

# STATE CONSTITUTIONAL *ÉTUDES*: VARIATIONS ON THE THEME OF A CONTEMPORARY STATE CONSTITUTIONAL PROBLEM

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## *Table of Contents*

I. <i>OVERTURE</i> : SETTING UP THE MOTIFS IN CONTEXT .....	71
II. <i>RECITATIVE</i> : RETIREES RAISE FEDERAL CONSTITUTIONAL CLAIMS CHALLENGING THE STATUTE .....	75
III. <i>SUBITO</i> : STATE ISSUES APPEAR IN A FEDERAL CASE.....	76
IV. <i>RITORNELLO</i> : WHO GETS TO DECIDE HOW TO DECIDE?.....	79
V. <i>DIVERTIMENTI</i> : THE UNSPOKEN STATE CONSTITUTIONAL QUESTIONS.....	86
VI. <i>MINUET</i> : AN INTERNAL LEGISLATIVE DISPUTE ENGAGES THE MICHIGAN JUDICIARY.....	95
VII. <i>LARGO</i> : THE PASSIVE VIRTUES, PRIMACY, AND FEDERALISM .....	101
VIII. <i>SCHERZO</i> : THE COURT REACTS TO COUNTING IMAGINARY VOTES .....	104
IX. <i>CADENZA</i> : THE LEGISLATURE GOES OFF SCRIPT.....	106
X. <i>WALTZ</i> : THE EMERGENCY MANAGER, ATTORNEY GENERAL, AND THE COURTS INTERACT.....	112
XI. <i>CODA</i> : LESSONS LEARNED .....	116

Conventional legal scholarship presents a new theory by testing its application against a variety of cases. In this essay, I reverse the process, considering a single recent case to identify the various theories of state constitutionalism it invokes. This exploration, reminiscent of the musical-composition concept of “*études*”<sup>1</sup> or the visual-arts idea of “studies,”<sup>2</sup> develops understanding by turning and turning the case until

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1. See, e.g., Classical Scores, Chopin – Op. 10 No. 3 (Pollini), YOUTUBE (Sept. 23, 2009), <http://www.youtube.com/watch?v=JS7KfOyMEIY>; Simon Finlow, *The Twenty-Seven Études and Their Antecedents*, in THE CAMBRIDGE COMPANION TO CHOPIN 50 (Jim Samson ed., 1992).

2. See, e.g., Edgar Degas, *Two Studies of a Dancer*, in RICHARD KENDALL, DEGAS AND THE LITTLE DANCER 39 (Richard Kendall ed., 1998).

all of its major facets are exposed. The case I have selected, from Michigan, raises issues typical of all of the ten modern constitutions under study in this symposium.<sup>3</sup> By adopting this method, I hope to demonstrate how even seemingly esoteric or abstract theories of state constitutionalism are playing out across some of the most important controversies of our day.

Continuing the music analogy, certain crucial motifs sound throughout the *études* in this Article. The first motif is the depth of the relationship between state constitutional law and contemporary problems of political life; even obscure provisions of state constitutions turn out to have a big influence on important social controversies. The second motif is the interdependence of state and federal constitutional law and of the state and federal courts engaged in interpreting both kinds of constitution. Ideas and doctrines that the academy conventionally puts in the “federal courts” box turn out to affect the interpretation of state constitutionalism, and, likewise, state constitutionalism notions bear on how and why federal courts reach decisions. A third motif discernible throughout this Article is the weakness of state constitutions as meaningful checks on highly motivated political actors, even in the face of seemingly clear text. The final, related motif is a challenge to all of us in the academy who study state constitutions: the persistence at the bar and bench of a casual attitude toward state constitutions that controverts our call for more careful appreciation of these complicated documents.

Each of these motifs has been previously identified and elaborated to varying degrees.<sup>4</sup> But this Article is new because it puts the motifs side

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3. CONN. CONST.; FLA. CONST.; GA. CONST.; ILL. CONST.; LA. CONST.; MICH. CONST.; MONT. CONST.; N.C. CONST.; R.I. CONST.; VA. CONST..

4. On the first, see ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* (2009). On the second, see JAMES A. GARDNER, *INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM* 117 (2005); Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CALIF. L. REV. 1409, 1431-36 (1999) (examining federal court practices when engaged with federal and state constitutional claims). On the third, see, for example, Helen Hershkoff, *The Michigan Constitution, Judicial Rulemaking, and Erie-Effects on State Governance*, 60 WAYNE L. REV. 117 (2014); Justin R. Long, *State Constitutional Prohibitions on Special Laws*, 60 CLEV. ST. L. REV. 719, 721-22, 732-41 (2012) (noting that many state high courts interpret special laws prohibitions as offering protection equivalent to the federal Equal Protection Clause—effectively reading the prohibition out of state constitutions). On the fourth, see James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 781-84 (1992) (stating that state courts are generally unwilling “to engage in any kind of analysis of . . . state constitution[s]”). See also Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1505-27 (2005) (discussing state high courts unreflectively construing state

by side, in context with each other and in the setting of a real case. By closely examining a single case, I demonstrate not only how each motif works on its own, but also how they all play out together, whether in harmony or dissonance. In some *études*, the various motifs appear more boldly than in others, just as in an orchestral work a particular theme will swell or recede. Sometimes, the motif will surprise us by its seeming absence, but this does not mean it has no effect on the process under study. Just as rests in music—the absence of sound at a moment when we expect it—changes the listener’s perception, so silent motifs change how disputes are resolved. Overall, this Article makes the claim that the key to understanding the contemporary practice of state constitutionalism is recognition that these themes influence every case, even if only by their noteworthy omission from the explicit rationales of judicial literature.

### I. OVERTURE: SETTING UP THE MOTIFS IN CONTEXT

Michigan’s legislature has been worried about the poor state of its localities’ finances for quite some time. Acting on an apparent presumption that bad governance, rather than insufficient state and regional financial support, is the primary cause of municipal insolvency,<sup>5</sup> the legislature passed an “Emergency Financial Manager” law in 1990 that authorized the governor, once preconditions were met, to appoint an official who would single-handedly manage finances for troubled local units.<sup>6</sup> Known as Public Act 72, this statute was employed several times over the next two decades, but eventually the legislature became convinced that the managers required even stronger emergency powers.<sup>7</sup> In 2011 (just over a year before passing the so-called Right to Work Act), the legislature passed a new version, known as Public Act 4,<sup>8</sup> which for the first time gave emergency managers powers to abrogate existing collective bargaining agreements and pension promises.<sup>9</sup>

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constitutional provisions as identical to federal provisions, in some cases even prospectively).

5. *But see* Peter J. Hammer, *The Fate of the Detroit Public Schools: Governance, Finance and Competition*, 13 J.L. SOC’Y 111 (2011) (demonstrating that poor local governance was blamed but not responsible for Detroit Public Schools’ financial crisis).

6. MICH. COMP. LAWS ANN. § 141.1519 (West 1990) (authorizing the governor to appoint an emergency manager).

7. MICH. COMP. LAWS ANN. § 141.1503 (West 2011) (finding in support of emergency manager power including the power to restructure contractual obligations).

8. MICH. COMP. LAWS ANN. §§ 141.1519(k), (m) (West 2011) (granting emergency manager the power to “reject, modify, or terminate 1 or more terms and conditions of an existing collective bargaining agreement” and alter pensions).

9. Michigan has a “home rule” clause in its constitution (MICH. CONST. art. VII, § 22). For more on why the emergency-manager statutes do not violate it, see *infra* Part V.

Public Act 4 was signed by the governor and given immediate effect upon filing with the Secretary of State.<sup>10</sup> Existing emergency financial managers empowered under the old Public Act 72 assumed the powers awarded under the new statute. In December 2011, the emergency manager for the City of Pontiac used his new powers to unilaterally increase employees' and retirees' share of health benefit expenses, contrary to the terms of their collective bargaining agreements.<sup>11</sup>

Then, in March of 2012, shortly before 90 days elapsed from the end of the 2011-2012 legislative session, opponents of the new law succeeded in presenting enough voters' signatures on a petition to repeal the law at a referendum.<sup>12</sup> Certification by the Secretary of State that the signatures were sufficient immediately suspended operation of Public Act 4.<sup>13</sup> An opinion of the attorney general concluded that the old Public Act 72 then governed the powers of existing emergency managers, based on the idea that because Public Act 4 had repealed Public Act 72 in the course of replacing it, the suspension of Public Act 4 effectively voided that repeal.<sup>14</sup> Therefore, existing emergency managers reverted to the authority they previously held under Public Act 72, which did not permit re-opening of union contracts and pension benefits.<sup>15</sup> In a referendum held in the November election of 2012, after a massive union-led campaign, voters repealed Public Act 4 by a slim majority.<sup>16</sup> This voided that act, leaving intact only the prior emergency manager statute.

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10. See generally Op. Att'y Gen. 6201 (Mich. 1984) (advising that a statute passed with legislative approval for immediate effect and signed by the governor becomes effective on filing with the Secretary of State).

11. Michigan has a state constitutional clause prohibiting the impairment of pensions. MICH. CONST. art. IX, § 24. For more on whether this action violates that clause, see *infra* Part V.

12. David Sands, *Michigan Emergency Manager Repeal Delivers 226,637 Signatures*, HUFFINGTON POST DETROIT (Feb. 29, 2012), [http://www.huffingtonpost.com/2012/02/29/michigan-emergency-manager-repeal\\_n\\_1311582.html](http://www.huffingtonpost.com/2012/02/29/michigan-emergency-manager-repeal_n_1311582.html) (reporting that petition to repeal Public Act 72 exceeds the 161,305 signatures required).

13. See generally MICH. CONST. art. II, § 9 (creating the power of initiative and referendum in Michigan).

14. See Op. Att'y Gen. 7267 (Mich. 2012) (advising that P.A. 4's suspension restored P.A. 72 to effect). Whether executive-branch officials are bound by opinions of the attorney general is an open question in Michigan. For more on this point, see *infra* Part X.

15. See MICH. COMP. LAWS ANN. § 141.1519 (West 1990) (granting the emergency manager broad powers did not authorize alteration of union contracts or pensions).

16. *Michigan Proposal 1 Results: State Emergency Manager Law Fails*, HUFFINGTON POST DETROIT (Nov. 14, 2012, 3:23 PM), [http://www.huffingtonpost.com/2012/11/07/michigan-proposal-1-results-emergency-manager\\_n\\_2070169.html](http://www.huffingtonpost.com/2012/11/07/michigan-proposal-1-results-emergency-manager_n_2070169.html).

Unwilling to accept the people's rebuke, the legislature quickly responded one month later with the passage of Public Act 436 (albeit not given immediate effect), which restored the emergency managers' powers to abrogate union contracts.<sup>17</sup> Because Public Act 436 includes an appropriation, the Michigan Constitution does not permit it to be subjected to a new referendum.<sup>18</sup>

Meanwhile, minority-party legislators fought the legislative procedure that gave immediate effect to Public Act 4 (and to 546 out of the 566 other bills passed by the Michigan House in 2011).<sup>19</sup> The Michigan Constitution gives citizens up to 90 days after the close of a legislative session to file enough signatures to put a referendum challenging a statute passed in that session on the ballot.<sup>20</sup> The constitution also requires all new statutes to take effect no sooner than 90 days after the close of the legislative session, except where two-thirds of each House vote in favor of giving the bill immediate effect.<sup>21</sup> Together with the requirement that a statute is suspended once a valid petition for referendum is filed, these clauses permit opponents of a new statute to submit their signatures before the statute ever has a single day of operation.

But the Michigan Constitution and House rules list what kinds of motions require a roll-call vote to pass, and motions for immediate effect are not among them.<sup>22</sup> Longstanding practice has been for the chamber's presiding officer to determine whether two-thirds of the present

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17. MICH. COMP. LAWS ANN. §§ 141.1552(k), (m) (West 2011) (granting emergency manager the power to "reject, modify, or terminate 1 or more terms and conditions of an existing collective bargaining agreement" and alter pensions).

18. Michigan's constitution provides for both referenda and initiatives, subject to certain limits including appropriations' immunity from popular review (MICH. CONST. art. II, § 9). For more on how the legislature and the voters used the referendum clause to carry out their policy preferences, see *infra* Part II.

19. Libby Spencer, *Michigan House Republicans Repeatedly Violated State Constitution*, THE DETROIT NEWS, Apr. 6, 2012, <http://blogs.detroitnews.com/politics/2012/04/06/michigan-house-republicans-repeatedly-violated-state-constitution/>. Michigan House Republicans claim a two-thirds majority voted in favor of immediate effect in 546 out of 566 bills, but did not allow a roll-call vote to confirm that 2/3 in fact voted in favor of immediate effect.

20. MICH. CONST. art. II, § 9 ("The power of referendum . . . must be invoked in the manner prescribed by law within 90 days following the final adjournment of the legislative session at which the law was enacted.").

21. MICH. CONST. art. IV § 27 ("No act shall take effect until the expiration of 90 days from the end of the session at which it was passed, but the legislature may give immediate effect to acts by a two-thirds vote of the members elected to and serving in each house.").

22. See MICH. CONST. art. IV (containing procedural restrictions on the legislative branch).

legislators support giving a newly-passed bill immediate effect by visually examining the room while those in favor of immediate effect stand up to indicate support.<sup>23</sup> Apparently, the presiding officer routinely “sees” two-thirds support, regardless of how many legislators actually rise.<sup>24</sup> Normally, most legislators are not bothered that immediate-effect motions make popular repeal of a statute through referendum more difficult. They actually support immediate-effect motions as a routine, rather than emergency measure, because they see little reason to delay the implementation of what a majority of legislators view, by definition, as sound public policy.<sup>25</sup> With respect to the emergency manager law, however, opponents argue that the Speaker’s constructive “standing” count, a legal fiction, fails to comply with the controlling constitutional clause.<sup>26</sup>

The constitution does provide that one-fifth of the legislators present in either house can demand a roll-call vote on any motion, implicitly inclusive of motions for immediate effect.<sup>27</sup> Like any motion, the demand for a roll-call vote is achieved by winning recognition from the presiding officer, articulating the motion, and then winning the required percentage of the present legislators’ votes.<sup>28</sup> As video of proceedings in the Michigan House demonstrates, however, the presiding officer will not always recognize a member seeking to move for a roll-call vote on a

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23. Called a “rising vote,” the practice involves visual inspection by the presiding officer to determine if the number of members standing meets the requisite two-thirds. *See City of Pontiac Retired Emps. Ass’n v. Schimmel*, 726 F.3d 767, 774 (6th Cir. 2013), *vacated*, *City of Pontiac Retired Emps. Ass’n v. Schimmel*, No. 12-2087, 2014 WL 1758913 (6th Cir. May 5, 2014) (en banc) (declining to address any state-law questions).

24. *Id.* (“Apparently, a two-thirds vote occurs whenever the presiding officer says it occurs—irrespective of the actual vote.”).

25. Jonathan Oosting, *Michigan Legislature Continues Abuse of Giving Bills Immediate Effect*, MLIVE (Nov. 19, 2013 10:18 AM), [http://www.mlive.com/politics/index.ssf/2013/11/michigan\\_legislature\\_continues.html](http://www.mlive.com/politics/index.ssf/2013/11/michigan_legislature_continues.html).

