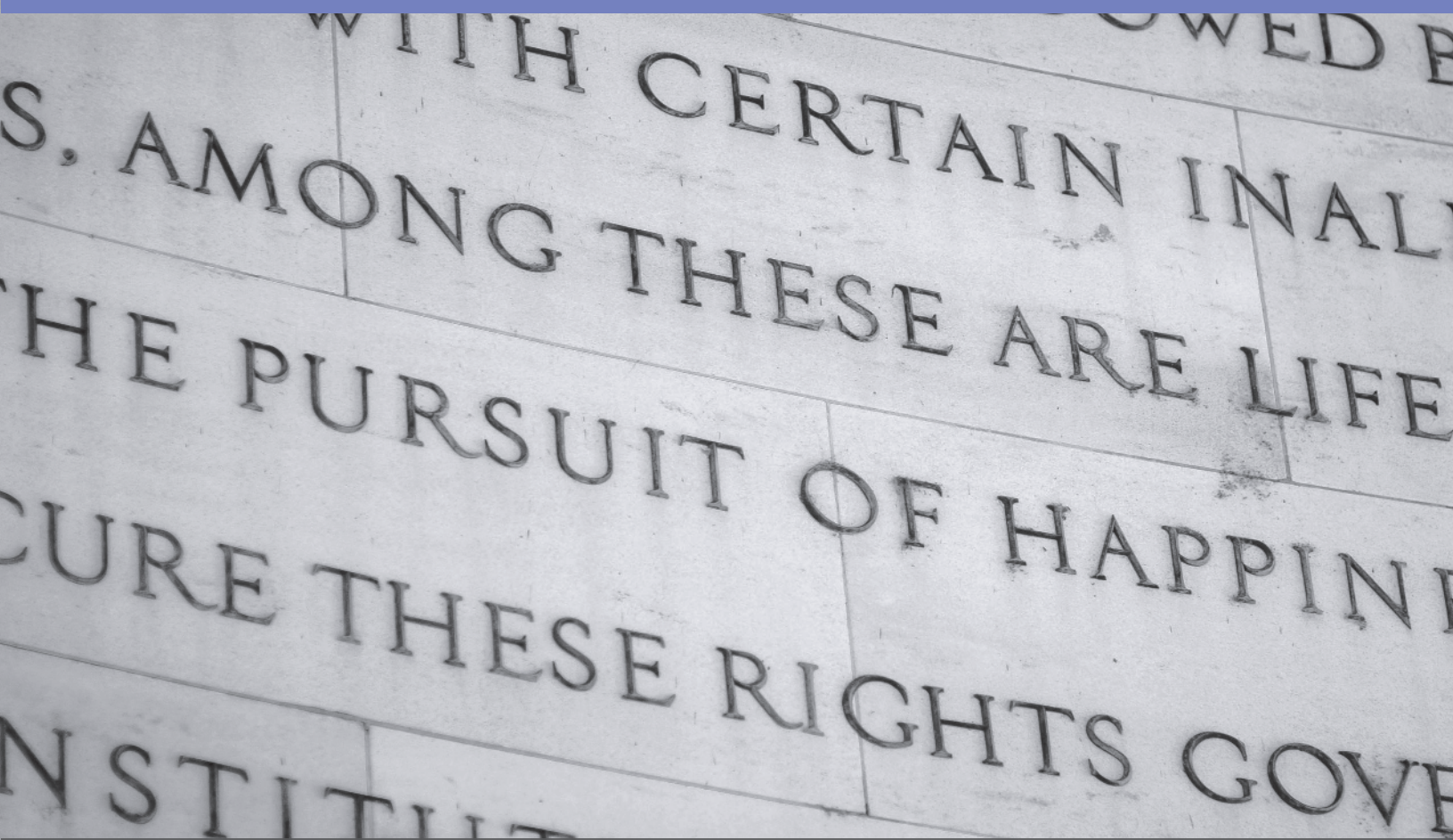


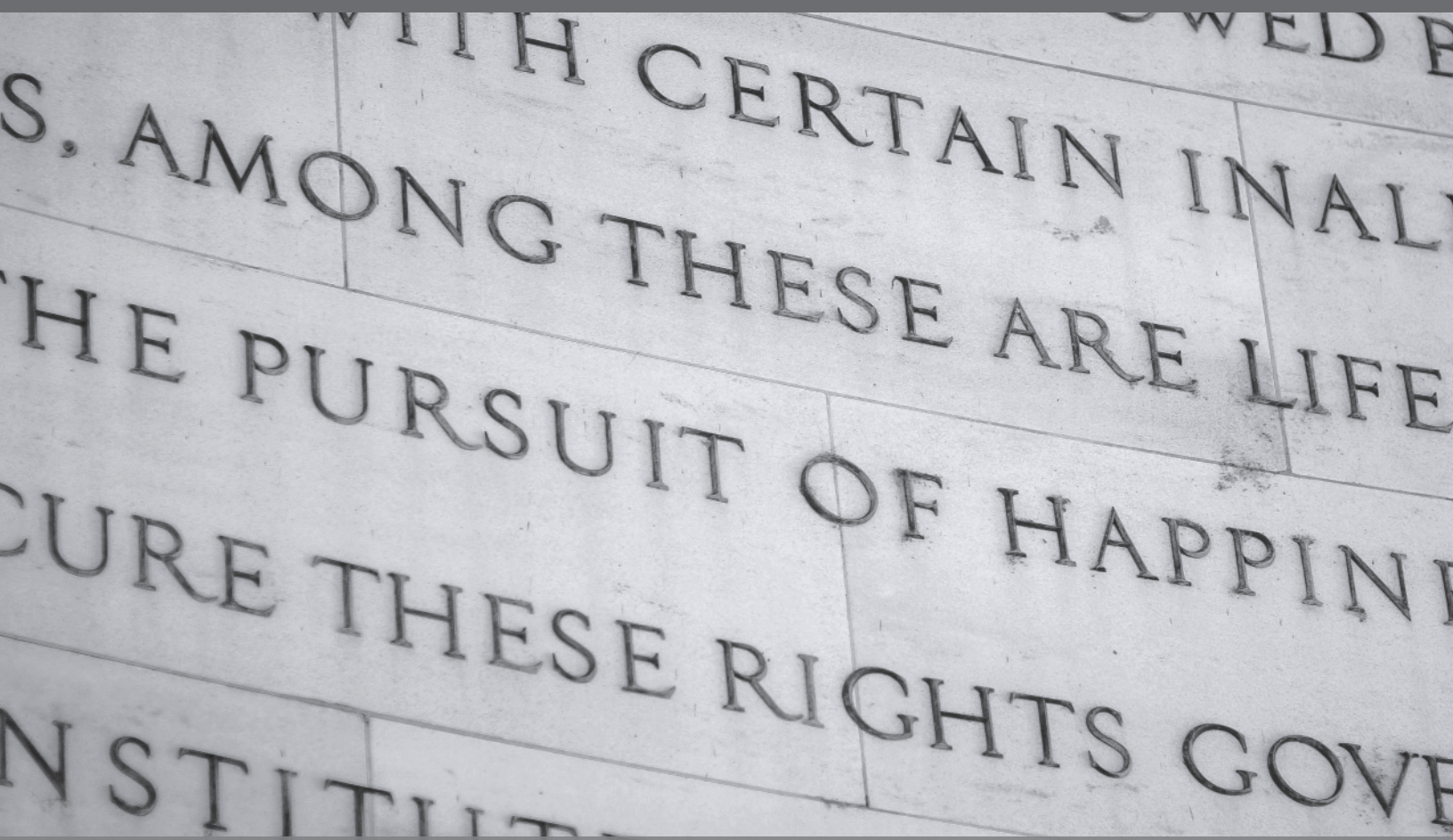
# STATE COURT PROTECTION OF INDIVIDUAL CONSTITUTIONAL RIGHTS



2018 FORUM FOR STATE APPELLATE COURT JUDGES



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“The one-size-fits-all approach may make sense on the federal level, but there are other issues where it could be very different state-by-state, let alone within a state. I think we need to protect our sovereignty as state courts.”

—A judge attending the 2018 Forum

“*Daubert* was a federal case, right? And yet, almost every state in this room adopted it. I think this is illustrating what the state judiciary does not do, and that is we don’t stay true to ourselves sometimes. I think it’s important, based on the papers we’ve had at the Forum today, that we stay true to our own constitution.”

—A judge attending the 2018 Forum

“If the judiciary doesn’t do what the state constitution asks it to do, then somebody else will take that power. The power doesn’t just go away.”

—A judge attending the 2018 Forum



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# Foreword

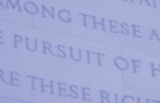
The Pound Civil Justice Institute's twenty-sixth Forum for State Appellate Court Judges was held on July 7, 2018, in Denver, Colorado. As with all of our past forums, it was both enjoyable and thought-provoking. In the Forum setting, judges, practicing attorneys, and legal scholars considered crucial issues in state constitutionalism, including how state constitutions may be invoked to protect individual rights and access to justice in areas in which the Federal Constitution is less effective.

The Pound Institute recognizes that state courts have the principal role in the administration of justice in the United States, and that they carry by far the heaviest of our judicial workloads. We try to support them in their work by offering our annual Forums as a venue where judges, academics, and practitioners can have a brief, pertinent dialogue in a single day. These discussions sometimes lead to consensus, but even when they do not, the exercise is inevitably fruitful. Forum attendees always bring with them different points of view, and we make additional efforts to include panelists with outlooks that differ from those of most of the Institute's Fellows. That diversity of viewpoints emerges in our Forum reports.

Our Forums for State Appellate Court Judges have been devoted to many cutting-edge topics, ranging from the court funding crisis to the decline of jury trial, to separation of powers, rulemaking, forced arbitration, and judicial transparency. We are proud of our Forums, and are gratified by the increasing attendance we have experienced since their inception, as well as by the very positive comments we have received from judges and faculty members who have participated. A full listing of the prior Forums is provided in an appendix to this report, and their reports and research papers—along with most of our other publications—are available for free download on our website: [www.poundinstitute.org](http://www.poundinstitute.org).

The Pound Institute is indebted to many people for the success of the 2018 Forum for State Appellate Court Judges:

- Professor Robert Williams and Professor Justin Long, who wrote the papers that started our discussions;
- Hon. Monica M. Márquez, Justice of the Colorado Supreme Court, for welcoming us to Denver;
- our lunch keynote speaker, Hon. Goodwin Liu of the California Supreme Court, for an inspiring discussion on the importance of state constitutions in protecting individual rights;
- our panelists—Hon. Judy Cates, John Cuttino, Hon. Noma D. Gurich, John Lebsack, Jonathan Marshfield, Andre Mura, Robert Peck, and Hon. David Schuman;
- the moderators of our small-group discussions—Linda Miller Atkinson, Leslie Brueckner, Kathryn Clarke, Caragh Fay, Tom Fay, Michelle Kranz, Pat Malone, Wayne Parsons, Gale Pearson, Alinor Sterling, John Vail, and David Wirtes;

- 
- and the Pound Civil Justice Institute’s dedicated and talented staff—Mary Collishaw, our executive director, and Jim Rooks, our Forum reporter—for their diligence and professionalism in organizing and administering the 2018 Judges Forum.

It goes without saying that we appreciated the participation of the distinguished group of judges who took time from their busy schedules so that we might all learn from each other. We hope you enjoy reviewing this report of the Forum, and that you will find it useful to you in your consideration of matters relating to state constitutionalism.



Ellen Relkin

President, Pound Civil Justice Institute, 2016-18

# Introduction

On July 7, 2018 in Denver, Colorado, 140 judges, representing 36 states, took part in the Pound Civil Justice Institute's twenty-sixth annual Forum for State Appellate Court Judges.

The judges examined the topic of "State Court Protection of Individual Constitutional Rights." Their deliberations were based on original papers written for the Forum by Professor Robert F. Williams of Rutgers University of School of Law and Director of its Center for State Constitutional Studies ("State Constitutional Protection of Civil Litigation"), and Professor Justin R. Long of Wayne State University Law School ("State Constitutional Structures Affect Access to Civil Justice"). The papers were distributed to participants in advance of the meeting, and the authors made less formal oral presentations of their papers to the judges during the plenary sessions.

The paper presentations were followed by discussion by panels of distinguished commentators: Hon. David Schuman, Senior Judge, Oregon Judicial Department, and Professor of Practice at the University of Oregon Law School; Hon. Noma D. Gurich, Oklahoma Supreme Court; John E. Cuttino, Immediate Past President of DRI—The Voice of the Defense Bar; Robert S. Peck, President of the Center for Constitutional Litigation; Prof. Jonathan Marshfield, University of Arkansas School of Law; Hon. Judy Cates, Illinois Fifth District Court of Appeal; John Lebsack of White & Steele, P.C.; and Andre M. Mura of the Gibbs Law Group, LLP. All provided incisive comments on the issues based on a wealth of diverse experience in the law. The Forum was moderated by Institute President Ellen Relkin, an appellate attorney with Weitz & Luxenberg in New York City and New Jersey.

The judges also heard a luncheon keynote address by Hon. Goodwin Liu, Justice of the California Supreme Court, based upon his 2017 New York University Law Review article, "State Constitutions and the Protection of Individual Rights: A Reappraisal."

After each plenary session, the judges separated into small groups to discuss the issues, with Fellows of the Pound Institute serving as group moderators. The paper presenters and commentators visited the groups to share in the discussion and respond to questions. The discussions were recorded electronically and transcribed. Under ground rules set in advance of the discussions, comments by the judges were not made for attribution in this report of the Forum. A representative selection of the judges' comments appears in this report.

At the concluding plenary session, the Forum Reporter, James E. Rooks, Jr., summarized points of apparent agreement among the judges, and all participants in the Forum had a final opportunity to make comments and ask questions.

This report is based on the papers written and presented by Professors Williams and Long, and on transcripts of the Forum's plenary sessions and group discussions.



James E. Rooks, Jr.  
Forum Reporter

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# Welcome Remarks

## Honorable Monica M. Márquez Justice of the Colorado Supreme Court

On behalf of our Chief Justice, Ben Coats, and Colorado Court of Appeals Chief Judge Alan Loeb, we welcome you to Denver and the Pound Civil Justice Institute's 2018 Forum. We hope you enjoy your stay here.

Are you adjusting to the altitude? Good. I have two words: water, and water. So, keep drinking it. That will help anyone adjust who is feeling a little out of kilter today.

I do know some of you, but for everyone else I have a quick story by way of introduction, and I'll share it because my colleague, Judge Stephanie Dunn on the Court of Appeals, is here and is part of it.

Some years ago, I attended the NYU program for new appellate judges. I imagine many of you have been there. At dinner on the first night we went around the room and introduced ourselves, and I stood up and announced, "Hello, everyone, I am Monica Márquez, from the Colorado Supreme Court." Judge Dunn was there and she confessed to me a couple of days later that someone leaned over at her table in the back of the room and said, "Seriously? She looks like she's twelve years old."

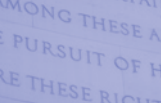
No, I am not a law clerk. Yes, I have been mistaken for one in our courtroom and in our courthouse several times over the last several years. But I have now wrapped up my eighth term on our court and I am happy to report I did survive all of the early hazing from my fellow justices. I picked up a couple of nicknames early on, like "Kid Justice" and "Baby J," which they were going to put on the back of my robe for our first portrait. But, with an unusual string of retirements and some unexpected departures for greener federal pastures, I have not only made the turn to the senior side of the table but, as of Monday, I will be the senior justice on the court next to our chief.

But the really good news is that I have finally started to sprout just a little bit of grey hair, and along the way I discovered the real secret weapon: reading glasses. These add 10 years and, importantly, gravitas during oral arguments.

If you missed the opportunity to come visit our courthouse I encourage you to swing by on Monday or on a future trip. Our Judicial Learning Center is a museum-like space that's designed to teach visitors about the rule of law and the role that courts play in preserving it. There is really no facility quite like it in the United States, so if you are at all interested in civics education I encourage you to stop by and check out the facility. We will be happy to take you on a tour.

Thank you all for taking time out of your busy schedules to come to Denver and be here today. Our jobs are hard, and if my own experience is any indication, much of the time we have our heads down focused on the cases that are right in front of us. Conferences like this are a terrific opportunity for us to sit back for a moment





and look up, and look around. Today, we can unwind a bit, we can network, we can share ideas, and we can learn from each other and learn from our collective wisdom. All of you bring wonderfully unique experiences from your respective jurisdictions and that is going to enrich today's discussion.

I personally really enjoyed reading the papers for today's Forum. They caused me to reflect, not only on the apparent absence of a civil jury trial right in our own state constitution, but also on some of its other unique provisions that keep me and my colleagues very busy, including our taxpayer bill of rights and the somewhat more recent voter amendment permitting recreational use of marijuana. As one of several western states with a very robust citizen initiative process, our ever-changing state constitution keeps us on our toes.

As you head into today's conversations I would like to just leave you with one thought. I imagine many of you, like me, are asked to speak to community groups about the nature of your work. A few years ago, I was asked at one of those community gatherings what I felt was the greatest threat to our legal system, and at that time, I responded that I worried about the general erosion of trust in our civic institutions, including our courts. And in a systemic sense, I think that has grown worse. I fear for the ways in which the very polarized rhetoric of our day is starting to erode the rule of law itself.

If you stop and think about it, the rule of law is just an idea. It's just a principle, and it's sustained only by our collective belief in it and our collective responsibility to uphold it. Your work within our nation's legal system is vitally important, and is critical to its preservation, and I hope that today you come away from this conference energized by the discussions and the ideas that are shared here. Please know that our Colorado Supreme Court and our Court of Appeals value you and the tremendous work that you do in your respective states.

Thank you very much for coming to Colorado. Welcome to Denver, and enjoy today's Forum.

# Morning Paper, Oral Remarks, and Comments

## State Constitutional Protection of Civil Litigation<sup>1</sup>

**Robert F. Williams<sup>2</sup>, Rutgers Law School**

### Executive Summary

*In his Introduction, and in part II, Professor Williams reminds readers that the vast majority of civil litigation in America takes place in the state courts—and that the great bulk of the American constitutional system’s treatment of societal, economic, and moral issues is left to the “low visibility” constitutions and statutes of the fifty states. Those constitutions are constrained by the Federal Supremacy Clause, but there are many instances in which they provide more protective rights within their particular spheres than does their federal counterpart.*

*In part III, Williams focuses on the right of citizens to engage in litigation in the state courts, for which the U.S. Constitution provides very little direct protection. Although the Seventh Amendment secures the right to trial by jury in civil cases in the federal courts, it has never been “incorporated” into the Due Process Clause of the Fourteenth Amendment to apply to the states. Thus federal Seventh Amendment jurisprudence may provide useful perspective for state judges, but it is not binding on them.*

*In part IV, he briefly addresses the extent to which the U.S. Supreme Court has not only allowed, but has actually encouraged independent state court interpretation of state constitutions.*

*In part V, Professor Williams surveys rights afforded by state constitutions that can and do bear on civil litigation:*

- *“Right to remedy” and “open courts” provisions, which date back to Magna Carta and appear in 39 state constitutions. He discusses applications in Oregon, Florida, and elsewhere, in workers’ compensation litigation and “tort reform” challenges;*
- *Equal Protection provisions, which state constitutions incorporate in a variety of forms (not always conveniently labeled “equal protection”). He discusses Florida’s application of its equality guarantee;*
- *“Special laws” prohibitions, which prohibit state legislatures from conferring special treatment and advantages on particular groups, professions, and industries;*
- *Due Process clauses, which appear in most state constitutions;*
- *Civil jury trial guarantees, which have been invoked in controversies involving: questions of jury v. bench trial; forced, binding arbitration; limitations on voir dire, legislative limitation of damage awards (“damage caps”); and “no reexamination” clauses, which, in Oregon and West Virginia, prohibit re-examination by courts of facts found by juries, except as authorized by common law or existing court rule; and*

- *Miscellaneous state constitutional provisions that have been invoked to protect trial by jury in civil cases, including “no abrogation” clauses prohibiting the abolition of specific causes of action, prohibiting limitations on damage awards, and specifying that the determination of certain defenses (like assumption of risk) are fact questions to be left to the jury.*

*In part VI, Williams addresses the discrete question of punitive damages, which, since the late 1980s, has been treated by the U.S. Supreme Court as a matter implicating the federal Due Process Clause. Some state court punitive damage awards have been overturned in federal courts as violating due process because of their size and the factual context of the cases; others have been left in place. Under the Supremacy Clause, the state courts are less free to make their own decisions in this area than they once were.*

*In part VII, he considers “majoritarian” judicial review, through which state courts examine special-interest legislation. Far from engaging in the much-maligned “judicial activism” on behalf of minorities, majoritarian review seeks to protect the rights of majorities in, for example, the state courts’ review of state economic and regulatory enactments. Williams urges that lawyers who seek to protect civil litigation in the state courts, and judges who decide the resulting cases, keep this distinction in mind.*

*In his Conclusion (part VIII), Professor Williams points out that powerful economic interests are aligned against citizens’ access to civil litigation, and that a surprising number of their points of attack raise state constitutional concerns.*

---

Although the term “American Constitution” is often used synonymously with “Constitution of the United States,” the operational American constitution consists of the Federal Constitution and the 50 state constitutions. Together these 51 documents comprise a complex system of constitutional rule for a republic of republics.<sup>3</sup>

## I. Introduction: The Importance of State Constitutions

The U.S. Constitution is “incomplete” in the sense that it leaves to the states the great bulk of societal, economic, and moral issues to be treated within their “subnational” constitutional provisions and ordinary lawmaking powers.

A standard account of American constitutionalism portrays the United States Constitution as enumerating certain powers for the federal government and leaving residual, plenary power to the states and the people.<sup>4</sup> Thus, the U.S. Constitution is “incomplete” in the sense that it leaves to the states the great bulk of societal, economic, and moral issues to be treated within their “subnational” constitutional provisions and ordinary lawmaking powers. According to political scientist Daniel Elazar:

Were the Federal Constitution to stand alone, one could conclude that morality and government were entirely separated in the new American constitutional order. This is not, in fact, the case. Since both the Federal Constitution and the government it creates are incomplete and need the states to be complete, *we must also look at the state constitutions to see what kind of liberty they are committed to protecting and fostering.*<sup>5</sup>

Among the “liberty” interests that are thereby left to the states, and their state constitutions, are the rights of litigants in civil litigation heard by state courts. Of course many other matters of justice, such as workers’ compensation, are also left entirely to the states and their constitutions.<sup>6</sup> However, by contrast to the Federal Constitution, the constitutions of the states are “low-visibility” constitutions.<sup>7</sup> Therefore, lawyers and some state court judges hearing civil cases, particularly new judges, may be less familiar with their more relevant state constitutions than with the less-relevant Federal Constitution. This is a very important point because these less-understood state constitutions, rather than the Federal Constitution, contain far more protections for civil litigation.

In our American system of *federal* constitutionalism, the fifty state constitutions are constrained by the Federal Supremacy Clause, but they may also operate independently of federal constitutional rights guarantees to provide more protective rights within a particular state. This is a very important feature of our constitutional system, particularly with respect to constitutional protections for civil litigation, which are virtually absent from the United States Constitution. Generally speaking, the state constitutions provide rights guarantees that are redundant, in the best, most protective, sense of the word.<sup>8</sup>

This paper is not intended as a comprehensive catalog of state constitutional provisions protecting state civil litigation and cases interpreting them. Rather, it is intended as an introduction to such “low-visibility” constitutional provisions and the contexts where they may be applied. In the American legal system, where the vast majority of civil litigation takes place in *state* courts, and in the virtual absence of federal constitutional protections, it is the *state* constitutions that will provide the only line of protection. They should be taken very seriously.

## II. The Great Majority of Civil Litigation Takes Place in State Courts

It is well known that the vast majority of civil litigation, although currently declining slightly, is filed in our state courts.<sup>9</sup> Tort cases actually account for a fairly small percentage of the state court civil caseload.<sup>10</sup> When contract actions are included, it is clear that literally millions of civil actions are filed in the state courts. By contrast, in 2017, only slightly more than 292,000 civil actions of all kinds were filed in federal district courts.<sup>11</sup> It is thus clear that the basic duty to protect access to a fair system of civil litigation is a *state* duty. It is a duty that often must be shouldered by state *courts*.

## III. The Absence of State Civil Litigation Protections in the Federal Constitution

There is very little in the United States Constitution that provides protection for civil litigation in *state* courts. Broad federal constitutional guarantees of equal protection and due process provide little protection in this context of economic regulation and deference to the states.

There is very little in the United States Constitution that provides protection for civil litigation in state courts.

The Seventh Amendment to the United States Constitution provides: “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”<sup>12</sup> Many people, including some lawyers and judges, assume that this federal constitutional guarantee applies to civil litigation in state courts. Importantly, however, unlike the Sixth Amendment right to jury trial in criminal cases, that is not the case because the Seventh Amendment has never been “incorporated” into the Due Process Clause of the Fourteenth Amendment to apply to the states.<sup>13</sup> By contrast, virtually every state has at least one explicit guarantee of a right to jury trial in civil cases. So under the Federal Constitution there is, quite simply, no right to a jury trial in state civil cases. In other words, despite the “nationalization of civil liberties”<sup>14</sup> in the last half of the twentieth century, the Seventh Amendment is one of the very few provisions of the Federal Bill of Rights that has never been, and probably never will be, applied to the *states* so as to govern civil litigation in the state courts. It only applies to civil jury trials in *federal* court.

This is quite unusual, because, with most of the provisions of the Federal Bill of Rights, similar state constitutional guarantees are often (improperly) seen as “redundant,” or as a “fallback” source of rights.<sup>15</sup> By contrast, here, the *state* constitutional guarantees of jury trial rights serve as the primary, rather than as secondary, constitutional guarantees. As a consequence, although federal Seventh-Amendment cases can certainly be persuasive in state courts applying their state constitutional jury trial guarantees, such federal cases should not shine a “shadow”<sup>16</sup> or a “glare”<sup>17</sup> over the proceedings, as is often the case in other constitutional litigation. State court interpretation of state constitutional jury-trial rights thus proceeds in complete independence from federal interpretations of the Seventh Amendment.

Seventh Amendment jurisprudence may provide useful perspective for state judges interpreting their state constitutional civil jury trial guarantees, but it is in no sense binding.

Federal constitutional interpretations often exert a kind of “gravitational pull” on interpretations of identical or similar state constitutional provisions. However, according to Professor Scott Dodson:

Constitutional law often involves sensitive and important policy matters, on which local preferences tend to be stronger, more unified, and more extreme than national preferences. Further, state constitutions have a different history and erect a different governmental structure than the Federal Constitution. Finally, constitutional governance is the most prominent feature of popular sovereignty, a cherished American ideal.

These factors suggest that states should exercise independence in state constitutionalism, relying on the preferences of their particular populaces, with sensitivity to the nuances of their state governmental structures.<sup>18</sup>

Again, Seventh Amendment jurisprudence may provide useful perspective for state judges interpreting their state constitutional civil jury trial guarantees, but it is in no sense binding. State constitutional jury trial guarantees for civil litigation must be applied independently.



