

DON'T MESS WITH TEXAS JUDGES: IN PRAISE OF THE STATE JUDICIARY

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There is one transcendent advantage belonging to the province of the State governments . . . It is that which, being the immediate and visible guardian of life and property, having its benefits and its terrors in constant activity before the public eye, regulating all those personal interests and familiar concerns to which the sensibility of individuals is more immediately awake, contributes, more than any other circumstance, to impressing upon the minds of the people, affection, esteem, and reverence towards the government.

Alexander Hamilton, *The Federalist* No. 17

Thank you for your gracious invitation to join you here today. I would especially like to thank the organizations sponsoring this meeting: the Federalist Society, the Abigail Adams Society, the Board of Student Advisors, the Journal of Law and Public Policy, and the Texas Club. I am privileged to address such an eclectic group of students and especially honored that some of my classmates are here today as we celebrate our twentieth law school reunion.

As you may have gathered from the title of my speech, I am going to be talking with you today about state courts and how they deserve more recognition. But from the outset, I must disclose my bias on this topic. Before becoming an appellate judge, I was appointed and twice elected to serve as a Texas state court judge, where I worked for five-and-a-half years. Because of that experience, I have come to appreciate and admire

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the arduous, and sometimes overlooked, work performed by state court judges. That is what prompted me to speak to you about state courts today.

I. HISTORICAL PERSPECTIVES

In elite law schools, federal courts get most of the attention and respect. State courts are often forgotten or (worse) viewed with skepticism—in part because many state judges must campaign and run for office. This attitude toward state judges has not always been prevalent, and it should not be so today.

But before I delve into the contemporary criticisms of the state judiciary, I think it is helpful to review how the drafters of the Constitution and subsequent generations have viewed state courts. A common explanation for the clauses in Article III establishing federal diversity jurisdiction is that the drafters of the Constitution believed justice might be denied in such cases if they were decided by state courts. For example, former Supreme Court Justice Joseph Story, in *Commentaries on the Constitution*, stated:

The constitution has presumed (whether rightly or wrongly, we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct, or control, the regular administration of justice. Hence, in controversies between states; between citizens of different states; between citizens, claiming grants under different states; between a state and its citizens, or foreigners; and between citizens and foreigners; it enables the parties, under the authority of congress, to have the controversies heard, tried, and determined before the national tribunals.¹

Chief Justice Marshall expressed similar views in *Bank of the United States v. Deveaux*,² where he elaborated on what has

1. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 647 (Boston, Hilliard, Gray & Co. 1833); see also *Guar. Trust Co. v. York*, 326 U.S. 99, 119 (1945) (Rutledge, J., dissenting) (“A good case can be made, indeed has been made, that the diversity jurisdiction was created to afford protection against exactly this sort of nullifying state legislation.”); *D’Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 466 (1942) (Jackson, J., concurring) (explaining that “federal jurisdiction exists to provide nonresident parties an optional forum of assured impartiality”).

2. 9 U.S. (5 Cranch) 61 (1809).

been called the “local prejudice theory” of federal diversity jurisdiction:³

The judicial department was introduced into the American constitution under impressions, and with views, which are too apparent not to be perceived by all. However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the Constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.⁴

In the same vein, some of President James Madison’s statements and actions suggest some distrust of state courts. Madison’s original proposal for the organization of the judiciary called for a series of inferior federal courts to serve as trial courts, even though many other delegates to the Convention favored state courts as the forum of first resort for cases raising federal issues.⁵ Later, during the Virginia Convention on the adoption of the federal constitution, Madison also expressed the view that “[c]ontroversies affecting the interest of the United States ought to be determined by their own judiciary, and not be left to partial, local tribunals.”⁶ During the same debate, he expounded on his skeptical view that state tribunals could not impartially apply the law to out-of-state litigants:

It may happen that a strong prejudice may arise, in some states, against the citizens of others, who may have claims against them. We know what tardy, and even defective, ad-

3. Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 509 (1928).

4. *Deveaux*, 9 U.S. (5 Cranch) at 87.

5. *History of the Federal Judiciary*, FED. JUDICIAL CTR., http://www.fjc.gov/history/home.nsf/page/talking_co_tp.html, [<http://perma.cc/VM3F-KWML>]. Ultimately, of course, the delegates did not accept either proposal, and they decided instead to give Congress the option to establish inferior courts. See U.S. CONST. art. III. For a more comprehensive review of the Constitutional Convention debate over the creation of federal courts, see Wythe Holt, “*To Establish Justice*”: *Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1459–78.

6. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 532 (Jonathan Elliot ed., 2d ed. 1901) [hereinafter ELLIOT’S CONSTITUTIONAL DEBATES].

ministration of justice has happened in some states. A citizen of another state might not chance to get justice in a state court, and at all events he might think himself injured.⁷

But the research of some scholars, including former Justice Felix Frankfurter⁸ and Court of Appeals Judge Henry Friendly,⁹ casts some doubt as to whether prejudice actually existed in state courts. Judge Friendly, for example, undertook a study of state court decisions from around the time of the Constitutional Convention, attempting to discover whether “local prejudice theory” was the historical basis of federal diversity jurisdiction.¹⁰ Based on his examination of available documents, Judge Friendly did not find any record of bias in the decisions of state appellate courts before 1787.¹¹ Indeed, he explained that “a careful reading of the arguments of the time will show that the real fear was not of state courts so much as of state legislatures.”¹²

Others in the founding generation were far more trusting of state courts than federal courts to preserve their liberties, and even Madison remarked that “[a]s to [federal] cognizance of disputes between citizens of different states, I will not say it is a matter of much importance. Perhaps it might be left to the state courts.”¹³ Many believed that state courts were more responsive to the interests of the local citizenry than federal courts ever could be¹⁴ and proposed that the federal courts retain only appellate jurisdiction.¹⁵

Thus, the Anti-Federalists opposed what they saw as Article III’s broad grant of jurisdiction to the federal judiciary, as well as the enumerated power of Congress to create inferior federal

7. *Id.* at 533.

8. See generally Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499 (1928).

9. See generally Friendly, *supra* note 3. See also John P. Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3 (1948).

10. See Friendly, *supra* note 3, at 493–97.

11. See *id.* at 497 (concluding that “there was little cause to fear that the state tribunals would be hostile to litigants from other states”).

12. *Id.* at 495.

13. 3 ELLIOT’S CONSTITUTIONAL DEBATES, *supra* note 6, at 533.