26. Paul Egan, *Michigan House Democrats Lose Challenge to GOP’s Voice Votes that Give Laws Immediate Effect*, DETROIT FREE PRESS, Aug. 17, 2012, <http://www.freep.com/article/20120817/NEWS15/308170058/Michigan-House-Democrats-lose-challenge-to-GOP-s-voice-votes-that-give-laws-immediate-effect>.

27. This provision has been part of each of Michigan’s constitutions since its first in 1835. *See* MICH. CONST. art IV, § 11 (1835); MICH. CONST. art IV, § 10 (1850); MICH. CONST. art IV, § 16 (1908); MICH. CONST. art IV, § 18; *see also* R. 12(1), *Standing Rules of the House of Representatives in Accordance with the Michigan Constitution Article IV, Section 16* (2013) [hereinafter *Michigan House Standing Rules*], available at [http://www.legislature.mi.gov/Publications/rules/house\\_rules.pdf](http://www.legislature.mi.gov/Publications/rules/house_rules.pdf) (requiring the Speaker to hold a roll-call vote upon the demand of one-fifth of the members).

28. *See, e.g., Motions*, ROBERT’S RULES OF ORDER, <http://www.robertsrules.org/rulesintro.htm#Motions> (last visited Apr. 15, 2014).

motion for immediate effect.<sup>29</sup> If a member succeeds in challenging the presiding officer's ruling that no motion for "division" (roll-call) was made, the ruling can be appealed to the House as a whole, which—again, as in any parliamentary dispute—can affirm the chair's ruling by a simple-majority vote.<sup>30</sup> In this way, a slim majority of the legislature is able to accomplish its policy agenda without hindrance from crystal-clear super-majority requirements in the constitution.

## II. RECITATIVE: RETIREES RAISE FEDERAL CONSTITUTIONAL CLAIMS CHALLENGING THE STATUTE

In *City of Pontiac Retired Employees Association v. Schimmel*, a panel of the Sixth Circuit considered a retirees' challenge to actions taken by the Pontiac emergency manager.<sup>31</sup> The Pontiac retirees challenged the emergency manager's decisions undertaken after the statute was passed but before the petition certification (which automatically suspended operation of the law under the Michigan Constitution).<sup>32</sup> Instead of filing their complaint in state court alleging state constitutional violations, they brought their action in the federal Eastern District of Michigan, raising federal questions under the Contracts Clause, the Bankruptcy Clause (arguing Bankruptcy Code preemption), and the Due Process Clause.<sup>33</sup> The plaintiffs sought a

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29. MichiganHouseDems, *Michigan House Floor 3/28/2012*, YOUTUBE (Mar. 30, 2012), [http://www.youtube.com/watch?v=JxYl\\_G\\_DKuA](http://www.youtube.com/watch?v=JxYl_G_DKuA) ("Michigan House Democrats fought for recognition on behalf of their constituents, but Republicans refused to follow House rules and the Constitution . . . and continued their illegal practice of not counting votes.").

30. See R. 67, *Michigan House Standing Rules* (describing procedure for appeals from rulings of the chair). See generally *Voting on a Motion*, ROBERT'S RULES OF ORDER, <http://www.robertsrules.org/rulesintro.htm#Voting> (last visited Apr. 15, 2014).

31. See *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 726 F.3d 767 (6th Cir. 2013), *vacated*, *City of Pontiac Retired Emps. Ass'n v. Schimmel*, No. 12-2087, 2014 WL 1758913 (6th Cir. May 5, 2014) (en banc) (declining to address any state-law questions).

32. *Id.* at 769 ("The retired employees do not specifically argue that Schimmel violated Michigan's Constitution when he changed their pension rights. But, the Michigan Legislature may have violated the Michigan Constitution when it passed Public Act 4. In addition, Michigan voters rejected Public Act 4 by referendum, and this rejection may have rendered Schimmel's actions void.").

33. Plaintiffs also raised a state constitutional claim (but probably not the one listed in the district court's opinion, which is Article I, Section 24 and concerns the rights of criminal defendants), as well as state statutory claims. These were not taken up on appeal. *Id.* at 771. The City of Pontiac Retired Employees Association filed their action in federal court alleging "several federal claims, including the unconstitutional impairment of contract, preemption under federal bankruptcy law, and deprivation of a property interest without due process of law." *Id.*

temporary restraining order and a preliminary injunction to void the emergency manager's orders reducing their retirement benefits.<sup>34</sup> The district court rejected the retirees' federal claims on the merits and declined jurisdiction over the supplemental state law claims.<sup>35</sup> The retirees appealed. The parties then briefed and argued solely the federal issues before a panel of the U.S. Court of Appeals for the Sixth Circuit.<sup>36</sup>

### III. *SUBITO*: STATE ISSUES APPEAR IN A FEDERAL CASE

All of this is straightforward compared to what came next. In an opinion by District Judge James Gwin (sitting by designation from the Northern District of Ohio), the panel majority declined to consider the merits of the federal claims.<sup>37</sup> Instead, the court asked, on its own initiative, whether the emergency manager's actions were void because the Michigan Legislature had not complied with the procedural requirements set forth in the Michigan Constitution.<sup>38</sup> The majority supported its sudden articulation of state constitutional questions that neither party had raised by pointing to the canon of federal constitutional avoidance,<sup>39</sup> the traditional doctrine indicating that a federal court should prefer to resolve any other dispositive issues in a case before deciding the questions raised under the federal Constitution.<sup>40</sup> A major rationale for this doctrine flows from the "passive virtues."<sup>41</sup> By declining to resolve

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34. *Id.* ("Retired Employees filed a motion for a temporary restraining order . . . and a motion for a preliminary injunction to stop certain Emergency Manager orders from taking effect.").

35. *City of Pontiac Retired Emps. v. City of Pontiac*, No. 12-12830, 2012 WL 2917311 at \*3-\*8 (E.D. Mich. July 17, 2012) (rejecting federal claims and declining jurisdiction over state law claims), *vacated and remanded sub nom.* *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 726 F.3d 767 (6th Cir. 2013), *vacated*, *City of Pontiac Retired Emps. Ass'n v. Schimmel*, No. 12-2087, 2014 WL 1758913 (6th Cir. May 5, 2014) (en banc) (declining to address any state-law questions).

36. *See Pontiac Retirees*, 726 F.3d at 771.

37. *Id.*

38. *Id.* at 772-73 (finding emergency managers' actions may be void because passage of Public Act 4 violated the Michigan Constitution).

39. *Id.* at 771 ("Under the doctrine of constitutional avoidance, we avoid constitutional determinations when a case can be resolved on other grounds.").

40. *See generally* *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346-47 (1936) ("The Court will not anticipate a question of constitutional law in advance of the necessity of deciding it. It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.") (quotations and citations omitted).

41. *See generally* Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567, 1584-90 (1985) (explaining that passive virtues are a form of judicial restraint—using tools such as jurisdiction, standing, ripeness, and the political question doctrine to avoid deciding cases on substantive grounds).



disputes on constitutional grounds, federal courts leave open the possibility that other institutions of government will address the issue and dispose of it differently from the courts. This formal space for political reversal of court holdings does not exist if the holdings stem from the constitution, because then, as a formal matter, only constitutional amendment could change the courts' conclusion. In terms of institutional capacity, the canon of constitutional avoidance is meant to leave formal space for polycentric decision-makers, like Congress, to address important social questions, outside of the binary or polar winner-takes-all approach inherent in adjudication.<sup>42</sup>

The court also viewed a resolution of the federal issues as potentially advisory, because a holding in favor of the emergency manager founded on the federal questions would have no practical effect if a state court then ruled in favor of the plaintiffs on state grounds.<sup>43</sup> In federal courts, describing an opinion as "advisory" is functionally equivalent to calling it "judicial activism," a slur that means "illegitimate and wrong."<sup>44</sup> Despite the panel's concern, however, there are many examples of federal courts, including the U.S. Supreme Court, resolving particular disputes on federal-law grounds that later come to turn on questions of state law. For example, the U.S. Supreme Court concluded in a famous case from 1983 that certain automobile searches do not violate the U.S. Constitution.<sup>45</sup> The remand to the state supreme court directed that court to evaluate the same stops under the state constitution.<sup>46</sup> A decision at the state court in favor of the defendant on state constitutional grounds

42. See William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 844-46 (2001).

43. *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 726 F.3d 767, 771-72 (6th Cir. 2013) (expressing the need to avoid an advisory opinion), *vacated*, *City of Pontiac Retired Emps. Ass'n v. Schimmel*, No. 12-2087, 2014 WL 1758913 (6th Cir. May 5, 2014) (en banc).

44. *United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 89 (1947) ("As is well known, the federal courts established pursuant to Article III of the Constitution do not render advisory opinions.").

45. See *Michigan v. Long*, 463 U.S. 1032, 1050 (1983) ("If, while conducting a legitimate *Terry* search of the interior of the automobile, the officer should, as here, discover contraband other than weapons, he clearly cannot be required to ignore the contraband, and the Fourth Amendment does not require its suppression in such circumstances.") (citations omitted).

46. See *People v. Long*, 359 N.W.2d 194, 195-97 (Mich. 1984), *on remand from Michigan v. Long*, 463 U.S. 1032, 1050 (1983). The U.S. Supreme Court found that the "decision did not rest on an adequate and independent state ground" and that "the search of the passenger compartment of the vehicle did not violate the federal constitution. . . . [T]he Supreme Court found a remand to [the Michigan Supreme Court] necessary to determine whether the trunk search was permissible under *Opperman* or other decisions of [the Michigan Supreme] Court." (quotations and citations omitted).

would, presumably, have done nothing to render the U.S. Supreme Court's original decision "advisory," even if that federal opinion no longer provided the legal reasoning that would explain the ultimate disposition of the case. If the federal Supreme Court thought otherwise, it would never have reached the merits of the search-and-seizure problem under federal law.

One might have expected the Sixth Circuit, to the extent it wanted to enforce the state constitution, to be bound under *Erie* to apply any relevant state-court holding.<sup>47</sup> In fact, the Michigan intermediate appellate court had already ruled on the same state constitutional questions posed by the *Pontiac Retirees* panel in a case called *Hammel v. Speaker of House of Representatives*,<sup>48</sup> but the Michigan Supreme Court denied leave to appeal from that decision, leaving no definitive holding from the state's highest court on the merits.<sup>49</sup> The panel concluded that, while it would be bound by a state supreme court decision, it owed the intermediate court only deference.<sup>50</sup>

Naturally, the Sixth Circuit had options other than a black-and-white choice between deciding federal constitutional questions or deciding state constitutional questions. The *Pontiac Retirees* panel, if it were generally concerned about how the Michigan Constitution applied in the absence of a state supreme court ruling, could have certified the question to the Michigan Supreme Court.<sup>51</sup> Doing so would have left the first and last word on the application of the Michigan Constitution's immediate-effect clause with the state court (for better or worse),<sup>52</sup> uninfluenced by any federal perspective on the question. Even more dramatically, given

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47. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (stating that federal courts are bound by state high court interpretations of state law).

48. 825 N.W.2d 616, 622 (Mich. Ct. App. 2012) ("[W]hen no evidence to the contrary appears in the journal, we will presume the propriety of those proceedings. Thus, there is no evidence suggesting that the defendants violated [art. 4, § 27 of the Michigan Constitution, requiring a 2/3 vote for immediate effect] . . .") (internal quotations and citations omitted). For more on the state constitutional questions decided in the state appellate court, see *infra* Part V.

49. See *Hammel v. Speaker of House of Representatives*, 829 N.W.2d 862 (Mich. 2013) (denying appeal).

50. *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 726 F.3d 767, 775 (6th Cir. 2013) (concluding that it is not bound by the holdings of state appellate courts where the state's highest court has yet to address the issue), *vacated*, *City of Pontiac Retired Emps. Ass'n v. Schimmel*, No. 12-2087, 2014 WL 1758913 (6th Cir. May 5, 2014) (en banc).

51. See Mich. Ct. R. 7.305(B)(1) ("When a federal court, state appellate court, or tribal court considers a question that Michigan law may resolve and that is not controlled by Michigan Supreme Court precedent, the court may on its own initiative or that of an interested party certify the question to the Michigan Supreme Court.").

52. Cf. Justin R. Long, *Against Certification*, 78 GEO. WASH. L. REV. 114 (2009) (arguing certification by federal courts is often used to the detriment of state high courts).

the complexity of the state constitutional questions involved and their intrusiveness into the fundamental workings of the state government's internal structure, the federal panel could have abstained from proceeding further with the case until the plaintiffs secured a state-court ruling on the state constitutional questions under the *Pullman* doctrine.<sup>53</sup> Both certification and abstention would have permitted the Sixth Circuit to avoid interpreting either the federal Constitution or the state constitution. But instead the *Pontiac Retirees* court directly addressed the state constitutional questions it had invented, questions that had never been resolved by the state high court.<sup>54</sup>

In these circumstances, the court concluded that the deference ordinarily due to the intermediate state appellate court was outweighed by the improbability that the state legislature had complied with the state constitution.<sup>55</sup> As a result, the court remanded the case to the federal district court for fact-finding and a first analysis of the state constitutional issues the appellate panel identified.<sup>56</sup> After the panel issued the decision I examine in this Article, the Sixth Circuit accepted the case en banc and again remanded the matter to the district court but without any discussion of state-law issues.<sup>57</sup>

#### IV. RITORNELLO: WHO GETS TO DECIDE HOW TO DECIDE?

Deciding state questions before reaching federal questions like the *Pontiac Retirees* court did here, what the federal courts call "constitutional avoidance," has a direct parallel known as "primacy" in the state constitutional context.<sup>58</sup> Hans Linde has argued that primacy is

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53. See *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 501 (1941) (stating that federal courts should abstain from resolving federal constitutional claims where the issue could be resolved by state law); see also *Brown v. Tidwell*, 169 F.3d 330, 332 (6th Cir. 1999) (declining to decide plaintiff's claim that fee collection under two Tennessee statutes constituted an unconstitutional deprivation of property because a state court ruling on the matter would moot the constitutional claim).

54. See *Pontiac Retirees*, 726 F.3d at 773-76 (addressing whether passage of Public Act 4 violates the Michigan Constitution, an issue not addressed by the state supreme court).

55. See *id.* at 775 (quoting *Ziebart Int'l Corp. v. CNA Ins. Cos.*, 78 F.3d 245, 250-51 (6th Cir. 1996) ("We may refuse to follow intermediate appellate court decisions where we are persuaded that they fail to reflect state law correctly . . .").

56. See *id.* at 775-76.

57. *City of Pontiac Retired Emps. Ass'n v. Schimmel*, No. 12-2087 (6th Cir. May 5, 2014) (en banc).