## IV. United States Supreme Court Approval of Independent State Constitutional Rights Decisions

The following 1982 statement by a Supreme Court *majority* is important:

As a number of recent State Supreme Court decisions demonstrate, a state court is entirely free to read its own State's constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee. *See generally* Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977), and cases cited therein.<sup>19</sup>

As indicated by the above quote, the United States Supreme Court is comfortable, or even in a sense encouraging, in its acknowledgement that state courts are free, under their own state constitutions, or even statutes, court rules, and common law, to render decisions that are more protective than the Supreme Court's interpretations of federal constitutional rights which establish a national minimum standard under the United States Constitution's Supremacy Clause.<sup>20</sup> Therefore, it is not only in the Court's *dissenting opinions* that state courts are encouraged to "diverge" from the national minimum standard of rights,<sup>21</sup> but also in the opinions of the majority members of the Court. Again, state judges should take heed of the Court's statements such as those quoted above, and similar statements such as: "Our reasoning in *Lloyd*, however, does not, *ex proprio vigore*, limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."<sup>22</sup> Justice Scalia, in a death penalty sentencing case, noted: "The state courts may experiment all they want with their own constitutions, and often do in the wake of this Court's decisions."<sup>23</sup> Based on all of these statements, state judges should not feel any discomfort in "going beyond" the Supreme Court or even in disagreeing with it in the process of interpreting their own state constitutions.

State courts are free, under their own state constitutions, or even statutes, court rules, and common law, to render decisions that are more protective than the Supreme Court's interpretations of federal constitutional rights which establish a national minimum standard.

## V. State Constitutional Rights in Civil Litigation

### A. Right to Remedy/Open Courts

At the time the Federal Bill of Rights was being considered, a guarantee of a "right to remedy," or "open courts," was considered but not proposed to the states.<sup>24</sup> These provisions, dating back to Magna Carta, appear in the state constitutions of thirty-nine states.<sup>25</sup>

#### 1. Oregon

The Oregon Supreme Court issued a very important remedy guarantee/open courts decision in 2001.<sup>26</sup> An employee filed for workers' compensation benefits, alleging that he sustained a "compensable injury" from

exposure to chemical mist and fumes in the workplace. His claim was rejected by the Workers' Compensation Board on the ground that the exposure to the mist and fumes was not a "major contributing cause" of his medical condition. The employee filed a tort action, but was met with a defense based on the "bar" contained in the workers' compensation statute. The circuit court agreed, observing that the state legislature had amended the workers' compensation law in 1995 to provide that, even if a worker's injury was not compensable, still no tort suit could be brought.<sup>27</sup>

On appeal, the Oregon Supreme Court held that that result violated the state constitution's right to remedy guarantee.<sup>28</sup> The court carried out an extensive historical analysis of the constitutional provision and concluded that it operated substantively to prohibit the legislature from abolishing a common-law cause of action without providing an adequate substitute. The court held:

Although this court has held that the remedy clause preserves common-law rights of action, *id.*, it never has held that the remedy clause prohibits the legislature from changing a common-law remedy or form of procedure, attaching conditions precedent to invoking the remedy, or perhaps even abolishing old remedies and substituting new remedies. *Id.* That is, the court never has held that the remedy clause freezes in place common-law remedies. However, just as the legislature cannot deny a remedy entirely for injury to constitutionally protected common-law rights, *id.*, neither can it substitute an "emasculated remedy" that is incapable of restoring the right that has been injured. . . .<sup>29</sup>

In 2016, the Oregon Supreme Court revisited this and several other issues in *Horton v. Oregon Health & Science University*<sup>30</sup>—a case that arose under the state Tort Claims Act where, without a legislative waiver, the governmental entity would have been protected by sovereign immunity. The court made a new analysis of the deep constitutional history behind remedy guarantee/open courts provisions, and this time concluded that the right to remedy clause did *not* impose substantive limits on the legislature's modification or elimination of common law claims.<sup>31</sup> The court concluded that, at least in the state tort claim context, the damage cap was constitutional.<sup>32</sup>

The *Horton* court appears to have taken care to avoid the appearance of an across-the-board holding in favor of damage caps. In *Bundy v. Nustar GP, LLC*,<sup>33</sup> the Oregon Supreme Court acknowledged the limit of its "overruling" of *Smothers*, writing that

[t]his court in *Horton* overruled the construction of the remedy clause on which *Smothers* relied. 359 Or. at 218. But *Horton* did not specifically overrule *Smothers*' ultimate holding that injured workers who "receive no compensation benefits" have a constitutional right to pursue a civil action for their injury. See *Smothers*, 332 Or. at 125.<sup>34</sup>

*Horton* has since been applied by the Oregon Court of Appeals to invalidate application of the cap on noneconomic damages in two cases: *Vasquez v. Double Press, Inc.*,<sup>35</sup> currently on review to the Oregon Supreme Court, and *Rains v. Stayton Manufacturing*.<sup>36</sup> It has also cited *Horton* to invalidate a portion of Oregon's dram shop act that eliminates a cause of action by an overserved patron who suffers injury as a result of his own intoxication.<sup>37</sup>

## 2. Florida

Florida's right to remedy guarantee, Article I, § 21 provides: "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." The Florida Supreme Court began its serious enforcement of this provision when the Florida Legislature enacted a no-fault automobile insurance statute, providing that there would be no remedy for property damage to an automobile under the amount of five hundred fifty dollars if the automobile was uninsured for such damage. In the landmark decision of *Kluger v. White*,<sup>38</sup> the Florida Supreme Court struck down this statutory limit on a negligence cause of action. The court annunciated the following test:

The legislature may eliminate or modify common-law or statutory remedies, but only if it provides an adequate substitute or can justify its change by an "overpowering public necessity."

We hold, therefore, that where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State . . . the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such a public necessity can be shown.<sup>39</sup>

This interpretation of the right-to-remedy clause can be seen as setting up a kind of "grand bargain" test: the legislature may eliminate or modify common-law or statutory remedies, but only if it provides an adequate substitute or can justify its change by an "overpowering public necessity."<sup>40</sup>

*Kluger* set the stage for the development of an independent state constitutional jurisprudence of the right to remedy in Florida. A line of cases dealing with limitations on causes of action, or on damages, has ensued, and is very much alive today.

In 1987 the Florida Supreme Court struck down a "tort reform" provision capping all noneconomic damages under the authority of *Kluger*.<sup>41</sup> The court concluded that the statute failed to provide any "commensurate benefit" for imposition of the damage cap.<sup>42</sup> The statute failed the "grand bargain" test and was held unconstitutional.

Appearing in the constitutions of thirty-nine states, the right-to-remedy or open-court provisions appear to be the most widely available protections for civil litigation in state courts.

However, in 1993 the Florida Supreme Court upheld, under the *Kluger* test, a statute imposing a cap on noneconomic damages in medical malpractice claims *when a party requests arbitration*.<sup>43</sup>

The court found that the arbitration statutes did provide a "commensurate benefit,"<sup>44</sup> and that, in any event, the "medical malpractice insurance crisis" provided an "overpowering public necessity" justifying the damage cap.<sup>45</sup> Thus, it held, the statute passed the "grand bargain" test.

### 3. Other states

Again, appearing in the constitutions of thirty-nine states, the right-to-remedy or open-court provisions appear to be the most widely available protections for civil litigation in state courts.<sup>46</sup> There is very complete, fifty-state coverage of this, and many other state constitutional rights provisions, in Professor Jennifer Friesen's treatise,<sup>47</sup> as well as extensive law review literature.<sup>48</sup> A key question under these provisions is whether they operate to limit substantive legislation interfering with civil litigation or, rather, only protect procedural rights in the judicial branch.<sup>49</sup> The latter is a minority view, but it is reflected in Oregon's recent *Horton* decision.<sup>50</sup>

### B. "Equal Protection"

The Fourteenth Amendment's Equal Protection Clause certainly applies to the states, but is among the most "underenforced" provisions in the Federal Constitution.<sup>51</sup> By contrast, states have a variety of equality guarantees, many of which do not even refer to "equal protection."<sup>52</sup> The Florida Supreme Court has rendered a number of very important civil litigation decisions applying the rational basis test under its state constitutional equality provision.<sup>53</sup> For example, in 2014 the court struck down a statutory cap on noneconomic damages in wrongful death actions.<sup>54</sup> The court, in a very important decision, took issue with the legislature's finding that there was a "medical malpractice insurance crisis."<sup>55</sup> It stated:

To satisfy the rational basis test, a statute must bear a rational and reasonable relationship to a legitimate state objective, and it cannot be arbitrary or capriciously imposed. . . . Stated another way, the test for consideration of equal protection is whether individuals have been classified separately based on a difference which has a reasonable relationship to the applicable statute, and the classification can never be made arbitrarily without a reasonable and rational basis.<sup>56</sup>

The court found that the damage cap failed even the rational basis test because "it imposes unfair and illogical burdens on injured parties when an act of medical negligence gives rise to multiple claimants." Plaintiffs who are not seriously injured receive full compensation, whereas seriously injured plaintiffs may not receive full compensation even if suing individually. If they are litigating along with multiple claimants, they are even less likely to receive full compensation.

The court relied on an earlier decision striking down a damage cap under the same equality analysis.<sup>57</sup> Finally, the court relied on similar decisions from other states applying their state constitutional limits to strike down damage caps.<sup>58</sup> The court concluded that the damage cap "has the effect of saving a modest amount for many by opposing devastating costs on a few—those who are most grievously injured, those who sustain the greatest damage and loss, and multiple claimants for whom judicially determined noneconomic damages are subject to division and reduction simply based on the existence of the cap."<sup>59</sup> The court distinguished its right-to-remedy jurisprudence from this line of equality jurisprudence.<sup>60</sup> Finally, the court rejected the legislature's stated rationale for the damage cap: that there was a "medical malpractice insurance crisis."<sup>61</sup>

In *McCall*, the Florida court quoted with approval Illinois and Texas cases striking down statutory limits on noneconomic damages. The Texas decision<sup>62</sup> responded to a certified question from the Fifth Circuit, concluding that a statutory cap on medical malpractice damages violated the Texas Constitution's right to remedy clause. The

Illinois case<sup>63</sup> noted that such a cap arbitrarily discriminates between slightly and severely injured persons, as well as tortfeasors who cause severe or minor injuries.<sup>64</sup> The court relied on the state constitution's ban on "special laws," which, like equality clauses, prohibits arbitrary legislative classifications.<sup>65</sup>

Then, in 2017 the Florida Supreme Court, relying on its earlier decision, struck down similar statutory caps on noneconomic damages in medical malpractice personal injury cases.<sup>66</sup> Placing significant reliance on its 2014 decision, the court held:

We conclude that the caps on noneconomic damages in sections 766.118(2) and (3) arbitrarily reduce damage awards for plaintiffs who suffer the most drastic injuries. We further conclude that because there is no evidence of a continuing medical malpractice insurance crisis justifying the arbitrary and invidious discrimination between medical malpractice victims, there is *no rational relationship* between the personal injury noneconomic damage caps in section 766.118 and alleviating this purported crisis.<sup>67</sup>

In 2016, in a workers' compensation context, the Florida Supreme Court considered a gap between the statutory 104-week cap on temporary total disability benefits and the point at which a claimant reached "maximum medical improvement but is totally disabled." The injured worker would have no benefits during that period. The Florida Supreme Court struck down that statutory provision, citing *Kluger*.<sup>68</sup> The court stated:

The "reasonable alternative" test is then the linchpin and measuring stick, and this Court has undoubtedly upheld as constitutional many limitations on workers' compensation benefits as benefits have progressively been reduced over the years and the statutory scheme *changed to the detriment of the injured worker*.

But, there must eventually come a "tipping point," where the diminution of benefits becomes so significant as to constitute a *denial* of benefits—thus creating a constitutional violation.<sup>69</sup>

Where totally disabled workers can be routinely denied benefits for an indefinite period of time, and have no alternative remedy to seek compensation for their injuries, something is drastically, fundamentally, and constitutionally wrong with the statutory scheme.<sup>70</sup>

By contrast to constitutional provisions that guarantee equality and protect individual rights, bans on special laws operate as a limitation on legislative action itself.

## C. Prohibited Special Laws

By contrast to constitutional provisions that guarantee equality and protect individual rights, bans on special laws operate as a limitation on legislative action itself.<sup>71</sup> In *Best*, the Illinois court stated: "The special legislation clause expressly prohibits the General Assembly from conferring a special benefit or exclusive privilege on a person or a group of persons to the exclusion of others similarly situated."<sup>72</sup> The court linked its interpretation of the special laws ban to equal protection analysis,<sup>73</sup> and applied a *rational basis* analysis to strike down the noneconomic damage cap.<sup>74</sup>



In 2016, when Oklahoma adopted a workers' compensation "opt-out" law permitting employers to develop their own worker-protection programs, under statutory guidelines that were substantially less protective than the workers' compensation statute, the Oklahoma Supreme Court struck it down as a prohibited "special law."<sup>75</sup> Article II, section 59 of the Oklahoma Constitution provides: "Laws of a general nature shall have a uniform operation throughout the State, and where a general law can be made applicable, no special law shall be enacted."<sup>76</sup> The court stated:

The statutory language itself demonstrates that injured workers under the Opt-Out Act have no protection to the coverage, process, or procedure afforded their fellow employees falling under the Administrative Workers' Compensation Act. There is little question that 203 specifically allows the employers creating their own plans to include conditions for recovery making it more difficult for the injured employee falling within to recover for a work-related injury than a counterpart covered by the Administrative Act.<sup>77</sup>

Then, in 2018, the Oklahoma Supreme Court addressed a provision in the separate Workers' Compensation Act that was enacted together with the Opt-Out Act. It contained a provision deeming operators or owners of oil or gas wells to be (absent an actual employment relationship) an "intermediate or principal employer" of those providing services under different employers, thereby barring common law actions. The court struck this down as a special law:

State due process clauses have been invoked to protect, *inter alia*, civil litigation rights.

The last sentence of §5(A) carves out a special subclass of employers, specifically oil and gas employers who are *automatically* deemed principal employers and given immunity in the district court regardless of whether the employer would be considered a principal employer under the facts of the case. All other employers seeking

immunity from civil liability under the principal employer doctrine must present factual proof that a statutory employment relationship exists pursuant to the necessary and integral test. . . . Without a distinctive characteristic that actually warrants differential treatment, the distinction is considered arbitrary and will not withstand constitutional scrutiny.<sup>78</sup>

## D. Due Process

State due process clauses have been invoked to protect, *inter alia*, civil litigation rights. In Florida, the state legislature imposed a strict fee scale for workers' attorneys in workers' compensation cases, but not for employers' attorneys. This statute eliminated the prior "reasonableness" standard and imposed a rigid formula.<sup>79</sup> In *Castellanos v. Next Door Co.*, despite the supposed "no fault" character of workers' compensation, the claimant's lawyer confronted at least twelve defenses, and spent over one hundred hours before obtaining a favorable result. Application of the rigid formula resulted in an attorney's fee of \$1.53 per hour!<sup>80</sup> Characterizing the result of the statutory schedule as an "irrebuttable presumption" of reasonableness, the Florida Supreme Court struck down the "award" as unconstitutional on its face, under both the state and federal due process clauses.<sup>81</sup> The court stated that ". . . in reality, the workers' compensation system has become increasingly complex *to the detriment of the claimant* who depends on the assistance of a competent attorney to navigate the thicket."<sup>82</sup>

And in *Maxwell v. Sprint PCS*,<sup>83</sup> the Oklahoma Supreme Court held that the deferral of permanent partial disability payments to workers who return to work, under the Administrative Workers' Compensation Act, is both a due process violation under article 2, section 7 of the state constitution and an unconstitutional special law under article 5, section 59.

## E. Right to Civil Jury Trial

Jury trials and access to the courts more generally have sustained unwarranted decades-long attacks. Assaults on these fundamental cornerstones of our civil justice system have not just warped the views of the public and policymakers, but also insinuated themselves into the outlooks of the academy and the judiciary, undermining the fundamental and critically important role that juries and litigation play in securing liberty, equality, and justice.<sup>84</sup>

All state constitutions, other than those of Colorado and Louisiana, protect the right to civil jury trial.

All state constitutions, other than those of Colorado and Louisiana, protect the right to civil jury trial.<sup>85</sup>

### 1. Jury v. Bench Trial

A central jury trial issue is which claims or defenses give rise to a right that they be heard by a jury. In Oregon, for example, despite the Article I, section 17 “inviolable” language, the Oregon Supreme Court held that a party does not have a right to jury trial for claims or defenses that would have been tried to a court of equity in 1857 when the Oregon Constitution was adopted.<sup>86</sup> On the other hand, there is a right to jury trial in cases where this was customary at the time the state constitution was adopted, and in “cases of like nature as they may hereafter arise.”<sup>87</sup> The New Jersey Supreme Court held that modern statutory claims, such as those arising under the state law against discrimination, do not require a right to jury trial.<sup>88</sup> Notably, however, after that ruling the New Jersey Legislature enacted a *statutory* right to jury trial in such cases.<sup>89</sup> The New Jersey Supreme Court also held that claims against insurance companies for bad-faith refusal to settle claims were, essentially, traditional breach of contract cases that carried a right to jury trial.<sup>90</sup>

### 2. Binding Arbitration

In 2013, the New Jersey Supreme Court struck down a statute that compelled parties seeking damages from public utilities to their underground facilities to submit such claims to binding arbitration.<sup>91</sup> The court concluded that such claims for damages were essentially common-law negligence actions, and were therefore guaranteed a right to trial by jury under the New Jersey Constitution.<sup>92</sup> The court noted that “[i]t is well-established that this protection applies to civil cases only where the right to a jury trial existed at common law and does not normally apply to cases in equity.” The court continued: “[o]nly those actions that triggered the right of a jury trial that predated our State Constitutions, and those that were created anew with the enactment of New Jersey’s 1776 Constitution, the 1844 Constitution, or the 1947 Constitution serve as the basis for that constitutional right today.”<sup>93</sup>

### 3. Limits on Voir Dire

Article II, Section 12 of the New Mexico Constitution provides: “The right to trial by jury as it has heretofore existed shall be secured to all and remain inviolate.” That provision applies to both the legislature and the courts. Ordinarily, when it is applied to the legislature, it provides a *facial* limitation on statutes limiting the right to jury trial. It also applies to the judicial branch and restricts it from diminishing the right to trial by jury. When a court deprives a litigant of the benefit of a jury trial, it violates the constitution as clearly as any statute. The difference

between the legislature and the courts is that judicial intrusions on the right to jury trial are likely to occur in individual cases and thus be examined as *applied* in any given case.

The contest over “tort reform” has been waged in the forum of public opinion.

The history of the right to jury trial in New Mexico and throughout the United States demonstrates full judicial recognition of the importance of assuring that a jury panel is impartial as a whole, and that each member of a petit jury is impartial. In order for a trial court to assure itself that this critical element of trial by jury is satisfied in a given case, the court must assure that juror biases are adequately explored and that litigants have a fair opportunity to exercise challenges for cause and peremptory challenges. This remains central to fair trials even though the number of them has been shrinking.<sup>94</sup>

In medical malpractice cases, the trial court’s refusal to permit plaintiff’s counsel to question prospective jurors about the alleged “malpractice crisis,” “tort reform” propaganda, and related issues, or to adopt another method of exploring potential juror bias, constitutes a denial of the right to an impartial jury *as a matter of law*. Counsel should be able to ask about prospective jurors’ relationship to the medical field, knowledge of the case due to pretrial publicity, attitudes about medical malpractice and about people who sue doctors, relationship to persons disabled by such things as brain injury, and experiences with side effects from prescription drugs.

The contest over “tort reform” has been waged in the forum of public opinion.<sup>95</sup> In a very important study, Stephen Daniels and Joanne Martin observed:

Tort reform, it now seems, is a permanent fixture of the political agenda . . . . While the reformers are, of course, seeking sympathetic rule-makers and favorable rule changes, they also want to affect the way in which the media, intellectuals, key elites, and ultimately the public at large think about the civil justice system. Consequently, this “war” has always been waged on multiple fronts, in legislatures, in the courts, in elections, in the worlds of various elites, including academe, and in the world of public perception. More than just the formal legal changes it seeks, tort reform has always been about altering the cultural environment surrounding civil litigation—e.g., what is perceived as an injury; whether and whom to blame for an injury; what to do about it; and even how to respond to what others (especially plaintiffs and their lawyers) do with regards to naming and blaming. The best evidence of this is found in the various public relations campaigns used by the reform interests since at least the 1970s to persuade people that the reformers’ vision of civil litigation is the true rendition, and should guide both policy-makers and ordinary people (especially if they serve on a jury).<sup>96</sup>

Daniels and Martin evaluated the public relations campaigns for “tort reform” (i.e. against tort litigation) and concluded that it potentially poisoned jury pools.<sup>97</sup> Plaintiffs’ lawyers<sup>98</sup> and defense lawyers<sup>99</sup> are aware of this probability. The only way for plaintiffs’ lawyers to counter this misinformation is through effective, case-specific voir dire.<sup>100</sup>

When various “tort reform” measures included caps on, most commonly, noneconomic damages, challenges were brought based on the state constitutional guarantee that the right to a jury trial in civil litigation must remain “inviolable.”

A Washington Court of Appeals medical malpractice decision, *Lopez-Stayer v. Pitts*,<sup>101</sup> is instructive. The trial court permitted inquiry on voir dire into “juror’s attitudes on medical malpractice litigation, the medical malpractice crisis, claims, and frivolous lawsuits.”<sup>102</sup> In upholding this line of questioning, the court acknowledged the difficulty of reviewing the trial court’s management of voir dire “because of the nuances and subtleties presented by each jury case,”<sup>103</sup> but concluded that “The test is whether the court permitted the plaintiff here to ferret out bias and partiality.”<sup>104</sup>

Two other important scholars have contended that “the identification of potential biases in prospective jurors is one of the most important tasks in the trial.”<sup>105</sup> Such biases can be particularly important in medical malpractice cases, and therefore trial court methods of choosing an impartial jury must be attentive to “case-specific” factors: “If a hospital patient is suing a surgeon for medical malpractice, attitudes toward authority figures and especially the medical profession become salient.”<sup>106</sup> The Florida courts have, in numerous instances, overturned trial courts’ arbitrary voir dire time limits of 45 or 30 minutes.<sup>107</sup>

#### 4. Right to Jury Trial and Damage Caps

When various “tort reform” measures included caps on, most commonly, noneconomic damages, challenges were brought based on the state constitutional guarantee that the right to a jury trial in civil litigation must remain “inviolable.”<sup>108</sup> The Oregon Supreme Court ruled in *Lakin v. Senco Products, Inc.*,<sup>109</sup> that such a damage cap was unconstitutional as violative of the successful plaintiffs’ jury trial rights. The court reviewed the origins of the right to jury trial in civil cases, dating from England, and concluded that the jury’s fact-finding function included a full assessment of damages, including noneconomic damages, and the statutory cap was an unconstitutional violation of the right to jury trial.<sup>110</sup>

Importantly, in the 2016 decision in *Horton v. Oregon Health & Science University*,<sup>111</sup> the Oregon Supreme Court also overruled *Lakin*:

[W]e conclude that *Lakin* should be overruled. The text of Article I, section 17, its history, and our cases that preceded *Lakin* establish that Article I, section 17, guarantees litigants a procedural right to have a jury rather than a judge decide those common-law claims and defenses that customarily were tried to a jury when Oregon adopted its constitution in 1857, as well as those claims and defenses that are “of like nature.” However, that history does not demonstrate that Article I, section 17, imposes a substantive limit on the legislature’s authority to define the elements of a claim or the extent of damages available for a claim.<sup>112</sup>

The Kansas Supreme Court also upheld a statute that required the court, rather than the jury, to determine the amount of punitive damages.<sup>113</sup> Plaintiffs argued that at common law the amount of punitive damages was a factual issue for the jury, but the court held it was not a “cause of action,” and that because there was no right to punitive damages, and the legislature could abolish punitive damages, it could require the court to determine the amount of such damages.<sup>114</sup>

The jury trial clause still invalidates damage caps in other states.<sup>115</sup>

## 5. “Reexamination” of Facts Found by Juries

The Seventh Amendment provides, in part, that “no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”<sup>116</sup> Two states, Oregon and West Virginia, have similar provisions in their constitutions.

Oregon’s clause, urged by populists and adopted in 1910, states, “In actions at law . . . no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict.”<sup>117</sup> This provision was added to the constitution by initiative in 1910, to supplement the original 1857 guarantee that the right to civil jury trial would remain “inviolable.”<sup>118</sup> Oregon’s “strict constitutional preference for finality in jury findings of fact” seems to have been “meant to inhibit trial courts from setting aside judgements and granting new trials whenever the Court believed the verdict was excessive.”<sup>119</sup> The *Lakin* decision had placed partial reliance on the re-examination clause in striking down a damage cap, but the recent *Horton* case also overturned this holding:

[T]he part of Article VII (Amended), section 3, on which plaintiff relies was directed at a specific practice—a trial court’s decision to grant a new trial because the court concluded that the verdict was contrary to the weight of the evidence.

That practice is not present here. In applying the statutory limit on damages, the trial court was not “re-examining” a fact found by the jury, determining that the fact was contrary to the weight of the evidence, and granting a new trial for that reason. Rather, the court was applying a legal limit, expressed in the statute, to the facts that the jury had found.

Article VII (Amended), section 3, does not prohibit courts from applying the law to the facts.<sup>120</sup>

The legislature may not abrogate a common-law claim but may regulate such claims.

To the extent that trial judges are seen as being too liberal in granting *remittitur* (*additur* is much rarer), a provision such as Oregon’s can be a powerful tool. But post-*Horton* it cannot be invoked to invalidate legislatively enacted limits on damages.

Notably, however, the U.S. Supreme Court declared Oregon’s reexamination clause partially unconstitutional in 1994, under the Supremacy Clause, to the extent it purported to bar a reexamination of *punitive damages* under federal constitutional substantive due process standards.<sup>121</sup>

West Virginia’s reexamination clause provides that, “. . . No fact tried by a jury shall be otherwise reexamined in any case than according to rule of court or law.”<sup>122</sup> Attempts were made in 1991<sup>123</sup> and 2011<sup>124</sup> to invoke the



state's re-examination clause to invalidate legislative caps on noneconomic damages in medical malpractice cases, but the state's Supreme Court of Appeals held, *inter alia*, that the provision was a limitation on the judiciary, not the legislature, and could not be used to challenge the damage cap.