14. See, e.g., Holt, *supra* note 5, at 1462 (quoting John Rutledge).

15. See *id.* at 1462–64 (noting that “only the Virginia Plan explicitly required lower federal courts other than admiralty courts”).

courts.¹⁶ In his first essay in opposition to ratification, the Anti-Federalist Brutus wrote:

The judicial power of the United States is to be vested in a supreme court, and in such inferior courts as Congress may from time to time ordain and establish. The powers of these courts are very extensive; their jurisdiction comprehends all civil causes, except such as arise between citizens of the same state; and it extends to all cases in law and equity arising under the constitution. One inferior court must be established, I presume, in each state, at least, with the necessary executive officers appendant thereto. It is easy to see, that in the common course of things, these courts will eclipse the dignity, and take away from the respectability, of the state courts. These courts will be, in themselves, totally independent of the states, deriving their authority from the United States, and receiving from them fixed salaries; and in the course of human events it is to be expected, that they will swallow up all the powers of the courts in the respective states.¹⁷

So powerful was this fear of the displacement of state courts that the Constitution's proponents felt the need to address it head-on in their quest for ratification. Thus, in 1787, Hamilton wrote in *Federalist No. 17*:

There is one transcendent advantage belonging to the province of the State governments, which alone suffices to place the matter in a clear and satisfactory light—I mean the ordinary administration of criminal and civil justice. This, of all others, is the most powerful, most universal, and most attractive source of popular obedience and attachment. It is this which, being the immediate and visible guardian of life and property, having its benefits and its terrors in constant activity before the public eye, regulating all those personal interests and familiar concerns to which the sensibility of individuals is more immediately awake, contributes more than any other circumstance to impressing upon the minds of the people affection, esteem, and reverence towards the government. This great cement of society, which will diffuse itself almost wholly through the channels of the particular

16. *Id.* See also 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 119 (Max Farrand ed., 1911), <http://oll.libertyfund.org/>, [<http://perma.cc/3DZR-CLJ8>].

17. Brutus I (1787), reprinted in 1 FEDERALISTS AND ANTIFEDERALISTS: THE DEBATE OVER THE RATIFICATION OF THE CONSTITUTION 8 (John P. Kaminski & Richard Leffler eds., 1st ed. 1989).

governments, independent of all other causes of influence, would insure them so decided an empire over their respective citizens as to render them at all times a complete counterpoise, and, not unfrequently, dangerous rivals to the power of the Union.¹⁸

One might argue that Hamilton's toast to the state judiciaries was merely a calculated response to the Anti-Federalists, but it is quite revealing of popular sentiment that such a staunch defender of national power felt the need to defend state courts as "the immediate and visible guardian of life and property."¹⁹ Perhaps Hamilton's comments make particular sense in light of the fact that, as Professor Akhil Reed Amar explains, "By 1787, the American judiciary had begun to rise in repute. Patriots now peopled state courts everywhere."²⁰ In fact, six of the thirty-nine signers of the Constitution had served as prominent state or continental judges.²¹

It is also instructive, when assessing the Founders' view of the state judiciary, to consider those of the Founding generation who declined a seat on the United States Supreme Court in favor of a position in state service. John Jay, for example, served as the first Chief Justice of the United States from 1789 to 1795, when he left to become Governor of New York,²² a position he held until 1801.²³ Indeed, Jay received a considerable salary raise by transferring to state service: as Chief Justice, he earned a \$4,000 per year salary,²⁴ but as Governor he made \$10,000 per year. Similarly, John Rutledge resigned as a Supreme Court Justice in 1791 after serving two years to become South Carolina's Chief Justice.²⁵ Rutledge's salary as an Associate Justice was \$3,500,²⁶ while his salary at the state supreme court was 800 pounds, or about \$3,640. Although Associate Jus-

18. THE FEDERALIST NO. 17 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

19. *Id.*

20. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 207 (2006).

21. *See id.*

22. WALTER STAHR, JOHN JAY: FOUNDING FATHER 339 (2005).

23. *Id.* at xii.

24. Adelbert H. Steele, *Shabby Salaries of Our Public Officials*, 18 GUNTON'S MAG. 419, 421-22 (1900).

25. HENRY FLANDERS, THE LIVES AND TIMES OF THE CHIEF JUSTICES OF THE SUPREME COURT OF THE UNITED STATES 622 (Philadelphia, Lippincott, Grambo & Co. 1855).

26. Steele, *supra* note 24, at 422.

tice William Cushing never left the bench after his appointment, he probably would have done so if he had beat Sam Adams in the election for Massachusetts governor.²⁷

II. THE IMPACT AND WORKLOAD OF STATE COURTS

Understandably, many view federal courts as more powerful than state courts. The Supreme Court has ultimate authority to interpret the Federal Constitution. Federal courts frequently interpret statutes and regulations that set national policy and affect numerous people beyond the litigants. In just this past year alone, millions waited to hear the Supreme Court's pronouncements on the constitutionality of the Defense of Marriage Act²⁸ and California's Proposition 8.²⁹ Not only does the Supreme Court decide important legal issues, but also its list of important legal issues is growing: It seems that federal jurisdiction expands almost daily.³⁰ On top of all this is the fact that, absent a constitutional amendment or intervening legislation, the Supreme Court's decisions are final unless it decides to revisit an issue, which is rare.³¹ No one grades its papers.

Despite the ability of the U.S. Supreme Court to issue landmark judicial pronouncements, the average American is significantly more likely to interact with a state court than a federal court. As former Colorado Supreme Court Justice Rebecca Love Kourlis put it, "For most Americans, Lady Justice lives in the halls of state courts."³² More recently, Justice Antonin Scalia said that state supreme court decisions are significantly more

27. AMAR, *supra* note 20, at 223–24.

28. *United States v. Windsor*, 133 S. Ct. 2675 (2013).

29. *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

30. In 2005, for example, Congress significantly expanded federal diversity jurisdiction by passing the Class Action Fairness Act of 2005, which permits federal courts to hear a wide range of class action suits. Pub. L. No. 109–2, 119 Stat. 4. Of course, federal jurisdiction expands as Congress enacts new federal criminal legislation. See generally JOHN S. BAKER JR., FEDERALIST SOC'Y FOR LAW & PUB. POLICY STUDIES, MEASURING THE EXPLOSIVE GROWTH OF FEDERAL CRIME LEGISLATION, fedsoc.server326.com/publications/practicegroupnewsletters/criminallaw/crimereportfinal.pdf, [<http://perma.cc/V2Z4-XLJJ>].

31. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992).

32. John Schwartz, *Critics Say Budget Cuts for Courts Risk Rights*, N.Y. TIMES, Nov. 27, 2011, at A18.

likely to affect the day-to-day life of the American citizen.³³ Justice Scalia further remarked, "If you ask which court is of the greatest importance to an American citizen, it is not my court."³⁴ State, not federal, law ultimately guides the typical citizen's day-to-day life.³⁵

Indeed, due to the confines of federal jurisdiction, federal courts are powerless in many instances where state courts are not. In contrast to federal courts, which are courts of limited jurisdiction, state courts have inherent authority to adjudicate federal and state law claims,³⁶ and although the Supreme Court is the ultimate arbiter of issues of federal law, the state supreme courts retain that distinction for issues of state law.³⁷ Even in cases where federal issues are present, the Supreme Court must stay its hand if the state court decision rests on adequate and independent state grounds.³⁸ As explained by Justice Brennan, these "state decisions not only cannot be overturned by, they indeed are not even reviewable by, the Supreme Court of the United States. [The Supreme Court is] utterly without jurisdiction to review such state decisions."³⁹

Even if a case falls within federal jurisdiction, a number of abstention doctrines confine the ability of federal courts to decide cases. These doctrines favor state court declarations of state constitutional and statutory law. According to the so-called *Pullman* abstention doctrine, for example, federal courts "should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been

33. See *Justice Scalia Honors U.S. Constitution*, GEO WASH. TODAY Sept. 18, 2013, <http://gwtoday.gwu.edu/justice-scalia-honors-us-constitution>, [<http://perma.cc/DV48-5ATE>].

34. *Id.*

35. *Id.*

36. See, e.g., *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) ("[W]e have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States.").

37. See, e.g., *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 488 (1976) ("We are, of course, bound to accept the interpretation of [state] law by the highest court of the State.").

38. *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1874).

39. William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 501 (1977).

afforded a reasonable opportunity to pass upon them.”⁴⁰ Professor Erwin Chemerinsky explains that this and the other abstention doctrines “uniformly reflect a desire to allow state courts to decide certain matters instead of federal courts.”⁴¹

Facts and figures confirm that state courts are responsible for a significant portion of the caseload in this country—and they do it with fewer resources:

Volume of cases processed (total): Roughly ninety-five percent of all legal cases in the United States are filed in state court,⁴² and more than 106 million state cases were filed in 2009.⁴³ In Texas, over 10.5 million cases were filed in fiscal year 2012.⁴⁴ In California during the same period, roughly 8.5 million cases were filed in superior courts, with dispositions totaling roughly 7.5 million.⁴⁵ Compare those numbers to the 1.8 million federal cases filed in 2009, of which only 353,000 were filed in district court.⁴⁶ Including bankruptcy, federal cases accounted for less than 2% of all U.S. cases filed in 2009; excluding bankruptcy the percentage becomes well less than 0.5%.

Volume of cases processed (per judge): State courts process significantly more cases per judge than federal courts. State judicial officers process roughly 3,400 cases per year, with judges in courts of general jurisdiction, which usually handle more complex issues, processing roughly 1,800 per year.⁴⁷ To compare,

40. *Harrison v. NAACP*, 360 U.S. 167, 176 (1959); *see also* *R.R. Comm’n. v. Pullman Co.*, 312 U.S. 496 (1941).

41. ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 784 (5th ed. 2007).

42. ROBERT C. LAFOUNTAIN ET AL., *NAT’L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2009 STATE COURT CASELOADS* (2011), <http://www.courtstatistics.org/flashmicrosites/csp/images/csp2009.pdf>, [<http://perma.cc/DA4F-2PWK>].

43. *Id.* at 3. 18.3 million of these cases were filed in state courts of general jurisdiction. *Id.* at 4.

44. OFFICE OF COURT ADMIN., *ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY*, at ii (2013).

45. JUDICIAL COUNCIL OF CAL., *2013 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS 2002-2003 THROUGH 2011-2012*, at xvii (2013).

46. STATISTICS DIVISION ADMIN. OFFICE OF THE U.S. COURTS, *JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2009 ANNUAL REPORT OF THE DIRECTOR 1* (2010), <http://www.uscourts.gov/Statistics/JudicialBusiness>, [<http://perma.cc/9GCJ-EXHB>].

47. LA FOUNTAIN ET AL., *supra* note 42, at 5–6. The caseload per state judge varies widely across the states. In New Jersey, for example, full-time judges in courts of general jurisdiction handled 3,410 non-traffic cases on average in 2010, whereas that same number was only 537 for judges in Alaska. *Id.* at 5.

federal courts process just under 1,000 cases per judge per year, and federal district judges process about 500 cases per year.⁴⁸

Number of trials: State courts conduct more trials than federal courts, with the state courts conducting about 46,200 civil jury trials per year.⁴⁹ Texas juries decided more than 4,000 cases in 2012.⁵⁰ In California, there were 10,007 jury trials in fiscal year 2011–2012.⁵¹ By contrast, the federal courts conduct about 2,100 civil jury trials per year.⁵²

Relative size of the state and federal judiciaries: As of 2009, there were more than 30,000 state judicial officers.⁵³ Currently, there are 874 authorized Article III judgeships and about 1,790 federal judicial officers if bankruptcy and magistrate judges are included.⁵⁴ Thus, there are more than sixteen times as many state as federal judicial officers and more than thirty-four times as many state judicial officers as Article III judges.