58. See generally Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues when Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025, 1027-28 (1985) ("The primacy model . . .

simply the logical approach to deciding constitutional questions because the federal Constitution is not violated, by definition, if the state constitution prohibits the conduct that potentially might offend the federal Constitution and state courts stand willing and able to enforce that prohibition.<sup>59</sup> For example, if the state constitution (and its judicial interpreters) require compensation for a public taking of private property because of a particular zoning regulation, then the state cannot possibly have violated the federal Takings Clause—state law already compels the compensation.<sup>60</sup> Others, most notably Robert Williams, have argued that state-court application of primacy promotes respect for state constitutions by building a richer body of precedent than would be possible if state constitutional questions are considered less frequently.<sup>61</sup> The absence of workable, well-reasoned decisions on state constitutional questions has long been posited as a reason for why attorneys regularly fail to raise state constitutional arguments in cases where they seem applicable.<sup>62</sup>

However, few state high courts—including none of the ten under study in this Symposium—actually apply primacy as their main interpretive approach.<sup>63</sup> Instead, they commonly apply their own *state* version of constitutional avoidance, preferring to decide whether the federal Constitution has been violated first and only then, if at all, going on to apply the state constitution.<sup>64</sup> According to this mirror image of primacy, known as “interstitial” state constitutionalism, the state constitution serves only to fill gaps where the federal Constitution has left rights unprotected that the state court wishes to preserve.<sup>65</sup>

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focuses on the state constitution as an independent source of rights and relies on it as the fundamental law.”).

59. Hans A. Linde, *Without “Due Process:” Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 133-35 (1970) (asserting that state constitutional claims should always be dealt with and disposed of first).

60. See *San Remo Hotel, L.P. v. City & Cnty. of S.F., Cal.*, 545 U.S. 323, 338 (2005).

61. See Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499.

62. See Gardner, *The Failed Discourse of State Constitutionalism*, *supra* note 4, at 791 (“[B]ecause the federal Constitution is generally more fully elaborated than its state counterparts . . . federal law [is] the law of choice for the interpretation of the state constitution[s]; it provides a generous source of off-the-shelf standards and analyses for application to state constitutional problems.”).

63. JAMES A. GARDNER, *INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM* (2005).

64. See *generally* ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 140-62 (2009).

65. See Utter, *supra* note 58, at 1028 (stating that under the interstitial model, “state courts recognize the federal doctrine as the floor and focus the inquiry on whether the state Constitution offers a means of supplementing or amplifying federal rights”).

For many state high courts, interpretive principles like the interstitial approach have the status of doctrine; cases sometimes called “teaching opinions” announce that the court will consider all state constitutional questions, or at least those in certain categories, in this way. In Michigan, for example, the supreme court has held that all free exercise challenges raised under the state constitution will be decided as if they were raised under the federal Constitution,<sup>66</sup> an interpretive principle Robert Williams has identified as “prospective lockstepping.”<sup>67</sup> In other areas of law, the Michigan Supreme Court has adopted the interstitial approach—again, not as a matter of individual justices’ preferences, but as formal doctrine of the court.<sup>68</sup> Interestingly, at the federal-court level, things don’t work this way. Supreme Court Justices are famously free to differ about their preferred interpretive tools, which is why we can see disputes about originalism, textualism, and other analytical tools carried out in the U.S. Reports, as well as the law reviews.<sup>69</sup>

As Abbe Gluck has observed, there is no consensus in the federal courts on whether these state-court interpretive doctrines are binding on them under *Erie* when they consider state-law questions, a confusion that flows directly from the underlying disagreement about whether interpretive principles are “law.”<sup>70</sup> In *Pontiac Retirees*, the Sixth Circuit never considered whether the Michigan Supreme Court would decide the state constitutional questions before deciding the federal questions, and if it would not (the most likely answer), whether that approach would bind the federal courts under *Erie*.<sup>71</sup> This is quite understandable, because federal judges don’t normally have any reason to think of interpretive

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66. See *Woodland v. Mich. Citizens Lobby*, 378 N.W.2d 337, 344-45 (Mich. 1985) (observing that the state and federal free exercise clauses have identical effect).

67. See Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, *supra* note 4, at 1509 (asserting that a court engages in prospective lockstepping when it commits to interpreting state and federal clauses the same in, not just current, but all future cases).

68. See, e.g., *Sitz v. Dep’t of State Police*, 506 N.W.2d 209 (Mich. 1993) (holding that Michigan’s search-and-seizure clause will be construed to afford rights above the federal floor only for a “compelling reason”).

69. See generally Christopher J. Peters, *What Lies Beneath: Interpretive Methodology, Constitutional Authority, and the Case of Originalism*, 2013 BYU L. REV. 1251 (2013) (“It is a surprising fact of American constitutional practice that we cannot agree on a methodology of constitutional interpretation.”).

70. See Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as “Law” and the Erie Doctrine*, 120 YALE L.J. 1898 (2011).

71. See *City of Pontiac Retired Emps. Ass’n v. Schimmel*, 726 F.3d 767, 775 (6th Cir. 2013), *vacated*, *City of Pontiac Retired Emps. Ass’n v. Schimmel*, No. 12-2087, 2014 WL 1758913 (6th Cir. May 5, 2014) (*en banc*).

approaches like originalism, interstitialism, or canons of construction<sup>72</sup> as binding law. But if the Michigan Supreme Court would interpret the federal Constitution before reaching the state constitution question, and if that interpretive approach were treated under *Erie* as state law, *Pontiac Retirees* presents a type of *renvoi* problem.<sup>73</sup> If the federal canon of constitutional avoidance directs the federal courts to apply state law first, but the state law includes as part of its substance an interpretive approach that directs the federal courts to look at the federal Constitution first, we end up with a funhouse-mirrors system of infinite reverberation, until one court breaks the cycle and decides which approach trumps.

In theory, the law that trumps (surprisingly) ought to be the federal practice. The federal canon of constitutional avoidance is merely a prudential doctrine,<sup>74</sup> while *Erie* has quasi-constitutional foundations.<sup>75</sup> But the interstitial approach is better characterized as procedural and not substantive, to the extent such distinctions can be made. Application of the interstitial principle (i.e., interpreting the federal Constitution before the state constitution) certainly does not conflict with a federal rule or statute, but it does conflict with an important interest of the federal courts.<sup>76</sup> Michigan itself treats the interstitial principle as substantive, relying on it as precedent in the supreme court's approach to similar cases.<sup>77</sup> And in general, Michigan's view of what counts as more substantive than procedural is extraordinarily expansive, as Helen Hershkoff demonstrates in her work on the Michigan Supreme Court's civil procedure powers in this issue.<sup>78</sup> Nevertheless, the basic question of whether to apply the interstitial principle in federal court is one of federal law. Under the tests established by *Erie*, *Hanna*, *Byrd*, and progeny, we ask whether the interstitial approach adjusts the rights and obligations of

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72. In many states, canons of construction are statutorily imposed, although whether the statute can actually impose the canons on the judiciary consistently with constitutional separation of powers remains doubtful. See generally Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 350 (2010).

73. See generally Kermit Roosevelt III, *Resolving Renvoi: The Bewitchment of Our Intelligence by Means of Language*, 80 NOTRE DAME L. REV. 1821 (2005) (defining "renvoi" as "the doctrine that a reference to the law of another state is a reference to the entirety of that state's law [including its choice-of-law rules]").

74. See *Muller Optical Co. v. Equal Emp't Opportunity Comm'n*, 743 F.2d 380, 386 (6th Cir. 1984) ("The duty to avoid decisions of constitutional questions and the various doctrines related to advisory opinions, political questions, ripeness, etc., are all based upon the general policy of judicial restraint.").

75. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79-80 (1938) (finding federal courts do not have the power, under the federal Constitution, to create common law).

76. Cf. *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958).

77. See, e.g., *Sitz v. Dep't of State Police*, 506 N.W.2d 209 (Mich. 1993).

78. See Hershkoff, *supra* note 4.

parties, a factor that could go either way; and whether it would be dispositive, a factor that counts against its application as substantive. At first glance, the balance of interests between state and federal concerns appears to favor the canon of federal Constitutional avoidance. If the federal court interprets the federal Constitution, no political branch in the country can achieve a different result through the operation of ordinary (non-constitutional) politics. A federal court interpreting state law generally lacks the last word in this way.<sup>79</sup> Ordinary state politics can proceed to change the result of a misguided federal decision.<sup>80</sup>

But are state constitutions different? Surely, as Mila Versteeg and Emily Zackin amply demonstrate, state constitutions change like the way the proverbial Chicagoan votes: early and often.<sup>81</sup> The frequency of change, however, is no proof of its ease as a formal matter. State constitutional change typically requires super-majorities, passage by multiple legislatures, and ratification at the polls, procedural hurdles entirely absent from a state's ratification of federal constitutional change, which requires nothing more than a single simple-majority vote by the state legislature alone.<sup>82</sup> Practically, as a political matter, state constitutions are not held in high regard, their framers are not revered, and they commonly suffer change for trivial or highly sectional purposes.<sup>83</sup> State constitutional change in response to unpopular court opinions startles nobody.<sup>84</sup> Nevertheless, the regular political branches in state government, and the forces that influence them, cannot alter state constitutional law in response to a federal decision binding state officials.<sup>85</sup> Only constitutional politics can suffice.<sup>86</sup> The history of state

79. See *Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (The United States Supreme Court "has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory").

80. See generally *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945) (holding state courts have the final say in interpreting state law).

81. Mila Versteeg and Emily Zackin, *American Constitutional Exceptionalism Revisited*, U. CHI. L. REV. (forthcoming 2014), available at SSRN, <http://ssrn.com/abstract=2416300>.

82. U.S. CONST. art. V.

83. See G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 2-3 (1998) (explaining why state constitutions are not held in high regard); see also Douglas S. Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings*, 30 RUTGERS L.J. 871, 886-87 (1999) (discussing why state constitutions are not seen as real constitutions).

84. Reed, *supra* note 83, at 875-76 ("[J]udicial determinations of controversial state constitutional rights and meanings are rarely final; instead, popular determinations of the content of those rights will more likely prevail . . .").

85. Note that where nominally local officials are the named defendants, as in *Pontiac Retirees*, a federal decision on either state or federal grounds formally binds only the

constitutional change shows that state politics are far from reluctant to engage in constitutional politics. But perhaps federal courts should not rush to foster this attitude toward state constitutions by resting unpopular decisions on state, rather than federal, constitutional grounds. In essence, a federal court exploits the populace's willingness to change state constitutions easily by applying the canon of federal constitutional avoidance. If the federal court thinks a state practice unreasonably interferes with settled expectations embodied in lawful contracts, why not let the political fall-out from that decision rain on the federal Constitution? As Sanford Levinson and others have argued, much about the federal Constitution is worthy of change;<sup>87</sup> conversely, as many scholars have argued, much about state constitutions is worthy of greater stability.<sup>88</sup>

Furthermore, *Erie*'s concern for intrastate intersystemic uniformity—the preference for the same dispute to come out the same way, whether decided in state or federal court in the same state<sup>89</sup>—suggests that federal courts should apply state interpretive principles like the interstitial doctrine if state high courts do. There might be national, interstate uniformity in applying the canon of federal constitutional avoidance to decide state questions first. But there is almost no federal constitutional challenge to state action that could not, in theory, equally be resolved on state constitutional grounds. In fact, state constitutions are *more* likely to contain some text that could form the basis for a challenge, because (among other reasons) the state constitutions are simply longer and contain more restrictions on state actions.<sup>90</sup> So consistent application of the federal canon would lead to nearly all state-action challenges being

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parties to that case (and any lower courts within the deciding court's own judiciary). So regardless of whether the *Pontiac Retirees* court rested its decision on state or federal grounds, the lowest state court would be free the very next day to reach the opposite conclusion with respect to, say, the Detroit emergency manager. Where the official defendants have statewide authority, however, as in a suit against the governor or legislative leaders, the first court to decide a question against them would bind them as parties to the case.

86. *Id.*

87. SANFORD LEVINSON, *FRAMED: AMERICA'S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* (2012).

88. See, e.g., Daniel B. Rodriguez, *State Constitutional Failure*, 2011 U. ILL. L. REV. 1243, 1249 (2011) ("The creation of a constitution is just the first order of business; ensuring that constitutional commitments endure to create optimal constitutional stability is the central challenge.").

89. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74 (1938) (explaining that the doctrine of *Swift v. Tyson* was problematic, in part, because it prevented uniformity).

90. See TARR, *supra* note 83, at 9-10 (asserting that state constitutions are longer and more detailed in part because of the plenary power attributed to state legislatures).



resolved by federal courts on state-constitutional grounds. This would cause *both* interstate disuniformity, because each state has its own fundamental law, *and* intrastate disuniformity, because the state high courts would continue applying the interstitial principle—the canon of *state* constitutional avoidance—and would only occasionally decide cases on other than federal constitutional grounds, leading to differing results in state and federal courts in the same state. The goals of *Erie* could not be effectuated by such a practice.

Finally, the *Pennhurst* doctrine asserts that there is no federal interest in enforcing state law, even state constitutional law, against state officials.<sup>91</sup> Federal courts do have congressionally-granted subject matter jurisdiction to decide questions of state law that arise from the same case or controversy that gives rise to a federal question (like state human rights law claims attached to federal employment discrimination claims), or state-law questions that are embedded in federal questions (like the meaning of “property” in federal due-process claims), and certainly federal courts decide state-law questions that arise between citizens of different states (like consumer actions against national corporations).<sup>92</sup> But the concept of dual-spheres federalism, whereby each judicial system should decide the questions of law from its own sovereign, still holds sway over federal courts.<sup>93</sup> In that line of thinking, federal courts should go out of their way to avoid exercising the jurisdiction they have over state constitutional questions, even to the point of abstaining from the entire case rather than reach a state constitutional conclusion.

We see in this *étude* signs of several of the motifs described in the introduction. First, the pensioners of Pontiac would never have imagined that their right to healthcare might have been effectively determined by a federal court’s choice to apply the canon of federal constitutional avoidance rather than the interstitial interpretive principle that the Michigan Supreme Court would have applied. Important contemporary controversies turn on a highly obscure provision of state constitutional

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91. See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) (“A federal court’s grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment.”).

92. See 28 U.S.C.A. § 1367 (West 2013) (codifying supplemental jurisdiction); see also 28 U.S.C.A. § 1332 (West 2013) (codifying diversity jurisdiction).

93. See Long, *supra* note 52, at 153-58 (discussing how dual federalism presents a faulty account of the relationship between state and federal courts, but federal courts continue to subscribe to the view).

law. Second, this *étude* makes crystal clear the inescapability of intersystemic adjudication. The citations to classic doctrines of federal courts law here—like *Erie*, *Pullman*, *Pennhurst*, the canon of federal constitutional avoidance, the principle that lower federal courts do not bind state courts even in the interpretation of federal law, and the principle that each federal judge may apply her own interpretive frameworks rather than adopting these hermeneutics as law—all were necessary to determine whether and how state constitutional law would be resolved, and by which courts. And of course, which court ends up deciding state constitutional questions has an enormous influence on the disposition of real controversies. The third motif concerns the weakness of state constitutional doctrine as an effective check on state actors. Here, we see this in effect because the dizzying complexity of the interaction between state and federal courts leaves actual enforcement unpredictable. Without a clear path through interpretive disputes toward reliable legal resolution, state officials can act with assurance that no judiciary will confidently read the state constitution and enforce its terms unapologetically. This is particularly true if federal courts avoid state constitutional decisions by abstaining, certifying, or dismissing them and state courts avoid state constitutional decisions by applying the interstitial principle. The fourth and final motif recalls the general lack of sustained attention to state constitutional law found in the bench and bar. Here, there is no hint, anywhere, that any courts, state or federal, have ever addressed the basic question of whether federal courts should apply state interpretive law when interpreting state constitutions. Matters of vast importance turn on this choice, but there is no evidence that courts are making this choice consciously at all. Instead, they stumble and blunder, lash out or hide, without engaging even with the state constitutional precedents, let alone the scholarly literature explaining which questions must be addressed to engage with these foundational texts.