## F. Miscellaneous State Constitutional Protections of Civil Litigation

Over the years, a number of states have inserted specific protections for aspects of civil litigation in their state constitutions. For example, Arizona's Constitution provides in Article XVIII, § 6 that "[t]he right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation . . ."<sup>125</sup> Interestingly, the Arizona Constitution also provides a separate level of protection in Article II, § 31, providing: "[n]o law shall be enacted in this state limiting the amount of damages to be recovered for causing the death or injury of any person."<sup>126</sup> These two sections have been "much-litigated"<sup>127</sup> and the Arizona Supreme Court has held that Article XVIII, §6 is "more specific and stronger" than open court or right-to-remedy clauses.<sup>128</sup> That provision is also broader in that it not only protects the cause of action itself from being "abrogated," but also bars any statutes limiting damages.<sup>129</sup> Further, the Arizona Supreme Court has stated:

We conclude, simply, that where dealing with a right to recover damages originating exclusively in a statute, the legislature may, notwithstanding the non-limitation provisions, constitutionally restrict a *remedy* or a *theory of recovery*. The governmental power to do so is more persuasive when the cause of action, as here, is not protected by the anti-abrogation clause.<sup>130</sup>

Therefore, the legislature may not abrogate a common-law claim but may regulate such claims.<sup>131</sup>

Other states have multiple provisions protecting civil litigation in state courts. For example, Kentucky's Constitution has not only a "right to remedy" provision<sup>132</sup> but also two more provisions protecting the causes of action for negligence or wrongful act,<sup>133</sup> as well as barring

legislation limiting damages for death or injury.<sup>134</sup> The Kentucky Supreme Court has struck down statutes of repose under these state constitutional protections of civil litigation.<sup>135</sup> Construing § 241 as early as 1911, the Supreme Court of Kentucky stated: ". . . it is not within the power of the legislature to deny this right of action. The section is as comprehensive as language can make it. The words 'negligence' and 'wrongful act' are sufficiently broad to embrace every degree of tort that can be committed against the person. . . ."<sup>136</sup>

The Oklahoma Constitution provides that the defense of assumption of risk shall be a fact question "left to the jury."<sup>137</sup> State constitutions have formed the basis for challenging limitations on civil litigation in state courts, including the wide variety of "tort reform" measures. This litigation has resulted in a rich body of law that is unrecognizable under the Federal Constitution.<sup>138</sup>

State constitutions have formed the basis for challenging limitations on civil litigation in state courts, including the wide variety of "tort reform" measures. This litigation has resulted in a rich body of law that is unrecognizable under the Federal Constitution.

## VI. Limitations on Punitive Damages

For most of the history of civil litigation in America, “exemplary,” or punitive, damages assessed by juries were relatively unregulated except by an “excessiveness” standard. Beginning in the 1980s, several justices of the United States Supreme Court began to express concern about excessive punitive damage awards by state juries.<sup>139</sup> Then, in 1991, the Court confronted the issue directly.<sup>140</sup> It declined to hold that the relatively unfettered *process* by which punitive damages were determined constituted a violation of the federal Due Process Clause, examined Alabama’s process in upholding a punitive damage award of more than four times the compensatory damages, and concluded that there was no due process violation.<sup>141</sup> In 1993 a plurality of the Court declined to establish a “mathematical bright line,” and upheld a punitive damage award that was 526 times the compensatory damages against a claim that it was “grossly excessive” in violation of the defendant’s federal substantive due process rights.<sup>142</sup> Actual damages were minimal, but the defendant had engaged in egregious and dishonest behavior.

In 1996, however, the Court took up the issue again. In *BMW of North America v. Gore*<sup>143</sup> the Court held that it was beyond a state court’s authority to assess punitive damages to deter misconduct in other states.<sup>144</sup> Justice Stevens noted that

by attempting to alter BMW’s nationwide policy, Alabama would be infringing on the policy of other States. To avoid such encroachment, the economic penalties that a State such as Alabama inflicts on those who transgress its laws, whether the penalties take the form of legislatively authorized fines or judicially imposed punitive damages, must be supported by the State’s interest in protecting its own consumers and its own economy. Alabama may insist that BMW adhere to a particular disclosure policy in that State. Alabama does not have the power, however, to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents. Nor may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions.<sup>145</sup>

When litigation is brought challenging limits on civil litigation, there is an important “big picture” element to be remembered. While defenders of limitations on civil litigation will accuse judges engaging in judicial review under their state constitutions of bringing in a new “Lochner era,” that is simply not the case.

The Court accepted, however, the state court’s *remittitur* to delete the amount of punitive damages attributable to BMW’s out-of-state activities. It went on to evaluate the award that was 500 times the compensatory damages and, based on its assessment of the “degree of reprehensibility,” the ratio of punitive to compensatory damages, and sanctions for comparable conduct, concluded that the award of punitive damages was a due process violation.<sup>146</sup> The Court still did not provide a bright-line test.

In 2003, in a case alleging bad-faith failure to settle an insurance claim,<sup>147</sup> the Court made the following observation in again striking down an excessive punitive damage award:

We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and

compensatory damages, to a significant degree, will satisfy due process. . . . While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit

multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 . . . or, in this case, of 145 to 1.<sup>148</sup>

Consequently, punitive damage awards in state courts are now potentially reviewable on appeal under the United States Supreme Court's still-blurry guidelines.

## VII. Majoritarian Judicial Review

Virtually all of the statutory limitations on the procedure and substance of civil litigation, in the area of torts and workers' compensation, can be seen as "special interest" or "rent seeking" legislation. The defense bar, insurance companies, and other defense-oriented actors participating in the civil justice system may have inordinate influence in many state legislatures. This influence has resulted in a host of limitations such as damage caps, limitations on attorneys' fees, erosion of workers' compensation benefits, mandatory defense-favoring alternative dispute resolution mechanisms, etc. Many of these can be seen as within the legitimate sphere of legislative authority over important aspects of state civil litigation. On the other hand, as outlined in this paper, there are a number of important state constitutional *limitations* on legislative (and judicial) discretion when it comes to the area of civil litigation.

When litigation is brought challenging limits on civil litigation, there is an important "big picture" element to be remembered. While defenders of limitations on civil litigation will accuse judges engaging in judicial review under their state constitutions of bringing in a new "*Lochner* era," that is simply not the case.<sup>149</sup> Actually, the *Lochner* era involved courts striking down majoritarian-protective statutes in favor of special interests. The type of litigation described herein, by contrast, involves state judicial review of special interest legislation, for the benefit of the majority! In the words of the editors of the *Harvard Law Review*:

Both courts and commentators have largely ignored the possibility that judicial review might play a radically different role—that of safeguarding the interests of *majorities*. State constitutional law could be dramatically divorced from its federal counterpart if state courts were to reconceive their purpose in terms of elaborating and employing a theory of majoritarian, rather than antimajoritarian, review. In fact, there is a reason to believe that state courts already have undertaken something very much like this change of direction in one area: the review of economic regulation.<sup>150</sup>

This form of "majoritarian judicial review," protecting the broad public interest, by contrast to *Lochner*-era judicial protection of special interests, is most evident in the sustained state-court review of state economic and regulatory enactments.<sup>151</sup> State decisions striking down statutes barring advertisement of drug prices, prohibiting insurance agents from discounting their commissions, and "fair trade" laws that limit price competition are all examples of judicial review benefitting the *majority* of the public. The kinds of cases described in this paper also fit that description.<sup>152</sup>

Provisions such as those discussed herein were the result of political decisions by the voters of the states at referenda to include them in the text of the state constitutions. They are not, therefore, the product of "judicial activism," where judges can be accused of "making up" interpretations of vague constitutional provisions.

Lawyers seeking to protect civil litigation in state courts by relying on a variety of state constitutional provisions, and judges deciding such cases, should keep this important distinction in mind. In addition, as Professor, and then Justice, Hans Linde has pointed out, provisions such as those discussed herein were the result of political decisions by the voters of the states at referenda to include them in the test of the state constitutions.<sup>153</sup> They are not, therefore, the product of “judicial activism,” where judges can be accused of “making up” interpretations of vague constitutional provisions. The states’ voters have mandated judicial review under these provisions.

Finally, most of the relevant judicial provisions should be seen as “great ordinances,” which by their terms call for flexible judicial review.<sup>154</sup>

## VIII. Conclusion

There are powerful economic interests with a stake in pushing through a variety of policies limiting access to civil litigation. While a number of these do not raise state constitutional issues, a surprising number do raise such concerns.

Hopefully, this brief survey of the reasons why state constitutions provide the primary protections for civil litigation; the kinds of specific state constitutional provisions that can, and do, protect civil litigation processes; and the contexts in which such provisions can be brought

to bear on limitations on access to civil litigation remedies will bring greater visibility to these matters. There are powerful economic interests with a stake in pushing through a variety of policies limiting access to civil litigation. While a number of these do not raise state constitutional issues, a surprising number do raise such concerns.

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## Notes

<sup>1</sup> Presented at the Pound Civil Justice Institute’s 2018 Forum for State Appellate Court Judges in Denver, Colorado, July 7, 2018. A version of this paper has been published in the *RUTGERS LAW REVIEW*: Robert F. Williams, *State Constitutional Protection of Civil Litigation*, 70 *RUTGERS U. L. REV.* 905 (2018).

<sup>2</sup> Distinguished Professor of Law, Rutgers Law School; Director, Center for State Constitutional Studies, <https://statecon.camden.rutgers.edu>.

<sup>3</sup> John Kincaid, *State Constitutions in the Federal System*, 496 *ANNALS* 12, 13 (1988).

<sup>4</sup> ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 27 (2009). For another very important treatment of these issues, see Robert S. Peck and Erwin Chemerinsky, *The Right to Trial by Jury as a Fundamental and Substantive Right and Other Civil-Trial Constitutional Protections*, 96 *OR. L. REV.* 489 (2018).

<sup>5</sup> Daniel J. Elazar, *THE AMERICAN CONSTITUTIONAL TRADITION* 169 (1988) (emphasis added). See also Donald S. Lutz, *The United States Constitution As An Incomplete Document*, 496 *ANNALS* 23 (1988).

<sup>6</sup> See, e.g., Robert F. Williams, *Can State Constitutions Block the Workers’ Compensation Race to the Bottom?* 69 *RUTGERS U.L. REV.* 1081 (2017).

<sup>7</sup> WILLIAMS, *supra* note 4, at 1.

<sup>8</sup> Goodwin Liu, *The Brennan Lecture, State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 *N.Y.U.L. REV.* 1307, 1335 (2017). See generally William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 *HARV. L. REV.* 489 (1977).

<sup>9</sup> CONFERENCE OF STATE COURT ADMINISTRATORS, *EXAMINING THE WORK OF STATE COURTS: AN OVERVIEW OF 2015 STATE COURT CASELOADS* 2 (2016).

<sup>10</sup> *Id.* at 6, 8.

<sup>11</sup> Administrative Office of the U.S. Courts, *Federal Judicial Caseload Statistics 2017*, <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2017>.

<sup>12</sup> U.S. CONST. amend. 7. See generally Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 *MINN. L. REV.* 639 (1973); Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 *HARV. L. REV.* 289 (1966).

<sup>13</sup> *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3035 n. 13 (2010); *Minneapolis & St. L.R. v. Bombolis*, 241 U.S. 211 (1916); *Sofie v. Fibreboard Corp.*, 771 P.2d 711, 716 (Wash. 1989). Senator Sheldon Whitehouse of Rhode Island has argued that the Supreme Court should incorporate the Seventh Amendment to apply to the states. Sheldon Whitehouse, *Restoring the Civil Jury’s Role in the Structure of Our Government*, 55 *WM. & MARY L. REV.* 1241, 1273-74 (2014). See also Peck & Chemerinsky, *supra* note 4, at 554-558.

<sup>14</sup> RICHARD C. CORTNER, *THE SUPREME COURT AND THE SECOND BILL OF RIGHTS: THE FOURTEENTH AMENDMENT AND THE NATIONALIZATION OF CIVIL LIBERTIES*

(1981).

<sup>15</sup> See, e.g. James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 837 (1992).

<sup>16</sup> Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353 (1984).

<sup>17</sup> Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication* 72 NOTRE DAME L. REV. 1015 (1997).

<sup>18</sup> Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 724-25 (2016).

<sup>19</sup> *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293 (1982).

<sup>20</sup> U.S. CONSTITUTION, ART. VI, CL. 2.

<sup>21</sup> See, e.g., *Michigan v. Mosley*, 423 U.S. 96, 120 (1976) (Brennan, J., dissenting).

<sup>22</sup> *Pruneyard Shopping Ctr. v. Robbins*, 447 U.S. 74, 81 (1980). See also *Nichols v. United States*, 511 U.S. 738, 748-49 n.12 (1994); *Cooper v. California*, 386 U.S. 58, 62 (1967); *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940); *Arizona v. Evans*, 514 U.S. 1, 8 (1995); *Oregon v. Hass*, 420 U.S. 714, 719 (1975); *Florida v. Powell*, 559 U.S. 50, 59 (2010).

<sup>23</sup> *Kansas v. Carr*, 577 U.S. \_\_\_, 136 S. Ct. 633, 641 (2016).

<sup>24</sup> David Schuman, *The Right to a Remedy*, 65 TEMPLE L. REV. 1197, 1199-1200 (1992) (hereinafter Schuman, *Remedy*) (citing BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 967-68 (1971)). See also, David Schuman, *Oregon's Remedy Guarantee: Article I, Section 10 of the Oregon Constitution*, 65 OR. L. REV. 35 (1986); Jonathan M. Hoffman, *Questions Before Answers: The Ongoing Search to Understand the Origins of the Open Courts Clause*, 32 RUTGERS L. J. 1005 (2001) (hereinafter Hoffman, *Questions*).

<sup>25</sup> Hoffman, *Questions* *supra* note 2, at 1006.

<sup>26</sup> *Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333 (Or. 2001).

<sup>27</sup> *Id.* at 337.

<sup>28</sup> *Id.* at 362.

<sup>29</sup> *Id.* at 354. In 2007 the Oregon Supreme Court upheld a Tort Claims Act damage cap in an action against a governmental defendant but struck it down under the right-to-remedy/open-courts provision in the action against public employees in their individual capacities. *Clarke v. Oregon Health Sciences University*, 175 P.3d 418 (2007).

<sup>30</sup> 376 P. 3d 998 (Or. 2016). For a detailed critique of the *Horton* decision, see Travis Eiva, *The Constitutional Authority of Oregon Juries: Drawing the Line on Legislative Encroachment*. 96 OR. L. REV. 599 (2018); Peck & Chemerinsky, *supra* note 4 at 540-553. These articles appear in a symposium that contains several other articles on *Horton*.

<sup>31</sup> *Id.* at 1016-20, 1051-54. See Kathryn H. Clarke, *Foreword: Fundamental Rights or Paper Tigers?*, 96 OR. L. REV. 480 (2018).

<sup>32</sup> *Id.* at 1046.

<sup>33</sup> 407 P.3d 801 (Or. 2017).

<sup>34</sup> *Id.* at 805, n. 10.

<sup>35</sup> 406 P.3d 225 (Or. App. 2017) (rev. allowed, 415 P.3d 580 (Or. 2018)).

<sup>36</sup> 410 P.3d 336 (Or. App. 2018) (since settled).

<sup>37</sup> *Schutz v. La Costita III, Inc.*, 406 P.3d 66 (Or. App. 2017) (rev. allowed, 416 P.3d 1096 (Or. 2018)).

<sup>38</sup> 281 So. 2d 1 (Fla. 1973).

<sup>39</sup> *Id.* at 4.

<sup>40</sup> Williams, *supra* note 4, at 1099.

<sup>41</sup> *Smith v. Dept. of Insurance*, 507 So.2d 1080 (Fla. 1987).

<sup>42</sup> *Id.* at 194.

<sup>43</sup> *University of Miami v. Echarte*, 618 So. 2d 189 (Fla. 1993).

<sup>44</sup> *Id.* at 194.

<sup>45</sup> *Id.* at 195.

<sup>46</sup> Schuman, *Remedy*, *supra* note 24.

<sup>47</sup> JENNIFER FRIESEN, 1 STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES ch. 6 (4<sup>th</sup> Ed. 2006). This chapter concludes with Appendix 6, which collects all of the states' provisions.

<sup>48</sup> Jonathan M. Hoffman, *By the Course of Law: The Origins of the Open Courts Clause of State Constitutions*, 74 OR. L. REV. (1995); Hoffman, *Questions*, *supra* note 24; William C. Koch, Jr., *Reopening Tennessee's Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution*, 27 U. MEM. L. REV. 333 (1997); Martin B. Margulies, *Connecticut's Misunderstood Remedy Clause*, 14 QUINNIPIAC L. REV. 217 (1994); Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309 (2003).

In an exhaustively-researched article, Judith Resnik contends that right-to-remedy and access-to-court guarantees constitute a positive entitlement owed by state governments to litigants in need of this government service. Judith Resnik, *Constitutional Entitlements To and In Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture*, 56 ST. LOUIS U. L. J. 917 (2012).

<sup>49</sup> See, e.g. *Meech v. Hillhaven West, Inc.*, 776 P.2d 488, 493 (Mont. 1989); Schuman, *Remedy*, *supra* note 24, at 1200-1201.

<sup>50</sup> *Horton v. Oregon Health & Science University*, 376 P.3d 998 (Or. 2016).

<sup>51</sup> In decoupling its uniformity in taxation provision from federal equal protection doctrine, the Supreme Court of Iowa observed:



Another writer has observed that equal protection challenges to state taxation laws and business regulations are “dismissed out of hand” by federal courts, in part due to federal restraint with respect to state matters. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1216 (1978). This author writes:

Institutional rather than analytical reasons appear to have prompted the broad exclusion of state tax and regulatory measures from the reach of the equal protection construct fashioned by the federal judiciary. This is what creates the disparity between this construct and a true conception of equal protection, and thus substantiates that equal protection is an underenforced constitutional norm.

*Id.* at 1218; *see also* Brennan, *supra* note 8, at 503 (“With federal scrutiny diminished, state courts must respond by increasing their own.”).

Racing Assoc. Central Iowa v. Fitzgerald, 675 N.W.2d 1 (Iowa 2004), n. 5.

<sup>52</sup> WILLIAMS, *supra* note 4, at 27.

<sup>53</sup> FLA. CONST. art. I, § 2; “Basic rights.—All natural persons, female and male alike, are equal before the law and have inalienable rights. . . .” The clause does not use the term “equal protection.” *See generally* FRIESEN, *supra* note 47, at ch. 3.

<sup>54</sup> Estate of McCall v. United States, 134 So.3d 894 (Fla. 2014).

<sup>55</sup> *Id.* at 905-910.

<sup>56</sup> *Id.* at 901.

<sup>57</sup> *Id.* citing St. Mary’s Hospital, Inc. v. Phillipe, 769 So. 2d 961 (Fla. 2000).

<sup>58</sup> Best v. Taylor Mach. Works, 689 N.E. 2d 1057 (Ill. 1997); Carson v. Maurer, 424 A.2d 825 (N.H. 1980), *overruled on other grounds*, Cmty. Res. For Justice, Inc. v. City of Manchester, 917 A.2d 707 (N.H. 2007).

<sup>59</sup> Estate of McCall, 134 So.3d at 903.

<sup>60</sup> Estate of McCall, 134 So.3d at 904.

<sup>61</sup> *Id.* at 905-910. The court cited Lucas v. U.S., 757 S.W. 2d 687 (Tex. 1988). The Utah Supreme Court struck down an offset for one-half of a workers’ compensation claimant’s Social Security retirement benefits as age discrimination in violation of the Utah Constitution’s “uniform operation of laws” clause and applied the decision retroactively. Merrill v. Utah Labor Comm’n, 223 P.3d 1099, 1103 (Utah 2009); *see also* Caldwell v. MACO Workers’ Comp. Tr., 256 P.3d 923 (Mont. 2011) (coming to similar result under state equal protection analysis). The Kansas Supreme Court took the opposite view, reversing earlier cases, under federal and state equal protection doctrine. *See* Hoesli v. Triplett, Inc., 361 P.3d 504 (Kan. 2015).

<sup>62</sup> Lucas v. U.S., 757 S.W.2d 687 (Tex. 1988).

<sup>63</sup> Best v. Taylor Machine Works, 689 N.E.2d 1057 (Ill. 1997).

<sup>64</sup> *Id.* at 1069.

<sup>65</sup> ILL. CONST. art. IV, § 13. *See* notes 69-76 *infra* and accompanying text.

<sup>66</sup> North Broward Hospital District v. Kalitan, 219 So.3d 49 (Fla. 2017).

<sup>67</sup> *Id.* at 59 (emphasis added).

<sup>68</sup> Westphal v. City of St. Petersburg, 194 So.3d 311 (Fla. 2016).

<sup>69</sup> *Id.* at 323 (first emphasis added).

<sup>70</sup> *Id.* at 330.

<sup>71</sup> Best, 689 N.E.2d at 1069; WILLIAMS, *supra* note 4 at 277-279.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 1171. I have criticized this. WILLIAMS, *supra* note 4, at 213-214, 222.

<sup>74</sup> For a thorough evaluation of the Pennsylvania special laws prohibition, as well as a proposed alternative to federal equal protection analysis, *see* Donald Marritz, *Making Equality Matter (Again): The Prohibition Against Special Laws in the Pennsylvania Constitution*, 3 WIDENER J. PUB. L. 161 (1993). *See also* Justin R. Long, *State Constitutional Prohibitions on Special Laws*, 60 CLEVELAND ST. L. REV. 719 (2012); Dan Friedman, *Applying Federal Constitutional Theory to the Interpretation of State Constitutions: The Ban on Special Laws in Maryland*, 71 MD. L. REV. 411 (2012); Anthony Schutz, *State Constitutional Restrictions on Special Legislation as Structural Restraints*, 40 J. LEGIS. 39 (2013-14).

<sup>75</sup> Vasquez v. Dillard’s, Inc., 381 P.3d 768, 770 (Okla. 2016).

<sup>76</sup> *See* DANNY M. ADKISON & LISA MCNAIR PALMER, THE OKLAHOMA STATE CONSTITUTION: A REFERENCE GUIDE 87 (2001). *See also* OKLA. CONST. art. II, §46 (giving a list of subject areas where special laws are prohibited). *Id.* at 80-81.

<sup>77</sup> *Id.* at 773; *see also* Maxwell v. Sprint PCS, 369 P.3d 1079, 1082 (Okla. 2016).

<sup>78</sup> Strickland v. Stephens Production Co., 411 P.3d 369, 375 (Okla. 2018) (emphasis in original).

<sup>79</sup> Castellanos v. Next Door Co., 192 So. 3d 431, 432 (Fla. 2016).

<sup>80</sup> *Id.* at 433, 435.

<sup>81</sup> *Id.* at 432 n. 1, 448. This additional reliance on the Federal Constitution, without a clear, separate state constitutional analysis, could have opened the decision up to review in the United States Supreme Court. *See* Michigan v. Long, 463 U.S. 1032 (1983); WILLIAMS, *supra* note 4, at 122-23, 231.

<sup>82</sup> Castellanos, 192 So. 3d at 434 (emphasis added); 434 n. 3. The Oklahoma Supreme Court struck down, as a state constitutional due process/irrebuttable presumption, a workers’ compensation statute barring coverage for cumulative-trauma injury for workers who had not been employed for a continuous 180-day period. Torres v. Seaboard Foods, LLC, 373 P.3d 1057, 1062 (Okla. 2016). *See* OKLA. CONST. art. II, § 7. The employer argued that a worker was not eligible for compensation or a common-law remedy. The Court deemed the provision arbitrary, as both overinclusive and underinclusive for screening fraudulent claims. *Id.* at 1078.

<sup>83</sup> 369 P.3d 1079, 1082 (Okla. 2016).

<sup>84</sup> Peck & Chemerinsky, *supra* note 4 at 490.

<sup>85</sup> Robert S. Peck, *Violating the Inviolable: Caps on Damages and the Right to Trial by Jury*, 31 U. DAYTON L. REV. 307, 311 n. 30 (2006).

<sup>86</sup> McDowell Welding & Pipefitting v. U.S. Gypsum Co., 193 P.3d 9 (Or. 2008).

<sup>87</sup> M.K.F. v. Miramontes, 287 P.3d 1045 (Or. 2012).

<sup>88</sup> Shaner v. Horizon Bancorp, 561 A.2d 1130 (N.J. 1989).

<sup>89</sup> N.J.S.A. § 10:5-13.

<sup>90</sup> Wood v. New Jersey Manufacturers Insurance Co., 21 A.3d 1131 (N.J. 2011).

<sup>91</sup> Jersey Central Power & Light Co. v. Melcar Utility Co., 59 A.3d 561 (N.J. 2013).

<sup>92</sup> N.J. CONST. art. I, ¶ 9: “The right to trial by jury shall remain inviolate . . . .”

<sup>93</sup> *Id.* at 569. *See also* Peck & Chemerinsky, *supra* note 4 at 492-93 nn. 9-10.

<sup>94</sup> *See, e.g.* Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255 (2005).

<sup>95</sup> *See* Stephen Daniels & Joanne Martin, “*The Impact That It Has Had Is Between People’s Ears: Tort Reform, Mass Culture and Plaintiffs’ Lawyers*,” 50 DEPAUL L. REV. 453 (2000). “Tort reform” was even included in the 1994 Republican “Contract With America.” NEWT GINGRICH ET AL., CONTRACT WITH AMERICA 143 (Ed Gillespie & Bob Schellhas eds., 1994):

Isn’t it time to clean up the court system? Frivolous lawsuits and outlandish damage awards make a mockery of our civil justice system. Americans spend an estimated \$300 billion a year in needlessly higher prices for products and services as a result of excessive legal costs.

<sup>96</sup> Daniels and Martin, *supra* note 95, at 453. *See also* STEPHEN DANIELS & JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM (1995); David A. Logan, *Juries, Judges and the Politics of Tort Reform*, 83 U. CINN. L. REV. 903 (2015); Stephen Daniels & Joanne Martin, *Where Have All the Cases Gone: The Strange Success of Tort Reform Revisited*, 65 EMORY L. J. 1445 (2016).

<sup>97</sup> *Id.* at 472-73.

<sup>98</sup> *Id.* at 455-56.

<sup>99</sup> *Id.* at 473.

<sup>100</sup> *Id.* at 473-474; James Gilbert, Stuart Ollanik & David Wenner, *Overcoming Juror Bias in Voir Dire*, TRIAL 42 (July 1997).

<sup>101</sup> 93 P.3d 904 (Wash. App. 2004).

<sup>102</sup> *Id.* at 905-06.

<sup>103</sup> *Id.* at 907.

<sup>104</sup> *Id.* at 908. *See also* Kozloski v. Rush, 828 P. 2d 854, 859-62 (Idaho 1992) (childbirth medical malpractice case where court approved voir dire questions concerning the “malpractice crisis”); Borkoski v. Yost, 594 P. 2d 688, 689-95 (Mont. 1979) (permitting questions on voir dire about potential jurors’ views of the effects of jury awards on insurance rates); Capoferri v. CHOP, 893 A. 2d 133 (Pa. Super. 2006) (upholding questions about knowledge of “tort reform”); Barrett v. Peterson, 868 P. 2d 96, 99-102 (Utah App. 1993) (holding that in medical malpractice cases, plaintiff’s counsel must be permitted to inquire into potential jurors’ exposure generally to “tort reform” propaganda to uncover not only actual, but also subconscious, bias even “absent any particular showing of specific campaigns, advertisements, or literature offered for the purpose of showing potential prejudice” in order to exercise peremptory challenges). *See also* Hyundai Motor Co. v. Vasquez, 189 S.W. 3d 743, 753 (Tex. 2006) (contrasting improper questions about the weight potential jurors will place on certain evidence from proper questions “about bias or prejudice resulting from societal influence outside the case—namely, ‘tort reform.’”).

<sup>105</sup> AMY L. POSEY AND LAWRENCE S. WRIGHTSMAN, TRIAL CONSULTING 157 (2005).

<sup>106</sup> *Id.* at 160. *See also id.* at 172: “. . . it seems plausible that jurors can be distinguished on the basis of a *tendency* to favor patients or to favor doctors.” (Emphasis in original.)