Resources: State courts manage this with significantly fewer resources than federal courts. For the 2012 fiscal year, the federal judiciary requested a budget of \$7.3 billion, which—including bankruptcy and magistrate judges—amounts to nearly \$4 million per judicial officer. By contrast, Texas appropriated just \$321 million to its judicial branch in fiscal year 2012,⁵⁵ New York’s judiciary requested \$2.3 billion,⁵⁶ and Cali-

48. STATISTICS DIVISION, *supra* note 46, at 9–18.

49. Nat’l Ctr. for State Courts, *Civil Jury Trials in State and Federal Courts*, 6 CIV. ACTION, no. 1, 2007, 1, 1.

50. OFFICE OF COURT ADMIN., *supra* note 44, at 38. This number represents 0.6% of Texas’ 215,187 civil cases and approximately 1.4% of Texas’ 210,289 criminal cases. *Id.*

51. JUDICIAL COUNCIL OF CAL., *supra* note 45, at xix.

52. Nat’l Ctr. for State Courts, *supra* note 49, at 1.

53. LA FOUNTAIN ET AL., *supra* note 42, at 6. Judicial officers in state courts are “judges, commissioners, masters, referees, and other quasi-judicial officers who adjudicate all or part of a court case.” *Id.*

54. *Federal Judgeships*, U.S. COURTS, <http://www.uscourts.gov/JudgesAndJudgeships/FederalJudgeships.aspx>, [<http://perma.cc/UZ5K-ZFDV>]; *History of the Federal Judiciary: Bankruptcy Judgeships*, FED. JUDICIAL CTR., http://www.fjc.gov/history/home.nst/page/judes_bank.html (last visited Jan. 23, 2014); *History of the Federal Judiciary: Magistrate Judgeships*, FED. JUDICIAL CTR., http://www.fjc.gov/history/home.nst/page/judges_magistrate.html (last visited Jan. 23, 2014).

55. OFFICE OF COURT ADMIN., *supra* note 44, at 3.

56. THE N.Y. STATE UNIFIED COURT SYS., BUDGET, FISCAL YEAR: APRIL 1, 2012 – MARCH 31, 2013, at ii (2011).

ifornia spent \$3.9 billion, which amounted to about \$2 million per judicial officer.⁵⁷

III. LINGERING CRITICISMS OF STATE COURTS

Despite the substantial caseload shouldered by the state courts, they are frequently the subject of criticism. Detractors criticize state courts for being too political, unimportant, and unwilling to uphold individual rights. I believe each of these criticisms is either unwarranted or overdone.

A. *Politics*

Conventional wisdom, at least among some in the academy, is that state judges are not nearly as impartial as federal judges because they are not sufficiently insulated from politics.⁵⁸ This is in large part because of selection methods.⁵⁹ Twenty-two states elect the judges of the highest court; seven of those states, including Texas, do so in partisan elections.⁶⁰ Thirteen states follow the Missouri Plan, or as its proponents often call it, the “merit-selection” plan.⁶¹ But even these judges must face the electorate in a retention election.⁶² The remaining fifteen states select their judges either by gubernatorial or legislative appointment, or a hybrid between appointment and the Missouri Plan.⁶³ But all except three of these states require their judges either to face reappointment and confirmation or a retention

57. *Governor’s Budget 2012–13, Legislative, Judicial, and Executive*, CALIFORNIA DEPARTMENT OF FINANCE, <http://www.ebudget.ca.gov/2012-13-EN/Enacted/StateAgencyBudgets/0010/0250/department.html>, [http://perma.cc/T6UF-MC3E].

58. See, e.g., JOANNA SHEPHERD, AM. CONSTITUTION SOC’Y, JUSTICE AT RISK: AN EMPIRICAL ANALYSIS OF CAMPAIGN CONTRIBUTIONS AND JUDICIAL DECISIONS (2013), http://www.acslaw.org/sites/default/files/ACS_Justice_at_Risk_6_24_13_0.pdf, [http://perma.cc/DMS6-HEAA].

59. This article does not delve into the relative merits of judicial elections versus judicial appointments, nor do I take a position on one selection method over another.

60. CHRIS W. BONNEAU, FEDERALIST SOC’Y, A SURVEY OF EMPIRICAL EVIDENCE CONCERNING JUDICIAL ELECTIONS 3 (2012), http://www.fed-soc.org/doclib/20120719_Bonneau2012WP.pdf, [http://perma.cc/0Q3x5wQ7]kN]. See generally CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS (2009).

61. BONNEAU, *supra* note 60, at 4.

62. See *id.*

63. See *id.*

election.⁶⁴ The exceptions are Massachusetts, which gives life tenure to judges, and New Hampshire and Rhode Island, which give tenure until age seventy.⁶⁵ In sum, eighty-seven percent of all state judges must face the electorate at regular intervals.⁶⁶

The critics of judicial elections are legion, including most prominently, retired U.S. Supreme Court Justice Sandra Day O'Connor. In her concurrence in *Republican Party of Minnesota v. White*, for example, she stated: "If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges."⁶⁷ In Texas, former Chief Justice Jefferson has criticized partisan elections, asserting that "merit matters little in judicial elections."⁶⁸ I would also be remiss if I did not acknowledge the former Chief Justice of the Texas Supreme Court, Thomas Phillips, who is here in the audience today. Chief Justice Phillips has worked for many years to change Texas's judicial election system, stating that "judges should not run as Republicans or Democrats, which in my opinion has been a terrible blow for the stability of our judiciary."⁶⁹

In some states, the method for selecting state court judges has been the subject of direct legal attack. In 2004 in New York, for example, unsuccessful candidates for trial court judgeships brought a § 1983 claim challenging the state's judicial-selection process, which selects judges through a party convention system.⁷⁰ The matter ultimately found its way to the United States Supreme Court, which upheld New York's

64. *See id.*

65. *See id.*

66. *See* Jeffrey S. Sutton, *What Does—and Does Not—Ail State Constitutional Law*, 59 U. KAN. L. REV. 687, 700 (2011) (citing J. Harvie Wilkinson III, *Gay Rights and American Constitutionalism: What's A Constitution for?*, 56 DUKE L.J. 545, 566 (2006)).

67. *Republican Party of Minn. v. White*, 536 U.S. 765, 792 (2002); *see also*, Jess Bravin, *Hello, This Is Sandra Day O'Connor . . . Did I Wake You Up?*, WALL ST. J., Oct. 27, 2010, <http://blogs.wsj.com/washwire/2010/10/27/hello-this-is-sandra-day-oconnor-did-i-wake-you-up/>; John Schwartz, *Sandra Day O'Connor Backs Campaign to End Judicial Elections*, N.Y. TIMES, Dec. 24, 2009, at A12.

68. Wallace B. Jefferson, Op-ed, *Make merit matter by adopting new system of selecting judges*, HOUS. CHRON., Mar. 21, 2009, <http://www.chron.com/opinion/outlook/article/Wallace-B-Jefferson-Make-merit-matter-by-1544078.php>.

69. *Frontline: Justice for Sale* (PBS television broadcast Nov. 23, 1999) (containing interview of Chief Justice Phillips).