#### V. *DIVERTIMENTI*: THE UNSPOKEN STATE CONSTITUTIONAL QUESTIONS

In the course of constructing its state constitutional arguments on the retirees' behalf, the Sixth Circuit did not address three state constitutional issues that superficially might have seemed to invalidate the emergency manager statutes entirely. Like Doyle's dog that did not bark,<sup>94</sup> the absence of these questions from the *Pontiac Retirees*

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94. See ARTHUR CONAN DOYLE, *The Silver Blaze*, in THE CELEBRATED CASES OF SHERLOCK HOLMES 172, 184 (Amaranth Press 1984) (1892) ("The dog did nothing in the night-time." "That was the curious incident," remarked Sherlock Holmes.").

decision—an opinion already self-liberated from the confines of addressing merely those issues raised by the parties—suggests that the panel did not find credible ground to support a challenge on any of these grounds. But that conclusion deserves more examination. The first issue left unspoken is home rule, the constitutional doctrine granting local governments authority over their own affairs;<sup>95</sup> the second is the constitutional prohibition on impairing pensions;<sup>96</sup> and the third silent dog is the state constitution's own contracts clause and due process clause,<sup>97</sup> which directly parallel the federal constitutional provisions.

Home rule is widely described as a common-sense provision in state constitutions. It rests on the idea that local people know best how to solve local problems, and that local governments are easiest for local people to influence.<sup>98</sup> On top of those laudable motives, localism is supported as a formal space to develop new governmental ideas, the same “laboratories of democracy” idea<sup>99</sup> that we often find describing state autonomy in our federal system. Scholars have credibly criticized all three of these assumptions.<sup>100</sup> But home rule as practiced in most states is a fairly moderate compromise between the two opposing attitudes toward localism represented historically by two judges: Michigan's own Thomas Cooley and Iowa's John Dillon. Cooley, recalling the halcyon days of feudal England's market towns, argued that localities pre-existed the state, carried out more important functions than the state, and retained all authority not expressly granted to the state (and even some of that).<sup>101</sup> Dillon bluntly took the opposite view: states

95. MICH. CONST. art. VII, § 22 (Michigan home rule provision).

96. MICH. CONST. art. IX, § 24 (Michigan pension protection clause).

97. MICH. CONST. art. I, § 10 (Michigan contracts clause); MICH. CONST. art. I, § 17 (Michigan due process clause).

98. See generally Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1124 (2007) (providing a detailed discussion on home rule).

99. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

100. See Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 923-26 (1994) (stating that the experimentation argument for federalism is premised on the assumption that governmental sub-units will take different approaches to a unified goal, “[b]ut true federalism allows governmental sub-units to choose different goals, not to experiment with different mechanisms for achieving a single one”); David Schleicher, *Why Is There No Partisan Competition in City Council Elections? The Role of Election Law*, 23 J.L. & POL. 419, 421-22 (2007); Gardner, *The Failed Discourse of State Constitutionalism*, *supra* note 4.

101. See *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 108-09 (1871) (Localities have possessed the power to self-govern “from time immemorial.” “[L]ocal government is a matter of absolute right” and cannot be denied.).

created municipal corporations (just as states created private corporations), municipalities served merely as an administrative convenience for the state, and the state could modify or destroy municipal authority at its whim.<sup>102</sup>

Michigan's constitution, like the other modern constitutions, has a "home rule" clause. The text, however, would deeply dissatisfy Justice Cooley. It provides, in essence, that "[e]ach [municipality] shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law."<sup>103</sup> This clause in the 1963 Constitution purports to provide protection to municipalities' authority to a greater extent than the prior constitution did.<sup>104</sup> Older Michigan Supreme Court cases reflect a greater judicial willingness to invalidate municipal action like public works as outside the localities' authority, a perspective not commonly adopted by the contemporary state courts.<sup>105</sup> Nevertheless, even a complete takeover of municipal functions by a state official accountable solely to the governor seems unlikely to qualify as a justiciable violation of the home rule clause. (Surprisingly, the first serious challenge on this ground was presented to a federal judge overseeing Detroit's bankruptcy proceeding,<sup>106</sup> a striking example of the motif of federal courts' deciding important state constitutional questions). As in other states, in Michigan the home rule clause is a "shield" that permits the municipality to carry out police powers without interference from the courts, but not a "sword" that would permit it to escape preemption by state legislation.<sup>107</sup>

In effect, the home rule clause is a sort of separation-of-powers provision, allocating authority over local governments to the legislature and not to the courts. Without a home rule clause, courts tend to reject municipal action that appears unrelated to specifically local concerns.<sup>108</sup> One might think of this as a mirror image of the "local laws" prohibitions in many state constitutions, which meant to bar the legislature from

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102. See *Clinton v. Cedar Rapids & Mo. River R.R.*, 24 Iowa 455, 475 (1868).

103. MICH. CONST. art. VII, § 22 (Michigan home rule provision).

104. See SUSAN FINO, *THE MICHIGAN STATE CONSTITUTION* 154 (2011).

105. See generally *City of Detroit v. Walker*, 520 N.W.2d 135, 137 (1994) (describing changes in the state's home rule policy).

106. Bill Vlasic, *Judge Hears Arguments on Legality of Detroit Bankruptcy Filing*, N.Y. TIMES, Apr. 13, 2014, [http://www.nytimes.com/2013/10/22/us/judge-hears-arguments-on-legality-of-detroit-bankruptcy-filing.html?\\_r=0](http://www.nytimes.com/2013/10/22/us/judge-hears-arguments-on-legality-of-detroit-bankruptcy-filing.html?_r=0).

107. Sarah Burgundy, *Charming the Eight-Hundred-Pound Gorilla: How Reconsideration of Home Rule in Oregon Can Help Metro Tame Measure 37*, 85 OR. L. REV. 815, 819 (2006) (describing the home rule "shield" and "sword" analogy).

108. See Frayda S. Bluestein, *Do North Carolina Local Governments Need Home Rule?* 84 N.C. L. REV. 1983, 1993-95 (2006).

passing statutes that target only a single locality.<sup>109</sup> Localities, in turn, faced consistent judicial opposition to regulatory activity that appeared to have effects outside the local jurisdiction.<sup>110</sup> Convention records suggest that home rule clauses were drafted as a progressive measure to protect local government from this active judicial oversight, particularly in the areas of socioeconomic regulation.<sup>111</sup> Echoes of the *Lochner* backlash whisper through the scholarship and political rhetoric supporting the home rule clauses. But the home rule clause discourse generally records no objection, from a democratic accountability perspective, to legislative management of local authority. Whether an issue is of statewide concern or not, the necessary condition for passage through both houses and enactment as a statute in a legislature prohibited from passing local laws, is uncontroversially a political matter properly decided by elected legislators. This view finds expression in Michigan's home rule clause in the "subject to . . . law" phrase, which indicates that both the other provisions of the constitution *and* state statutes validly preempt any local governance to the contrary.<sup>112</sup> In this light, municipalities remain, in all meaningful senses, "creatures" of the state subject to its control. Only the judiciary is admonished from suppressing the local government's energy or ambitions, not the legislature.

As Richard Briffault has pointed out, in practice the home rule clause works most strongly to protect the local autonomy of wealthy (suburban) municipalities.<sup>113</sup> Those are the local governments that have the lowest demand for high-intensity public services, the lowest concentrations of non-taxable property, and high levels of revenue from taxable property, all of which leads them to depend least on state aid.<sup>114</sup> Large cities that depend on state aid to cope with high concentrations of poverty, of intensive land/natural resource use, and of high concentrations of non-taxable property (like state offices) must satisfy the conditions attached to the state appropriations meant to assist with these obligations. This need for compliance renders the municipal governments dependent as a

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109. See, e.g., MICH. CONST. art. IV, § 29 ("The legislature shall pass no local or special act in any case where a general act can be made applicable . . .").

110. Bluestein, *supra* note 108, at 2017.

111. Bluestein, *supra* note 108, at 2018.

112. See MICH. CONST. art. VII, § 22 ("Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law.").

113. See Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 349-52 (1990) ("Many big cities [are] heavily dependent on intergovernmental aid" whereas in suburban municipalities "local legal powers are more likely to be sufficient for the satisfaction of local wants.").

114. *Id.*

practical matter regardless of what their powers might be under a home rule clause.<sup>115</sup> The state's takeover of municipal governments in impoverished cities like Pontiac and Detroit stands as an extreme example of Briffault's argument that home rule clauses play out inequitably for different kinds of localities.<sup>116</sup> There, the state offered no additional funding but removed all local autonomy.

The second issue the *Pontiac Retirees* court omitted from its discussion is Michigan's outright constitutional prohibition on impairing vested pensions.<sup>117</sup> If the emergency manager's orders violated this clause, which was an innovation of the 1963 Constitution, then the legislature's procedural shenanigans would not have made a difference. The plaintiffs would be entitled to an injunction invalidating the emergency manager's orders on the merits. The court might have raised this question as another issue for the federal district court to address with proper briefing. The apparent connection between the federal Contracts Clause claim and the state pension clause, where both seek to protect the reasonable expectations of vested parties, would seem like a good reason to include this claim. And disposing of the dispute on pension clause grounds would intrude less in the inner workings of the state government than would the procedural grounds actually raised by the court. So why did the court leave out any discussion of the pension clause?

One reason might be that the court simply found the question too close for comfort to the actually-argued issue of the federal Contracts Clause. As Helen Hershkoff has observed, it is fairly routine for courts of all stripes to assume that federal concepts apply even in areas where state constitutional provisions have no analogue in the federal text.<sup>118</sup> The Sixth Circuit might have been skeptical that Michigan's pension-protection clause really expanded rights above what the federal Constitution affords. After all, the clause includes phrases like "contractual obligation" and "shall not be . . . impaired," which seem to

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115. *Id.* at 350 ("[T]he fiscal dependency of many big cities means that local legal authority alone is not sufficient to create real local autonomy.").

116. *See generally id.* at 349-52 (discussing how poorer cities have less autonomy than wealthier suburbs despite the fact that both operate under the same grant of power).

117. MICH. CONST. art. IX, § 24 ("The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby."). The retirees raised this claim in the district court, which declined to exercise supplemental jurisdiction because of the complexity of the state issue.

118. *See* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1136-37 (1999) (observing that state supreme courts regularly apply federal rational basis to provisions in state constitutions without regard to the structural differences between states and the federal government that form the very foundation of federal rational review).

echo the federal Contracts Clause.<sup>119</sup> And the Contracts Clause cases establish a famously flexible doctrine, one that surely could not be anticipated as a likely winner for the retirees, to whom the court seemed sympathetic.<sup>120</sup> As the *Pontiac Retirees* majority pointed out, two federal district courts had already split on the merits of the federal Contracts Clause claim.<sup>121</sup>

Furthermore, as with the home rule clause question, even though the pension-protection clause by its terms seems to unambiguously prohibit the emergency manager's diminishment of bargained-for retiree health benefits, the claim would almost certainly lose under judicial decisions scaling back the clause. In *Studier v. Michigan Public School Employees' Retirement Board*,<sup>122</sup> the state supreme court held that health benefits, including the retirees' outright expenses like deductibles and co-pays, were not "accrued financial benefits" subject to the constitution's non-impairment protection.<sup>123</sup> While this decision was in conflict with an earlier opinion by the same court,<sup>124</sup> the decision was plain: only payments made directly as part of a pension, in the manner of deferred salary, are "financial benefits" for constitutional purposes.<sup>125</sup> The Pontiac manager was careful to impair only the retirees' healthcare-related benefits, including their share of the premiums and what level of coverage they would receive but not their monthly base payment from

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119. Compare MICH. CONST. art. IX, § 24 (Michigan pension protection clause), with U.S. CONST. art. I, § 10, cl. 1 (federal Contracts Clause).

120. When examining claims made under the Contracts Clause, the United States Supreme Court has outlined three factors for courts to consider: (1) whether the state law causes a substantial impairment to a contractual relationship; (2) whether the state is justified by a significant and legitimate public purpose; and (3) whether the means chosen to accommodate this public purpose are reasonable and necessary. *Energy Reserves Grp. Inc. v. Kansas Power & Light Co.* 459 U.S. 400, 411-13 (1983). The greater the impairment the greater the level of scrutiny the courts will apply. *Id.* Permissible purposes include, for example, "the remedying of a broad and general social or economic problem." *Id.* at 412. This requirement is to ensure the state is acting under its legitimate police power. *Id.*

121. See *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 726 F.3d 767, 771 (6th Cir. 2013) ("Unlike the district court here, another Michigan federal district granted injunctive relief when faced with similar federal questions.").

122. 698 N.W.2d 350 (Mich. 2005).

123. *Id.* at 357-58.

124. See *Musselman v. Governor*, 533 N.W.2d 237, 242 (Mich. 1995) [hereinafter *Musselman I*] *on reh'g*, 545 N.W.2d 346 (Mich. 1996) ("[T]he term 'financial benefits' must include retirement health care benefits.").

125. See *Studier*, 698 N.W.2d at 357-58 (stating that in order to accrue, benefits must increase over time, for example, pension payments or retirement allowances).

the pension fund.<sup>126</sup> Although the increased premiums were deducted from the pensions, thereby diminishing them in practice, as a formal matter the *Studier* decision appears insurmountable for the retirees.

Notably, the *Studier* majority framed its disagreement with the earlier court as one of interpretive method, not just result.<sup>127</sup> Yet again, we see what looks like a disagreement about a single policy actually expressed as a deep conflict over hermeneutics. The earlier court looked at records of the constitutional convention and discerned the intent of the delegates.<sup>128</sup> But the *Studier* court said that the only valid frame of reference to adopt in trying to understand the words of the constitution is that of the people who ratified it.<sup>129</sup> The fight, then, was between whether the “plain meaning” to ordinary voters should trump, or the meaning the drafters were trying to convey through both the text they adopted and the remarks they made on the record.<sup>130</sup> This dispute plays out frequently across state constitutional decisions. Richard Kay has best articulated the view that the ratifiers’ perspective is the only appropriate one specifically in the state constitutional context,<sup>131</sup> a view closely related to the “original public meaning” position that scholars like Larry Solum apply to interpretation of the federal Constitution.<sup>132</sup> But even Kay acknowledges that the question of what ordinary voters thought about texts they likely never even read poses a pragmatic challenge for application of his principle.<sup>133</sup> In Michigan, the supreme court’s frequent resort to the ratifiers’ perspective has meant a variety of decisions resting on the “plain meaning” of the constitutional text. Plain meaning is never as plain as the judges think it is. But in *Pontiac Retirees*, the court’s omission of the pension-clause argument was probably a response to the implausibility of such a claim after *Studier*.

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126. See *City of Pontiac Retired Emps. v. City of Pontiac*, No. 12-12830, 2012 WL 2917311 at \*1 (E.D. Mich. July 17, 2012).