<sup>107</sup> *See* Roberts v. State, 937 So. 2d 781, 784 (Fla. App. 2006) (improper time limit, without notice) and Carver v. Niedermayer, 920 So. 2d 123, 123-25 (Fla App. 2006) (discussing cases).

<sup>108</sup> *See generally* Peck, *supra* note 85.

<sup>109</sup> 987 P.2d 463, *modified*, 987 P.2d 476 (1999) (date interest accrues).

<sup>110</sup> *Id.* at 475. *See also* Sofie v. Fibreboard Corp., 780 P.2d 260 (Wash. 1989).

<sup>111</sup> 376 P.3d 998 (Or. 2016). *See* notes 26-37 *supra* and accompanying text. *See also* Eiva, *supra* note 30.

<sup>112</sup> *Id.* at 1044.

<sup>113</sup> Smith v. Printup, 866 P.2d 985 (Kan. 1993). *See* FRIESEN, *supra* note 47, at 6-19.

<sup>114</sup> *Id.* at 322, 326.

<sup>115</sup> *See, e.g.*, Sofie v. Fibreboard Corp., 771 P.2d 711 (Wash. 1989) and Watts v. Lester E. Cox Med. Ctrs., 376 SW 3d 633 (Mo. 2012).

<sup>116</sup> U.S. CONST. amend. 7.

<sup>117</sup> OR. CONST. art. VII §3.

<sup>118</sup> OR. CONST. art. I §17.

<sup>119</sup> FRIESEN, *supra* note 47, at 6-24.

<sup>120</sup> Horton, 376 P.3d at 1045-46.

<sup>121</sup> Honda Motor Co. v. Oberg, 512 U.S. 415, 420 (1994). *See also* notes 139-48 *infra* and accompanying text.

<sup>122</sup> W.VA. CONST. art. III § 13.

<sup>123</sup> Robinson v. Charleston Area Medical Center, Inc., 414 S.E.2d 877 (W.Va. 1991) (cited in Horton).

- <sup>124</sup> MacDonalld v. City Hosp., Inc., 715 S.E.2d 405 (W.Va. 2011) (challenging limits on medical malpractice damages).
- <sup>125</sup> ARIZ. CONST. art. 18, § 6. *See generally* JOHN D. LESHY, ARIZONA STATE CONSTITUTION: A REFERENCE GUIDE 310 (1993).
- <sup>126</sup> ARIZ. CONST. art. II, § 31. *Id.* at 81.
- <sup>127</sup> LESHY, *supra* note 125, at 310.
- <sup>128</sup> Kenyon v. Hammer, 688 P. 2d 961, 966 (Ariz. 1984). *See generally* Roger C. Henderson, *Tort Reform, Separation of Powers and the Arizona Constitutional Convention of 1910*, 35 ARIZ. L. REV. 535 (1993); Watts v. Medicis Pharmaceutical Corporation, 365 P.3d 944 (Ariz. 2016) (rejecting claim that the common-law “learned intermediary” doctrine violated anti-abrogation clause).
- <sup>129</sup> *See* Cronin v. Sheldon, 991 P.2d 231, 240 (Ariz. 1999). (The two provisions are slightly distinct, lest one be rendered superfluous.)
- <sup>130</sup> *Id.* (Emphasis in original.)
- <sup>131</sup> *Id.* at 240–41. *See also* Nunez v. Professional Transit Mgmt. of Tucson, Inc. 271 P.3d 1104, 1110 (Ariz. 2012). These provisions are not violated by new statutory causes of action, such as wrongful employment termination in violation of public policy, providing exclusive remedies. Cronin v. Sheldon, 991 P.2d 231 (Ariz. 1999). A products-liability statute of repose, however, was struck down as violating the Anti-Abrogation Clause. Hazine v. Montgomery Elevator Co., 861 P.2d 625 (Ariz. 1993). *See also* Baker v. University Physicians Healthcare, 296 P.3d 42 (Ariz. 2013).
- <sup>132</sup> KENTUCKY CONST. § 14. *See* Commonwealth v. Claycomb, \_\_\_ S.W.3d \_\_\_, 2018 WL 5994975 (Ky. 2018), in which the Kentucky Supreme Court struck down a statute requiring medical-malpractice cases to undergo a mandatory “medical-review panel” process and requiring the panel’s opinion on the merits of the claim before the plaintiff could file suit. The court engaged in a deep analysis of Section 14 and the delay caused by the statute.
- <sup>133</sup> *Id.* at § 241.
- <sup>134</sup> *Id.* at § 54. *See also* PA. CONST art. III § 18.
- <sup>135</sup> Saylor v. Hall, 497 S.W. 2d 218 (Ky. 1973); Perkins v. Northeastern Log Homes, 808 S.W. 2d 809 (Ky. 1991). *See generally* ROBERT M. IRELAND, THE KENTUCKY STATE CONSTITUTION: A REFERENCE GUIDE 202-203 (1999).
- <sup>136</sup> Britton’s Adm’r v. Samuels, 136 S.W. 143, 144 (Ky. 1911).
- <sup>137</sup> OKLA. CONST. art. XXIII, § 6. *See* Reddell v. Johnson, 942 P. 2d 200 (Okla. 1997) *See also* MONT. CONST. art. II, § 16; Connery v. Liberty Northwest Ins. Co., 960 P. 2d 288, 290 (Mont. 1998); Trankel v. State Dep’t. of Military Affairs, 938 P. 2d 614, 621 (Mont. 1997).
- <sup>138</sup> *See generally* Symposium, *Tort Reform and State Constitutional Law*, 32 RUTGERS L. J. 897 (2001); John Fabian Witt, *The Long History of State Constitutions and American Tort Law*, 36 RUTGERS L. J. 1159 (2005).
- <sup>139</sup> Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989); Bankers Life and Casualty Co. v. Crenshaw, 486 U.S. 71 (1988).
- <sup>140</sup> Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1 (1991).
- <sup>141</sup> *Id.* at 24.
- <sup>142</sup> TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993).
- <sup>143</sup> 517 U.S. 559 (1996).
- <sup>144</sup> *Id.* at 572-73.
- <sup>145</sup> *Id.* at 572-573.
- <sup>146</sup> *Id.* at 585.
- <sup>147</sup> State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003).
- <sup>148</sup> *Id.* at 425.
- <sup>149</sup> Lochner v. New York, 198 U.S. 45 (1905). *See generally* Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Rebuttal*, 1962 SUP. CT. REV. 34 (1962).
- <sup>150</sup> *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1498-99 (1982) (emphasis added). *See also* WILLIAMS, *supra* note 4, at 191-192.
- <sup>151</sup> WILLIAMS, *supra* note 4, at 33-34; 190-192.
- <sup>152</sup> ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, STATE CONSTITUTIONAL LAW: CASES AND MATERIALS 236-246 (5th Ed., 2015).
- <sup>153</sup> Sterling v. Cupp, 625 P.2d 123, 129 (Or.1981) (en banc).
- <sup>154</sup> WILLIAMS, *supra* note 4, at 336.

## Oral Remarks of Professor Williams

This is a chance to remind ourselves that in our country we have not just one constitution, the way the media and a lot of the public portray our constitutional system, but, of course, we have 51 constitutions in our country. The state constitutions, as you know, predate the Federal Constitution (at least the state constitutions on the eastern coast do), and those state constitutions served as models for the U.S. Constitution.

But, of course, the U.S. Constitution left much to state authority, and this is particularly important for this topic of protection of civil litigation—because most, if not all, of the rights that citizens have in the process of civil litigation in state courts are provided by state law and state constitutions. The problem is that the state constitutions are what I call “low visibility” constitutions. Many members of the public, the media and some lawyers, and even some judges, are not well aware of their own state constitutions.

The most visible elements of state constitution law, as I have observed it, relate to what we call the “new judicial federalism”—a phenomenon that most of you have seen, where rights are protected both by the United States Constitution and the state constitution, either in identical terms or in similar terms. The state constitutional provisions can be interpreted by state courts to be more protective than those recognized by the United States Supreme Court under the Federal Constitution. These are areas such as search and seizure, right to counsel, free speech, religion guarantees and what have you.

In this situation, where you have both federal and state constitutional protections in similar circumstances, the United States Supreme Court’s interpretation of the federal rights provides a background glare or shadow or gravitational pull that is exerted on state courts interpreting their state constitutions. But still, the state interpretation of state constitutional rights can be independent of federal constitutional law and more protective than federal law.

In fact, the United States Supreme Court has expressed approval of this phenomenon of states interpreting their own constitutions to be more protective than federal constitutional rights. So, in this sense, in those circumstances where you have rights that are protected in both constitutions, the federal constitutional law provides a national minimum standard which all of your courts can exceed if that makes sense under the circumstances. This gives state constitutions a sense of redundancy in the most positive sense of the word—a double protection for constitutional rights, a point made most recently by Justice Goodwin Liu of the California Supreme Court, whom you will hear from at lunch time.

But, interestingly, in the area of protection for rights in civil litigation, this is not the case. There is virtually no protection for litigants in civil litigation in state courts in the U.S. Constitution, so there is really not a background national minimum standard of rights for litigants in state courts. Even the Seventh Amendment

The most visible elements of state constitution law, as I have observed it, relate to what we call the “new judicial federalism”—a phenomenon that most of you have seen, where rights are protected both by the United States Constitution and the state constitution, either in identical terms or in similar terms.

right to jury trial in federal courts, as most of you know, is one of the few federal constitutional rights that has never been incorporated through the due process clause; it just literally does not apply to the states. I have seen state court opinions which assume that it does apply. So it's virtually *only* the states and the state constitutions and laws that will protect these rights.

I think going forward it's very important to remember that protections had been voted into the state constitutions by the public in all of your states (except Delaware where the public does not vote on state

It's very important to remember that protections had been voted into the state constitutions by the public in all of your states. So these rights are not something made up by judges where losing parties will accuse you of legislating from the bench or being legislators in black robes.

constitutional amendments). So these rights are not something made up by judges where losing parties will accuse you of legislating from the bench or being legislators in black robes. You are enforcing provisions that have been voted on by the public. I think that's very important to remember.

So, what are these rights? I have outlined them in my paper.

**The right-to-remedy provision** was considered by James Madison when he drafted the Federal Bill of Rights. He decided not to recommend it to the states, but 39 states have this right-to-remedy clause, which has a pretty decent pedigree emanating from Magna Carta, which is a reasonably important pedigree, it seems to me. This constitutes a promise by the states to citizens that if they are injured or

killed, there will be a remedy for them. The basic view here is that the legislature—and this does not exist in the Federal Constitution—may not abolish common law remedies for injury or death without providing an adequate alternative.

Everybody remembers the “grand bargain” for workers’ compensation. The common law remedies for injuries in the workplace were abolished, but, of course, at the time, the state legislatures promised automatic and simple recompense for workplace injuries to take the place of the tort remedies. That’s the requirement in most states under these right-to-remedy clauses.

So, for example, the Oregon Supreme Court in the *Smothers* case<sup>1</sup> struck down an application of the workers compensation statute where the injured worker was not eligible for comp because the injury caused by inhaling chemical fumes and such was not the substantial cause of his injury, but yet he was barred by the comp statute from a tort remedy. The Oregon Supreme Court went, “Wait a second; you can’t abolish a remedy without providing something else.”

That was the *Smothers* case which, more recently, however, was overruled by the *Horton* decision<sup>2</sup>—from my point of view, I would say the “much-criticized” *Horton* decision—which limited this view at least in the context of governmental torts, where you have a background of sovereign immunity. So *Horton* upheld the damage cap in cases against governmental defendants, but still, the general view from the *Smothers* case is good law in Oregon: the legislature cannot eliminate a remedy without providing a substantial alternative there.

Florida, for example, interprets its right-to-remedy guarantee similar to the earlier Oregon rule. Of course, workers’ compensation was upheld in Florida because there was an adequate substitute remedy. But a no-fault automobile insurance provision that eliminated all remedy for minor damage to an automobile where the owner



hadn't purchased comprehensive insurance was struck down. I grew up in Florida, and I certainly wasn't going to buy insurance on my \$200 car. (I had liability insurance, of course.)

But the abolition of the tort remedy for minor damage to a car was struck down in the 1970s. Unreasonable limits on workers' comp have been struck down as a violation of the right-to-remedy provision. A tort reform damage cap on non-economic damages was struck down because the cap didn't provide any commensurate alternative benefit to the injured party. That is a very important provision in 39 of the states.

**Due process and equal protection.** Virtually all of the states have these provisions. They may not actually use the words "equal protection," but they are *about* equality and *about* due process. The federal provisions are under-enforced by the federal courts because of deference to the states in the name of federalism. The Supreme Court is pretty clear about this, saying, essentially, "We are not going to trample on everything in the states on this basis."

But in Florida, the courts provide a more rigorous equal protection doctrine, concluding that damage caps discriminate against the most seriously injured people, and against people who are injured or killed in multi-plaintiff accidents. People who are injured in single-plaintiff accidents not so seriously get full compensation under these caps. And, importantly, the Florida Supreme Court determined that the rationale for these damage caps, that there was a crisis in medical malpractice insurance premiums, was just not true, so there was no rational basis for this under the Florida decisions.<sup>3</sup>

Also in the due process area, the Florida Supreme Court determined that a rigid schedule of attorney fees, which yielded an award to an individual lawyer of \$1.53 an hour, violated due process rights—not the rights of the attorney, but the rights of the comp claimant, because nowadays of course workers' compensation has gotten much more complicated. And in that particular case, there were 12 defenses. Counsel for the claimant spent 100 hours but this rigid schedule yielded \$1.53 per hour, which was struck down by the Florida Supreme Court.

**Special legislation.** Another important provision in state constitutions that is unheard of in federal constitutional law is the ban on special laws. It was particularly important in Oklahoma recently. And this also relates to classifications, so it looks like equal protection to a lot of people. But it's really not a rights guarantee; it's a limitation on how the legislature enacts laws. I actually should have left this comment for Justin Long's paper, but I didn't do that.

The special legislation prohibition is a clause that was inserted in state constitutions in response to legislatures enacting statutes that single out persons or entities for special treatment that is not accorded to other similarly situated folks. It sounds like equal protection, doesn't it? But in the states that have these clauses—and they are very common—there's a line of cases, a jurisprudence of special laws, bans, that is really quite different from equal protection. Oklahoma applied the special laws ban to several discriminatory workers' comp provisions recently, but these clauses have the potential for a much wider impact beyond just a workers' comp situation.

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**Right to civil jury trial**—48 of the states have this provision. Again, the Seventh Amendment of the Federal Constitution just doesn't apply to civil litigation in state courts, so the only rights that litigants in your courts have with respect to jury trial would emanate from your state constitutions in those 48 states. There's a variety of issues here that are extremely important to litigants in your courts.

First and most obvious is the law/equity distinction, where many of your state constitutions are worded to guarantee that the right to trial by jury in civil cases will remain inviolate, and that is usually interpreted to mean it has to be guaranteed in all cases where there would have been a right to civil jury trial at the date of adoption of your state constitution.

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This is kind of tricky. It often requires a deep dive into legal history to try to determine whether the cases coming before you now are of the type that would have qualified for jury trial at the time your constitution was adopted. As I have said, sometimes the lawyer needs to hire an expert witness who is a legal historian. It's a very interesting kind of litigation, it seems to me, and quite important to litigants.

Some states have adopted statutes requiring binding arbitration. New Jersey, where I teach and live, enacted a statute saying you can't go to court anymore for certain kinds of injuries to your property. You have to submit to binding arbitration. Lawyers said, "Look at our constitution. What are you talking about? You can't do that. We have a right to civil jury trial." So that statutory provision was struck down by our supreme court in New Jersey.<sup>4</sup>

**Voir dire.** A variety of limitations on *voir dire* are implicated under the right to jury trial. This is particularly true in questioning by lawyers about the impact of tort "reform" (as we liberals would say) propaganda and its impact on jurors. This has been a campaign of many generations, not just in courts but in the media and in public understanding, and a number of courts have held that full investigation into those issues is required under the state constitutional jury trial guarantee.

**Damage caps.** A number of states view the assessment of compensatory damages particularly, both economic damages and non-economic damages, to be a fact inquiry that is reserved to the jury. So, when the legislature enacts a damage cap on economic or non-economic damages (leaving aside punitive damages for the moment), a number of courts have said, "Look, you can't do that, because this is a jury function under our state constitution and it has to remain inviolate." Oregon had held that earlier, and again the *Horton* case overruled that point of view. But this approach is followed in a number of other states.

**Miscellaneous provisions.** A careful look at state constitutions will indicate that a number of states have sort of miscellaneous kinds of provisions. I have highlighted Arizona, Kentucky, Oklahoma and Pennsylvania,<sup>5</sup> whose state constitutions include specific limits on damage caps. You don't have to interpret the constitutions to get there. These states say the legislature cannot limit damages for injury or death, period. So tort reform debates in those states have to be centered around amending the state constitutions, not about tort reform damage caps. It can't be dealt with by statute in those states.

I want to make a final point here about all of this kind of litigation that I have been discussing which involves protections for litigants in civil litigation in state courts. Most of these cases deal with statutes that have been enacted at the behest of special interests—well-organized, powerful economic interests seeking protection against the broad public consisting of workers and injured people and their families. These cases are not really the bad old *Lochner* era, where federal courts were substituting their views on economic legislation.<sup>6</sup>

The *Lochner* era was exactly the opposite of this, where courts were striking down public interest statutes on behalf of special interests such as employers. This doesn't mean you're going to strike down every law that comes along, don't misunderstand me. But a lot of people say, "Oh, no, you're intruding yourself into economic legislation arrangements in your state and that's the bad *Lochner* era." I want to suggest that is completely wrong; this legislation is the exact opposite. It's really majoritarian protection through constitutional law.

## Comments by Panelists

### Honorable David Schuman (ret.)

Bob Williams has been doing state constitutional law very well and for a very long time. I consider him the Dean of state constitutional scholars, and today's presentation demonstrates why.

When I received the papers for today's event I naturally began by skimming the page bottoms to see if any of my law review articles or cases had been cited. Thank you, Bob. While searching, however, I noticed there was no citation to the work of once-professor and then Justice Hans Linde of the Oregon Supreme Court, frequently referred to as the Godfather of State Constitutional Law. Full disclosure: I was Justice Linde's law clerk in 1985.

Well, Justice Brennan's 1977 Harvard Law Review article, "State Constitutions and the Protection of Individual Rights," which is available on the table outside this room, brought the topic into the national conversation. That article appeared seven years after then-Professor Linde explained and advocated state constitutional primacy in an Oregon Law Review article—an article that Justice Brennan himself acknowledged as a source and an inspiration.<sup>7</sup>

More significantly, after Professor Linde became Justice Linde of the Oregon Supreme Court, he was the first to demonstrate that the theory of state constitutional primacy with respect to individual rights could be translated into a robust body of case law. Other judges soon followed his lead, and many of you are in that group. That is why I say that, without Hans Linde, who is now 94 years old, I don't think any of us would be here today.

I would like to expand on one aspect of state constitutional rights that Professor Williams mentions—and, in fact, was one of Justice Linde's under-implemented contributions. It is by now universally recognized that state courts can interpret individual rights guarantees more expansively than the United States Supreme Court interprets analogous provisions of the Federal Constitution, and many of you have participated in doing so.

It is by now universally recognized that state courts can interpret individual rights guarantees more expansively than the United States Supreme Court interprets analogous provisions of the Federal Constitution, and many of you have participated in doing so.

As Professor Williams' paper shows, though, state courts typically do so by applying the analytic structure from federal cases, sometimes reaching more protective or rights-generous results—not always, but frequently. For example, in defining what government actions trigger a person's constitutional right to be free from searches, state courts, relying on state constitutions, usually employ the federal formulation of a "reasonable expectation of privacy," but they may apply a more generous or expansive vision of what a reasonable person might expect.

Rarely do courts question, much less abandon, the federal template, but it can be done, and it has been done. For example, in Oregon, a search is defined as any government action that, if government could engage in it at will, would reduce the people's freedom from unwanted scrutiny. An individual's subjective expectation, reasonable or not, is simply not relevant.

More to the point, in the context of civil litigation, Oregon courts adjudicating equal protection claims, equal privileges and immunities claims under the state constitution did not use the federal levels of scrutiny framework that we are all familiar with—scrutiny for suspect classifications, etc. Instead, the courts posed a structured sequence of inquiries. That results, I might add, in what's probably in some ways a less expansive interpretation; in some ways, more expansive.

First, the court asks, "Does this challenge action confer a benefit or a burden on what's called a 'true class'—a group that is not defined by the law in question, but rather bears some of what the courts have called 'antecedent personal or social characteristics.' " Thus, a law that requires filing a notice of appeal within 35 days is simply not subject to equal protection analysis, and not even a rationality review, because late filers would never be considered a class if not for the law establishing the deadline.

Likewise, and somewhat more significantly, a law imposing, for example, tax surcharges on homeowners who do not recycle would simply not be subject to an inequality guarantee. But racial or ethnic groups, veterans, Portland residents, Catholics, college students, lawyers, redheads have a socially recognized group identity pre-existing any law that might affect them. Those groups are subject to the analysis.

But the court next asks whether the particular true class at issue is one that is based on immutable traits, such as race, ethnicity, age, or what might be called quasi-immutable traits, such as gender or religion, as opposed to classes such as Portland residents or college students—traits which can more or less be freely assumed or discarded. Again, the latter classifications are simply not subject to any equality guarantees. The former classification, however are rebuttably presumed to be unconstitutional.

In the analogous terminology of federal law, these classifications might be called "suspicious" because they raise the suspicion that they are driven by prejudice, animus, or stereotype. That presumption, however, can be rebutted if government can establish that the disparate treatment is based on relevant, genuine differences, usually biological. The importance of the government interest at stake is, again, simply not relevant.

Thus, for example, a law requiring annual driving tests for persons over 75 (these are hypothetical) or sickle cell anemia testing or screening based on ethnicity or race would not be unconstitutional. In Oregon, the government would violate the Privileges and Immunities Clause of the state constitution only when it burdens a true class defined by an immutable or quasi-immutable trait that the government cannot justify as based on genuine differences (usually biological).

Of course, there are, as Professor Williams pointed out, state constitutional rights that have no federal analog whatsoever. For these provisions the courts have no choice but to develop an independent, analytical framework. As Professor Williams notes, among the unique state provisions in constitutions most frequently invoked by tort plaintiffs are the remedy clauses in 39 state constitutions, which typically guarantee a legal remedy for injury to person, property or reputation. Courts in 39 states have developed a dizzying array of interpretations of their remedy clauses, probably because these provisions must mean something, but they can't possibly mean what they say. For example, there neither is, nor should there be, a legal remedy for the injury to person caused by age-related arthritis. I am here as an example. The injury to uninsured property caused by lightning has no remedy in due course of law. The injury to reputation caused by dropping an easily catchable throw to first base in the World Series has no remedy in due course of law. So courts struggle.

Courts in 39 states have developed a dizzying array of interpretations of their remedy clauses, probably because these provisions must mean something, but they can't possibly mean what they say.

A quick summary of these solutions, some of which Professor Williams touched on, illustrates this difficulty. Some courts subscribe to the theory that the guarantee is purely procedural, imposing no limits on non-judicial lawmakers' authority to declare why it is or is not an injury, and only requires courts to provide a fair and accessible process for what the legislature can freely define as an injury. Most jurisdictions, as Professor Williams points out, have some sort of guarantee of a remedy, but they are all over the place in terms of how you can justify *eliminating* a remedy.

For example, just as Professor Williams' paper points out, in Florida, lawmakers are free to abolish a cause of action that was established after the state constitution was enacted, but only if they provide an adequate *quid pro quo*. Even then, if it doesn't, it can justify eliminating the remedy if it can show an overpowering public necessity to do so.

Each of these solutions has obvious problems, which is why I believe that remedy clause litigation will continue to confound courts, plaintiffs, and defendants equally.

## Honorable Noma D. Gurich

I am from Oklahoma. We have all of these constitutional provisions that have been discussed, and reading through both Professor Williams's and Professor Long's papers, it's like reading my diary! Talk about taking your constitution to bed with you!

I am starting my eighth term on the court, and I have some colleagues here in the audience from the Court of Civil Appeals in Oklahoma. So I brought my cheering section with me, and I thank you all for being here.

We have been living constitutional law for a number of years in the state of Oklahoma. Although the legislature takes the same kind of oath that we take, which is to uphold the Constitution of the State of Oklahoma and the U.S. Constitution, that duty is overlooked in many of their acts. This is public record. We have told them they are disregarding the Oklahoma Constitution time and time again in opinions, and used words like that, so I'm not talking out of school here.



(Of course if a question is coming up in our court system I am not going to comment on that, and there are some issues that are discussed today that I think are still pending with us.)

In the state of Oklahoma, in the last year they had 30 jury trials in three federal districts total, and only seven of those were civil. Contrast that with Oklahoma County, which is our largest county in the state, where the jury trials are somewhere in the nature of two or three per judge per jury week, so it's very dynamic in state court.

We have had a lot of experience with tort reform in the state of Oklahoma, starting in 2009, when a comprehensive tort reform act was enacted which violated one of our constitutional provisions against germaneness. We have a constitutional provision that says you have to have a single subject for legislation, but there were 90 provisions in the act, on 45 different subjects, and that was struck down as unconstitutional. They then re-enacted some things, and we are going through some challenges currently, and I'm going to talk about a few of those.

I agree that the great majority of litigation takes place in state court. In the state of Oklahoma, in the last year they had 30 jury trials in three federal districts total, and only seven of those were civil. Contrast that with Oklahoma County, which is our largest county in the state, where the jury trials are somewhere in the nature of two or three per judge per jury week, so it's very dynamic in state court.

As Professor Williams mentioned, we have a very vigorous practice in Oklahoma in special law challenges. We have two special law provisions in our constitution. One is a very general statement, and the other is very specific, listing 28 specific areas where legislation, if they encroach on any of those 28 areas, is a "special law," and is dead on arrival.

Our more general special legislation provision is also helpful in dealing with subjects that are not on the 28 listed items but deal with laws that apply to a special situation when a general law would have a better application. And there is, of course, nothing like that in the U.S. Constitution.

Let me talk about a few cases quickly here. There was a workers' comp case involving a special law. We had a provision that, for the purpose of extending the immunity, said that any operator or owner of an oil and gas well, or other operation for exploring or drilling or producing oil, would be deemed to be an intermediate or principal employer for services with respect to any injury or death that occurred to a worker. We had a truck driver who came on an oil and gas well site and suffered serious injuries. The defendants filed a motion to dismiss in state court, saying that they could not be sued in state court, or anywhere else, because of the exclusive workers' compensation remedy. Even a conservative trial judge in Oklahoma County struck that down and said it was unconstitutional, and we agreed, following our analysis on special laws versus general laws (found in Article 5 § 59 of the Oklahoma Constitution).<sup>8</sup>

We also invalidated special laws in the state of Oklahoma in workers' comp. We had a big reform act that took effect in 2014, in which claims before February of 2014 were adjudicated in a workers' compensation court of record, and claims after 2014 are resolved in an administrative system. We have two workers' comp systems running right now: a court of existing claims, and the new administrative system, so we have a lot of challenges to the administrative system.