70. *N.Y. State Bd. of Elections v. Torres*, 552 U.S. 196, 198–202 (2008).

method of selecting judges.⁷¹ Earlier, in 2002, the Supreme Court struck down provisions of Minnesota's judicial conduct code that prohibited candidates for judicial office from expressing their views on controversial issues.⁷²

Yet the empirical evidence is not nearly as monolithic as the critics of judicial elections make it out to be.⁷³ Many articles related to the "quality" of state courts focus on "judicial independence" in the form of a judge's willingness to vote against the ideological interests of his or her party.⁷⁴ But that may not be an appropriate definition of independence because it fails to account for the facts at issue and the reasoning used to resolve a case.⁷⁵ Furthermore, there is a chicken-or-the-egg issue here. Imagine, for example, that a judicial candidate believes judges should use a textualist approach and should be modest in their decisions. This is attractive to voters who believe judges should use a textualist approach. They then commit money to the candidate precisely because she holds those views. The judge then rules consistent with her textualism approach. Critics may say that the judge is voting the way the voters want her to vote. But

71. *Id.* at 208–09.

72. *Republican Party of Minn.*, 536 U.S. at 788; see also *Dool v. Burke*, 497 F. App'x 782, 784 (10th Cir. 2012) (denying plaintiffs' challenge to the Kansas Supreme Court Nominating Commission's power to fill state appellate judge vacancies).

73. See, e.g., Stephen J. Choi, G. Mitu Gulati & Eric A. Posner, *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary*, 26 J.L. ECON. & ORG. 290 (2010). Indeed, judicial elections are unlikely to play any role in many of the interpretive questions judges face. See Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215, 1255 (2012) ("[M]any interpretive questions are quite technical and unlikely to arouse much passion in anyone, whether the people, the legislators, or the judges themselves. Moreover, even in those cases that hold the potential to generate strong views, often the enacted text and other traditional tools of statutory construction will yield only one plausible answer.").

74. See Charles G. Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 50–51 (2003) (explaining the view that "[elected] judges are supposed to make decisions agreeable to their 'constituents'"); Charles G. Geyh, *Can the Rule of Law Survive Judicial Politics?*, 97 CORNELL L. REV. 191, 218–19 (2012) (reviewing the arguments of those advocating for judicial independence).

75. See Choi et al., *supra* note 73, at 291 ("[I]ndependence captures only a part of the judge's role. Judges are supposed to be independent but not arbitrary: a judge who votes against her party may still make bad decisions. And an independent judge who is lazy will not resolve many cases or will resolve them poorly."); Sutton, *supra* note 66, at 703 (responding to critics of judicial elections).

in reality it may be that the judge was elected because of the methodology by which she judges.

Thus, to test the conventional wisdom that appointed judges are better than elected judges, an empirical study by Choi, Gulati, and Posner used a three-part definition of judicial quality—productivity (number of opinions), opinion quality (out-of-state citations), and independence (voting against other judges that share the same ideology).⁷⁶ The authors analyzed decisions of the states' highest courts in the years 1998–2000.⁷⁷ The study shows that not only are elected judges as independent as appointed judges,⁷⁸ but they also seem to focus on providing a service to voters (i.e., higher productivity) rather than being concerned with their long-term legacy as crafters of precedent.⁷⁹ According to the study, partisan-elected judges are the most productive, followed by merit-plan-selected judges and nonpartisan-elected judges.⁸⁰ Appointed judges are the least productive,⁸¹ although the study did find that appointed judges write the highest-quality opinions, as measured by the number of out-of-state court citations to the opinions.⁸² Regarding the type of opinions being written, the study found partisan elected judges were equally as likely as appointed judges to take on hot-button social issues.⁸³

Thus, the study shows that answering to the electorate enhances productivity, and judicial productivity is a relevant factor in the politics of running for a judicial position—as evidenced by the campaign ads of my law school classmate Bob Pemberton. His campaign ads, which the study references, included a table with productivity statistics for a group of judges and the following description:

76. Choi et al., *supra* note 73, at 296–97.

77. *Id.* at 299.

78. *See id.* at 325. Although the researchers admitted that their results with respect to judicial independence are “complicated and difficult to summarize,” they explained that their “overall sense is that elected judges are more likely to dissent (suggesting more independence)” and that “[w]hat is clear is that the conventional wisdom that appointed judges are more independent than elected judges is a simplification and probably an exaggeration.” *Id.*

79. *See id.* at 326–27.

80. *Id.* at 307–15.

81. *Id.* at 309.

82. *Id.* at 316.

83. *See id.* at 314.

Justice Bob Pemberton ranked #1 statewide among Texas' court of appeals judges in production of original appellate opinions on the merits. These results show that Justice Pemberton is the most productive appeals judge in Texas for original opinions and the Third Court of Appeals is the most productive of Texas' 14 courts of appeals.⁸⁴ He ran not on promised results in cases, but on productivity.

Moreover, answering to the electorate contributes to the transparency, predictability, and legitimacy of the state judiciary.⁸⁵ Judges who campaign remain closer to the communities their actions may impact. Accountability to the electorate forces judges to do their jobs and increases the pressure to refrain from ruling based on their personal predilections. The necessity of campaigning for office, at the very least, enhances public awareness of what judges do in our communities—and that's a good thing. My personal experience was consistent with that, as the campaign trail is the site for a great deal of public education on the role of judges and the proper function of judges.

Finally, the criticism of financial contributions to judicial elections may be overstated. A recent New York Times editorial expressed the view that “[e]lections turn judges into politicians, and the need to raise money to finance ever more expensive campaigns makes the judiciary more vulnerable to improper influence by donors.”⁸⁶ In addition, some studies have shown that the public is concerned about “justice for sale” in judicial elections.⁸⁷ For example, studies in Minnesota and Wisconsin in 2008 revealed that almost eighty percent of respondents in each state were concerned about the impact cam-

84. *Id.* at 312 n. 15.

85. BONNEAU, *supra* note 60, at 8 (“[O]ne could also argue that the evidence shows that the electorate is forcing the judges to do their jobs (instead of following their own personal predilections) or risk losing an election.”); see James L. Gibson et al., *The Effects of Judicial Campaign Activity on the Legitimacy of Courts: A Survey-Based Experiment*, 64 POL. RES. Q. 545, 553 (2011) (reasoning that “elections, ipso facto, seem to boost citizen support for the political system and its institutions” and that “elections seem to enhance judicial legitimacy”); Jed Handelsman Shugerman, *The Twist of Long Terms: Judicial Elections, Role Fidelity, and American Tort Law*, 98 GEO. L.J. 1349, 1400 (2010) (positing that “judicial elections may have cultivated a bench that was more in touch with current events and public opinion”).