127. See *Studier*, 698 N.W.2d at 357 (“[T]he majority in *Musselman I* did not address the term ‘accrued.’”).

128. See *Musselman I*, 533 N.W.2d at 241-42 (looking to the constitutional convention to interpret the term “financial benefits”).

129. See *Studier*, 698 N.W.2d at 357-58 (*Musselman I* erred “by focusing on the history . . . and the intent of the constitutional convention delegates in proposing [the provision] . . . rather than on the interpretation that the people would have given the provision when they adopted it”).

130. See *id.* (resolving the dispute in favor of the “plain meaning” to the voters).

131. Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703 (2009).

132. Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 U. ILL. L. REV. 1935 (2013).

133. Richard S. Kay, “Originalist” Values and Constitutional Interpretation, 19 HARV. J.L. & PUB. POL’Y 335 (1996).



The third noteworthy omission is even more striking. The federal canon of constitutional avoidance applies, of course, to the federal Constitution, and that canon led the Sixth Circuit to decline interpreting the federal Contracts and Due Process Clauses.<sup>134</sup> But none of the rationales supporting that canon apply to interpreting state constitutions, as the court's eagerness to address those issues demonstrates. So why didn't the Sixth Circuit instruct the district court to consider the directly parallel *state* clauses? Michigan's constitution includes, in Section 10 of its first article, this language: "No law . . . impairing the obligation of contract shall be enacted."<sup>135</sup> Susan Fino notes that this clause has been carried forward to the current constitution through each preceding constitution, starting with the state's first back in 1835.<sup>136</sup> The Michigan Constitution also prohibits the state from depriving people of property "without due process of law."<sup>137</sup> The existence of these clauses has offered the federal courts an unusual opportunity to engage with all of the (apparently) difficult questions surrounding the Contracts Clause and substantive due process, *without* inadvertently muddying up the federal Constitution or establishing a legal principle that could not be corrected by democratic action by the relevant sovereign. As James Gardner has persuasively argued, the existence of a state constitutional provision that so closely mimics a federal provision is a special invitation to courts to interpret the state provision freely, in conversation with but not dominated by federal jurisprudence.<sup>138</sup> Whatever worries the Sixth Circuit had about Contracts or Due Process Clause interpretation simply wouldn't apply to interpretation of Michigan's Article I, Section 10 and Article I, Section 17.<sup>139</sup> And even more, a federal court effort to apply the state clauses would almost certainly aid in the development and understanding of the parallel federal doctrine, without risk of creating a binding precedent. Perhaps the Sixth Circuit was unaware of Michigan's provisions (after all, the plaintiffs cited but did not argue them), or perhaps it assumed (rightly or wrongly) that the Michigan provisions would be interpreted in lockstep with the federal clauses.

The *Pontiac Retirees* panel's surprising decision not to address three seemingly central, and obviously relevant, issues—the home rule clause,

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134. See *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 726 F.3d 767, 771-72 (6th Cir. 2013) (invoking doctrine of constitutional avoidance with respect to plaintiff's federal Contracts and Due Process Clause claims).

135. MICH. CONST. art. I, § 10 (Michigan contracts clause).

136. SUSAN P. FINO, *THE MICHIGAN STATE CONSTITUTION: A REFERENCE GUIDE* 38 (1996).

137. MICH. CONST. art. I, § 17 (Michigan due process clause).

138. Gardner, *The Failed Discourse of State Constitutionalism*, *supra* note 4, at 765.

139. MICH. CONST. art. I, § 10; MICH. CONST. art. I, § 17.

the pensions clause, and the contracts/due process clauses—strongly demonstrates the motifs that run through this Article.<sup>140</sup> First, consider how the Michigan court's internal debate about state constitutional interpretive methods, whether to privilege the ratifiers' understanding or the drafters' intent, has immediate effects on the very real problem of whether elderly former public employees will be able to afford their doctors' visits or not. The two different procedural approaches support differing substantive conclusions derived from the pensions clause, itself a provision utterly unknown to federal constitutional law. Clearly, state constitutions remain an incredibly important site of legal regulation of contemporary communal life, the first motif.

Second, we see in this discussion more evidence of how interconnected state and federal interpretation, doctrine, and courts are, and the necessity of approaching state constitutional problems as inherently intersystemic. The *Pontiac Retirees* court's failure to take up an examination of the state contracts and due process clauses was a missed opportunity to engage with the very issues that both parties had actually argued (and that the district court had rested its decision on) while still avoiding an interpretation of the federal Constitution. The court could have had the best of both worlds: full briefing on the basic issues (or at least the federal case law on point, case law likely to be highly influential in interpreting the state clauses) and no chance of reaching a constitutional conclusion beyond the capacity of political forces to change with reasonable effort.

Third, by not resting its decision on these unspoken state constitutional problems, the Sixth Circuit perpetuated the state courts' severe underenforcement of state constitutional commands. Leaders in the state political branches know if they follow a decision like *Pontiac Retirees*, the courts will either entirely ignore state constitutional text that appears to stymie the legislature or else go out of their way to legitimate state action that conflicts with the surface meaning of state constitutional prohibitions meant to present obstacles to legislative tyranny or mismanagement. The spirit of the home rule clause, for example, is plainly inconsistent with a complete state takeover of all local power from specified municipalities.<sup>141</sup> The "subject to law" qualification in that clause certainly leaves room for judges to permit the emergency manager law, which is what the state courts have done so far. But that is far from a necessary conclusion. Similarly, the distinction between healthcare premiums and base pension is at best a formalism—

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140. *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 726 F.3d 767, 771-72 (6th Cir. 2013).

141. MICH. COMP. LAWS ANN. § 117.3 (West 2013).

economically, both are equally deferred compensation—and reducing a pensioner's bargained-for benefit violates the pension clause on its face. On both questions, the Sixth Circuit could have spoken out in favor of an interpretation more consistent with the constitutional context, even if that would mean interfering with the political branches' pursuit of their policy objectives.<sup>142</sup>

Finally, the fourth motif: the general inattention and unexamined assumptions that dominate courts' approach to state constitutions. The complete absence of any reference to the state provisions analyzed above—the home rule clause, the pensions clause, and the contracts/due process clauses—demonstrates how under-developed state constitutionalism can be, even in the hands of a court that has gone out of its way to examine state constitutional questions. We can never know exactly why the court did not engage with these facially applicable constitutional texts. But even the absence of an explanation for *why* the court avoided this engagement suggests that the Sixth Circuit panel simply did not take the state constitutional questions present in the case before it very seriously. The court was happy to attack the Michigan Legislature for what it perceived as a blatant sidestepping of constitutional procedure (even if the cynic suspects that the procedural objection was really cover for outrage at the underlying state takeover of an elected local government).

#### VI. *MINUET*: AN INTERNAL LEGISLATIVE DISPUTE ENGAGES THE MICHIGAN JUDICIARY

In *Hammel v. Speaker of House of Representatives*,<sup>143</sup> the state case preceding *Pontiac Retirees* that the Sixth Circuit declined to follow, minority legislators challenged the immediate-effect vote attached to Public Act 4 in state court, suing the House leadership and alleging a violation of the state constitutional requirement that two-thirds of legislators present vote in favor of an immediate-effect motion.<sup>144</sup> After the plaintiffs successfully obtained a preliminary injunction against application of the statute in the trial court, the legislative leaders

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142. To whatever extent the court was bound under *Erie* by state high court precedent in this respect, the point remains that failure even to acknowledge the *potential* for these texts to apply and to meaningfully critique the state courts' underenforcement of these clauses perpetuates the freedom of state politicians to ignore these clauses as genuine constraints on their policy options.

143. 825 N.W.2d 616 (Mich. Ct. App. 2012), *appeal denied*, 829 N.W.2d 862 (Mich. 2013).

144. *Id.* at 619 ("Plaintiffs alleged that the bills had been given immediate effect in violation of the constitution because a roll call vote was not performed.").

appealed to the Michigan Court of Appeals.<sup>145</sup> There, the court considered whether it could properly inquire into the actual proceedings of the legislature or if, instead, the legislature's official record of its proceedings (a journal under the control of the clerk, who serves exclusively at the pleasure of the Speaker) irrefutably established the validity of the vote.<sup>146</sup> In its opinion adopting the leadership's position and vacating the trial court's order, the appellate panel went on to discuss, or at least imply, a variety of justiciability-related questions.<sup>147</sup> The court never stated directly that the plaintiffs lacked standing sufficient to establish jurisdiction or that the constitutional issues in the case presented a political question committed by separation-of-powers principles to the other branches.<sup>148</sup> But it did decide, in the course of discussing the "irreparable harm" element of preliminary-injunction analysis, that the minority legislators had not suffered *any* harm because they remained free to vote however they wished on any properly presented motion or bill and to raise motions of any type permitted by House rules.<sup>149</sup>

It seems that, without saying so outright, the *Hammel* court applied the "enrolled bill" doctrine to reject the minority legislators' claims.<sup>150</sup> This doctrine, which derives from British practice meant to protect the supremacy of Parliament over judicial review, is like a parole evidence rule applied to statutory interpretation.<sup>151</sup> It generally prohibits courts from inquiring into legislative procedures once a bill has been duly certified as passed by the leaders of both houses.<sup>152</sup> More loosely, the doctrine bars courts from inquiring into the factual circumstances of a bill's passage beyond the official record, like the official legislative

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145. *Id.* at 618 ("Defendants appeal by leave granted a preliminary injunction enjoining the immediate effect of House Bill 4246 (HB 4246) and House Bill 4929 (HB 4249).").

146. *Id.* at 622 (finding that "the Journals of the House and Senate are conclusive evidence of those bodies proceedings") (quotations and citation omitted).

147. *See id.* at 622-23 (stating plaintiff's generalized constitutional argument fails to establish irreparable harm).

148. *See id.* at 619-23.

149. *Id.* at 622-23.

150. *See Hammel*, 825 N.W.2d at 622.

151. *See* Ittai Bar-Siman-Tov, *Legislative Supremacy in the United States?: Rethinking the "Enrolled Bill" Doctrine*, 97 GEO. L.J. 323, 345 (2009) (describing the parliamentary origins and current federal application of the "enrolled bill" doctrine).

152. *See* Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 48 U. PITT. L. REV. 797, 816 (1987) (defining the enrolled bill doctrine "as [a] 'conclusive presumption rule' because when it applies, it prevents *any* evidence, other than the final enrolled bill itself, to show constitutional violations occurring during the process of enacting legislation").

journal.<sup>153</sup> In the states that apply it (as the federal courts do),<sup>154</sup> the enrolled bill doctrine is an example of an interpretive principle that bears the weight of substantive law. Of the ten states with modern constitutions, only Georgia, Illinois, and North Carolina follow the enrolled bill doctrine, meaning that their high courts have formally announced that they will not look behind the official legislative certification to determine whether the legislature passed a bill in accordance with all required procedures.<sup>155</sup> Despite the *Hammel* appellate court's confidence in refusing to look past the legislative journal to determine whether the legislature had complied with the constitution's roll-call vote requirement, Michigan's supreme court has not adopted the enrolled bill doctrine.<sup>156</sup> Even among the three states under study in this symposium that have officially adopted the doctrine, Illinois followed a more lax understanding of the doctrine under its earlier constitutions.<sup>157</sup> It applied only a rebuttable presumption that a law duly certified by the legislative leaders was passed in compliance with constitutionally specified procedures.<sup>158</sup>

In Michigan, as early as 1844 the state supreme court held that courts may look behind the enrollment of a statute for some purposes, in order to determine whether it passed the legislature under the conditions required by the constitution, as, for example, to determine whether a majority voted in favor of the bill.<sup>159</sup> In 1914, the same court applied a presumption in favor of lawfulness in the passage of legislation, but left open the possibility of proof to the contrary, even against evidence of regularity found in the legislature's official journals.<sup>160</sup> As late as 1984, the Michigan Supreme Court invalidated a statute because in the course of amending it far afield from its original topic, the legislature violated

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153. *Id.* at 821-22. A less stringent version of the enrolled bill doctrine, the journal entry rule, creates a strong presumption in favor of the enrolled bill that can only be rebutted by evidence from the legislative journals. *Id.*

154. *Id.* at 817.

155. See *Wilson v. Ledbetter*, 389 S.E.2d 771, 775 (Ga. App. 1989), *rev'd on other grounds*, 390 S.E.2d 846 (Ga. 1990) (affirming Georgia's adherence to the enrolled bill doctrine); *McGinley v. Madigan*, 851 N.E.2d 709 (Ill. App. 2006) (demonstrating the continued use of the doctrine in Illinois); *State ex rel. Dyer v. City of Leaksville*, 165 S.E.2d 201, 205 (N.C. 1969) (endorsing the enrolled bill doctrine).

156. Williams, *supra* note 152, at 820.

157. See *Lynch v. Hutchinson*, 76 N.E. 370, 370 (Ill. 1905) ("[T]he signatures of the President of the Senate and the Speaker of the House to the bill are not conclusive evidence that the bill was properly passed, and that the journals of the respective houses may be examined . . .").

158. *Id.*

159. *Green v. Graves*, 1 Doug. 351, 354 (Mich. 1844).

160. See *City of Lansing v. Mich. Power Co.*, 150 N.W. 250, 251 (Mich. 1914).

the state constitutional requirement that bills remain consistent with their original purpose.<sup>161</sup> This required the court to examine how the bill had first appeared and then evolved through the legislative process, a far more intrusive inquiry than an examination of solely the final version published as the “enrolled” bill.<sup>162</sup> But other more recent decisions, particularly in the intermediate appellate court, seem at odds with the high court’s judicially-assertive approach, perhaps indicating lower-court resistance to the older (but still formally binding) precedents and the beginnings of a shift in attitude toward reviewability of legislative procedure.<sup>163</sup> Unfortunately, the Sixth Circuit panel in *Pontiac Retirees* considered none of this history, blithely assuming that Michigan courts would feel free to look behind the veil of the official legislative journal, without explanation and contrary to ordinary federal practice.<sup>164</sup>

The first motif here, the significance of state constitutional law to contemporary problems, sounds loud and clear. As popular distrust of political institutions remains high, people turn toward institutions outside of democratic politics to solve collective problems. For example, Michigan’s largest city, Detroit, has such low-functioning governmental services that core municipal activities like garbage collection have been outsourced to private companies,<sup>165</sup> public health and safety services have been rendered dependent on donations from private organizations (for ambulances & police cars,<sup>166</sup> and even fire-marshall training<sup>167</sup>), control of the city’s finances has been surrendered to a federal

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161. *Anderson v. Oakland Cnty. Clerk*, 353 N.W.2d 448 (Mich. 1984).

162. *Id.* at 452.

163. *See, e.g., Gen. Motors Corp. v. Dep’t of Treasury*, 803 N.W.2d 698, 714 (Mich. App. 2010) (“[T]he Journals of the House and Senate are conclusive evidence of those bodies’ proceedings . . .”).

164. *City of Pontiac Retired Emps. Ass’n v. Schimmel*, 726 F.3d 771, 778 (6th Cir. 2013).

165. *See* Christine Ferretti, *Detroit Selects Two Firms to Pick Up Garbage, Do Curbside Recycling*, THE DETROIT NEWS, Nov. 14, 2013, <http://www.detroitnews.com/article/20131114/METRO/311140128> (reporting that Detroit selected two private waste management companies to provide garbage collection for the city).