We also had a constitutional challenge to an opt-out provision under the workers' compensation court and the administrative body. Texas has an opt-out provision for workers' compensation, saying that you can go without compensation entirely. Their ERISA plans then cover workers' comp. In Oklahoma, the federal judges have never wanted to be workers' compensation judges, and they have struck down every attempt to use ERISA as a workers' compensation remedy.

So we have an opt-out provision in the new administrative act which was challenged as a special law, and we struck it down based on our state constitution, saying that you cannot regulate the practice or jurisdiction or change the rules of evidence in judicial proceedings or inquiry, including administrative proceedings. The opt-out basically allowed the employers to set up their own workers' compensation system, employer-by-employer. So, obviously, that might have been an equal protection issue, but we struck it down under special legislation provision.<sup>9</sup>

We have also had a number of due process challenges in Oklahoma regarding the new workers' compensation act, and there was a provision that said that you could not claim cumulative trauma unless you had been employed at least 180 days with the same employer. That was stricken under a due process analysis by our court.<sup>10</sup>

The majority opinion said (and this was mentioned by Professor Williams in his paper), that because the Oklahoma due process section is coextensive with, and protects at a minimum, those rights which are also provided by the 14<sup>th</sup> Amendment, we hold therein that the due process minimum was violated in this statute, and, therefore, we didn't even have to get to the Oklahoma standard, which would be much broader in scope than the federal counterpart. And we also found that the 180-day classification was both over-inclusive and under-inclusive, because it prohibits both wrongful conduct by people and innocent conduct by others. The challengers offered nothing real, only imagined, to substantiate their position that prohibiting cumulative trauma claims for an employee who works less than 180 days prevents fraudulent claims and reduces fraud in the State of Oklahoma.

We also have other people in our court who have written on this issue under the rights and remedies section of our state constitution and also equal protection, so we have a lot of things at play in Oklahoma regarding these constitutional provisions.

There's another thing we did in one of our workers' compensation cases. The new administrative act provided that, if you got a permanent partial disability award, but went back to work for the same employer, and worked a certain number of weeks, you could lose your permanent partial disability benefit. Or, if you didn't get rehired by that employer because of misconduct or some other reason, you would also lose your permanent partial disability award.

We held that a permanent partial disability is a property right, and that the legislature could not make a worker forfeit the award. It is a final court order or final administrative order under the new system, and it could not be forfeited. Otherwise it would violate the Oklahoma Constitution that says no person shall be deprived of life, liberty or property without due process. Our Oklahoma Constitution says that, so we didn't even have to go to the Federal Constitution for that. So that was a little bit of an interesting twist on things.

I also want to mention some issues we have had related to arbitration. I am a trial-oriented judge. I spent a combined 22 years as a trial judge in the workers' compensation court and the district court, and before that I

was a trial attorney, so I am a very big proponent of jury trials. I presided over 190 civil jury trials during my time on the Oklahoma County bench, so I really believe in this, and I think this is the right of the people, so I think I'm very patriotic. I don't think I'm an activist; I think I am patriotic. I believe in democracy, I believe in the right of the people to speak.

We had a case that came up under an employment contract that had an arbitration clause. We determined that the underlying employment contract had a very restrictive "do not compete/do not solicit" clause. In

I presided over 190 civil jury trials during my time on the Oklahoma County bench, so I really believe in this, and I think this is the right of the people, so I think I'm very patriotic. I don't think I'm an activist; I think I am patriotic. I believe in democracy, I believe in the right of the people to speak.

Oklahoma we have very strong language opposing and prohibiting those types of contract clauses, so we ruled as a matter of public policy that the arbitrator did not have authority to make the decision on that employment contract—we have the authority. We struck down that provision.<sup>11</sup>

Well, the U.S. Supreme Court didn't like that very much. They reversed us *per curiam*,<sup>12</sup> and said that the U.S. Supreme Court's precedents control. They said the Federal Arbitration Act declares a national policy favoring arbitration. They also said that the arbitration provision is severable and subject to state court determination—but, if it's valid, then the remainder

of the contract is for the arbitrator to decide. They held that the Oklahoma Supreme Court must abide by the Federal Arbitration Act, which is the supreme law of the land. So they invoked the supremacy clause on us, and they said there cannot be any specific state statute that is an exception to the supremacy clause when a general federal statute applies. And they said their cases hold that the FAA forecloses precisely this type of judicial hostility toward arbitration—presumably the hostility we had shown. So our decision was vacated and remanded.

Well, that just means that they have had the last say on that issue. Having been a trial judge, I have to defer to the appellate judge who has an opinion different from mine, but I don't have to say they're right or they're wrong. I just go on. I think it's our right as judges, in the states that we represent, to do what's right for the people in our state.

We have also had other special law issues. We have had issues regarding the medical affidavit, which we can discuss. I know that's in some of the materials. We have struck down the medical affidavit in medical malpractice cases three times now.<sup>13</sup>

I hope to have more chance to discuss some of these issues with you in the later sessions.

## John Cuttino

I have the best job in DRI. I want to thank you for having me here. DRI very much appreciates the Pound Institute making it possible for us to have a spot on the panel and to bring whatever defense bar perspective there is to the issues of the day.

Professor Williams had a fascinating paper. I learned more about state constitutional law in the last two weeks than I ever thought I would know. Hold that thought, because I think that's important.

As will quickly become apparent, I am not an academic, I am not a judge, I am certainly not a constitutional scholar, federal or state. My perspective is from a defense trial lawyer, civil defense trial litigator for 35 years. It saddens me that I don't get to try cases as much as I used to because I enjoyed that very much.

Most recently, as President of DRI, which as you know is a national voluntary defense bar organization of 22,000 lawyers, I spent a lot of time traveling and dealing with state defense organizations, talking to lawyers, listening to lawyers, understanding their practices and their challenges, so my comments are going to be observational, anecdotal, maybe a few questions and suggestions, some things to think about.

First of all, let me agree fully with Professor Williams's conclusion in his paper that says, and I quote, "There are powerful economic interests with a stake in pushing through a variety of policies limiting access to civil litigation." Yes, there are. And you will find that not all defense bar practitioners—in fact, a decreasing number of those—think those interests are very good. Over the last 20 years, during the existence of my practice, there has been a divergence, quite frankly, between the positions of the defense bar and some of the clients that we represent.

Over the last 20 years, during the existence of my practice, there has been a divergence, quite frankly, between the positions of the defense bar and some of the clients that we represent.

I think this is an opportunity for the plaintiff's bar and the defense bar to work together on a lot of things, protecting the rule of law in particular, protecting the right to a jury trial, which I consider sacrosanct. DRI is very forceful and very committed to preserving the civil jury trial, as is the American Board of Trial Advocates, as is the American Association for Justice. I think there are going to be some coming opportunities for us to do that.

I think you should know that there is no easily articulable national defense bar perspective on the influence or significance of state constitutional law protections of civil litigation. There are two reasons that there is not a homogenous or easily-stated position.

First of all, I certainly agree with Professor Williams's papers and with the paper for this afternoon by Professor Long, that state practice is very cultural. You really realize this when you travel around the country, like I did, and you talk to a lot of different people. State constitutions reflect when statehood was achieved, who the settlers were—English, French, German—if they were frontier states. All these things play into what the framers of those constitutions thought were important.

State constitutions reflect when statehood was achieved, who the settlers were—English, French, German—if they were frontier states. All these things play into what the framers of those constitutions thought were important.

Voir dire has been mentioned. We have a very limited voir dire process in South Carolina. Why is that important? Because cultural norms change very slowly, if at all, and people are protective of them. So there are things that some states ask DRI to do or to advocate for, which we wouldn't do because it would offend a neighboring state or would be at odds with the defense bar's interest in a neighboring state. So there is a very strong cultural difference that I think belongs in state constitutions and that you see in the defense bar practice.

The second reason why there will probably never be, certainly not now, a uniform defense bar—and I’m making a distinction between the defense bar practitioner and some of the interests that we represent—is the divergence of thought and the way that we all, as lawyers, learn to practice, the way we learn to work things out, the way we learn to conduct trials. Not all of the interests that the defense bar represents are for those things anymore, not all are for that process anymore. Not all defense lawyers or organizations agree with that approach.

It could be that state constitutions are a line of protection against some of the things that are economically driven that are designed, quite frankly, to change our judicial system.

I am not here to shill for any of the defense bar interests or our clients’ interests one way or the other on this state constitutional law issue, but I can tell you this: most of the defense bar practitioners that I talk to say tort reform in a lot of ways was needed. Tort reform also might have been good for my clients’ business, but it wasn’t particularly good for my business.

I think that is a true statement. You talk to a lot of lawyers in this country, and 25 years ago when I would be at a gathering of lawyers they would be telling war stories about trials, witnesses that went crazy, judges and certain rulings, verdicts, motions. Now you get a lot of lawyers together and it’s a profession in distress. Within the first two or three minutes of those conversations, lawyers begin talking about how tough it is and how it’s not like it used to be. And there’s more than just wistfulness about it. There’s a perilous, sort of ominous feeling that we are headed to a point in the practice of law that we don’t completely recognize.

It could be that state constitutions are a line of protection against some of the things that are economically driven that are designed, quite frankly, to change our judicial system.

I want to make four comments. These are far from academic but they’re sort of man-on-the-street practitioner observations.

I don’t know that state constitutional law courses are taught in law schools. It has been a long time since I was in law school, but I don’t remember a state constitutional law course being offered. We all took con law, but it was *Plessy v. Ferguson* and *Marbury v. Madison*.

I don’t remember discussing the constitution of South Carolina when I was in law school, so maybe that is something that the plaintiff and defense bar can advocate because I think that’s significant. If there are additional protections to be given civil litigation in state constitutions, then law students need to know about them and they need to be able to articulate and pursue them once they get out and practice.

I just learned in preparation for this Forum, for example, that South Carolina is one of the handful of states that articulates a separate right to privacy in addition to protection against unreasonable search and seizure. There is an additional protection against unreasonable invasions of privacy. Not all states have that. Of course, that’s in the criminal context but that is something worth knowing.

If it’s true that you will see the state constitutional law protections of civil litigation coming to the forefront, I can’t think of a better supplementary justification for adequate judicial funding and adequate judicial salaries



than that. If you are going to have more constitutional law cases and issues raised in state courts, you had better have somebody to hear them.

I know that many of your states are in distress on the judicial salary and judicial budgeting front. This is significant. I would like to look at some of these constitutions and see what they say, if anything, about judicial funding. Too many state courts are beholden to the legislature, and some, quite frankly, have to grovel to get the money to do their routine business.

The third thing I would ask you to think about is that, because state constitutional documents are operational in nature, as opposed to aspirational—and this will be touched on, I think, in the afternoon paper—I think an obstacle to the full realization of the value of a state constitution, quite frankly, is what I see as the decrease in lawyer-legislators at the state level. I don't have any data to give you on that, but I can give you some anecdotes. I can tell you that, in South Carolina when I first started practicing law, it seemed to me that every plaintiff's lawyer was in the legislature—and knew the judge, and voted as a legislator to appoint that judge. (Judges in South Carolina are elected by the legislature.) Not so much anymore. And I have to tell you that I think, although there are plenty of smart businessmen and car dealers and construction company owners in the legislature, I am not sure they appreciate the meaning of a constitutional law argument as a lawyer would. I think, truthfully, maybe the framers of our constitution contemplated that legislatures would be full of lawyers, and they are not anymore, and I think that is a drawback.

I think an obstacle to the full realization of the value of a state constitution, quite frankly, is what I see as the decrease in lawyer-legislators at the state level.

Now, don't say that I'm pining for the days when all the plaintiff's lawyers were legislators, because I am really not, but I think there is great value in having legal acumen in a legislature, because it gets traction and it gets attention. It results in the drafting of better statutes, understandable statutes, and I think that is something worth considering. I don't know what you do about this, but I think it's in the equation somewhere.

The last thing I would ask you to think about is something else that will be talked about this afternoon. This is very important to all members of the bar. State constitutions, as operational documents, I think generally give states the right to govern the practice of law in those states. It's a statewide issue.

To that end, you will see—or DRI thinks and I think a lot of the ABA thinks you will see—increasing movement to have non-lawyer providers of legal services. It is an access-to-justice issue. It's an economic issue. Regardless of whether you think it's a good idea or not, it is a state issue.

I know that there are states that already have something called limited law-licensed technicians. Maybe the State of Washington does that. They allow people, non-lawyers who have had some legal education but do not have law degrees, to represent folks in certain kinds of cases. That is on the way, and I think somewhere in this concept, somewhere in a state constitution's ability to enable the state to govern the practice of law, are things like that which will change the profession, which is already, in our estimation, under great duress.

I don't think there are specific defense bar perspectives on these matters, but I hope those are some things you can take back and think about.

## Robert S. Peck

Going last made me think of the practice when the Justices of the United States Supreme Court meet in conference and discuss the cases. The Chief Justice goes first, and then they go along in order of seniority, and the least senior justice always worries that everything that could be said has already been said.

Another duty of the junior justice when they meet in conference, because no one else is allowed in the room, is to answer the door when there's a knock. Justice Breyer served as the junior justice for what I believe was a

record 13 years, and when it hit the 10<sup>th</sup> anniversary of his holding that status he had gotten used to the fact that Justice Scalia liked to have a cup of coffee delivered to him halfway through the conference. So there would be a knock at the door, and Justice Breyer would step up to the door, receive the coffee and serve it to Justice Scalia.

So, on this 10<sup>th</sup> anniversary he said to Justice Scalia, "You know, I think I'm getting pretty good at this," to which Justice Scalia answered, "No, you're not."

I am grateful that as the last speaker I don't have to serve coffee to my fellow panelists.

It is only through the civil justice system, and not through the halls of power that deal with the executive branch or the legislative branch, that an individual who is not well financed, who has been injured or otherwise harmed, can seek redress before a neutral tribunal against the most powerful, influential individuals or corporations in the state.

In approaching this topic, we often forget how remarkable the civil justice system is. It is only through the civil justice system, and not through the halls of power that deal with the executive branch or the legislative branch, that an individual who is not well financed, who has been injured or otherwise harmed, can seek redress before a neutral tribunal against the most powerful, influential individuals or corporations in the state. A litigant's status in the community doesn't matter there; it's the justice of their cause. And that is what has to be preserved in the civil justice system.

As you heard from Bob Williams and others, these measures that the legislatures consider seek to change the playing field, to "uneven" it, to give advantage to those who are sufficiently well-heeled so that they can go to the legislature or the governor and change the calculation that places everyone on equal terms. They can throw obstacles before the courts so that an injured party doesn't have the same access to justice, or that make it so expensive to undertake a lawsuit that many meritorious cases cannot be pursued. And even when you do overcome these barriers, damage caps and other impediments make that victory in court less than the proof you mustered. So the question then becomes, "How does the state constitution deal with that?"

Bob also mentioned the prohibitions in some constitutions against special legislation that, in some ways, is really the flip side of equal protection. While equal protection guarantees the person will be treated similarly to everyone else, the special legislation prohibition says that special-interest groups can't be treated especially favorably because of their political clout. That is one protection for the civil justice system.

But we have other provisions in constitutions that also make a difference. So let's start with the right to trial by jury.

**Right to Trial by Jury.** Most state constitutions use the word “inviolable” to describe the right to trial by jury. That’s a word that doesn’t give any budging, doesn’t admit to any balancing test. For many constitutional rights, we balance different considerations to decide whether what the legislature did is sufficiently rational or compelling, depending on the standard of scrutiny used—that it makes sense despite the fact that it may mistreat an individual. But when a constitution declares that the right to trial by jury is inviolable, it means there is no balancing act. You have to obey the right to trial by jury as it was meant at the time the constitution was promulgated, as it was understood at common law. You have to also look at what the prerogatives of the jury were, and, as Bob said, one of the prerogatives is to determine the facts, and nobody gets to override those facts. The amount of damages is one of those facts.

For example, if a judge offers a remittitur, the offer says that, “You really didn’t prove the case, and the jury came up with an amount that is more than the evidence supports.” Even then, though, the plaintiff must be offered the option of a new jury trial, or the inviolable right is denied. This means that the right to a jury trial entitles the parties to a jury determination of damages and that is the gist of many of the arguments that are made against damage caps for violating the state constitutional right to trial by jury. Damage awards have always been considered a fact to be found by the jury. That determination is not an advisory opinion of the jury, to which then you can apply the law, which is the excuse that some courts have used to deny that the jury trial has anything to do with damage caps. The verdict is an actual determination of what the damages are. And if the state decides that you can’t really get the full value of that damage award, that really does amount to a taking for a public benefit, and so you end up getting involved in other parts of state constitutions.

As you have heard, the Supreme Court has never applied the Seventh Amendment to the states, and this dates from late 19<sup>th</sup> Century decisions of the Supreme Court, when it said no provision in the Bill of Rights applies to the states. Beginning in 1925, we saw the incorporation of various provisions to the states through the Fourteenth Amendment. It was not until the 1960s that we have the modern incorporation doctrine, but the Supreme Court has not considered that question about incorporating the Seventh Amendment since then.

But in 2010 the Supreme Court, for the first time in a long time, in the *McDonald* case,<sup>14</sup> considered whether the Second Amendment was incorporated and applied to the states. Justice Alito wrote the opinion and in it he went through a litany of numerous considerations on why the Second Amendment qualifies for incorporation: that at the time the Fourteenth Amendment was written a majority of the states had equivalents to the Second Amendment, and that this was fiercely protected in those states, etc. He went through a number of different criteria.

Well, the right to trial by jury in civil cases qualifies on even more well-developed grounds than the Second Amendment did in *McDonald*. For every one of Justice Alito’s criteria, even more states had supported the right to trial by jury in civil cases. It is fundamental to our understanding of liberty. So, while it is said that the jury-trial right has never been incorporated through the 14<sup>th</sup> Amendment, it qualifies. The fact is that the state courts also have the authority to interpret the Federal Constitution, and there’s no bar in your finding, by following the *McDonald* criteria, that the Seventh Amendment does apply to the states.

And if you look at the way the U.S. Supreme Court has applied the Seventh Amendment, using that same historical test of the jury's prerogatives when they first came into being, as the Seventh Amendment was added in 1791, you will find that they recognized that the jury is the judge of damages. The Supreme Court said this in a 1998 decision called *Feltner vs. Columbia Pictures*,<sup>15</sup> in which Justice Thomas, going through this historical background for a unanimous court, concluded that indeed Congress could not require parties to eschew a jury trial when opting for statutory damages in a copyright action, rather than actual damages. The decision applied the understandings reflected in the common law or statutory law as of 1791. In so holding, the Court rejected the argument that the jury's job was complete once it rendered a verdict.

The winning advocate in that particular case happened to be a lawyer named John Roberts, who is now the Chief Justice. This federal decision provides at least persuasive support that legislatures cannot substitute a one-size-fits-all override of the jury's damage determination and that the inviolate jury-trial right should be taken very seriously against legislative intrusion.

**Right-to-Remedy Clauses.** Moving on to the remedy clause, the remedy clause is a realization that, as Blackstone wrote about the English common law, "there is a remedy for everyone," and that those remedies that were recognized at common law must be observed. And so the usual formulation of that, as Bob Williams indicated, is that there has to be an adequate *quid pro quo* when the legislature substitutes something for the common-law rights that are being displaced.

For example, using workers' compensation, workers tended to lose cases in court because of contributory negligence, and workers' compensation came about more than a century ago because policymakers thought there needed to be some system of compensating workers for the dangerousness of what was then the industrial revolution. Workers gave up their right to trial by jury for an administrative process that guaranteed them at least a minimum level of compensation.

In some ways, I think that is the price we pay for a federal system where we have 51 separate systems. It doesn't mean that these cases decided in other states are not interesting and persuasive to you.

The employers also had to get a *quid pro quo*. They got some stability to this process. Rather than subjecting themselves to the uncertainty of trial, they knew that they could buy insurance and that there were specific kinds of damages available. So that was the *quid pro quo* that allowed the "Grand Bargain," as Bob referred to it, that allowed workers' compensation to exist. This met the right-to-remedy requirement.

So, right-to-remedy clauses often are invoked when there should be a *quid pro quo*, but there isn't because one side has convinced the legislature to so tilt the playing field that the result is that only one side is damaged. The right-to-remedy clause ought to provide protection against that.

When you talk about these interferences by the legislatures in the civil justice system, remember that what's motivating them is a dissatisfaction both with juries and with judges. They believe that the discretion you exercise as judges, and the determinations made by juries, are not producing the results that they want, and so they pass these pieces of legislation to direct the process to guarantee a certain type of outcome. And that is why separation of powers is also implicated, because some legislatures interfere with inherent judicial authority

as well as with the authority of the jury, which serves as the democratic arm of the judicial branch.

I like to say that, when they—the legislatures—do this, what they’re doing is trying to act as a super-judiciary interfering with judicial process. And the constitutional provisions that we have in our state constitutions stand as a bulwark against that.

We went through a revolution in state constitutionalism in the middle of the 19<sup>th</sup> Century because legislatures had become so powerful that they often overrode judicial decision-making, and so we saw a movement in state constitutional law at that point that strengthened state judiciaries to make sure that they could exercise their power as co-equal branches. It may be time to reinforce that status.

When you talk about these interferences by the legislatures in the civil justice system, remember that what’s motivating them is a dissatisfaction both with juries and with judges. They believe that the discretion you exercise as judges, and the determinations made by juries, are not producing the results that they want, and so they pass these pieces of legislation to direct the process to guarantee a certain type of outcome.

## Response by Professor Williams

I want to thank all four of you for your very thoughtful comments. I am tempted to say I agree with them and sit down, but no professor can do that. Let me just make a couple of quick comments because we have got some ground to cover.

Professor Schuman, thank you very much. You are absolutely right. I neglected to cite Hans Linde, who is the "Godfather" of state constitutional law of modern times, a guy who was very helpful to me when I was a younger professor, and I will cure that defect when this goes to further publication.

But, in some ways, as you said, these judicial doctrines are all over the place. I think that is the price we pay for a federal system where we have 51 separate systems. It doesn’t mean that these cases decided in other states are not interesting and persuasive to you. Just on the right to remedy, there are 39 states, so, if you’re one of those states you have 38 other states you can look at. Obviously their decisions are not binding, but they’re very important.

Justice Gurich, thank you so much. I agree that the legislative oath is often overlooked in state legislatures. I used to work in the Florida state legislature. But there’s another thing that actually happens. In some instances, legislators hide behind the state constitution to avoid legislating in areas where maybe they should. I have an example from Pennsylvania. I don’t think there are any Pennsylvania judges here, but in an abundance of caution I am not going to discuss it.

It’s very important that you pointed out the single-subject requirement. This is a limitation on the way that state legislatures enact statutes. Often what I call “special- interest legislation,” which is controversial, can’t get through committees as an ordinary piece of legislation, so it’s often hooked onto a bill that’s maybe not germane. And these are enforceable provisions that were voted into your constitutions by the citizens of your states.

Of course, you should give the legislature wide deference, and of course compromises have to be made, and things like that, but these are real limitations on the process of state legislating that have no analog in the U.S.



Constitution. And a number of your states have enforced these provisions. You know full well how these laws get enacted, these special-interest laws, and you are the protectors of the citizens in your state as long as there's a constitutional provision that is relevant.

Thank you, John Cuttino, for the defense perspective. Yes, the state constitutions are very diverse, not just in territory but also in time. A lot depends on when your state constitution was adopted. Again, Hans Linde made the very important point that Pennsylvania has an environmental protection clause in its constitution and Oregon does not, but that is not because people in Oregon don't care about the environment. It's that the Oregon Constitution was drafted in 1857, whereas the Pennsylvania Constitution was updated in the 1960s, coming into the year of the environment and all that stuff that a lot of us remember.

The little guy in court is really different from the little guy in the state legislature. It's a very different chance that the little guy has in court.

And again, thanks for your point, John, about courses not being taught in law schools. There are about 25 or 26, maybe a few more, schools where they do teach state constitutional law. Interestingly, the Conference of Chief Justices adopted a resolution five, six, or maybe seven years ago suggesting that law schools teach state constitutional law. It was music to my ears because I have a case book on state constitutional law! And there's a *creeping* recognition of the importance of this in law schools. So I appreciate that point, and could you push on the people in South Carolina? I'll send you a copy of my book!

Bob Peck, a lawyer for whom I have tremendous respect, I have known him for a long time. By the way, he has taught state constitutional law in more than one law school. He points out, I think very importantly, about majoritarian judicial review—judicial review that protects the broad public—because the little guy in court is really different from the little guy in the state legislature. It's a very different chance that the little guy has in court, thanks to your efforts. No one is saying you should strike down every law. That is not what we're saying, but be aware of the potential of these kinds of provisions in your state constitutions that are unheard of, again, by most people—the media and others who focus mostly on the U.S. Constitution. Again, this is not “liberal judicial activism.” It's law enforcement.

Bob Peck made an excellent point that special laws actually treat some people *better* than everybody else. There are a lot of state constitutional provisions on special privileges. This is the opposite concern from equal protection, which is about treating people worse than everybody else. So there's a whole different constitutional concern in these kinds of provisions.

Finally, I suspect that Bob Peck is right. It might be that the Seventh Amendment could be incorporated against the states the way the Second Amendment was recently incorporated. But even if that doesn't happen—it's in my paper, but I think I failed to mention it this morning—the Seventh Amendment cases under the Federal Constitution can have a gravitational pull. They can be quite persuasive as you interpret your state constitutional guarantees of civil jury trial rights in the 48 states that have them.

Thanks so much for your thoughtful comments and for your attention.

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## Notes

- <sup>1</sup> *Smothers v. Gresham Transfer, Inc.*, 941 P.2d 1065 (1997).
- <sup>2</sup> *Horton v. OHSU*, 376 P.3d 998 (2016).
- <sup>3</sup> *Estate of McCall v. United States*, 134 So.3d 894 (Fla. 2014).
- <sup>4</sup> *Jersey Central Power & Light Co. v. Melcar Utility Co.*, 59 A.3d 561 (N.J. 2013).
- <sup>5</sup> See Williams paper part F.
- <sup>6</sup> *Lochner v. New York*, 198 U.S. 45 (1905).
- <sup>7</sup> William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).
- <sup>8</sup> *Strickland v. Stephens Production Company*, 411 P.3d 369 (Okla. 2018).
- <sup>9</sup> *Vasquez v. Dillard's, Inc.*, 381 P.3d 768, 770 (Okla. 2016).
- <sup>10</sup> *Torres v. Seaboard Farms*, 373 P.3d 1057 (Okla. 2016).
- <sup>11</sup> *Howard v. Nitro-Lift Technologies, L.L.C.*, 273 P.3d 20 (Okla. 2011).
- <sup>12</sup> *Nitro-Lift Technologies, L.L.C., v. Howard*, 568 U.S. 17 (2012).
- <sup>13</sup> *Wall v. Marouk*, 302 P.3d 775 (Okla. 2013); *Zeier v. Zimmer*, 152 P.3d 861 (Okla. 2007); *John v. St. Francis Hospital*, 405 P.3d 681 (Okla. 2017).
- <sup>14</sup> *McDonald v. City of Chicago*, 561 U.S. 742 (2010).
- <sup>15</sup> *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998).