86. Editorial, *Judicial Elections and the Bottom Line*, N.Y. TIMES, Aug. 20, 2012, at A18.

87. BONNEAU, *supra* note 60, at 5–6; see Geyh, *Why Judicial Elections Stink*, *supra* note 74, at 54–55 (citing several polls indicating that the public believes campaign contributions affect judicial decisions).

paigned fundraising ultimately has on judicial decisions.⁸⁸ But perception may not be reality here.

Some scholars have found a correlation between campaign contributions and judicial decisions, but others have not.⁸⁹ The problem with the research is its inability to distinguish causation from simple correlational measures. Professor Damon Cann noted this problem and opined that ideological alignment—between a campaign contributor and a judge—may explain the correlation.⁹⁰ Attorneys who generally find themselves on the conservative or liberal side of issues probably contribute to candidates who are more likely to view the world through a similar lens.⁹¹ Thus, campaign contributors may be more likely to win cases before elected judges not because “justice is for sale,” but because the judge had a propensity to vote in a particular way.⁹² More recently, Professor Chris Bonneau concluded, after reviewing the literature on this topic, that the existing evidence does not conclusively show that justice is for sale in states with elected judges, although he acknowledged more research is needed.⁹³ Like judicial independence discussed above, the correlation between campaign contributions and judicial decisions is difficult to measure.

It is also important to note that an appointment system is not immune from politics. No matter who is selecting the judges, political factors have the potential to work their way into the process. For example, the “politics” of appointments garner major media attention when the President nominates someone to fill a vacancy on the Supreme Court. One study found that federal court nominations submitted by a Democratic president were significantly more likely to receive higher ABA ratings than nominations submitted by a Republican president.⁹⁴ While

88. See BONNEAU, *supra* note 60, at 18 n.33.

89. *Id.* at 5 (citing several studies).

90. Damon M. Cann, *Justice for Sale? Campaign Contributions and Judicial Decisionmaking*, 7 ST. POL. & POL'Y Q. 281, 283–84 (2007).

91. *Id.* at 284.

92. *Id.*

93. BONNEAU, *supra* note 60, at 5–6 (“Hence, based on the existing empirical evidence, one cannot look at the existing evidence in Michigan, Texas, Nevada, or anywhere else and conclude that justice is for sale.”).

94. Susan Navarro Smelcer et al., *Bias and the Bar: Evaluating the ABA Ratings of Federal Judicial Nominees*, 65 POL. RES. Q. 827, 836 (2012) (finding that “Democratic

many factors may contribute to this, the data suggests that politics are certainly not removed from an appointment system.

Moreover, a campaign contribution is only one of myriad influences that may engender perceptions of judicial bias. Chief Justice Roberts elaborated on these influences in his dissent in *Caperton v. A. T. Massey Coal Co.*,⁹⁵ noting that “[i]n any given case, there are a number of factors that could give rise to a ‘probability’ or ‘appearance’ of bias: friendship with a party or lawyer, prior employment experience, membership in clubs or associations, prior speeches and writings, religious affiliation, and countless other considerations.”⁹⁶ In a separate dissent, Justice Scalia opined that the biggest cause of public mistrust of the judiciary is not judicial elections, but the perception that litigation is a game to be won rather than a means to “real-world justice.”⁹⁷

B. Perceived Importance

If the academy seems to hold state courts in lower esteem than the federal judiciary, it may be due to decisions of the Supreme Court. The conduct of the U.S. Supreme Court between 1890 and 1940—often reversing state court judgments and even disregarding state court opinions when affirming their judgments—probably contributed to this diminished respect for state courts.⁹⁸ The landmark case *Lochner v. New York*⁹⁹ is a good example. There, the New York Court of Appeals, the state’s highest court, upheld the constitutionality of a New York labor law that prohibited bakers from working more than sixty hours in one week.¹⁰⁰ The Court of Appeals explained that the law

nominees are 17.8 percent more likely to be rated Well Qualified than Republican nominees, all else being equal”). *But see* Dustin Koenig, *Bias in the Bar? ABA ratings and federal judicial nominees from 1976–2000*, 95 JUDICATURE 188, 192 (2012) (reporting the results of an empirical study of the ABA’s ratings and concluding that “[w]hile the results of the analysis cannot confirm definitely the lack of political bias in the ABA’s ratings, if there is some political bias, it cannot be captured empirically”).

95. 556 U.S. 868 (2009).

96. *Id.* at 892 (Roberts, C.J., dissenting).

97. *Id.* at 903 (Scalia, J., dissenting).

98. See J. Skelly Wright, *In Praise of State Courts: Confessions of a Federal Judge*, 11 HASTINGS CONST. L.Q. 165, 179 (1984).

99. 198 U.S. 45 (1905).

100. *People v. Lochner*, 69 N.E. 373, 374, 378–79 (N.Y. 1904), *rev’d sub nom. Lochner v. New York*, 198 U.S. 45 (1905).

was within the police power of the state and had a “just and reasonable relation to the public welfare.”¹⁰¹ After granting certiorari, the U.S. Supreme Court rather sharply disagreed and stated that it was “not possible” to discover a link between the law and the public welfare, and that “[t]he connection, if any exists, is too shadowy and thin.”¹⁰² The Supreme Court proceeded to impugn the motives of the New York legislature, and perhaps the New York Court of Appeals itself: “It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives.”¹⁰³ As Judge J. Skelly Wright observed, “Such repeated chastisement, or dismissive snubbing, was not calculated to enhance the prestige or self-respect of the state courts.”¹⁰⁴

Whatever the reason, law schools frequently omit state constitutional law and state courts from their curriculum. Furthermore, although today’s legal commentary frequently focuses on federal judges and the U.S. Constitution, there is little discussion on our nation’s historied state constitutions,¹⁰⁵ and scholars praise the competence and structural superiority of federal courts.¹⁰⁶ When there *is* discussion of state courts, it is usually in jest. For example, David Lat, the founding editor of the blog “Above the Law,” maintains a running list of articles that attempt to highlight the follies of state judges.¹⁰⁷ While I

101. *Id.* at 381.

102. *Lochner*, 198 U.S. at 62.

103. *Id.* at 64.