166. *See* Ross Bones, *Detroit Welcomes New Ambulances, Police Cars Donated by Local Businesses*, CRAIN’S DETROIT BUSINESS (Aug. 23, 2013, 2:49 PM), <http://www.crainsdetroit.com/article/20130822/NEWS/130829932/> (reporting that private businesses participating in the ‘Downtown Detroit Partnership’ donated 23 EMS vehicles and up to 100 police patrol cars).

167. *See Answering the Alarm*, THE DETROIT JEWISH NEWS (Sep. 27, 2012), <http://www.thejewishnews.com/answering-the-alarm> (describing a fire-insurance defense attorney’s donation of essential fire-investigation training for the Detroit Fire Department).

bankruptcy court,<sup>168</sup> and even the basic political functions of an elected government have been delegated to a state-appointed, not democratically accountable, emergency manager.<sup>169</sup> State constitutional procedures designed to promote transparency and public confidence in the legislature, such as the state constitutional clause requiring legislative leaders to hold a roll-call vote on any issue upon request of one-fifth of the legislators present,<sup>170</sup> represent the formally strongest legal approach the people could have chosen to counteract disintegrating trust in democratic institutions. If courts apply a strong version of the enrolled-bill doctrine and refuse to inquire into legislative compliance with these good-government clauses in the state constitutions, then the appearance of impropriety and actual impropriety will continue to flourish. In other words, the questions of state constitutional interpretation outlined in this *étude* go to the heart of our self-governance: how do we balance the value of democratic participation in political institutions with assigning responsibility for collective decision-making to private charitable and profit-making institutions?

The second motif, the interconnectedness of state and federal constitutionalism and of the constitutional courts, stands out in this context by its omission from the court's explicit reasoning. The mutual interplay of federal and state court attitudes toward the enrolled bill doctrine should have made a big difference to the *Pontiac Retirees* court. Whichever choice it made from among several available, it should have explained why instead of proceeding without even acknowledging that it was making a choice. The panel did not apply the normal federal approach, which would have been to treat any legislative procedural steps prior to certification of the bill as beyond the power of courts to examine.<sup>171</sup> The opinion gives no indication that this was a deliberate choice. But even if it were, treating federal doctrine as presumptively irrelevant to state constitutional interpretation is inconsistent with how

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168. See Nathan Bomey, Brent Snively & Alisa Priddle, *Judge Rules Detroit Eligible for Historic Chapter 9 Bankruptcy, Says Pensions Can Be Cut*, DETROIT FREE PRESS (Dec. 3, 2013, 2:22 PM), <http://www.freep.com/article/20131203/NEWS01/312030084/> (reporting that Detroit entered chapter 9 bankruptcy with \$18 billion in debt).

169. See Monica Davey, *Bankruptcy Lawyer is Named to Manage an Ailing Detroit*, N.Y. TIMES, Mar. 14, 2013, <http://www.nytimes.com/2013/03/15/us/gov-rick-snyder-kevyn-orr-emergency-manager-detroit.html> (reporting that Kevyn Orr was granted sweeping powers as Detroit's emergency manager).

170. MICH. CONST. art. IV, § 18 ("The record of the vote and name of the members of either house voting on any question shall be entered in the journal at the request of one-fifth of the members present.").

171. See *Marshall Field & Co. v. Clark*, 143 U.S. 649, 672 (1892) (holding that once a bill has been authenticated as passed by the leadership of both houses, no evidence from house journals or committee reports can be admitted to impeach the statute).

state courts themselves typically read their own constitutional texts.<sup>172</sup> As it happens, the Michigan high court rejected the enrolled bill doctrine in plain terms as early as 1844, saying "We have certainly the right to look behind the enrollment of a statute for some purposes, in order to determine whether it passed the legislature under the conditions required by the constitution, as, for example, to ascertain what the vote was upon it."<sup>173</sup> Even after the federal Supreme Court decided *Marshall Field*, its leading enrolled-bill case from 1892,<sup>174</sup> Michigan courts persisted in looking behind the green curtain at the wizard pulling legislative levers; in 1914, the Michigan high court noted that

it has long been held in this state that the court may, and when forced upon its notice by proper proceedings should, look behind the enrollment of a statute to determine whether the records of its enactment show that in its passage the mandatory requirements of the [c]onstitution have been observed.<sup>175</sup>

No Michigan Supreme Court decisions have overruled these early precedents, but modern intermediate appellate opinions appear to disregard them in favor of an approach of (not) enforcing constitutional legislative procedure that more closely matches the federal influence.<sup>176</sup> Perhaps these lower-court decisions indicate more accurately what the current state supreme court would do; perhaps they are merely rogue decisions from courts that should have permitted the supreme court to overrule its own precedents if it wanted to do so. But either way, the federal court made a choice (whether or not it was a thoughtful one), and

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172. See Gardner, *The Failed Discourse of State Constitutionalism*, *supra* note 4, at 804 (1992). According to Gardner, state courts have very little interest in independently interpreting their constitutions. Instead, many engage in lockstep analysis, making it "unnecessary to distinguish between the state and federal constitutions because they are generally held to have the same meaning." *Id.* See also Utter, *supra* note 58, at 1027-30 (summarizing the interplay between state and federal constitutional jurisprudence).

173. *People ex rel. Gale v. Supervisor of Onondaga*, 16 Mich. 254, 258 (Mich. 1867).

174. *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892).

175. *McClellan v. Stein*, 201 N.W. 209, 211 (Mich. 1924).

176. Compare *McClellan*, 201 N.W. at 210-13 (refusing to conclude legislation is presumptively valid absent an affirmative showing otherwise within the journals), with *Gen. Motors Corp. v. Dep't of Treasury*, 803 N.W.2d 698, 714 (Mich. Ct. App. 2010) (concluding that legislation is presumptively valid unless the journals affirmatively show otherwise). See also *Northville Area Non-Profit Hous. Corp. v. City of Walled Lake*, 204 N.W.2d 274, 279 (Mich. Ct. App. 1972) (an affirmative showing of irregularity is necessary to overcome the presumption of validity attached to an enrolled bill); *Michigan Taxpayers United, Inc. v. Governor*, 600 N.W.2d 401, 405 (Mich. Ct. App. 1999) ("[W]hen no evidence to the contrary appears in the journal, we will presume the propriety of those proceedings.").



thereby took sides in the ongoing intrastate debate about the enrolled bill doctrine.

The third motif, the weakness of state constitutional text as law that effectively binds its targets, also relates to this *étude* by its notable absence. State constitutionalists reading the *Pontiac Retirees* panel opinion would likely be surprised at how vigorously the federal court assumed it could enforce state constitutional procedural requirements against the legislature.<sup>177</sup> The rarity of such a passionate and intrusive judicial approach makes the panel's decision appear out of sync with the ordinary course of judicial practice toward state constitutions. Intuitively, we don't expect anyone to take these clauses so *seriously*. And neither, apparently, do the legislators.

Finally, the *Pontiac Retirees* panel blithely passed by the serious and complicated question of whether and how to apply the enrolled-bill doctrine.<sup>178</sup> With only the most cursory and indirect consideration—a span of two short paragraphs, each citing only a single source—the court concluded that it had power to decide whether the legislature had complied with the constitutional procedures.<sup>179</sup> The court did not even resolve which source of law, state or federal, was binding.<sup>180</sup> For such a serious intrusion into state power, and in the face of a dissent, a reasonable reader would have expected a much more careful analysis of the state constitutional question at issue.

## VII. *LARGO*: THE PASSIVE VIRTUES, PRIMACY, AND FEDERALISM

For both federal constitutional avoidance as practiced in the federal courts and state constitutional avoidance in the state courts, the respective judiciaries may perceive themselves as practicing the “passive

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177. *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 726 F.3d 771, 774 (6th Cir. 2013).

178. *See id.* at 771-79 (giving no consideration to whether or not Michigan adheres to some iteration of the enrolled bill doctrine).

179. *See id.* at 776. Michigan courts do not refrain from scrutinizing the legislature's determination that a bill is passed with immediate effect. First, before 1963, the Michigan Constitution imposed additional requirements on the legislature before it could give a bill immediate effect: it said that the bill must be “immediately necessary for the preservation of the public peace, health or safety.” *Indus. Bank of Wyandotte v. Reichert*, 232 N.W. 235, 236 (Mich. 1930). At that time, when the legislature said a bill should take immediate effect, courts reviewed the legislature's determination to ensure that the bill was immediately necessary for those reasons. *See, e.g., Att'y Gen. v. Lindsay*, 145 N.W. 98, 103 (Mich. 1914). Likewise, courts should review the legislature's compliance with the Michigan Constitution's two-thirds vote requirement to give a bill immediate effect.

180. *See id.* at 771-79.

virtues.”<sup>181</sup> By striving to rest their decisions on the law of the other sovereign, the courts postpone the need to reach a final decision that would conclusively settle the content of their “own” law. Although it certainly contains echoes of the “dual spheres” federalism that James Gardner and others have persuasively attacked,<sup>182</sup> this approach does preserve fluidity in the law by delaying the day when an issue of public controversy must be finally resolved.

Helen Hershkoff has famously argued against state courts’ adherence to a rigid conception of the “passive virtues.”<sup>183</sup> The state judges in *Hammel* were elected to their offices.<sup>184</sup> Their supreme court, also elected,<sup>185</sup> stood ready to correct their decision. Michigan standing doctrine is generally somewhat looser than federal doctrine.<sup>186</sup> And the people of Michigan actually have politically feasible paths available to amend their constitution if necessary.<sup>187</sup> So perhaps the state court should have felt freer to take a more active approach in enforcing the constitution. But federal courts lack these overt political checks, and the passive virtues often play a more dominant role in their jurisprudence.

In *Pontiac Retirees*, the Sixth Circuit confronted the plaintiffs’ invitation to interpose federal authority in the midst of a highly controversial and important matter of internal state government.<sup>188</sup> Adjudicating the structural relationship between a state and its

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181. See generally Kronman, *supra* note 41, at 1584-90 (stating that passive virtues are a form of judicial restraint—using tools such as jurisdiction, standing, ripeness, and the political question doctrine, to avoid deciding cases on substantive grounds).

182. See Gardner, *The Failed Discourse of State Constitutionalism*, *supra* note 4, at 804 (arguing that dual sphere federalism is incorrect in part because it rests on the faulty assumption that state constitutions are a collection of each state’s own independent values and character).

183. See Helen Hershkoff, *State Courts and the “Passive Virtues”*: *Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1875-97 (2001) (asserting that because federal justiciability principles derive from Article III and state courts are not bound by Article III, state courts should not adhere to federal justiciability principles).

184. See MICH. CONST. art. VI, § 8 (providing that Michigan Court of Appeals judges are elected).

185. See MICH. CONST. art. VI, § 2 (providing that Michigan Supreme Court justices are elected).

186. See *Lansing Sch. Educ. Ass’n v. Lansing Bd. of Educ.*, 792 N.W.2d 686, 689-99 (Mich. 2010) (holding that in Michigan courts a litigant has standing where there is a legal cause of action or at the court’s discretion).

187. See, e.g., MICH. CONST. art. XII, § 2 (“Amendments may be proposed to this constitution by petition of the registered electors of this state.”).

188. See *City of Pontiac Retired Emps. Ass’n v. Schimmel*, 726 F.3d 771, 771 (6th Cir. 2013) (Plaintiffs “alleged several federal claims, including the unconstitutional impairment of contract, preemption under federal bankruptcy law, and deprivation of a property interest without due process of law”).

municipalities is perhaps the most intrusive step into state affairs a federal court can take. In those circumstances, the Sixth Circuit might have felt that a decision invalidating the emergency manager's actions on federal constitutional grounds would have been an even more unwelcome intervention than its decision founded on state law. Even though the *Pontiac Retirees* panel discovered the state constitutional issues without invitation from the parties,<sup>189</sup> and in doing so cast into doubt an important state statute with rhetoric that was at least "activist" if not downright belligerent,<sup>190</sup> the panel might have felt it was exercising restraint to some degree. At least a decision resting on state law is ultimately subject to validation or correction by the state itself, whereas a federal constitutional ban on the challenged actions would have left the state's only options within the federal government: either an appeal to the entire court en banc (which was ultimately what happened), by certiorari to the federal Supreme Court, or through the politically impossible technique of constitutional amendment.<sup>191</sup>

The *Pontiac Retirees* panel's self-perception as practicing the passive virtues implicates each of the four motifs. The heated tone of the court's opinion suggests that it knew its decision would intervene in a politically controversial issue. This was not a dry adjudication of obscure insurance industry regulations. Instead, the court entered its full-throated participation in an important public policy debate. The interdependence of state and federal legal systems, the second motif, also appears here. Reasonable people can disagree about whether the federal court would be more or less in line with the passive virtues if it decided on federal or state constitutional grounds; either approach appears interventionist in some respects and less aggressive in others. Ultimately, the panel's choice to avoid interpreting federal law and to give a broad reading to state law makes a political response to the decision somewhat more feasible, but at the expense of promoting either open conflict between state and federal courts or a cavalier attitude toward state constitutional change. Third, the *Pontiac Retirees* decision appears to be an unusually frank and assertive expression of judicial review under the state

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189. See *id.* The plaintiffs premised their claims on federal law. *Id.*

190. See *id.* at 774-76 (asserting that the practices of the Michigan Legislature violated Michigan's constitution despite a determination by the Michigan Court of Appeals to the contrary).

191. U.S. CONST. art. V; see *Michigan v. Long*, 463 U.S. 1032 (1983) (showing how the federal Supreme Court exercises its power to review and reverse state high court decisions that do not rest on adequate and independent state-law grounds).

constitution.<sup>192</sup> But in practice, the decision does nothing to compel the legislature to abide by the procedures the court claims are constitutionally required. After all, the decision actually binds only the Pontiac emergency manager, and even so affects only those policies he implemented prior to the legislature's re-enactment of the emergency manager law.<sup>193</sup> Despite the aggressive rhetoric, the legislature is free to continue its fake immediate-effect votes, and the emergency manager is free to reinstate his old order diminishing retirees' health benefits.<sup>194</sup> The state constitutional command waits another day for a court that can actually bind the legislature to obey it. The fourth motif, a lack of serious reasoning around state constitutional issues, sounds here in the panel's discussion of the canon of federal constitutional avoidance. On that topic, the panel majority cited several leading federal Supreme Court cases and explained why the doctrine applied here.<sup>195</sup> But the opinion never engages with the rationales behind the canon, and never inquires whether interpreting the state constitution first is more or less respectful of the political institutions and democratic accountability.<sup>196</sup>

#### VIII. *SCHERZO*: THE COURT REACTS TO COUNTING IMAGINARY VOTES

The first state constitutional question raised by the *Pontiac Retirees* panel was whether the Michigan Legislature had actually satisfied a state constitutional clause requiring all statutes to take effect no sooner than 90 days after they are enacted, unless two-thirds of each house voted—in a separate vote from the merits tally—to give the statute “immediate effect.”<sup>197</sup> The Sixth Circuit's instruction to the district court to find facts took the form of two questions. The court asked, “Specifically, did two-thirds of both houses of the Michigan Legislature vote to make Public

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192. See *Pontiac Retirees*, 726 F.3d at 771 (“Because state law could provide an alternative basis for deciding this case, the more prudent approach is to allow the district court to conduct additional fact-finding and to consider the state law issues.”).