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# Luncheon Keynote Address

## State Constitutions and the Protection of Individuals Rights: A Reappraisal<sup>1</sup>

**Hon. Goodwin Liu, Supreme Court of California**

Today I want to introduce a topic that you are probably familiar with. Forty years ago, Justice William Brennan of the Supreme Court of the United States, in one of the most cited law review articles of all time, argued that it is the duty and prerogative of state courts to engage in independent interpretation of the individuals' rights guarantees in state constitutions—especially in areas where the U.S. Supreme Court had, in his view, unduly constricted the scope of individual rights in the Federal Constitution.

State courts should, he argued, decline to follow opinions of the U.S. Supreme Court they find unconvincing, even where the state and Federal Constitutions are similarly or identically phrased. State Constitutions, he said, must be given independent protective force, for without it the full realization of our liberties cannot be guaranteed.<sup>2</sup>

Forty years ago, Justice William Brennan argued that it is the duty and prerogative of state courts to engage in independent interpretation of the individuals' rights guarantees in state constitutions.

Justice Brennan offered this clarion call for judicial federalism in 1977, after President Nixon had appointed four new justices to the Supreme Court. He sensed that change was afoot and he urged state courts to “step into the breach” as a new Supreme Court majority was narrowing individual rights protections under the Federal Constitution.

I realize that our current moment may bear some resemblance to the situation facing Justice Brennan in 1977. But the thoughts I have prepared for this afternoon talk long pre-dated the current moment, long pre-dated the current administration, long pre-dated many of these developments, because they are actually timeless themes about the structure of government rather than a response to any particular exigency or perceived trend in the law.

What theory of interpretation should guide state courts in deciding when they should depart from federal constitutional decisions in construing analogous provision of state constitutions?

No one disputes that state courts have the authority to interpret their state constitutions independently, but the question that Justice Brennan left unanswered was this: what theory of interpretation should guide state courts in deciding when they should depart from federal constitutional decisions in construing analogous provision of state constitutions? Lacking a good answer to this question, many state judges have hesitated to depart from federal precedent when construing their state constitutions, lest state constitutionalism be reduced to a kind of forum shopping for liberals.

My thesis is this: Questions of interpretative methodology, while interesting, are not the main fulcrum on which the legitimacy of state constitutionalism rests. The legitimacy of state constitutionalism does not primarily depend on the development of a distinctive state-centered jurisprudence in many areas. Many of our basic rights and liberties are protected by similar language in the Federal and state constitutions. State courts and federal courts can and do have principled disagreements on the meaning of those rights and liberties. When state courts depart from federal precedents, it may be because a state's constitutional text or history points to a different result. State courts should look to state-specific sources when they are available.

But when they are not available, when there is no state-specific text or history to guide the analysis, there is no reason why a state court cannot disagree with federal precedent on the basis of constitutional reasoning that transcends state boundaries—in other words, on the basis of general principles that guide constitutional reasoning.

This redundancy in interpretative authority is one way in which our system of government channels disagreement in our diverse democracy. My point today is that the legitimacy of state constitutionalism mainly turns on a proper understanding of the structure of our federal system, and not on matters of interpretive methodology.

To bring this issue into focus, let's put to one side those cases where state constitutional provisions materially differ from analogous federal provisions in their text purpose or history. For example, the religion clauses of many state constitutions differ from the free-exercise and establishment clauses of the First Amendment. Many state constitutions also have provisions that mandate government provision of social services like education. So it is no surprise that state courts have construed individual rights in these areas more expansively than federal courts interpreting the Federal Constitution.

What I want to focus on are those cases involving state constitutional provisions that *don't* meaningfully differ from their federal analogues. How should state courts interpret these kinds of provisions?

Consider, as an example, the Supreme Court's 1988 decision in *California vs. Greenwood*,<sup>3</sup> which held that the police can search trash left at the curbside of a home without a warrant. Several state courts have rejected this rule as a matter of state constitutional law. The New Hampshire Supreme Court found Justice Brennan's dissent in *California vs. Greenwood* more persuasive and concluded that "society is prepared to recognize [the expectation of privacy in one's trash] as reasonable."<sup>4</sup> The New Jersey Supreme Court found *Greenwood* "flatly and simply wrong as to the way people think about garbage."<sup>5</sup> The Court did not rely on state-specific grounds, making clear that "there is no unique New Jersey state attitude about garbage."

Or consider a more recent issue: same-sex marriage. My court, the California Supreme Court, held unconstitutional the state's laws restricting marriage to opposite-sex couples under California's equal protection clause. It did not employ any state-specific reasoning. We simply disagreed with federal precedent, employing similar analytical approaches but reaching different doctrinal conclusions.

Not all examples of this sort are liberal-leaning in their result. After the Supreme Court's decision in *Kelo v. New London*,<sup>6</sup> some state high courts read their state constitutions to confer greater protection for property rights against eminent domain. The Ohio Supreme Court, for example, concluded that *Kelo* had construed the concept of public use too expansively. The Supreme Court of South Dakota disagreed with *Kelo*'s public-benefit



rationale and construed “public use” to mean use by the public. These courts did not point to any meaningful textual difference between the state and federal takings clauses or to any other state specific factors. Instead, they reasoned from general principles.

The discomfort with these decisions may be traced to a conventional understanding of a constitution as an expression of a sovereign people’s fundamental values. So, just as the Federal Constitution expresses the fundamental commitments of the American people, so too it is thought that the California constitution should be read to express the fundamental commitments of the people of California.

Just as the Federal Constitution expresses the fundamental commitments of the American people, so too it is thought that the California constitution should be read to express the fundamental commitments of the people of California.

My contention is that this positivist conception of state constitutions does not properly account for the amalgam of historical influences that have shaped those constitutions and the Federal Constitution. The Federal Bill of Rights borrowed heavily from the state constitutional provisions, just as more recent state constitutions have borrowed heavily from the Federal Constitution, including its equal protection clause. And state constitutions have borrowed heavily from each other.

Constitutional interpretation historically has often employed reasoning from general concepts with qualities similar to the common law. That’s not to say that original meanings are unimportant. It is to say that federal and state constitutional interpretation, in many areas, is a mutually informative enterprise of elaborating not uniquely federal principles, or uniquely state principles, but rather uniquely *American* principles.

Just as there is no unique New Jersey attitude about reasonable expectations regarding garbage, there is no California concept of equal protection that is distinct from the analogous concept in the Federal Constitution. In these cases, the state courts and the Supreme Court are not interpreting different concepts of equal protection or unreasonable searches and seizures; they are offering different interpretations of the same concept. As Professor Paul Kahn has said, “The common object of state interpretive efforts is American constitutionalism.”<sup>7</sup>

On this view, the legitimacy of state constitutionalism must rest not on interpretative methodology, but on a justification for redundancy between state and federal courts interpreting shared constitutional principles. This is where I think many state judges feel a certain anxiety. If federal courts and state courts are often interpreting a common object, a common concept, and if that concept is national in its character, then why shouldn’t the interpretations of the U.S. Supreme Court be controlling? Why allow, essentially, two bites at the same constitutional apple?

State courts and federal courts are differently situated, institutionally speaking, when it comes to interpreting constitutional rights.

One kind of answer is that state courts and federal courts are differently situated, institutionally speaking, when it comes to interpreting constitutional rights. Federal courts may under-enforce constitutional norms because of federalism concerns. We see this in many domains of criminal procedure, for example, where the Supreme Court is reluctant to impose a national rule and may apply what some call a “federalism discount” to elucidating the content of individual rights. Of course, this concern has no applicability to state courts. They need not worry that their constitutional rulings will constrain the prerogatives of other jurisdictions.

Moreover, many state judges face electoral accountability in contrast to the life-tenure enjoyed by federal judges, and virtually all constitutions are easier to amend than the Federal Constitution. Although political accountability can induce a certain degree of judicial restraint, it also lessens the counter-majoritarian difficulty involved in constitutional adjudication and, perhaps counterintuitively, may aid the legitimacy of counter-majoritarian decision making by state courts.

In fact, one data point that counters the conventional view that federal courts are more protective of individual rights than state courts is, perhaps surprisingly, *Brown v. Board of Education*. *Brown*, some of you may recall, was a consolidated action involving four cases: from Kansas, Virginia, South Carolina, and Delaware. The Kansas, Virginia, and South Carolina cases reached the Supreme Court after the federal district courts in those cases had upheld segregated schooling. Those judgments were reversed by *Brown*. The only judgment affirmed by *Brown* was in the Delaware case, *Gebhart v. Belton*,<sup>8</sup> where the Delaware Supreme Court had expressed impatience with the pace of equalization of school facilities under the separate-but-equal standard and had ordered black school children admitted to white schools. So consider: *Brown* reversed three federal district courts and affirmed one state high court.

A state court can provide protection for basic liberties above the federal floor, but the impact of state rulings can be even more far reaching.

There are other reasons why judicial federalism is important. Most directly, a state court can provide protection for basic liberties above the federal floor, but the impact of state rulings can be even more far reaching. An accumulation of state decisions that depart from federal precedent may induce a second look by the Supreme Court of the United States. Landmark cases like *Mapp v. Ohio*,<sup>9</sup> *Batson v. Kentucky*,<sup>10</sup> *Lawrence v. Texas*,<sup>11</sup> to name a few, all cited state constitutional rulings on the same point of law. State constitutional decisions can shape federal constitutional law even when the Supreme Court confronts an issue for the first time, as in *New York Times v. Sullivan*.<sup>12</sup>

The American vision of “one nation under law” has always been complex, requiring an account of not only what various constitutional provisions mean, but, more importantly, who gets to decide.

These examples confirm Duke law professor Joseph Blocher’s observation that “the structure of American federalism . . . need not be one that simply divides and separates judicial power. It can instead be one in which various interpretive bodies, both state and federal, are

engaged in a shared enterprise of articulating constitutional values.”<sup>13</sup> “In other words, state courts need not be independent laboratories. They can be part of the same general research institution as the [U.S.] Supreme Court.”<sup>14</sup>

Against these considerations, it is said that vertical uniformity is a virtue, because it inhibits forum shopping and confers the appearance of neutrality. Some judges worry that giving different meanings to identical textual provisions may breed distrust in the legal system. Others warn that independent state constitutionalism may diminish the moral authority of the U.S. Supreme Court or threaten the vision of “one nation under law.”

To these concerns I would respond as follows: The American vision of “one nation under law” has always been complex, requiring an account of not only what various constitutional provisions mean, but, more importantly, who gets to decide. It is no accident that the Framers of the U.S. Constitution focused their efforts principally on

crafting an intricate and durable structure of government and only later adopting, as amendments to the main document, a Bill of Rights stated in general terms.

The Framers knew that a large and diverse nation committed to liberty will not often agree on one right answer to questions of intense public controversy. So the redundancies that are built into our structure of government serve to channel and manage conflict, and not necessarily always to facilitate a permanent resolution.

Many constitutional principles are stated in general terms open to various meanings and application. In the long run, the legitimacy of American constitutionalism rests not only on the substantive merits of particular decisions, but also on the capacity of our governmental structure to give full expression to the debates themselves.

The unique role of courts is that they frame a mode of contestation whereby each side lays claim to the same legal heritage, the same legal text, the same historical tradition. And it is that mode of contestation, as much as it is substantive results, that bind us together as a nation.

State constitutionalism is properly understood as a mechanism by which ongoing disagreement over fundamental principles is acknowledged and channeled in our democracy.

So state constitutionalism is properly understood as a mechanism by which ongoing disagreement over fundamental principles is acknowledged and channeled in our democracy. Far from endangering the legitimacy of constitutional law, interpretative pluralism is a source of its resilience and deep resonance with our diverse citizenry. When a state court departs from U.S. Supreme Court precedent, it carries forward a dialogue over the meaning of our basic liberties. In short, state constitutionalism is one way in which our structure of government provides an outlet for constitutional conflict.

## Notes

<sup>1</sup> These remarks are adapted from Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. REV. 1307 (2017) (23rd annual Institute of Judicial Administration Brennan Lecture).

<sup>2</sup> William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

<sup>3</sup> *California v. Greenwood*, 486 U.S. 35 (1988).

<sup>4</sup> *State v. Goss*, 834 A.2d 316, 319 (N.H. 2003).

<sup>5</sup> *State v. Hempele*, 576 A.2d 793, 814 (N.J. 1990).

<sup>6</sup> *Kelo v. City of New London*, 545 U.S. 469 (2005).

<sup>7</sup> Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147 (1993).

<sup>8</sup> 91 A.2d 137 (Del. 1952).

<sup>9</sup> *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>10</sup> *Batson v. Kentucky*, 476 U.S. 79 (1986).

<sup>11</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>12</sup> *New York Times v. Sullivan*, 376 U.S. 254 (1964).

<sup>13</sup> Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 343, 370 (2011).

<sup>14</sup> *Id.* at 343.

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# Afternoon Paper, Oral Remarks, and Comments

## State Constitutional Structures Affect Access to Civil Justice

Justin R. Long,<sup>1</sup> Wayne State University Law School

### Executive Summary

*Justin Long's paper addresses nine ways in which the structures of state constitutions protect individual rights in the area of civil justice, in some ways affording more protections than does the United States Constitution.*

*In his introduction, he points out that the Federal Constitution, and the federal courts which it authorizes and governs, protect individual rights to an extent. They provide a federal "floor" for our rights. America's state constitutions, however, create rights beyond the federal catalog, and the state courts enforce them in ways in which the federal courts cannot.*

- In section I, Professor Long describes the ways in which state constitutions allocate power among the states' governmental institutions in ways different from those of the Federal Constitution. State constitutions create institutions that have broader substantive authority than the federal government, and they enforce rights through judges who, for the most part, have legitimacy derived directly from the voters. They also impose checks on state government, including subject matter exclusions; procedural limitations; and empowerment of state institutions to act against the legislature when appropriate.*
- In section II, Long considers the civil justice system more specifically, focusing on who decides cases and the critical role of institutions in enforcing rights to prevent their violation.*
- In section III, Professor Long looks at the authority of the state courts to adopt rules that can be fair and neutral, favoring neither side, or more outcome-determinative, as when they erect barriers to, or increase the cost of, litigation. He discusses conflicts that can and do arise between court rules and inconsistent state statutes.*
- In section IV, Long discusses the ways in which the courts' authority over law school enrollment, bar admission, and attorney conduct can impact the availability of legal services to citizens. He points out that increased diversity in law schools—and, ultimately, in the bar as a whole—could help to enhance access to justice for minorities and the indigent.*
- Section V focusses on the "civil Gideon" concept: constitutional protection of the right to counsel in certain civil cases that affect crucial personal matters like parental rights, evictions, adoption, foreclosure, public benefits, and consumer debt collection.*
- In section VI, Long discusses the state constitutions' grant to the state courts of authority to secure their own functionality, through the power to require adequate funding from the state government. He provides examples of situations in which courts have had to become litigants against their own state governments in order to continue to fulfill their obligations to provide justice.*



- In section VII, Professor Long examines constitutional provisions that create, fund, and staff state government programs (like employee benefits and pension plans), and require that the activities be administered responsibly.
- Section VIII is dedicated to the unique role of the state attorneys general, most of whom are elected by the citizens. State constitutions ensure that they have the authority to enforce the law and individual rights, even in the face of political opposition from state executives and legislators.
- In section IX, Professor Long looks at the ways in which state constitutions empower state agencies, giving them the power to regulate business, health care, worker safety, education, and the environment.

In conclusion, Professor Long observes that most of the constitutional structures he examines have no federal analogues. He argues that the state courts should draw confidence from the sometimes unusual provisions of their constitutions, and embrace and enforce them in the interest of their citizens.

When we think about state constitutions (as rarely as that might be for most lawyers) and how they differ from the Federal Constitution, most likely we consider how individual rights under state constitutions can be protected above the federal floor. Typically, these questions arise in the areas of criminal law and criminal procedure. For example, what can be regulated as obscenity under the Federal First Amendment is protected

under the Constitution of New York,<sup>2</sup> and what is a permissible police search under the Federal Fourth Amendment violates the Washington Constitution.<sup>3</sup>

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Jeffrey Shaman, for example, has authored a thorough catalog of these individual rights.<sup>4</sup> Robert F. Williams has published similar work (emphasizing state constitutions' individual rights above the federal floor), including in this volume.<sup>5</sup> And classic works in the field like Jennifer Friesen's two-volume practitioner's guide follow along the same lines.<sup>6</sup>

Relatedly, when we think about access to civil justice, we tend to focus on private law: the torts, contracts, and property disputes that adjust the relative power of people acting in the free market. Government power can be oppressive, but so, too, can economic power. Workers and consumers turn to the courts for protection from this private oppression. The law, and its observers, largely treat these disputes as relevant to the parties involved and little else. By contrast, *public* law, the constitutional law that determines the relative power of institutions of government and citizens' rights against that government, can sometimes be forgotten in both legal and scholarly writing about civil justice.

But the focus of this paper is different. Instead of first-order individual rights, here I will discuss second-order constitutional structures that protect and enhance those rights. I refer to institutions, not rights, and public law, not private law. In math, if individual rights are the function, you would think of this paper as taking the integral; in music, if rights are the melody, here is an account of the bass line. And as with individual rights, state constitutions can and do vary in quite meaningful ways from the Federal Constitution.

Some of these variations are themselves startling: for example, if the three branches of government must include a legislature accountable to the people and supreme in lawmaking, an executive accountable to the people and supreme in executing the laws, and a judiciary independent from the people but ultimately accountable to the other two branches, then *no state* has three branches of government. The concept simply does not fit (as we will see in detail below). So, the most important first step in thinking about state constitutional structure is to open your mind to the possibility (and even likelihood) of truly creative diversity in function and form. What we teach in the law schools about federal constitutional structure (typically the only kind of constitutional structure we teach), is at best a loose analogy to the way things work in the states. And the Federal Constitution itself leaves open this constitutional space for the states to go their own weird ways.<sup>7</sup>

## I. State constitutions allocate power among governmental institutions differently from the Federal Constitution.

One of the foremost theoreticians in current state constitutional studies, James A. Gardner, has described our American federal system as a contest for affection.<sup>8</sup> If the people trust the federal government more, they can trust it with more powers by way of the constitutional arrangement. And if the people trust their state governments more, they can likewise bolster it with constitutional arrangements.<sup>9</sup> Given the cultural/political difficulty in amending the Federal Constitution, the more ordinary place to adjust these arrangements is in the state constitutions.

A state with complex and deep limits on legislative procedure, or a state with too many checks and balances among branches, will be unable to pass much legislation, unable to implement policy, and therefore unable to do much good (or harm) for the people. When the people of that state seek help, they will turn to the government they like better, the federal government. For a practical example, consider a state like Florida with strong limits on its power to borrow money.<sup>10</sup> When a natural disaster strikes, and the people of Florida need their homes rebuilt, their infrastructure restored, and their environment rehabilitated, state assistance would necessarily be inadequate because the state's budget cannot accommodate the sudden massive expense while remaining balanced. Instead, the people turn immediately to the federal government for assistance from the Federal Emergency Management Agency ("FEMA").<sup>11</sup> After all, the federal government has proven itself quite willing to borrow whatever amount it wants to satisfy its policy preferences.<sup>12</sup> Conversely, if the state government is structured without impediments to policy-making, with a vigorous executive and an unhampered legislature, it will fill the gaps left by a federal government that lacks constitutional power to make or enforce the full range of desirable policies. For example, a state like Massachusetts could adopt far-reaching public health insurance ("Romneycare") without the constitutional controversy<sup>13</sup> that has dogged the Affordable Care Act ("Obamacare"). Maybe the state has the fiscal resources to carry out such policies, or maybe it does not, but as a constitutional matter it has far more room to maneuver than does the federal government.

As important as the individual rights are, they mean nothing if they cannot be implemented and protected.

What does all of this have to do with access to civil justice? As important as the individual rights are, they mean nothing if they cannot be implemented and protected. State constitutions create the institutions that are capable of providing injured people a remedy, or not. And states go about protecting these remedies through

governmental structures that might well seem bizarre from a federal perspective. Naturally, the front line for protecting access to civil justice is the judiciary. And state courts have a variety of powers that federal judges would gnash their teeth in envy over.

For one thing, the scope of state courts' substantive authority is greater than that of the federal courts. State courts make common law, routinely and well; federal courts generally do not.<sup>14</sup> Most state high courts, with the assistance of other state judges, create the rules of procedure and evidence for their states.<sup>15</sup> The Federal Supreme Court (after preliminary work by subordinate institutions of the judiciary) produces a draft of procedure and evidence rules for the federal courts, but it does so subject to Congress's power to reject the Court's rules and only because Congress has delegated it that responsibility<sup>16</sup> just as it delegates the details of rulemaking for highway safety to the Department of Transportation.<sup>17</sup> State courts also regulate the bar, a crucial function for determining whether the indigent, the marginalized, and the unpopular will have access to law or not.<sup>18</sup>

Furthermore, unlike federal judges, most state judges have direct democratic legitimacy in that they have stood for election and won. As Professor Helen Hershkoff has explained, state judges' closer connection to the people, via the ballot box, should lead them to feel empowered to carry out their duties unapologetically and with gusto.<sup>19</sup> Federal judges just do not think about courts as having democratic legitimacy; even Justice O'Connor, a famous proponent of states' rights, has written of the "representative branches" when she meant the *political* branches.<sup>20</sup> Thirty-eight states elect their judiciary, in one way or another.<sup>21</sup> State judges, by and large, know the same rubber-chicken circuit that state senators know; they know the party bosses, the community organizers, and the out-of-state donors.<sup>22</sup> Whether or not judicial elections are wise policy, they at least mean that state judges need not worry that their "activism" is unaccountable or undemocratic.<sup>23</sup>

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Another feature of state constitutions is more uncomfortable to discuss, but cannot be avoided. To understand it requires a bit of background. As we all know, the federal government is one of *enumerated* powers. Whatever shenanigans the Commerce Clause and the Spending Clause have gotten up to lately, it remains irrevocably correct that each and every federal action—whether legislative, executive, or judicial—must have some origin in

The federal government is one of enumerated powers; each and every federal action—whether legislative, executive, or judicial—must have some origin in Constitutional text.

Constitutional text. If a letter carrier steps onto your porch to deliver mail, it is because her supervisor assigned that route. The supervisor's power to assign the route comes from a guidance manual, which in turn derives its authority from duly promulgated Post Office regulations.<sup>24</sup> Those regulations are authorized by statute, and Article I, Clause 8 of the Constitution empowers Congress to pass the statute.<sup>25</sup>

But state governments are different. As a matter of constitutional theory, states—not the federal government—are the inheritors of the sovereignty enjoyed by medieval English kings.<sup>26</sup> That means that state legislatures have plenary power. They can pass any statute they wish, limited only where federal law or the state constitution prohibits their action. And the state governor, too, has plenary power in her proper sphere, subject only to the limitations imposed by federal law and the state constitution.

State courts? The same. They hold the same sovereign powers as the King's courts, restrained only by superior sources of law and the prerogatives of the other branches. If that seems odd, consider under what authority the common law exists. An injured person comes to court; she asks the court to compel the injurer to make her whole. With no basis in text and no express grant of power, the court decides whether the injury complained of can be redressed in law or not—even if that particular wrong has never been so much as imagined by the courts before.<sup>27</sup> In other words, the state courts have power unless some other source of law takes it from them.

When we see state constitutional provisions directed at the legislature, then, we are seeing the expression in law of the people's wish to constrain the legislature, not empower it.

When we see state constitutional provisions directed at the legislature, then, we are seeing the expression in law of the people's wish to *constrain* the legislature, not empower it. If the people wish to permit their state legislature to make law in any given area, they need do nothing. The default, unlike in the federal context, is that the power to act exists. By writing a legislature-directed clause into the constitution, then, the people express, at root, a lack of confidence in their elected legislators. Sadly, history offers many examples to justify such lack of faith.<sup>28</sup> State democratic processes have often resulted in “capture” of the legislature by special interests, to disastrous effect. The people have responded by writing state constitutions that reflect an intent to implement checks on a non-majoritarian legislature.<sup>29</sup>

These checks take a variety of forms, but the three most important are: subject matter exclusions, where the legislature is barred from acting on specified topics; procedural limitations, where the legislature is burdened with super-majority rules or other constraints on the lawmaking process (a method entirely absent from the Federal Constitution apart from the basic requirement of bicameralism); and the empowerment of other state institutions to act against the legislature when appropriate. This third form of restraint, in turn, manifests in complex ways. For example, strong state constitutional protection for the powers of localities are one way a legislature must contend with, and even concede to, other state institutions.<sup>30</sup>

Courts in every state exercise ordinary judicial review of statutes, seemingly just as the federal courts do. But the reasons for state court review are fundamentally different.

State constitutional grants of authority to state agencies are another means of weakening the legislature and forcing it to make deals with other institutions rather than set policy unilaterally. For example, in my state of Michigan, the three leading state universities are governed by independently elected boards—and the boards' authority over university policy exceeds that of the legislature.<sup>31</sup> The legislature can use its power of the purse to affect university policy indirectly, but ultimate authority remains with the elected boards.<sup>32</sup> Of course, by far the most influential check on the legislature is the judiciary.

Courts in every state exercise ordinary judicial review of statutes, seemingly just as the federal courts do. But the reasons for state court review are fundamentally different. Judicial review in the states occurs against the background described above: judges' using their own democratic legitimacy instead of isolating independence; the assumption of power except where prohibited instead of exclusively where that power has been enumerated; and a deep, durable, and justified constitutional suspicion of the legislature.<sup>33</sup> In that context, state judicial review can often be *majoritarian*. When the legislature has passed anti-majoritarian statutes because of special lobbying by powerful but not numerous elites (like the medical associations),<sup>34</sup> or has infringed the powers of other state institutions with their own democratic authority, or has violated constitutional procedural restraints with a wink and a nod, the state courts stand empowered to strike down the legislation in the name of the people.<sup>35</sup>

The vigor, or lack thereof, with which the courts carry out this function directly affects injured parties' ability to win some form of justice, both against state officials and against private forces. After all, it is private forces—the economic elites that set terms of employment, compel consumer contracts of adhesion, and “speak” to the legislature with their dollars<sup>36</sup>—that will rush to fill the power void if state courts do not.

## II. Structural arrangements intimately affect access to civil justice.

### A. As every litigator knows, *who* decides often matters just as much (or more) as *how* they decide.

The layer of government responsible for a particular issue will have, in many circumstances, a dispositive effect on how the issue gets resolved. For example, if air pollution is left to local governments to solve, there will be a race to the bottom and we will all live in smog. On the other hand, if the federal government has adequate power and responsibility to address air pollution, it can take great strides to protect public health.<sup>37</sup> If financing schools is left to local governments, there will be enormous inequality of opportunity as rich towns buy high quality schools while poor towns look on in grief and frustration. On the other hand, if states and the federal government assume primary responsibility for financing schools, adequate and uniform resources for public education become possible, if not likely.<sup>38</sup>

Which branch of government bears primary responsibility for a particular issue can also determine the outcome. Legal economists point out that tort damages, all else being equal, are no different from an administrative fine or a legislative tax, at least from the perspective of a profit-driven firm.<sup>39</sup> But all else is not equal. Administrative agencies have the resources, expertise, and inclination to send out inspectors across the land, actively seeking safety violations. The tort system must wait for the plaintiff who is injured gravely enough for litigation to be cost-effective and who has the personal temperament and capacity to seek a remedy in court. And the legislature can hold hearings, debate, and study research that brings forward perspectives from all sides before fixing a preventative tax on unsafe activities, while the tort system must rely on the parties before it for information and typically must treat arguments not raised as waived. For a concrete example of *who* decides making a difference, consider family law: historically, state legislatures were responsible for granting divorces, but today courts fill that role—and divorces have become much easier to get as a result.<sup>40</sup>

Even within the judiciary, the level of court with responsibility for an issue can have outsized effects on the results.