104. Wright, *supra* note 98, at 179.

105. See, e.g., ADVISORY COMM’N. ON INTERGOVERNMENTAL RELATIONS, STATE CONSTITUTIONS IN THE FEDERAL SYSTEM: SELECTED ISSUES AND OPPORTUNITIES FOR STATE INITIATIVES 2 (1989) (citing a poll finding that only forty-four percent of persons interviewed knew that their respective states even had constitutions).

106. See, e.g., Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 233–34 (1988) (reviewing the literature); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1120–21 (1977) (describing federal courts as “superior” in terms of technical competence and as “structurally preferable” as a forum to challenge powerful local interests).

107. Joe Patrice, *State Judges Are Clowns*, ABOVE THE LAW, (Oct. 28, 2013, 5:43 PM) <http://abovethelaw.com/state-judges-are-clowns>, [<http://perma.cc/CQ9-MHFA>].

enjoy some of the material Mr. Lat publishes,¹⁰⁸ this list does a disservice to state judges.

This state of affairs overlooks the depth of history behind our state legal systems. Massachusetts, for example, possesses the oldest appellate court in not only the nation but the Western Hemisphere: the Supreme Judicial Court of Massachusetts was established in 1692, almost 100 years before the first federal court.¹⁰⁹ Indeed, many in the legal community seem to have forgotten the words of Justice Story—that “the judges of the state courts are, and always will be, of as much learning, integrity, and wisdom, as those of the courts of the United States.”¹¹⁰

C. Protection of Individual Rights

In his article, *In Praise of State Courts*, Judge J. Skelly Wright explained his former blanket distrust of state courts.¹¹¹ Based on his experience during civil rights struggles in Louisiana, Wright saw the federal courts as the exclusive vindicators of individual rights.¹¹² State courts, by contrast, “were at best faithful followers; at worst, obstructionists.”¹¹³ He noted that if one examined the judgments of state courts between the turn of the century and the 1960s, “the trumpet of liberty would seldom be heard.”¹¹⁴ But that period, Wright subsequently realized, stands in contrast to the important role state courts have played—and still play—in upholding individual rights both

108. For example, I particularly enjoyed Mr. Lat’s survey of judges on the topic of peep-toe pumps. See David Lat, *Wearing Peep-Toe Shoes to Court? Women Judges Weigh In*, ABOVE THE LAW (Aug. 3, 2010 6:17 PM), <http://abovethelaw.com/2010/08/can-you-wear-peep-toe-shoes-to-court-women-judges-weigh-in>, [http://perma.cc/684C-FKP3].

109. *About the Court*, SUPREME JUD. CT., <http://www.mass.gov/courts/sjc/about-the-court.html>, [http://perma.cc/0WefQPY8gcL].

110. *Martin v. Hunter’s Lessee*, 14 U.S. 304, 346 (1 Wheat.) (1816).

111. Wright, *supra* note 98, at 165.

112. See *id.* at 165. Before his appointment as a judge on the U.S. Court of Appeals for the District of Columbia Circuit, Judge Wright served as a U.S. Attorney and a federal judge in New Orleans, Louisiana. *Id.* at 167.

113. *Id.* at 165.

114. *Id.* at 173.

before and after that time.¹¹⁵ I urge those who have a blanket distrust for the state courts to recognize the same.¹¹⁶

Not only did state courts establish early and important judicial doctrines, such as judicial review,¹¹⁷ but also, as noted by Judge Wright, “for more than a dozen years between the Declaration of Independence and the ratification of the Constitution of the United States, there were *only* state courts”—and they were “stalwart defenders of liberty”:¹¹⁸

[U]ntil Reconstruction, the only government that touched most people was that of their state and, until the Fourteenth and Fifteenth Amendments were adopted, state action was uncontrolled by the federal Bill of Rights and largely beyond the reach of federal courts. Moreover, until the 1870’s, the lower federal courts had no significant federal question jurisdiction. . . . And, even after that authority was declared, it remained precarious for some time.¹¹⁹

In other words, state courts alone shouldered the responsibility of protecting individual rights during a substantial portion of this country’s history.

Federal courts, of course, took the leading role in upholding individual liberties during Reconstruction and the 1960s civil rights movement, but jumping forward to the 1970s, Wright explains that state courts had not only caught up, but in some cases moved ahead of the federal courts.¹²⁰ Wright references five cases from the 1980s in which the Supreme Court concluded that state courts in Texas, Illinois, and Michigan read the Fourth Amendment too broadly.¹²¹ Overall, Wright concluded,

115. *See id.* at 165.

116. In discussing individual liberties, I must caution that although in its modest role as the “least dangerous branch” the judiciary may uphold individual liberties, it does not create them.

117. Wright, *supra* note 98, at 174; *see also* ROSCOE POUND, THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY 96–101 (1957). Pound discusses the precursors to *Marbury*, including cases such as the 1780 New Jersey case of *Holmes v. Walton* (N.J. 1780) and *Commonwealth v. Caton* (Va. 1782). *Id.*

118. Wright, *supra* note 98, at 174.

119. *Id.* at 175 (footnotes omitted). The Supreme Court did not declare its ability to review civil or criminal cases until 1816 and 1821, respectively. *Id.*

120. *Id.* at 181.

121. *Id.* at 183. Specifically, Wright lists *Michigan v. Long*, 463 U.S. 1032 (1983) (reversing a Michigan Supreme Court decision that the Fourth Amendment did not justify a police search), *Illinois v. Andreas*, 463 U.S. 765 (1983) (reversing an

“state courts are fully capable of vindicating the rights of most citizens against governmental oppression when the ultimate responsibility” lies in their forum.¹²²

Others have echoed the view that individual liberties may more easily find refuge within the arms of the state judiciary. As recognized by Justice William Brennan, the historical “pattern of state court decisions puts to rest the notion that state constitutional provisions were adopted to mirror the federal Bill of Rights.”¹²³ He expounds:

State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court’s interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.¹²⁴

Recognizing the role state courts can play in upholding civil liberties, Brennan expressly urged state court judges to rest decisions on independent state law grounds so as to evade Supreme Court reversal.¹²⁵

Judge Jeffrey Sutton similarly remarked that individual rights may find greater protection in state court.¹²⁶ He explained that “[a] narrative assuming that only politically insulated judges will protect politically disfavored rights must account for a range of contrary state court decisions,”¹²⁷ and supported his conclusion with several examples where, through either legislative response or court decisions, the States have chosen to recognize individual rights not recognized by

Illinois Appellate Court decision that a warrantless search violated the defendant’s Fourth Amendment rights), *Illinois v. Lafayette*, 462 U.S. 640 (1983) (reversing an Illinois Appellate Court decision), *Illinois v. Gates*, 462 U.S. 213 (1983) (reversing an Illinois Supreme Court decision to suppress evidence), and *Texas v. Brown*, 460 U.S. 730 (1983) (reversing a Texas Court of Appeals decision that a warrantless seizure was not justified under the Fourth Amendment).