193. See *id.* at 776 (stating that “if the Legislature's attempt to give Public Act 4 immediate effect violated the Michigan Constitution, then Public Act 4 would not have become effective until March 2012, ninety days after the legislative session ended. Consequently, the Emergency Manager would not have possessed the power to modify the employees' retirement plans when he did”).

194. See *id.* Nothing in the *Pontiac Retirees* opinion prevents the legislature from continuing its practice of using “immediate effect,” nor does the opinion prohibit the Pontiac Emergency Manager from reimplementing his prior order.

195. See *id.* at 771-72.

196. See *id.* (providing only a cursory analysis of the doctrine of constitutional avoidance).

197. See *id.* at 773-76 (discussing whether the Michigan Legislature violated art. IV, § 27 of the Michigan Constitution).

Act 4 immediately effective? And, since Michigan voters rejected Public Act 4 in a referendum, do the acts taken under the rejected law have any power?"<sup>198</sup> The answer to the first question seemed unlikely to the Sixth Circuit because the bill passed by a much smaller margin on the merits, so an implausible number of legislators in both houses would have had to vote "no" on the bill and then, immediately after it passed, vote "yes" on the motion to give it immediate effect.<sup>199</sup>

Why not just look at the legislative record to see how many voted for immediate effect? On this bill, as with the vast majority of bills considered by the Michigan Legislature over the last ten years, legislative leaders held no roll call or recorded vote before concluding that two thirds of the legislators supported the immediate effect motion.<sup>200</sup> Instead, they held what has become known as a "rising vote," where legislators stand to indicate support.<sup>201</sup> As described above, it has become commonplace for legislative leaders to visually "see" two-thirds support for immediate effect, seemingly regardless of how many legislators actually stand.<sup>202</sup> In the surprisingly frank language of the Sixth Circuit panel, "This authority is unchecked and often results in passing motions for immediate effect that could not receive the constitutionally required two-thirds vote. Apparently, the Michigan Legislature believes the Michigan Constitution can be ignored."<sup>203</sup>

Clearly, whether the legislature continues to give immediate effect to routine legislation, regardless of the minority party's objections, has an effect on nearly all state lawmaking. In most cases, neither party would have any serious objection to immediate effect for most routine bills, but

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198. *Pontiac Retirees*, 726 F.3d at 769 (remanding to the district court for additional fact finding).

199. *See id.* at 774 ("The Michigan House presiding officer refused a request for a roll call vote and made Public Act 4 immediately effective through the obvious fiction that twelve House members immediately changed their positions.").

200. *See Michigan House Republicans Want Immediate Effect Powers Back*, DETROIT FREE PRESS (Apr. 5, 2012, 10:02 AM), <http://www.freep.com/article/20120405/NEWS15/120405012/Michigan-House-Republicans-immediate-effect-appeals-court>; *see also* *Wills v. Deerfield Twp.*, 669 N.W.2d 279, 286 (Mich. Ct. App. 2003) (finding that a public body held a two-thirds roll call, but failing to record the roll call in meeting minutes did not "provide grounds for invalidating action taken by a public body" in closed session); MICH. COMP. LAWS ANN. §§ 15.263, 15.270 (2), (5) (West 2013).

201. *See Pontiac Retirees*, 726 F.3d at 774. A "rising vote" occurs "where the presiding officer examines the chamber to see whether the requisite two-thirds support exists." *Id.*

202. *See id.* ("Apparently, a two-thirds vote occurs whenever the presiding officer says it occurs—irrespective of the actual vote.").

203. *Id.* (discussing the Michigan Legislature's use of immediate effect in violation of the Michigan Constitution).

the balance of procedural power can make a difference in other ways. At a minimum, giving the minority party a real chance to block immediate effect would give it a significant bargaining chip that it could use to dilute or mitigate objectionable policies passed by the majority. This demonstrates the first motif, the surprisingly close relationship between arcane state constitutional principles and important public policy debates. The disdain that the panel's rhetoric shows for the legislature's behavior was clearly meant to embarrass the politicians into paying more attention to their constitutional obligations. Possibly, the federal court felt surprised or disappointed that state courts had not already intervened, so then felt emboldened to take up the challenge itself. Here we see the second motif, the interactive federalism inherent in a federal court reviewing state law. The third motif, the weakness of state constitutionalism as a constraint on political action, is present here only indirectly. The *Pontiac Retirees* opinion explicitly accuses the state legislature of not caring whether it follows the state constitution.<sup>204</sup> And finally, yet again the opinion here merely skims or passes over important state constitutional principles that it should have addressed with more depth and sensitivity.<sup>205</sup> What sort of fact-finding did the panel expect the district court to do—subject legislative leaders to depositions? Call the legislature's clerk to testify about the vote count? Admit video evidence of house proceedings? Nearly any method of investigation that treats the legislature's compliance with the constitution's immediate-effect clause as a question of fact, rather than one of law, would almost certainly raise serious federal constitutional questions about the power of federal courts to intervene in state government. For a panel that was so concerned about the canon of federal constitutional avoidance, the remand decree could have raised more (unforeseen) problems than it would have solved.

#### IX. *CADENZA*: THE LEGISLATURE GOES OFF SCRIPT

As a general matter, state legislatures are treated in law as having inherited the full lawmaking power of the British Parliament, known as "plenary" power.<sup>206</sup> In practice, this means that typical state legislatures

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204. See *id.* ("Apparently, the Michigan Legislature believes the Michigan Constitution can be ignored.").

205. See *id.* at 772-78. The *Pontiac Retirees* majority concerns itself primarily with whether the Michigan Legislature violated Article IV, Section 27 and the effects of the voter referendum repealing Public Act 4 on the Emergency Manager's actions. *Id.*

206. *Harsha v. City of Detroit*, 246 N.W. 849, 850 (Mich. 1933) ("The legislative power is the authority to make, alter, amend, and repeal laws. In this state, it is coextensive with that of the Parliament of England, save as limited and restrained by the state and federal Constitutions.").

can pass any statute on any topic that they are not prohibited from passing by some higher law.<sup>207</sup> To avoid legislative tyranny, state constitution framers wrote checks and balances on the legislature into their constitutions.<sup>208</sup> In addition to the traditional example of separation of powers as a tool to heel wayward legislatures, state constitutions contain many and varied direct restrictions on legislative procedure unknown to the federal Constitution.<sup>209</sup>

The modern constitutions, in particular, exhibit constitutional restraints clearly derived from experience with legislative overreaching. The late twentieth-century framers had seen legislatures abandon their obligations to address essential social problems, so they strengthened constitutional clauses compelling legislative action on issues like public education.<sup>210</sup> They had seen legislatures captured by special interests, so they carried forward older prohibitions on special and local laws, and developed or expanded new methods of direct popular control of legislation through initiative and referendum.<sup>211</sup> And legislatures, when they could, operated in as obscure a manner as they could get away with, so the framers responded with clauses meant to compel transparency, like the single-subject rule and rules requiring clear titles, requiring multiple readings, or prohibiting non-germane amendment.<sup>212</sup>

In essence, convention records<sup>213</sup> and court opinions<sup>214</sup> indicate that the state procedural restrictions stem from a profound distrust of the

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207. See *id.* State legislative power can be “limited and restrained by the state and federal Constitutions.” *Id.* (quoting THOMAS COOLEY, *CONSTITUTIONAL LIMITATIONS* (8th ed.)).

208. See Williams, *supra* note 152, at 798 (observing that state constitutions contain many procedural restrictions adopted “in response to perceived state legislature abuses”).

209. See *id.* at 798-99 (“[T]he requirement that a bill contain a title disclosing its subject[;] . . . the requirement that a bill contain only matters on a ‘single subject’; that all bills be referred to committee; that the vote on a bill be reflected in the legislature’s journal; that no bill be altered during its passage through either House so as to change its original purpose; and that appropriations bills contain provisions on no other subject.”).

210. See, e.g., MICH. CONST. art. VIII (providing free elementary and secondary education and establishing higher education institutions).

211. See TARR, *supra* note 83, at 157-61. Distrust of state legislatures led to “a series of constitutional amendments that, taken together, fundamentally altered the character and powers of state governments by limiting the tenure of governmental officials, reducing their powers, and transferring policymaking responsibilities to the people.” *Id.*

212. See, e.g., MICH. CONST. art. IV, § 24 (“No law shall embrace more than one object, which shall be expressed in its title. No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title.”); MICH. CONST. art. IV, § 26 (“Every bill shall be read three times in each house before the final passage thereof.”).

213. See JOHN DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* (2006).

capacity of legislators to faithfully represent their constituents. The federal Framers may have distrusted members of Congress, but they imposed almost no procedural restrictions beyond bicameralism and presentment.<sup>215</sup> They seem to have imagined, first of all, that Congress would exercise only those powers granted to it expressly, such that legislative tyranny could be avoided by restricting the subject matter, rather than the procedure, of legislation.<sup>216</sup> The Framers further believed that most legislative energy would occur in the states, such that Congress's agenda could not become too aggressive without a backlash from the then-potent subnational polities.<sup>217</sup> The federal Framers also reacted to the chafing and even dangerous experience of the Confederation, where the national legislature could not accomplish essential aims of the nascent republic because of excessive restraint on its powers.<sup>218</sup>

By contrast, the state clauses are nearly opposite to any design intended to make the passage of legislation smooth and efficient. These clauses were intended to hamper, delay, complicate, and sometimes thwart the legislature's normal pursuit of its policy ambitions.<sup>219</sup> In Michigan's case, the constitutional implication that most bills would not take effect until people had a reasonable amount of time to gather referendum-forcing signatures is clearly a roadblock to policy implementation.<sup>220</sup> The constitutional exception that swallowed the rule, the two-thirds supermajority requirement for giving legislation immediate effect, would strengthen the delayed-effect principle by forcing legislative leaders to obtain a much broader consensus for "emergency" bills.<sup>221</sup> These restrictions do *not* promote legislative efficiency, effective compromises, durable legislation, or the kind of

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214. See, e.g., *Pohutski v. City of Allen Park*, 641 N.W.2d 219 (Mich. 2002) ("This constitutional limitation ensures that legislators and the public receive proper notice of legislative content and prevents deceit and subterfuge.").

215. See U.S. CONST. art. I, § 1; U.S. CONST. art. I, § 7, cls. 2, 3; U.S. CONST. art. 2, § 2, cl. 2.

216. See U.S. CONST. amend. X; see also *In re Mcvey Trucking, Inc.*, 1987 WL 1380282 (7th Cir. 1987) (finding that "to the extent Congress acts within sovereign powers delegated to it by the states i.e., it has the power to abrogate states' immunity").

217. U.S. CONST. amend. X.

218. Eric M. Freedman, *Why Constitutional Lawyers and Historians Should Take a Fresh Look at the Emergence of the Constitution from the Confederation Period: The Case of the Drafting of the Articles of Confederation*, 60 TENN. L. REV. 783, 825 (1993).

219. See MICH. CONST. art. IV, § 24.

220. See MICH. CONST. art. IV, § 27 ("No act shall take effect until the expiration of 90 days from the end of the session at which it was passed . . .").

221. See *id.* ("[B]ut the legislature may give immediate effect to acts by a two-thirds vote of the members elected to and serving in each house.").



responsive government policy that wins favorable media attention for politicians. Instead, they make it easier for the general public (or special interests outside of the legislature) to delay or deny the legislature's agenda and give legislative minorities power to interfere with majority will. Naturally, legislative leaders would bristle under these restrictions and the pressure to evade the constitutional requirements would be intense. Only consistently rigorous oversight by the courts could protect the people's interest in encouraging legislators to abide by the constitutional clauses.

Any high court that takes these clauses seriously and attempts to enforce them will routinely find itself at loggerheads with the political branches. In states where high court judges are elected, particularly through partisan processes, the judges will likely share many of the concerns and policy goals of the legislature. The judges may perceive themselves as "part of the team," with their role being to find creative legal solutions around the obstacles imposed by meddling and restrictive constitutional text. Such judges would be unlikely to hold the kind of extraordinary respect for the framers of the procedural clauses that the federal Framers enjoy. Particularly with the modern constitutions, and even with older constitutions that have been recently amended, the framers are typically not as distinguished, educated, or politically prominent as the high court judges themselves. The framers' wisdom, the judges might think, is legitimately a matter of doubt. And pressure on elected judges to elide, overlook, or nullify state constitutional procedures that stop the legislature from achieving what judges and legislators alike agree is important public policy appears overwhelming. So courts have developed various doctrines to avoid rigorously enforcing the procedural protections. Perhaps the most common is lock-stepping, whereby the courts fix the meaning of a state clause to a textually unrelated clause in the federal Constitution, where the federal clause gives much more slack for legislative action than the a plain reading of the state text would permit.<sup>222</sup> Treating special-laws prohibitions as nothing more than equivalent to the federal Equal Protection Clause is a prime example of this approach.<sup>223</sup> Another common approach is to apply federal *interpretive* techniques to the state clauses in a way that

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222. See Helen Hershkoff & Stephen Loffredo, *State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis*, 115 PENN ST. L. REV. 923, 970-71 (2011) (asserting that state courts routinely borrow from federal doctrine even where a state constitutional provision has no federal analogue).

223. See generally Long, *supra* note 4, at 732-41 (discussing how many state high courts construe their special law prohibitions as coextensive to the federal Equal Protection Clause and apply only rational basis analysis).

effectively negates them. The “enrolled bill doctrine” is such an interpretive step. As mentioned above in *Minuet*, that doctrine stems from the historic supremacy of Parliament.<sup>224</sup> In that sense, it appears inconsistent with the extensive limitations on legislative procedure adopted in state constitutions like Michigan’s.<sup>225</sup>

The first motif, the importance of state constitutionalism to contemporary public policy, appears here in the form of constitutionalized legislative procedure. These restrictive clauses set up a conflict between the legislature—responsible for creating public policy and accustomed to thinking of itself as holding plenary power—and the judiciary obliged to enforce constitutional provisions that interfere with the legislature’s ambitions. As a result, some of the most important social issues confronting contemporary society come before the courts as questions of legislative compliance with seemingly esoteric procedure. The single-subject rule, for example, which requires every passed bill to be about just one topic (however that is defined), is the main legal argument at the center of a fight about the Oklahoma Legislature’s last-minute addition of a rule keeping “Plan B” contraception behind pharmacy counters to a bill originally devoted to insurance-form drafting.<sup>226</sup> Likewise, the *Pontiac Retirees* dispute focused formally on the immediate-effect clause, but actually was about the tangible question of retiree benefits.<sup>227</sup>

The second motif, the importance of intersystemic adjudication, appears here in an especially interesting way. The federal judges in the panel majority did not gain office through the political system of the state they assess; Judge Cole and Judge Gwin both sit in Ohio.<sup>228</sup> Perhaps they

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224. See Ittai Bar-Siman-Tov, *supra* note 151, at 364. The enrolled bill doctrine “is intimately (if not inextricably) related to the traditional English concept of legislative supremacy, which views lawmaking as an absolute sovereign prerogative and the legislative process as a sphere of unfettered legislative omnipotence.” *Id.*

225. See, e.g., MICH. CONST. art. IV, § 24 (“No law shall embrace more than one object, which shall be expressed in its title. No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title.”); MICH. CONST. art. IV, § 26 (“Every bill shall be read three times in each house before the final passage thereof.”).