Even within the judiciary, the level of court with responsibility for an issue can have outsized effects on the results. The level of deference appellate courts pay to fact-finding by the trial court substantially affects whether losing litigants will be able to take a second bite at the apple (without a jury) or not. In New York, for example, the appellate division of the state supreme court has far greater power to review fact-finding than in many other states.<sup>41</sup> The willingness of a state high court to correct inconsistent lines of appellate precedent<sup>42</sup> determines whether litigants will be able to exploit competing precedents to effectively throw the matter to the personal ideology of the judges, where the advocates' and parties' relative power outside of court (as important firms in the local economy, politically connected firms, or the like) can sometimes influence judges, consciously or unconsciously.<sup>43</sup>

Unresolved inconsistencies lead to throat-clearing platitudes; as I teach my education law students, every student free-speech case must include the line “Students do not lose their constitutional rights at the schoolhouse door” and this line must be followed by some variety of “But schools may restrict those rights to protect the educational environment.”<sup>44</sup> The pointless repetition of these lines does nothing to advance doctrine or explain the



result to the litigants and lower courts, but does reveal how the Federal Supreme Court has not taken enough of these cases for its precedents to be determinative in a wide array of common circumstances.

The result is that lower courts have more room to decide cases based on reasons other than the Supreme Court's conclusive interpretation of law. And a supreme court's response to lower courts that comply with precedent less than enthusiastically can have, and has had, major effects on the substance of the law. For example, after many lower federal courts began tightening pleading requirements in apparent contravention of the liberal standard articulated in *Conley v. Gibson*,<sup>45</sup> the Federal Supreme Court responded not by slapping down the errant courts, but by adopting their unauthorized "reforms" as its own in *Iqbal*.<sup>46</sup> Similarly, the Federal Court in *Pearson*<sup>47</sup> explicitly cited lower courts that were out of compliance with its precedent in *Saucier*,<sup>48</sup> which required them to consider qualified immunity claims in an order that would preserve the plaintiff's right to have the challenged conduct declared unlawful or not. Even though the lower courts had no authority to disregard binding, clear, and effective law from the Supreme Court, their path was treated by the Court as evidence that its precedent was not working, and the Court then adopted the approach of the rebellious circuits.<sup>49</sup> On the other hand, when some federal circuits were expanding non-mutual claim preclusion beyond previously expressed boundaries, the Federal Supreme Court corrected them sharply in *Taylor*.<sup>50</sup> In this way, even when it comes to the law-announcing function, power can flow back and forth between high courts (which, formally, have the exclusive authority to set a conclusive interpretation) and the lower courts (which must implement the jurisprudence and may do so with more or less enthusiasm).

The geographic boundaries of judicial authority and judicial financing also affect how the law shapes access to justice. Geographic jurisdiction, which is limited by more than just venue and long-arm statutes, can funnel the most vulnerable members of society to the most underfunded and overworked courts.

The geographic boundaries of judicial authority and judicial financing also affect how the law shapes access to justice. Geographic jurisdiction, which is limited by more than just venue and long-arm statutes, can funnel the most vulnerable members of society to the most underfunded and overworked courts. If *state* courts are funded by *local* units of government like counties, the misalignment between resources and function can sometimes lead to underfunding the judiciary—such as by denying judges sufficient support staff, sufficient office space, or sometimes even adequate courtrooms—in ways that expand dockets, rush decisions, and impugn the dignity of the courts.<sup>51</sup>

Perhaps worse, relying on the poorest localities to fund their courts often means that the poorest citizens are served by courts that cannot provide the justice their richer neighbors enjoy. Furthermore, if judges are elected or selected from local or regional districts instead of statewide, opportunities for forum-shopping increase as the differing characteristics of different areas of the state manifest themselves on the bench—and states exhibit greater internal political variation than they do compared to each other (just think about how Austin is much more like Boston than it is like the exurban areas around Dallas, and rural Maine is much more like rural West Virginia than it is like Portland).<sup>52</sup> And, as is commonly acknowledged, the differing geographic cachements from which judges are assigned and jury pools are drawn can yield extraordinary differences in the ability of plaintiffs, in particular, to file their complaints in a fair forum.<sup>53</sup>

The layer of government, the branch of government, the level within the judiciary, and the geographic jurisdiction all work to strengthen or weaken a court's power to offer adequate remedies for legal wrongs. Legal procedure also affects how these institutional arrangements allocate power. For example, some state courts have



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identified parts of their constitution as “hortatory” or “precatory,” euphemisms for “toothless.”<sup>54</sup> Even among judges who would find shocking and unacceptable any suggestion that the Federal Constitution contains inconsistencies and superfluities, there seems to be a widespread willingness to treat duly ratified elements of state constitutions as unenforceable. For example, in Pennsylvania, a quite direct and strong clause protecting environmental, historical, and aesthetic values was held unenforceable, even by the state

Attorney General (who, as an elected official, has ample non-legal incentive to avoid over enforcing the clause).<sup>55</sup> The first step against this tendency, then, is to accept that the people have placed clauses in their state constitutions purposefully (even if they seem obstructionist or hampering the legislature!) to solve historically contingent social problems, and expect the courts to stand firm in enforcing every last word.

## **B. Rights without an institution capable of enforcing them are commonly violated.**

To accomplish the courts' duty to the people to preserve the rule of law, a private cause of action is necessary. Sometimes state courts have followed (often without much introspection) the federal practice of acknowledging the existence of a right but leaving enforcement to government officials.<sup>56</sup> For example, in federal law, there is no private cause of action for damages to challenge conditions of immigration detention, even though there *is* formally a “right” to be free of unconstitutional conditions of confinement.<sup>57</sup> Factors in support of this practice at the federal level typically include federalism, deference to the elected branches, national security concerns, and a general antipathy to judge-made law.<sup>58</sup>

To accomplish the courts' duty to the people to preserve the rule of law, a private cause of action is necessary.

But not one of these rationales apply at the state level. State courts are common-law courts, and routinely make law where justice and sound policy call for it.<sup>59</sup> And state judges are mostly elected—meaning that the courts themselves *are* an elected branch—which gives that common-law making function democratic legitimacy. Federalism favors decentralizing decision-making down to the states; it does not favor states abdicating

the problem-solving capacity properly devolved to them. So the federal skepticism about judicially created causes of action is simply misplaced at the state level. Access to justice requires private parties to have their grievances heard and remedied in the courts, even in the absence of legislation to that effect.

Furthermore, for civil wrongdoers to face justice, the courts must grant standing liberally. The federal standing doctrine is complex and restrictive. But as with the recognition of private causes of action, the reasons behind the federal approach to standing largely do not apply in state courts. For a start, every state has a court of general jurisdiction—unlike any federal court. Exercising general jurisdiction over all comers eliminates the need for the parsimony we see in federal standing doctrine. Many similar factors, carefully and comprehensively articulated by Helen Hershkoff, point state doctrine toward opening the courts to plaintiffs who would not satisfy federal requirements.<sup>60</sup> Since many social problems, such as climate change, affect a wide array of people but not any one person with provable severity, standing obstacles can exclude the courts from doing their share to right wrongs. This is a structural defect that states are well-positioned to correct.

Once the state courts recognize a private cause of action and a plaintiff with standing to pursue it, the courts must assert for themselves the power to remedy the legal violation for access to justice to be meaningful.

Particularly in cases implicating the other branches of government, state courts have often recoiled from a full-bore remedial effort. For example, in education law, state courts have identified constitutional violations in one of our most important communal obligations only to then offer no more than a tepid admonition to the political branches.<sup>61</sup>

Courts that have more assertively exercised their authority to remedy wrongs have seen greater success.

Courts that have more assertively exercised their authority to remedy wrongs have seen greater success.<sup>62</sup> In New Jersey, the supreme court has heard the same education-equity case nearly two dozen times, demonstrating its unwillingness to let repeated legislative non-compliance wear the court down into impotence.<sup>63</sup> In Massachusetts, when the legislature refused to follow a court order to appropriate money for a public finance fund for political campaigns, the state high court authorized a single justice to enforce the decree. She did so by selling state surplus at a judicial auction; compliance quickly followed.<sup>64</sup> Whether a reluctance to pursue assertive remedies is understood as a matter of doctrine or culture, procedure or structure, it remains a substantial chokepoint for access to justice even where a substantive right and appropriate procedures exist to protect it.

### III. State high courts have constitutional authority to make rules of procedure and evidence.

One way state constitutions allocate lawmaking authority would seem exceedingly strange to a federal observer: they allocate it to the courts.<sup>65</sup> Most state high courts have the authority—whether granted expressly by constitutional text<sup>66</sup> or implied by inherent powers<sup>67</sup>—to make rules of civil procedure and evidence.<sup>68</sup> This is decidedly not the power that the Federal Supreme Court has to promulgate the Federal Rules, which is nothing more than an agency’s power to make regulations under authority delegated from Congress and subject to Congress’s approval.<sup>69</sup> Some state constitutions have taken this power from the courts and granted it to the legislature,<sup>70</sup> while others have acceded to the courts’ power but modified it with concurrent or superseding legislative authority.<sup>71</sup> But for most courts, the supreme lawmaking authority with respect to rules of procedure is the high<sup>72</sup> court itself, sometimes even in the face of contrary statutes.<sup>73</sup>

This basic constitutional principle—that the judiciary should make its own rules, just as the houses of the legislature make their own rules—might seem a mite abstruse.<sup>74</sup> Constitutional separation of powers arguments already veer toward the theoretical, and constitutional separation of powers arguments about civil procedure are even more unlikely to grip the crowds at a summer barbecue. But as the many examples I discuss below demonstrate, these superficially abstract, structural disputes can have profound effects on the workaday world of the civil litigator, and therefore on the ability of the unjustly injured to obtain redress. Those who make the rules can determine the outcome.

One way state constitutions allocate lawmaking authority would seem exceedingly strange to a federal observer: they allocate it to the courts.

The foundational case in this area comes from New Jersey.<sup>75</sup> John Winberry sued a clerk of court asserting that a grand jury report lodged against him was libel.<sup>76</sup> The trial court held there was no cause of action and dismissed, so Winberry appealed—but with a catch. According to a state statute, Winberry had a year from the final judgment to file his appeal, and he filed just over two months after the judgment. But the rule promulgated by the state supreme court gave only 45 days to file an appeal.<sup>77</sup> So whether Winberry could get an appellate court to review the merits or not turned on whether the court rule or the statute would control. The New Jersey Supreme Court pointed out that the tradition of court-made rules of procedure extended back to ancient

English practice, a tradition near-universally picked up in the colonies and carried forward in the new states.<sup>78</sup> The court noted that this type of rule-making is unmistakably a kind of legislation—there could be no hiding that—but found:

Too many people think of the Legislature as a body that has as its sole function the making of laws for the future, the Governor as a chief executive who merely enforces the law, and the courts as having power only to decide cases and controversies. While these notions are true so far as they go, they are quite insufficient to explain the complicated operations of the three great branches of government, either historically or analytically. Thus, while the primary function of the courts is to decide cases and controversies properly brought before them, the Legislature also has the power to adjudicate as to the qualifications of its members, their deportment while in office, as well as in impeachment proceedings on the misdemeanors of all state officers, and the Governor has the right to try any officer or employee in the Executive Department on charges after notice and an opportunity to be heard, and a host of controversies are decided in administrative tribunals which are not courts but which are located in the executive branch of the government. Thus, adjudication is not exclusively a judicial function . . . . Not only are these seeming exceptions to an over-simplified statement of the doctrine of separation of powers necessary as a matter of logic and analysis of governmental activities, but they have centuries of historical justification.<sup>79</sup>

The court refused to be bound by formalist (and inaccurate) limitations of strict separation of powers. Instead, the court carried out an extensive analysis of the then three-year-old state constitution's text and legislative history to conclude that the court's own rules would, indeed, trump the legislature's statutes, but only where the rules were procedural rather than substantive.<sup>80</sup> There being no dispute about the procedural element of the timing for appeals, the court ruled *Winberry's* appeal untimely.<sup>81</sup>

Among the policy reasons the *Winberry* court found in support of its constitutional authority was the interest in uniformity obtained by the dominance of a single institution in the field (as opposed to pluralist procedure made by different branches at different times), and even more importantly, a dedication of the task to the institution most expert in the subject. After all, the court reasoned, who knows better than judges what the rules of procedure ought to be?<sup>82</sup>

Neither of these policy rationales impressed the justices of the Michigan Supreme Court in 1999 when they decided the case of *McDougall v. Schanz*.<sup>83</sup> As the result of an intensive lobbying campaign by the state medical association and insurance carriers, the Michigan legislature adopted a package of statutes aimed at “tort reform”—particularly limiting medical malpractice liability.<sup>84</sup> Among those new statutes was a provision imposing heightened requirements for testifying physicians to be qualified as expert (and therefore permitted to testify as to the standard of care).<sup>85</sup> This legislation conflicted directly with the aims of a plaintiff suing a group of doctors who failed to diagnose his wife's diabetes, which caused her death.<sup>86</sup> He wanted to put an expert on the stand who did not meet the new requirements.<sup>87</sup> But the plaintiff figured that he had a good shot at getting the testimony admitted, because a Michigan Rule of Court plainly and explicitly permitted a doctor with the proffered witness's qualifications to be placed in front of the jury.<sup>88</sup> The case made its way to the supreme court for resolution of the question the New Jersey court answered in *Winberry*: does the statute or the court rule prevail?<sup>89</sup>

In *McDougall*, the majority (a group of justices ideologically sympathetic to, and politically aligned with, the proponents of “tort reform”) held, quite vigorously, that rules do indeed trump statutes where they conflict—but

only when those court-made rules are truly procedural, or as the court put it, affect the “mere dispatch of judicial business.”<sup>90</sup> Where there is *any* legislative policy other than court administration underlying a statute, the court rule is no longer procedural and can be superseded by statute.<sup>91</sup> The court did not discuss the fact that no legislature anywhere would ever pass a statute that was *only* motivated by concern for the dispatch of judicial business. Voters do not flock to the polls to support their favorite representative’s stance on the font size of legal briefs. Any bill sufficient to garner a majority of two houses’ worth of legislators would need some rationale that would affect the public, something to satisfy an interest group or win favor from a constituency. And the constituency of people who vote based on policies affecting the “mere” administration of justice without any effect on people outside the courts (court clerks? legal printers? stenographers?) is just too tiny to support the passage of legislation.<sup>92</sup> Thus, in the *McDougall* case itself, the court concluded that the statute fixing the qualifications of an expert witness was not simply a matter of evidentiary law, but was motivated by the legislature’s broader public policy push to limit tort liability.<sup>93</sup> And, presumably, there will never again be a court rule that trumps a statute in Michigan.

The separation-of-powers dispute in *McDougall* had a major effect on the plaintiff’s effort to hold his wife’s doctors accountable for her death.<sup>94</sup> But more broadly, that decision changed the battleground for how to win fair rules of procedure. While the supreme court was responsible for procedure (and evidence), citizens seeking a change in the rules could present their claims to the court—by definition, a group of experienced and savvy former lawyers—at rule-making hearings.<sup>95</sup> But they could also seek procedural change by way of litigation,<sup>96</sup> or by a democratic campaign. Michigan justices, like most state high court judges, are elected.<sup>97</sup>

All of these approaches strongly favor lawyers, the people who know and care about the judiciary’s internal politics and who work daily in the cauldron of the courts. These methods of accountability and change make surprise lurches in one direction or another unlikely and assure that experts in law have the most influence on policy within their ambit of expertise. By contrast, the crafting of civil procedure in the legislature subjects the courts to rules that swing from one political pole to the other as partisan majorities cycle through the statehouse. And the kinds of voices that get privileged in the legislature are different from those with influence in the judiciary. Lobbying by special-interest groups with no real knowledge of or belief in the fundamental principles of civil justice, or even rule of law, can (and often does) prevail over the measured voice of the experienced bar. Changes can be piecemeal without thought for their effect on the overall litigation experience. And high-visibility or controversial questions get disproportionate attention while important but “technical” issues are left unexamined.

In another personal injury case that turned out to really be about separation of powers, *Lebron v. Gottlieb Memorial Hospital*, the Illinois Supreme Court confronted a state statute setting caps on non-economic (but still compensatory) damages, specifically in medical malpractice cases.<sup>98</sup> There was no court rule in open conflict with the statute.<sup>99</sup> But after a comprehensive review of *why* plaintiffs are entitled to damages, how that entitlement can vary from case to case, and how the courts had always operated to apply rationality to damages awards through the procedure of remittitur, the supreme court concluded that the statute was a legislative encroachment on the powers constitutionally vested in the judiciary.<sup>100</sup> Therefore, the caps were invalidated on state constitutional separation of powers grounds.<sup>101</sup>

In Ohio, “a power struggle between those who seek to limit their liability and financial exposure for civil wrongs and those who seek compensation for their injuries” roiled the state.<sup>102</sup> After the legislature passed a statute that, among other things, required plaintiffs to obtain a “certificate of merit” in medical malpractice cases before their action could go forward, the Ohio Supreme Court ruled that the requirement violated the state civil rules, which contained no such obstacle.<sup>103</sup> In an opinion that can only be described as heated, the supreme court reiterated its

longstanding understanding of the state constitution's explicit grant of rulemaking authority to the judiciary. While the court could not make substantive law in the guise of procedural rules, where its rules were procedural no statute could supersede them.<sup>104</sup> Thus, again, a highly political and practical fight about how far the law should go to provide a remedy for people injured by medical professionals was transformed into a structural dispute about separation of powers. And it was on that battlefield—the historical, philosophical grounds on which the constitution allocated power among government institutions—that the healthcare policy dispute and the injured parties' entitlement to relief were finally determined.<sup>105</sup>

It is worth remembering, in thinking about cases like *Winberry*, *Lebron*, and *Ohio Trial Lawyers*, that these cases could not possibly have come out the way they did under federal constitutional doctrine. The Rules Enabling Act,<sup>106</sup> by which Congress delegated its power over the lower federal courts to the Supreme Court for the development of procedural rules (but retained the last word by requiring proposals to come back to Congress before taking effect), is “undoubted[ly]” constitutional.<sup>107</sup> The United States Supreme Court, presented with the

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question of whether an act of Congress must yield to a contrary rule, would find the matter farcical if not sanctionable. As a result, the fight over procedure—the rules of the game that can be fair or fixed, and that determine, in so many cases, who wins and who loses—must ultimately be carried out in the political branches at the federal level. That the states, broadly, have made the opposite choice goes to the heart of our federalist system. There is no one way of doing something in American democracy. Groups that struggle to be heard over the din in the lobbies of

legislatures might find a more receptive forum in the judiciary; groups ill-equipped to seek change in the courts might find greater access in the capitols. The big questions our society argues over might be the same in the judiciary as they are in the other branches of government, and their political connotations might also transcend institutions; some judges lean one way, some lean the other, just as some politicians do. But the *way* we carry out that large, important social conflict matters enormously to what result we get.

#### IV. State high courts have constitutional authority to regulate the bar.

For ordinary people, especially including the indigent or otherwise vulnerable, access to justice is crucial because it puts the power of the state on their side against the economic elites who oppress them in the

For ordinary people, especially including the indigent or otherwise vulnerable, access to justice is crucial because it puts the power of the state on their side against the economic elites who oppress them in the marketplace.

marketplace. If the courts lack power—if the judges are demoralized, the dockets are overcrowded, and competent attorneys will not accept judicial appointments—then the courts cannot protect the injured and downtrodden. Again, state constitutional structures bear on access to justice in profound and practical ways.

In addition to deciding the rules by which cases go through court, state high courts decide *who* may argue those cases. Access to civil justice is not commonly linked to state policy about bar admissions. Instead, we see two large-scale debates presented as if they were unrelated. On the one hand, post-Great Recession changes in the legal services market



caused law school enrollment to plummet.<sup>108</sup> To keep up their revenue, many schools admitted students with low LSAT scores, which correlated with low bar passage (and also with the race and class of the admitted students).<sup>109</sup> As legal jobs disappeared, vituperative anti-law school rhetoric from popular websites like Above the Law<sup>110</sup> and even the New York Times<sup>111</sup> poisoned the common conception of lawyering's economic, social, and moral value. In particular, critics attacked law schools with low bar passage rates on the ground that students' expensive educational loans could never be repaid without access to a legal career.<sup>112</sup> Even the president of the National Conference of Bar Examiners blamed law schools for the historically low bar passage rates.<sup>113</sup>

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On the other hand, the unmet needs of indigent clients across the country continue at a heartbreaking scale. Long-time homeowners facing foreclosure find themselves outgunned in mortgage proceedings by the banks' greater access to savvy lawyers;<sup>114</sup> public benefits recipients face new and complex requirements without affordable representation;<sup>115</sup> and arbitration clauses and anti-class action initiatives leave workers alone, vulnerable, and in need of advocates.<sup>116</sup>

Increasing the socioeconomic diversity of the bar would likely increase the number of lawyers motivated to take on these clients.<sup>117</sup> But the broader sense that too many lawyers are competing for too few (paying) legal jobs has led to calls for increasing the difficulty of passing the bar examination.<sup>118</sup> Even defenders of the bar examination agree that it replicates the racial disparities present earlier in the pipeline: law school admissions, LSAT scores, college graduation rates, and SAT scores.<sup>119</sup> Critics of the current structure of the bar exam go further, arguing that it exacerbates racial inequity and worsens the underrepresentation of people of color in the legal profession.<sup>120</sup> And, as already noted, underrepresentation at the bar correlates with lower access to attorneys for clients from those underrepresented racial and ethnic groups.<sup>121</sup>

Wherever one falls along the spectrum of opinion on this issue, it should be clear that a large and growing pool of clients who cannot afford lawyers is *not a separate question* from the problem of law school enrollment and bar admissions. An economist would characterize the current debate around law schools and low bar passage rates as addressing the problem of supply. But the problem of demand is just as pressing: how can we increase the access of indigent and otherwise marginalized communities to competent lawyers?<sup>122</sup> Some part of that discussion must include a reconsideration of whether the bar exam is effective at testing what we need it to test and how raising the required scores would affect these vulnerable client communities.

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And what is the appropriate institution of government to carry out that reconsideration? State high courts and the relevant commissions and committees of the state judiciary that report to them have well-established authority in this area. For example, in a Connecticut case from 1961, the state high court considered whether



a New York lawyer who had not graduated from a law school could still be admitted to the Connecticut bar—as a statute would have permitted—or was properly denied admission—as court rules required.<sup>123</sup> The court held without hesitation and without dissent that only the judiciary could set the qualifications for attorneys.<sup>124</sup> This result followed from an analysis of the constitutional practice in other states, the early English and colonial practice, and the legislative history of the constitution; all of those sources pointed in the same direction.<sup>125</sup>

This structural allocation of power means that, instead of the horse-trading, logrolling, and grandstanding associated with legislative decision-making, citizens can expect the relatively collegial, learned, and deliberate lawmaking of the judiciary. Even politically unpopular outcomes are feasible for a court focused on the long-term good of the commonwealth. The judges and justices responsible for regulating admission to the bar can—and should—set policy not just in light of the economic self-interest of the professional guild, but what maximizes access to law for our society’s most vulnerable populations.

## V. State constitutional clauses protect the right to counsel in certain civil actions.

Determining who gets to be a lawyer has significant consequences for who has *access* to a lawyer. But state courts, thanks to the structural choices inscribed in their constitutions, have an even more direct way of increasing access to justice: by establishing a right to counsel for certain important rights.<sup>126</sup> Although often called “civil *Gideon*,” the concept actually embraces several distinct approaches to solving the “justice gap,” the divide between indigent clients who need lawyers and lawyers who can afford to take on those clients.<sup>127</sup> Some advocates propose a statutory scheme, perhaps keyed to a dedicated tax; some propose a relaxation of the standards limiting the unauthorized practice of law to authorize lower-cost, lesser-trained legal advisers; some urge dramatically expanding pro bono requirements for attorneys, who would be assigned civil cases by the courts; some focus attention on federal constitutional claims; and some simply support higher public support for legal aid organizations. But another approach centers on using state court litigation to press claims founded on state constitutional principles, resulting in a right to counsel in the most high-stakes civil cases directly comparable to the right to counsel in criminal cases established in the original *Gideon*.<sup>128</sup>

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The contours of such a right would naturally vary from state to state. But the most promising areas of law for the establishment of a civil right to counsel would be those touching on core features of a person’s identity. For example, in a Montana case, the state supreme court considered a mother who had her parental rights terminated without benefit of counsel.<sup>129</sup> Using the state constitution’s equal protection clause to rise above the federal floor, the court held that the parent’s statutory entitlement to an attorney in an abuse/neglect proceeding must also be applied where her parental rights were involuntarily terminated in an adoption proceeding.<sup>130</sup> Upon determining that the right to parent is fundamental, the court applied a “strict scrutiny” standard of review—a federal notion commonly applied in a state constitutional context.<sup>131</sup> The opinion did not engage in any federal analysis, except to note that the question is “open” under the Federal Constitution; following *Michigan v. Long*, which permits the U.S. Supreme Court to review state courts’ constitutional decisions unless the state court makes explicit that its decision rests on state-law grounds, the court concluded its opinion with a clear statement that the decision rested independently on state grounds.<sup>132</sup> Neither did the court make any reference whatsoever to unique Montana factors.

Unapologetically, the court interpreted its own equal protection clause according to its own best understanding and in doing so diverged from federal doctrine, thereby guaranteeing access to justice for indigent parents during the trauma of termination proceedings.

Other state constitutional bases for civil *Gideon* might include the state due process clauses,<sup>133</sup> state clauses guaranteeing a right to a remedy,<sup>134</sup> “open courts” clauses,<sup>135</sup> and even the inherent power of the courts to operate fairly. In addition to parental rights, other areas of law that appear promising for expansion of the right to counsel under state constitutions include evictions, adoption, foreclosure, public benefits, and even consumer debt collection.<sup>136</sup> Just as with the right to counsel in criminal cases, financial support for this expansion of access to civil justice could come from some combination of public appropriation at the state and/or local level. If the compensation scale were insufficient to attract enough lawyers, courts could use their power to regulate the bar to assign lawyers involuntarily,<sup>137</sup> as they sometimes do in the criminal context.<sup>138</sup> Because of the close link between access to an attorney and the proper functioning of the courts,<sup>139</sup> state judiciaries would likely be near the zenith of their power to order appropriate funding for the programs.

## VI. State courts have constitutional authority to secure their own functionality.

Many judges who are otherwise sympathetic to a vigorous protection of the judiciary’s powers under the state constitutions seem to quaver at the problem of enforcement. For example, in the famous *de facto* school desegregation case from Connecticut, *Sheff v. O’Neill*, the state supreme court issued a strong and quite controversial decision ordering the legislature to desegregate the Hartford schools.<sup>140</sup> But the command included no express sticks or carrots, and indeed, the legislature had to be sued two more times before the rudiments of compliance became visible.<sup>141</sup>

Many judges who are otherwise sympathetic to a vigorous protection of the judiciary’s powers under the state constitutions seem to quaver at the problem of enforcement.

