedia.org/Partisan_election_of_judges (last visited Apr. 18, 2023) [https://perma.cc/UW98-2NTN].

[52] *Id*.

[53] *Id*.

[54] *Id*.

[55] *Id*.

My home state, Kentucky, has nonpartisan judicial elections.[56] Last year, my court heard a case about two candidates who allegedly engaged in partisan conduct.[57] The panel decision found that the Kentucky Judicial Conduct Commission's Code of Judicial Conduct rules, as applied to these two candidates in vague threats, likely violated the First Amendment.[58] Campaign materials with a generic elephant and identifying the candidates as conservative and Republican did not rise to the level of claiming to be the party's nominee.[59] And, endorsements by pro-life groups, which did not fall within the definition of a political organization in the Code of Conduct, did not mean the candidates were committing to deciding cases involving abortion in a certain way.[60] Thus, we held, the challenged conduct and speech were likely protected by the First Amendment.[61]

Wisconsin is another state with nonpartisan elections, but its voters recently experienced an election in which judicial candidates weighed in on various issues as part of the campaign. The race featured one candidate who called the state's legislative maps "rigged" and referred to "precedent changes" about a 2011 state law.[62] This candidate also accepted contributions from the Democratic Party of Wisconsin.[63] She ran ads disclosing her position on abortion and was endorsed by two large pro-choice groups.[64] Meanwhile, the other candidate was endorsed by the state's three largest pro-life groups and had historical ties to the Republican Party.[65] The Wisconsin contest ended up being the most expensive judicial election in American history to date.[66]

That state supreme court candidates have become more assertive on issues in judicial campaigns reflects a transfer in final decision-making from the U.S. Supreme Court to state supreme courts. As one of my clerks, Ross Hildabrand, and his brother, Clark Hildabrand, wrote recently, state judges may have been hesitant in the past to interpret their state's constitution differently than analogous provisions of the federal constitution because the Supreme Court had decided *it* had the final say on many of the most important issues.[67] Now, state supreme courts are realizing that they don't have to interpret their constitutions in lockstep with the federal

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[56] *Id*.

[57] Fischer v. Thomas, 52 F.4th 303 (6th Cir. 2022).

[58] *Id.* at 310.

[59] *Id.* at 310–12.

[60] *Id.* at 312–13.

[61] *Id.* at 310–13.

[62] Editorial Board, *Wisconsin Supreme Court Race Shows Folly of Electing Judges*, WASH. POST, Mar. 29, 2023, https://www.washingtonpost.com/opinions/2023/03/29/wisconsin-supreme-court-judge-election/ [https://perma.cc/XSR3-USAY].

[63] Richard J. Epstein, *Wisconsin Court Candidates Clash Over Abortion and Democracy*, N.Y. TIMES, Mar. 21, 2023, https://www.nytimes.com/2023/03/21/us/politics/wisconsin-supreme-court-debate.html [https://perma.cc/4XCQ-35DC].

[64] *Id.*; *see also* Editorial Board, *supra* note 62.

[65] Editorial Board, *supra* note 62.

[66] Epstein, *supra* note 63.

[67] Clark L. Hildabrand and Ross C. Hildabrand, *Who Decides? Depends on What the Federal Government Allows*, 2022 HARV. J.L. & PUB. POL'Y PER CURIAM 2, *5–7 (2022).

constitution with respect to abortion,[68] and future U.S. Supreme Court decisions may return the final say on other areas to the states too.

All of these developments have made state supreme courts very consequential places. And I suspect the increasing importance of state supreme courts has influenced the career choices made by the clerks in my chambers. To be sure, the vast majority of my 21 former clerks thus far are in private practice. But there is a significant group—four of them—who have foregone or taken a sabbatical of sorts from law firms to work for state attorneys general. In fact, I have slightly more former clerks who work, or have worked, for state attorneys general than those who are assistant United States attorneys. The state-attorney-general-office option not only allows for more in-court arguments early in one's career, but also the opportunity to work on important issues that are increasingly being decided in lawsuits brought or defended by state attorneys general. In the past few years, such cases have run the gamut, involving election law, abortion, COVID-related restrictions, and a host of other important issues.

The increasing importance of state supreme courts also highlights the need for quality attorneys to run for office in those states that elect judges or to throw their names into the hat for consideration in those states where judges are appointed. The caliber of the judiciary should be high at both the federal and state levels; otherwise, the rule of law suffers.

I encourage you to consider making it a goal to improve the judiciary in your state. Of course, I would be happy if some in attendance today ended up as my colleagues in the federal judiciary. But I would be just as happy—perhaps even more so—if some of you followed Justice Cook's lead to serve on the state-court bench.

In closing, let me say how pleased I am that this symposium is focused on state supreme courts. For me to do my job right as a federal judge, much depends on the work of state supreme courts. We federal judges need to remember that we do not know best when it comes to the interpretation of state law. And for the law students here, while I welcome your arguments based on federal law before our federal courts, don't forget that state law and state courts are just as important, if not more so, for the lives of most Americans.

Thank you.

[68] For example, South Carolina's Supreme Court held, earlier this year, that its state constitutional right to privacy is implicated when a woman gets an abortion. Planned Parenthood S. Atl. v. State, 438 S.C. 188 (2023), *reh'g denied* (Feb. 8, 2023).