122. Wright, *supra*, note 98, at 181.

123. Brennan, *supra* note 39, at 501.

124. *Id.* at 491.

125. *See id.* at 503.

126. *See* Sutton, *supra* note 66, at 703.

127. *Id.*

their federal counterpart.¹²⁸ In *Kelo v. City of New London*,¹²⁹ for example, the Supreme Court rejected plaintiffs' takings claims and, in doing so, severely limited the ability of citizens to challenge the government's use of its eminent domain power.¹³⁰ The National Conference of State Legislatures notes that forty-two states have enacted legislation between 2005 and 2011 in response to the *Kelo* decision.¹³¹ Although these post-*Kelo* enactments address a wide range of issues,¹³² they share a common concern: the Federal Constitution, as interpreted by the *Kelo* decision, does not do enough to uphold the property rights of their citizens. Similarly, in *San Antonio Independent School District v. Rodriguez*,¹³³ the Supreme Court declined to declare education a fundamental right.¹³⁴ Nevertheless, plaintiffs in forty-five states have challenged their state's system of funding public schools on state-constitutional grounds, using their state constitutions as vehicles to assert educational rights.¹³⁵ These suits have been successful in twenty-eight states and, "in the process compelled legislatures to adopt a host of additional reforms."¹³⁶

Regarding religious liberty, Justice Christine Durham of the Utah Supreme Court has stated that "generally, state constitutions currently afford a friendlier venue for litigants."¹³⁷ Her comments come in the context of the state response to the Su-

128. *Id.* at 703–704.

129. 545 U.S. 469 (2005).

130. *Id.* at 489.

131. *Eminent Domain Overview*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/issues-research/env-res/eminent-domain-overview.aspx>, [<http://perma.cc/Q567-JZYV>].

132. According to the National Conference of State Legislatures, the laws and ballot measures generally fall into the following five categories: restricting the use of eminent domain for economic development, enhancing tax revenue, or transferring private property to another private entity; defining what constitutes public use; establishing additional criteria for designating blighted areas subject to eminent domain; strengthening public notice, public hearing, and landowner negotiation criteria; and requiring compensation at greater than fair-market value. *Id.*

133. 411 U.S. 1 (1973).

134. *See id.* at 58–59.

135. Jeffrey S. Sutton, *San Antonio Independent School District v. Rodriguez and Its Aftermath*, 94 VA. L. REV. 1963, 1974 (2008).

136. *Id.*

137. Christine M. Durham, *What Goes Around Comes Around: The New Relevancy of State Constitution Religion Clauses*, 38 VAL. U. L. REV. 353, 370 (2004).

preme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*,¹³⁸ which held that neutral, generally applicable laws are not subject to strict scrutiny when challenged on free exercise grounds.¹³⁹ She explains that after *Smith* was decided, "several state courts began to discard their history of reliance on federal precedent and to turn to the language of their state constitutions in religious liberty cases" and that "[a]t least ten state supreme courts have used a heightened scrutiny standard in their state constitutional analysis."¹⁴⁰

Even though we often look to the Supreme Court as the final word on important legal issues, the Supreme Court's own case law suggests that state courts play an important role in addressing salient legal questions regarding the status of individual rights. In *Cruzan v. Director, Missouri Department of Health*,¹⁴¹ for example, the Supreme Court addressed the constitutional right to refuse medical treatment and its applicability to a woman in a persistent vegetative state.¹⁴² To determine the scope of that right, however, the Court considered precedent from numerous state supreme courts, which had previously addressed the issue.¹⁴³ As another example, the Supreme Court's recent decisions in *Hollingsworth v. Perry*¹⁴⁴ and *United States v. Windsor*¹⁴⁵ came on the heels of many years of state court decisions addressing the issue of gay marriage. Indeed, in both of these decisions, the Court in large part chose to leave the issue up to the States.¹⁴⁶

138. 494 U.S. 872 (1990).

139. *See id.* at 879.

140. Durham, *supra* note 137, at 366; *see also* Sutton, *supra* note 66, at 704 ("Since *Smith*, twelve state supreme courts have held that their constitutions provide greater protection for free exercise of religion."); Daniel A. Crane, *Beyond RFRA: Free Exercise of Religion Comes of Age in the State Courts*, 10 ST. THOMAS L. REV. 235, 245–47 (1998).

141. 497 U.S. 261 (1990).

142. *Id.* at 265.

143. *See id.* at 269–77 (citing cases from the Court of Appeals of New York, the Supreme Court of New Jersey, the California Court of Appeal, the Supreme Court of Minnesota, and the Supreme Court of Illinois).

144. 133 S. Ct. 2652 (2013).

145. 133 S. Ct. 2675 (2013).

146. Chief Justice Roberts makes this point in his dissenting opinion in *Windsor*: "The Court does not have before it, and the logic of its opinion does not decide, the distinct question whether the States, in the exercise of their 'historic and essential authority to define the marital relation,' may continue to utilize the traditional

In sum, there have been many times when advocates turned to state courts to seek protection for individual rights.

IV. CONCLUSION

I do not believe I could do any better in closing than this quotation from J. Skelly Wright:

I invite those of my colleagues in the federal judiciary who, like me, have tended to deprecate the state courts, to embark on a fresh approach—in which arrogant distrust gives way to respectful appreciation of how much state judges *have done* and *can do* to vindicate liberty and equality for all our people.¹⁴⁷

definition of marriage.” *Id.* at 2696 (Roberts, C.J., dissenting) (citation omitted); see also Randy Barnett, *Federalism marries liberty in the DOMA decision*, SCOTUSBLOG (June 26, 2013, 3:37 PM), <http://www.scotusblog.com/2013/06/federalism-marries-liberty-in-the-doma-decision/>, [<http://perma.cc/97QD-XF86>] (commenting that, as a result of the decision in *Windsor*, states “are free to define marriage as they wish (subject to Equal Protection and Due Process clause restraints), and the fight over ‘gay marriage’ will continue in the states for years”).

147. Wright, *supra* note 98, at 188.