226. See Oklahoma Coalition for Reproductive Justice, et al. v. Oklahoma State Board of Pharmacy, et al. (OK), CENTER FOR REPRODUCTIVE RIGHTS, available at <http://reproductiverights.org/en/case/oklahoma-coalition-for-reproductive-justice-et-al-v-oklahoma-state-board-of-pharmacy-et-al-ok>. (“The [Center for Reproductive Rights] is challenging Oklahoma House Bill 2226 on the grounds that the law violates the Oklahoma Constitution’s ‘single-subject rule’ . . .”).

227. See *City of Pontiac Retired Emps. Ass’n v. Schimmel*, 726 F.3d 771, 771-79 (6th Cir. 2013).

228. See Cole, *R[ansey] Guy Jr.*, Biographical Directory of Federal Judges, FEDERAL JUDICIAL CENTER, available at

felt free to critique the Michigan political structure because of their independence from it. They never needed to raise money from Michigan donors, win support from Michigan's federal senators, or gain endorsement from Michigan political parties or special interests, so they owed not even abstract loyalty to Michigan politicians. Their independence as federal judges gave them room to evaluate the legislature's compliance with its state constitution as outsiders in a way that elected state judges who *do* owe their office and their hopes for promotion to in-state politicians simply could not. The dissenting judge in *Pontiac Retirees*, Judge Griffin, was born in Michigan, went to college and law school in Michigan, practiced law in Michigan, and served as an elected state judge in Michigan for sixteen years before appointment to the federal bench in 2005.<sup>229</sup> In what is most likely a coincidence, but an interesting one, his view of the case turned out to be far more deferential to Michigan political figures than his colleagues'.

The prevalence of legislative procedural provisions in state constitutions by itself demonstrates that people sought to cabin legislative power, not necessarily that the textual restraints did not work effectively, so the third motif is not obvious in this *étude*. But the history of state constitutional change, which includes regular repetition and strengthening of these clauses, does show that constitution drafters were responding to ongoing legislative non-compliance by toughening the constitutions further and further. For each new constitutional restriction, however, the legislatures found loopholes (or blatantly disobeyed) to allow them to continue to adopt their policy agendas, and the courts continued a permissive, one-of-the-gang habit of underenforcement.

Finally, like almost all courts that consider state constitutional restrictions on legislative procedure, the *Pontiac Retirees* panel never seriously discussed whether the procedure was designed to make the

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<http://www.fjc.gov/servlet/nGetInfo?jid=473&cid=999&ctype=na&inststate=na> (indicating that Judge R. Guy Cole, Jr. served as a U.S. Bankruptcy Judge in the Southern District of Ohio from 1987 to 1993 and that he was appointed to the U.S. Court of Appeals for the Sixth Circuit by President William J. Clinton in 1995); *Gwin, James S.*, Biographical Directory of Federal Judges, FEDERAL JUDICIAL CENTER, available at <http://www.fjc.gov/servlet/nGetInfo?jid=2730&cid=999&ctype=na&inststate=na> (indicating that Judge James Gwin was appointed to the Northern District of Ohio by President William J. Clinton in 1997).

229. See *Griffin, Richard Allen*, Biographical Directory of Federal Judges, FEDERAL JUDICIAL CENTER, available at <http://www.fjc.gov/servlet/nGetInfo?jid=3089&cid=999&ctype=na&inststate=na> (indicating that Judge Griffin was born in Traverse City, MI, in 1952; he received his undergraduate degree from Western Michigan University in 1973 and graduated from University of Michigan Law School in 1977; he was appointed to the U.S. Court of Appeals for the Sixth Circuit by President George W. Bush in 2005).

passage of desirable legislation more efficient or, instead, to interfere with the passage of legislation.<sup>230</sup> Even courts that find themselves critical of legislative conduct, as in *Pontiac Retirees*, almost never directly admit that enforcement of the constitutional text will genuinely stymie the adoption of popular legislation. This reflects the fourth motif, a general practice of not treating state constitutional questions with intellectually rigorous and nuanced consideration.

#### X. WALTZ: THE EMERGENCY MANAGER, ATTORNEY GENERAL, AND THE COURTS INTERACT

The second overarching state constitutional question that the *Pontiac Retirees* court addressed was whether the referendum invalidating the expansive Public Act 4 meant that any actions taken under its authority were retroactively rendered void.<sup>231</sup> The Sixth Circuit panel acknowledged that the state constitution does not speak to this question, a noteworthy omission.<sup>232</sup> In the absence of any controlling text or judicial opinion, public policy concerns are likely to guide a court's decision-making on this point. In other words, this is an occasion for constitutional common law, an unusual task for most courts.

But an even more interesting dilemma for the court is the question of what deference to afford the state attorney general's proffered answer to this question. The attorney general in Michigan, as in most states, is a constitutional officer elected independently of the governor.<sup>233</sup> But astonishingly, the constitution does not even hint what the attorney general's scope of authority is, or what powers the attorney general has with respect to the governor and other branches of state government.<sup>234</sup> If the federal court applied ordinary federal principles of administrative law, which oblige courts to extend great deference to agency legal

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230. See *Pontiac Retirees*, 726 F.3d at 771-79. The *Pontiac Retirees* panel never looks to the reasons behind the inclusion of Article IV, Section 27 within the Michigan Constitution.

231. See *id.* at 776 ("Even if the Michigan Legislature's passage of Public Act 4 with immediate effect did not violate the Michigan Constitution, remand is also warranted to allow the district court to consider whether the voters' November 2012 referendum of Public Act 4 voided the Emergency Manager's actions.").

232. See *id.* at 777 ("[T]he Michigan Constitution does not say what effect a referendum rejection of Public Act 4 would have.").

233. See MICH. CONST. art. V, § 21.

234. See MICH. CONST. art. V (defining the executive branch, but silent with respect to the powers of the attorney general).

interpretations within their own sphere of expertise,<sup>235</sup> it might conclude that the attorney general's interpretations of state law should be followed by federal courts unless arbitrary or capricious. Perhaps in the context of an agency official who holds an office created directly by the state constitution, the claim for deference is even stronger. But even if the court embraced this view, to what kinds of attorney general interpretations should a court defer?

The Michigan Attorney General, in the Sixth Circuit panel's opinion, has offered inconsistent positions on the effect of action taken under statutes that were repealed by referendum.<sup>236</sup> For private parties, there is no bar in either formal law or general practice to adopting different views in different cases.<sup>237</sup> But from government lawyers, courts expect consistency across disputes even if a legal position would be advantageous in one case and harmful to the state in another.<sup>238</sup> With that expectation of consistency in mind, the *Pontiac Retirees* court was bothered by what it saw as shifting arguments across different disputes. In one case before the Michigan Supreme Court, according to the federal panel, the attorney general had maintained that a referendum superseding a statute is "more powerful" than a statutory repeal and would render actions taken under the superseded statute retroactively void.<sup>239</sup> But in the *Pontiac Retirees* case, the attorney general argued that the emergency manager's action under the superseded Public Act 4 was valid, not void.<sup>240</sup>

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235. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (holding that in the absence of congressional intent, courts will defer to an agency's permissible construction of its statute).

236. See *Pontiac Retirees*, 726 F.3d at 778 ("Despite recognizing that a 'referendum is more powerful than a repeal,' and despite saying that the referendum 'erase[d]' Public Act 4, the Michigan Attorney General seems to argue the inconsistent position that the Emergency Manager's action under Public Act 4 are valid after the referendum.").

237. Litigants are generally free to adopt alternative or inconsistent positions, even in the same case. See Fed. R. Civ. P. 8(d) (permitting alternative and inconsistent pleadings in federal court).

238. Patricia M. Wald, *"For the United States": Government Lawyers in Court*, 61 LAW & CONTEMP. PROBS. 107, 124 (1998) ("[W]e expect government lawyers to be reasonably consistent about the positions they take in similar cases. A private lawyer sometimes argues one meaning of a precedent one day and another meaning in a different case another day, but we would be outraged if the government did the same.").

239. See *Pontiac Retirees*, 726 F.3d at 778 ("[I]n his brief to the Michigan Supreme Court . . . the Michigan Attorney General says that 'the rejection of a law by referendum is more powerful than the repeal of a law because the rejection erases the Legislature's and Governor's original enactment.'").

240. See *id.* ("Yet, in the same brief, the Attorney General also says '[t]he voters' rejection does not render [Public Act 4] void ab initio since it was lawfully enacted by the

Significantly, the attorney general's arguments that the Sixth Circuit panel perceived as inconsistent were expressed in appellate briefs, not formal opinions.<sup>241</sup> As former Michigan Attorney General Frank Kelley's remarks at this symposium make clear, the attorney general's official legal opinions are carefully considered, influential, and intended to have precedential effect.<sup>242</sup> There is no formal opinion on whether actions taken under statutory authority that are later nullified by referendum become void retroactively or not. But even if there were such an opinion, the actual authority of an official Opinion of the Attorney General is a complicated question in Michigan—and one on which the state constitution offers no guidance. The opinions are advisory in the sense that they do not bind the courts (although they do seem to influence the courts, which cite them routinely as persuasive authority).<sup>243</sup> But the Michigan courts are mixed on whether they bind executive branch officials in the absence of a court ruling that contradicts the opinion.<sup>244</sup>

To the extent that the question is open in Michigan, the Sixth Circuit panel's instruction that a federal trial court be the first to address such an important matter of state governance seems remarkable. In a sense, this part of the *Pontiac Retirees* decision, like other intersystemic adjudications<sup>245</sup> at odds with "dual spheres" federalism,<sup>246</sup> may stand as a

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Legislature in the first instance. Thus the disapproval has no effect on lawful actions taken by the emergency managers during the time [Public Act 4] was effective.").

241. See *id.* (discussing the attorney general's brief in *Davis v. Roberts*, 810 N.W.2d 555 (Mich. 2012)).

242. Attorney General Kelley asserted that formal Opinions of the Attorney General bind the officials of executive agencies, including those subordinate to the governor, in a way reminiscent of how the federal Department of Justice's Office of Legal Counsel opinions bind the rest of the executive branch. As a matter of custom, this appears descriptively correct. But there is no explicit support for this view in Michigan constitutional or statutory law, and the independent election of the state attorney general creates a quite different relationship with the governor's subordinates than the Office of Legal Counsel has with other federal officials, all of whom are subordinate to the same chief executive.

243. See *Williams v. City of Rochester Hills*, 625 N.W.2d 64, 74 (Mich. Ct. App. 2000) ("Attorney General opinions are not binding but can be persuasive authority.") (citations omitted).

244. See *Danse Corp. v. Madison Heights*, 644 N.W.2d 721 (Mich. 2002). Indeed, the extent to which a governmental agency is even bound by an opinion of the Attorney General is open to question. Compare *East Grand Rapids Sch. Dist. v. Kent Co.*, 330 N.W.2d 7, 12 (Mich. 1982) (a state agency is not bound by an attorney general opinion that a statute is unconstitutional), with *Traverse City Sch. Dist. v. Attorney General*, 185 N.W.2d 9, 16 n.2 (Mich. 1971) (stating that an opinion of the Attorney General commands allegiance of state agencies).

245. See Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 301-02 (2005) (An adjudication "in which a court defined by one political system implements the laws of another system . . .").

possible example of Heather Gerken's notion of federalism as voice without sovereignty.<sup>247</sup> Rather than leaving the development of law to the "sovereign" responsible for its conclusive definition, the "voice" model admits the possibility of advantages for the development of law by non-authoritative interpreters.<sup>248</sup> In *Pontiac Retirees*, the federal court is the non-authoritative interpreter, because its understanding of the Michigan Constitution's restraint on legislative procedure will not be the final word. Only Michigan's supreme court can ultimately decide what effect repeal by referendum has on official action taken under authority of the repealed statute, or whether the state will follow the enrolled bill doctrine, or whether instead legislative voting is subject to constitutional review by the courts. The federal court disposes of the particular controversy arising out of *Pontiac*, but its legal conclusions merely have influence and not authority over the next state court to confront the problem.

The confusion over the retroactivity of repeal-by-referendum could be resolved if there were a clear constitutional clause detailing the power of the state attorney general. Most ordinary voters, presumably, do not care a whit about whether the state constitution's clause concerning the attorney general is detailed or not. Nevertheless, here we see—as the first motif of these *études* emphasizes—that esoteric second-order legal rules in the state constitution end up having profound effects on substantive public policy. We also see the second motif, the importance of intersystemic adjudication, at work; the federal court might well be the first to offer a judicial resolution to these complex questions of state law. That resolution would benefit from the intellectual and material resources of the federal bench. But it would necessarily be a tentative, soft-power resolution, its authority derived from its persuasiveness rather than formal law. It would ultimately fall to state courts to answer these questions, subject of course to any subsequent challenges founded on federal law. The third motif, the weakness of state constitutions as restraint on state actors, is not as strong in this *étude*, but still present. If the attorney general has no constitutional text authorizing her opinions to bind the governor's subordinates, but custom has led to that practice anyway, then the state constitution's omission clearly does not effectively restrain the relevant public officers. On the other hand, if the

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246. See Long, *supra* note 4, at 148 ("Dual federalism is the theory that the state and federal governments are separate sovereigns and that their operations should be confined to separate spheres of endeavor.").

247. See Heather K. Gerken, *Foreword: Federalism All The Way Down*, 124 HARV. L. REV. 4, 8 (2010).

248. *Id.* at 13.

constitutional framers did expect the attorney general's opinions to bind the executive, their failure to say so explicitly in constitutional text greatly weakens that power. Finally, the fourth motif calls us to note that the *Pontiac Retirees* panel engaged with the disparity between the attorney general's assertions in briefs versus formal opinions, but never questioned what sort of deference those opinions were due and what constitutional authority over the Pontiac emergency manager the attorney general might hold under state law.<sup>249</sup> This reflects an uninquisitive, intuitive approach to state constitutions that a reader would not expect in a federal judge's approach to federal constitutional interpretation.

#### XI. CODA: LESSONS LEARNED

A local executive decided to cut healthcare benefits for workers who had retired from city service. No one is surprised that the retirees decided to sue. But the *Pontiac Retirees* case demonstrates four major motifs of modern state constitutionalism: how important state constitutional law is to the resolution of the most pressing contemporary problems in public policy; how constitutional law from both state and federal sources is inextricably interwoven, with state and federal courts both intimately responsible for its interpretation; how state constitutional text rarely stands as a meaningful restraint on state political actors; and how, even after decades of sustained attention to state constitutions in the academic literature, advocates and judges woefully underestimate the complexity and opportunity inherent in state constitutional law. By examining a single case in context and through multiple theoretical lenses, this Article reveals the significance of these motifs to contemporary state constitutionalism. The bar, bench, and academy should treat these motifs as routine questions to apply to any state constitutional debate to promote a richer and more effective understanding of these foundational texts.

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249. See *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 726 F.3d 771, 778 (6th Cir. 2013).