It can sometimes seem that judges perceive themselves to be part of the team, an arm of the state meant to smooth over legal problems rather than serve as a check on the political branches’ more audacious policy ambitions. And the struggle to devise appropriate yet effective enforcement mechanisms has yet to be won. After all, no court can just put all the legislators in jail for civil contempt if they fail to pass an appropriation. But a strong judiciary is not possible without strong enforcement powers, and some courts have found creative ways to protect the rule of law without fomenting debilitating backlash or sinking into popular disdain and illegitimacy.

The first line in the sand in defending the judiciary’s prerogatives is the funding of the courts themselves. Access to justice for the injured and the wronged is meaningless if dockets are too large for timely proceedings, judges’ working conditions are too Spartan to support careful decision-making, or resources are granted and withheld politically to undermine judicial independence. In Pennsylvania, the state supreme court issued one of the most assertive decisions anywhere to protect the basic functioning of the judiciary.<sup>142</sup> Certain trial-level courts there are funded not by the state legislature but by local units of government. In the midst of a profound fiscal crisis of its own, the City of Philadelphia appropriated more than 15% less to the local state courts than they had requested in an already bare-bones budget.<sup>143</sup> The judges sued.<sup>144</sup>

When the case ultimately reached the top of the state judiciary, the supreme court was thoroughly convinced that the appropriations approved for the support of the Philadelphia court were grossly insufficient.<sup>145</sup> Turning to the constitutional question, the supreme court concluded that by creating courts, the constitution empowered those same courts to demand sufficient funding to operate.<sup>146</sup> In other words, the courts had an inherent power to insist on a certain basic level of funding below which they could not carry out their constitutional obligations.<sup>147</sup> The supreme court ordered the Philadelphia municipal legislature to fund the courts, despite the many other serious demands on its treasury.<sup>148</sup>

More recently, in New York, the state high court also ordered the political branches to appropriate money for the courts that the representatives did not wish to spend. In *Maron v. Silver*, the New York Court of Appeals determined that, because of *inaction* by the legislature, inflation had diminished the salaries of state judges to such an extent that the constitutional separation of powers was violated.<sup>149</sup> The legislature had repeatedly approved budgets that included increases in judicial compensation, but had consistently refused to appropriate the money allocated in the budget (at least without a concurrent increase in the legislators' own salaries).<sup>150</sup> So the judges finally brought a lawsuit against both houses of the legislature, their leaders, the governor, the comptroller, and even the court administrator.<sup>151</sup> The high court agreed with the judges, but merely declared the legislature's failure unconstitutional without issuing an injunction. Instead, the court concluded its opinion with the line, "[w]e therefore expect appropriate and expeditious legislative consideration."<sup>152</sup> The court's decision, it held, was authorized by its inherent right to interpret the constitution.<sup>153</sup>

As in *Carroll v. Tate* and *Maron v. Silver*, courts can use their inherent powers, or extrapolations from their constitutional separation of powers clauses, to protect their own resources.<sup>154</sup> While no one argued in either case that the judges were making less than a living wage, both sets of plaintiffs demonstrated concrete effects on the ability of the courts to carry out their functions with a highly qualified bench backed by sufficient resources to provide just and efficient services.<sup>155</sup>

Although neither *Carroll* nor *Maron* demonstrated a vigorous judicial enforcement mechanism to back up what were certainly unpopular opinions, other examples do show courts holding the legislature to account. In a 2002 case, the high court of Massachusetts required the legislature to fund a public campaign-finance program that had passed by popular initiative over staunch legislative objection.<sup>156</sup> When the legislature simply refused to comply with the court's command, it created a conundrum. The court could hardly hold the entire legislature in contempt; some of the members might well have supported the necessary appropriation.

The court did not want to commit its own violation of separation of powers by directly appropriating the money or commanding the Treasurer to pay the fund without appropriation.<sup>157</sup> Instead, the Massachusetts court devised a solution both novel and deeply traditional: a judicial foreclosure sale. The court vested a single justice with ongoing jurisdiction to enforce the decree, and that justice started selling state property.<sup>158</sup> She started with surplus equipment from a state warehouse, which served only to poke the bear—the legislators got even angrier, but still did not appropriate the funds. She threatened to sell the Speaker's office furniture, but still the appropriation was not forthcoming. Finally, she began the process to sell state *land*, at which point the legislators blinked and the appropriation went through.<sup>159</sup> The elegance of this approach is how it blends unyielding insistence that the court's decree be honored with an ancient and well-understood enforcement mechanism almost banal in its conventionality. Such an approach, while inarguably aggressive and thus probably a last-ditch effort, could guarantee victorious civil litigants dependent on legislative action that the courts will protect their rights.

## VII. State constitutional clauses protect state workers.

While lawsuits against state officials are typically “civil” in the sense of not criminal, “civil rights” cases are commonly categorized apart from private law cases. But the states wear many hats. In addition to their role as governments, in which they are susceptible to judicial oversight at the insistence of citizen plaintiffs, states also carry out important proprietary functions.<sup>160</sup> Their performance of these functions subjects them to many of the same legal burdens shared by other employers, property owners, and buyers/sellers. Access to civil justice for state workers is a small subset of the larger problem of vulnerable workers and their capacity to seek help from the courts, but it is an important subset. State constitutions play an important part in the employer-employee relationship between the state and its workers, and they model that relationship for private employers.

For example, in a recent case from Illinois, the state supreme court considered that state’s constitutional “pension protection clause.”<sup>161</sup> State constitutions might be mocked for their detail and small-bore miscellany, but underlying all of that detail is often a textual expression of the people’s deeply-held values and their grave pessimism about their elected representatives’ ability to live by those values. The states’ pension clauses are a vivid example of this.

State constitutional pension protection clauses often read as if they were written by a computer posing as an accountant pretending to be a lawyer. Michigan’s, for example, says:

States also carry out important proprietary functions. Their performance of these functions subjects them to many of the same legal burdens shared by other employers, property owners, and buyers/sellers.

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.

. . . Financial benefits arising on account of service rendered in each fiscal year shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities.<sup>162</sup>

The text sounds boring, technical, and about as far away from the constitutional poetry of “to form a more perfect union” as it is possible to get.<sup>163</sup> In the Illinois case mentioned above, a nearly identical text formed the basis for a challenge by Chicago public workers to that city’s habitual underfunding of its pension obligations, which in turn led to reduction in benefits.<sup>164</sup> The supreme court expressly rejected financial exigency as an exception to the clause prohibiting the reduction of benefits, saying that the constitutional clause would be meaningless if the legislature or local governments could evade it whenever they saw fit to do so.<sup>165</sup> All beneficiaries of the pension plan were entitled to their full pensions, regardless of whether the city or state ultimately bore the financial burden.<sup>166</sup>

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In the recent bankruptcy of Detroit, the state’s pension protection clause would have barred the diminution in pension payments ultimately endorsed by the federal bankruptcy court. That result was only possible because of the Supremacy Clause, which privileges the requirements of the federal Bankruptcy Code over even constitution-level state law.<sup>167</sup>

These obscure clauses, directly affecting only government workers, apply to civil justice more broadly in at least two ways. First, they demonstrate the considered judgment of the people of the state that the protection of promised employee benefits is a virtue, and a virtue of such significance that it deserves constitutional expression. This creates opportunities for argument by analogy in protecting workers' rights against private employers.

Each state carries out the responsibilities of sovereignty through the hands of its workers. Ordinary people rely on state employees.

Second, the constitutional protections for state workers are really a protection for the state itself. By promoting the recruitment and retention of highly qualified workers, these clauses help protect the power of the state.

Each state carries out the responsibilities of sovereignty through the hands of its workers. When it comes to whose hands are guarding against unreasonable hazards in private workplaces, assuring the quality of healthcare facilities, or licensing professionals to protect the public, ordinary people rely on state employees. The state constitutions' protection of those workers helps solve

many of the problems before tragedy strikes or litigation ensues. Even when private malfeasance does lead to litigation, the expertise and experience of the state workforce can lead to evidence that allows injured parties to meet their burden of proof.

## VIII. State constitutions empower state attorneys general.

Among the state workers crucial to protecting the public and its access to justice are the states' top law officers, the attorneys general ("AGs"). As with so many of the other areas I discuss in this paper, there are major differences between the state AGs and their federal counterparts—and those differences rarely get sufficient attention from the bench and bar. First, all but seven of the states have independently elected attorneys general;

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they report directly to the people, not the governors.<sup>168</sup> State AGs also derive their authority directly from state constitutions, not by delegation from the governors. And they have broad common law powers, inherited from early England, to pursue cases independently of the executive branch.<sup>169</sup> Some AGs have both civil and criminal authority, while some have only civil authority.<sup>170</sup> All AGs have *regulatory* power as well as enforcement power; areas subject to attorney general regulation typically

include non-profit organizations (for which the AGs serve functionally as shareholders), certain insurance matters, protection of people who lack legal capacity, and public bonding. All AGs serve as both state counsel (advising agencies formally and informally, helping with their transactions, and defending them in court) and as the people's advocate (litigating on behalf of the public, without any particular state agency as a client).

One of the more distinctive powers of state AGs, a power that would be quite alien to those immersed in the federal system, is their common-law *parens patriae* authority.<sup>171</sup> This ancient power (again, derived from merry old England),<sup>172</sup> vests the AGs with the power to bring actions on behalf of the people. No state agency need be involved, and no governor's or legislature's permission is required.<sup>173</sup> The doctrine typically permits the state AG to bring an action even if no one else would have standing, such as for aesthetic injuries, dignitary injuries, harm to inaccessible areas of state land,<sup>174</sup> or simply legal violations causing injuries too diffuse for any private individual to hold standing.<sup>175</sup> And these actions can be brought on behalf of the people of the state, not the state itself—*parens patriae* authority is distinct from litigation on behalf of the state government in its proprietary capacity.<sup>176</sup>



The tobacco litigation initiated by Mississippi's Attorney General on behalf of the people of his state stands as the most important and successful exercise of *parens patriae* authority. The *Mississippi v. American Tobacco Master Settlement Agreement*<sup>177</sup> stands as a shining example of the use by attorneys general of extraordinary powers to recover for losses to both the states themselves as proprietors and their people. Private class actions could never have accomplished the same comprehensive remedy. Other state AGs followed suit, using Mississippi's model.<sup>178</sup> And once the state's victory was on the books, private plaintiffs could and did pile on, suing the tobacco companies with the legal theories and factual evidence already developed by the attorneys general.<sup>179</sup>

The tobacco litigation initiated by Mississippi's Attorney General on behalf of the people of his state stands as the most important and successful exercise of *parens patriae* authority.

In this way, preserving the strong, albeit vague, constitutional powers of the state attorneys general can have positive effects on access to civil justice. Injured parties who might not have been able to afford attorneys, or whose claims fell below the threshold of economic viability, could (and did) finally win redress for their injuries by piggy-backing on the states' litigation.<sup>180</sup> Even if the efficiency of issue preclusion is not available to private litigants piling on after the state AGs' victories, the simple knowledge of the facts uncovered in discovery in the states' litigation offers private attorneys an easier path forward against otherwise daunting defendants.<sup>181</sup>

And what justifies this extraordinary set of powers, including the *parens patriae* power, for a state AG? In contrast to the federal model, state AGs are almost all elected.<sup>182</sup> Their power comes directly from the people, and that leaves a direct political check on their offices.<sup>183</sup> Notably, the political check does *not* come from gubernatorial oversight; governors cannot hire, fire, or command their own attorneys general.<sup>184</sup> This creates the possibility for one of the least intellectually interesting but most practically important powers a state AG can possess: the right *not* to litigate. By and large, state attorneys general tend to take seriously their obligations as the state government's lawyer, and they are typically quite professional about offering zealous advocacy on behalf of defendant state agencies even when the AG would decide the policy matter differently from the agency. But the exceptions—when AGs decide they can no longer defend a statute or state agency action—can create a major impact on the disputed legal question. For example, the California attorney general's decision not to defend that state's same-sex marriage ban simultaneously weakened the defense of the statute in court and signaled to the public that the ban was likely to fail. That signal energized the ban's opponents and prepared the ban's defenders for the legal, political, and cultural loss that soon came their way.<sup>185</sup>

## IX. State constitutions empower state agencies.

While state AGs can use their authority to protect the public, especially as the availability of class actions continues to decline,<sup>186</sup> state agencies can also use relatively unusual constitutional powers to create the conditions necessary for expanded access to justice.

Many states have specialized agencies that are functionally outside of the executive branch; the state constitutions have imbued them with independent authority. For example, in Michigan, the three most prominent public universities are each overseen by boards granted express authority over university policy by the state constitution.<sup>187</sup> The board members are directly elected by the people, state-wide.<sup>188</sup> As a result, the legislature can only influence the universities indirectly, through its appropriations. The boards retain the final say about



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the kind of education offered, and the courts have upheld the boards' authority even in the face of statutory law to the contrary.<sup>189</sup> In Florida, the constitutional drafters were worried that political pressure to expand harvesting opportunities for hunters and fishers would harm the environment, so they created a special commission to regulate fish and wildlife.<sup>190</sup> The executive branch agency responsible for natural resources, the Florida Department of Natural Resources, was directly accountable to the governor.<sup>191</sup> The Florida Supreme Court held that the constitutional commission's regulations took precedence over the executive branch regulations;<sup>192</sup> an earlier case held that the commission's regulations also superseded contrary statutes.<sup>193</sup>

The existence of state agencies with their own direct constitutional authority, unaccountable to either the governor or legislature legally or politically, means that marginalized groups without adequate access to the conventional political system in the legislature may find surprising opportunities to influence policy in more congenial fora. These independent agencies might conduct their work in a way that treats righting civil wrongs

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as a higher priority than the conventional branches do. They might also adopt regulatory policies that protect consumers, the environment, students, or other politically weak classes more strongly than do the legislatures. And their enforcement methods—their inspections, investigations, and litigation—can expose wrongdoing that then invites private parties to pursue their own remedies in the civil justice system.

Judicial protection for the autonomy and authority of these independent constitutional agencies can help to create alternative spaces for debate, open new opportunities for marginalized groups, and empower bolder protection for society's vulnerable members.

## X. Conclusion

Each constitutional structure described in this paper affects how injured parties can—or cannot—obtain relief in the state courts. Access to justice depends on more than acknowledgment of the appropriate cause of action. Real access to justice requires institutions of government with the power and incentives to give meaning to that cause of action, to assure that litigants get fair treatment and have democratic access to the state officials who *make the rules*.

Ultimately, within every personal injury or similar civil action, there is the seed of a constitutional claim. Every claim is an assertion that the courts have power to redress that injury; that the legal violation derives its applicability from a legitimate law-making institution; and that state officials stand willing and able to enforce the law. These state constitutional questions, implicit in every case, can be brought out into the open by skilled advocates and learned judges. Sometimes what look like even the most ordinary cases will end up turning on

deep questions about the structure of state government. And when these cases, which first arrived in a lawyer's office looking like a run-of-the-mill personal injury case, get translated into legal discourse as separation-of-powers claims or justiciability claims, they can shift how power is allocated across the state. They can inspire new—maybe odd—alliances, where judges who would normally be skeptical of the cause of action stand strong against intrusions on judicial authority. And these civil actions turned structure-of-government cases can alter the state's democratic accountability, opening new avenues of influence for communities who would otherwise be shut out of political discussion and decision-making.

Most, if not all, of the particular structures I describe in this paper have no analogue in the federal system. They may seem strange to lawyers who are trained in federal law-centered law schools and to a public immersed in federal-law rhetoric. But at least by volume, it is these distinctive state arrangements that constitute the normal American practice; and it is the federal system that is strange. To preserve access to justice for the indigent and marginalized, state courts must insist on the preservation of these constitutional arrangements. Where state constitutional text does something startling, like give an agency power over fishing licenses that exceeds the legislature's, state courts must resist the temptation to read the constitutional text as if it were federal, with the federal presumptions and the federal limitations. State courts must embrace the weirdness of their own constitutions.

State courts must first and foremost protect themselves. Rather than seeing themselves as team players with responsibility for papering over whatever policy choices the political branches make, state judiciaries can draw confidence from their constitutions.

To do that best, state courts must first and foremost protect themselves. Rather than seeing themselves as team players with responsibility for papering over whatever policy choices the political branches make, state judiciaries can draw confidence from their constitutions. Looking at the structural arrangements described in this paper and the rest of the constitutional institutions and their incentives, state courts can come to the appropriate conclusion that state constitutional drafters and ratifiers have never viewed their legislatures and governors as worthy of excessive deference. The constitutions are jammed with quiet expressions of distrust in the political officials of the states. Bold, self-confident judiciaries can stand up for the ratifiers of state constitutions—the people themselves—by holding the other institutions of government to account. Doing so will, in turn, protect access to civil justice and the courts' own legitimacy as the best place to find that justice. The constitutional texts contain plenty of reason for state courts to assert themselves. All that the people ask is for judges who will give these texts their due.

## Notes

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<sup>2</sup> See *People v. P.J. Video, Inc.*, 501 N.E.2d 556, 564–65 (N.Y. 1986); *People ex rel. Arcara v. Cloud Books, Inc.*, 503 N.E.2d 492, 558–59 (N.Y. 1986).

<sup>3</sup> See *State v. Boland*, 800 P.2d 1112, 1116–17 (Wash. 1990).

<sup>4</sup> See generally JEFFREY M. SHAMAN, *EQUALITY AND LIBERTY IN THE GOLDEN AGE OF STATE CONSTITUTIONAL LAW* (2008) (matching state constitutional rights with their federal analogues and analyzing the differences under state interpretations).

<sup>5</sup> See, e.g., ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* (2009); Robert F. Williams, *State Constitutional Protection of Civil Litigation*, 70 *RUTGERS U. L. REV.* 905 (2018) (describing civil litigation rights, such as the right to a jury, that exceed federal constitutional protections).

- <sup>6</sup> See generally 1 JENNIFER FRIESEN, *STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES* (4th ed. 2006) (emphasizing individual rights under state constitutions, particularly in the areas of criminal law and criminal procedure).
- <sup>7</sup> See generally G. Alan Tarr, *Explaining Sub-National Constitutional Space*, 115 PENN. ST. L. REV. 1133 (2011) (examining the gap between federal and state powers as established through each government's respective constitution).
- <sup>8</sup> See JAMES A. GARDNER, *INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM* 18–20 (2005).
- <sup>9</sup> The third leg in the table of power is the private sphere. If the people handcuff both their federal and state governments, they are necessarily empowering private power—corporations. If the people fear oppression in their role as workers, consumers, and small entrepreneurs, they must give some layer of government sufficient power to act against the forces that threaten them in the private economy. If both the state and federal governments are deprived of authority to regulate wages and hours, for example, then private corporations are limited only by the market itself in terms of extracting the value of labor from workers. See, e.g., Alan B. Krueger and Eric Posner, *Corporate America Is Suppressing Wages for Many Americans*, N.Y. TIMES (Feb. 28, 2018).
- <sup>10</sup> See FLA. CONST. art. VII, § 1 (requiring a balanced budget), and art. VII, § 11 (imposing restrictions on state bonds).
- <sup>11</sup> For further information regarding FEMA, see *About the Agency*, FEMA, <https://www.fema.gov/about-agency> (last visited Sept. 9, 2018). See also Disaster Relief Act of 1974, 42 U.S.C. §§ 5121–5208.
- <sup>12</sup> See Richard Briffault, *Foreword: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L. J. 907 (2003) (discussing fiscal limitations imposed upon federal and state governments by their respective constitutions).
- <sup>13</sup> See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536–38, 595 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).
- <sup>14</sup> Compare *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (requiring the application of state common law in federal diversity cases), with *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 483, 506 (2008) (making federal common law of admiralty by following state practices and principles).
- <sup>15</sup> See Jack L. Landau, *State Constitutionalism and the Limits of Judicial Power*, 69 RUTGERS U. L. REV. 1309, 1321 n.76 (2017) (asserting that some thirty-eight state high courts have constitutional authority to create rules of procedure). Connecticut, unusually, seems to vest rulemaking power in the state trial courts, not the supreme court; see RULES FOR THE SUPERIOR COURT §§ 1-9, 1-9B (COMM'N ON OFFICIAL LEGAL PUBL'NS 2018) in CONNECTICUT PRACTICE BOOK 103–04 (2018); RULES COMMITTEE OF THE SUPERIOR COURT, STATE OF CONNECTICUT JUDICIAL BRANCH, <https://www.jud.ct.gov/Committees/rules/default.htm#Members> (last visited Sept. 12, 2018) (describing the rules committee as an organ of the state trial court).
- <sup>16</sup> Rules Enabling Act of 1934, 28 U.S.C. § 2072 (2018).
- <sup>17</sup> See 49 U.S.C. § 102 (2018).
- <sup>18</sup> Thomas M. Alpert, *The Inherent Power of the Courts to Regulate the Practice of Law: An Historical Analysis*, 32 BUFF. L. REV. 525, 525 (1983).
- <sup>19</sup> See Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1887 (2001) ("State trial judges . . . enjoy[] a greater aura of democratic accountability." (internal question marks omitted)).
- <sup>20</sup> See Justin R. Long, Comment, *Enforcing Affirmative State Constitutional Obligations and Sheff v. O'Neill*, 151 U. PA. L. REV. 277, 299 (2002) (citing *Missouri v. Jenkins*, 515 U.S. 70, 112 (1995) (O'Connor, J., concurring)).
- <sup>21</sup> See Jonathan L. Marshfield, *Foreign Precedent in State Constitutional Interpretation*, 53 DUQ. L. REV. 413, 432 (2015).
- <sup>22</sup> See, e.g., MICH. JUDICIAL SELECTION TASK FORCE, REPORT AND RECOMMENDATIONS 5 (2012), <http://www.mcfn.org/uploads/documents/MJJudicialSelectionTaskForce.pdf>.
- <sup>23</sup> See Hershkoff, *supra* note 19.
- <sup>24</sup> See 39 C.F.R. §§ 111.1–111.5 (2005).
- <sup>25</sup> See U.S. CONST. art. I, § 8; 39 U.S.C. §§ 501–503 (2018).
- <sup>26</sup> See *Alden v. Maine*, 527 U.S. 706, 765–66, 765 n.4, 772 (1999) (Souter, J., dissenting).
- <sup>27</sup> See generally *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) (validating the legitimacy as "law" of state judge-made law in the absence of superseding statutes).
- <sup>28</sup> See, e.g., Justin R. Long, *State Constitutional Prohibitions on Special Laws*, 60 CLEV. ST. L. REV. 719, 727–28 (2012).
- <sup>29</sup> Cf. *League of Women Voters of Pennsylvania v. Commonwealth*, 181 A.3d 1083, 1084 (2018).
- <sup>30</sup> See, e.g., MICH. CONST. art. IX, § 29 (requiring the state to reimburse local governments for costs derived from state-imposed mandates).
- <sup>31</sup> MICH. CONST. art. VIII, § 3.
- <sup>32</sup> See *id.*
- <sup>33</sup> See generally Anthony Schutz, *State Constitutional Restrictions on Special Legislation as Structural Restraints*, 40 J. LEGIS. 39, 56 (2013–2014); Michael L. Buenger, *Friction by Design: The Necessary Contest of State Judicial Power and Legislative Policymaking*, 43 U. RICH. L. REV. 571 (2008).
- <sup>34</sup> See Schutz, *supra* note 33, at 44–45, 54–55.
- <sup>35</sup> *Id.*
- <sup>36</sup> See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 329, 372 (2010).
- <sup>37</sup> See, e.g., Clean Air Act, 42 U.S.C. § 7401 (2018).
- <sup>38</sup> Cf. Justin R. Long, *Democratic Education and Local School Governance*, 50 WILLAMETTE L. REV. 401, 425–26 (2014).
- <sup>39</sup> See generally Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (explaining how the tort system functions like regulation because it allocates costs to parties for their economic activity).
- <sup>40</sup> See Schutz, *supra* note 33, at 62–63.
- <sup>41</sup> Jill Paradise Botler et al., *The Appellate Division of the Supreme Court of New York: An Empirical Study of Its Powers and Functions as an Intermediate State Court*, 47 FORDHAM L. REV. 929, 930 (1979).

- <sup>42</sup> See, e.g., Michael J. Yetter, Note, *Gutierrez v. Smith, A Curious Case of Depraved Indifference Murder*, 77 ALB. L. REV. 1201, 1201–02 (2014) (describing conflicting lines of precedent in New York’s depraved-indifference murder doctrine).
- <sup>43</sup> See, e.g., *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868 (2009) (describing the influence, perceived or real, of a coal baron on the West Virginia Supreme Court in a case where his company was a party).
- <sup>44</sup> See, e.g., *Joy v. Penn-Harris-Madison Sch. Corp.*, 212 F.3d 1052, 1063 (7th Cir. 2000) (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)) (“[S]tudents have a lesser expectation of privacy than the general public. However, students do not shed their constitutional rights at the schoolhouse door.”).
- <sup>45</sup> 355 U.S. 41, 47–48 (1957).
- <sup>46</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 677–79 (2009).
- <sup>47</sup> *Pearson v. Callahan*, 555 U.S. 223, 234–36 (2009).
- <sup>48</sup> *Saucier v. Katz*, 533 U.S. 194, 200–01 (2001).
- <sup>49</sup> *Pearson*, 555 U.S. at 234–36.
- <sup>50</sup> *Taylor v. Sturgell*, 553 U.S. 880, 895–96 (2008).
- <sup>51</sup> See, e.g., *Commonwealth ex rel. Carroll v. Tate*, 274 A.2d 193 (1971) (describing a municipality’s underfunding of a state court).
- <sup>52</sup> See, e.g., Matthew Bloch, Larry Buchanan, Josh Katz, and Kevin Quealey, *An Extremely Detailed Map of the 2016 Election*, N.Y. TIMES (July 25, 2018), available at <https://www.nytimes.com/interactive/2018/upshot/election-2016-voting-precinct-maps.html>.
- <sup>53</sup> See, e.g., *Republic of Bolivia v. Philip Morris Cos.*, 39 F. SUPP. 2d 1008, 1009–10 (S.D. Tex. 1999) (Kent, J.) (mocking plaintiffs for filing in the Southern District of Texas).
- <sup>54</sup> See, e.g., *Mandel v. O’Hara*, 576 A.2d 766, 780 (Md. 1990) (referring to art. 6 of the Maryland Declaration of Rights as “precatory” and so inapplicable); *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375, 1377 (N.H. 1993) (referring to the trial court’s order indicating the state’s education clause is “hortatory” and not enforceable).
- <sup>55</sup> *Commonwealth v. Nat’l Gettysburg Battlefield Tower, Inc.*, 311 A.2d 588, 594–95 (Pa. 1973).
- <sup>56</sup> See, e.g., *Hunter v. City of Eugene*, 787 P.2d 881 (Or. 1990) (finding no private cause of action implied in a constitutional text), quoted in ROBERT F. WILLIAMS AND LAWRENCE FRIEDMAN, *STATE CONSTITUTIONAL LAW: CASES AND MATERIALS* 394 (5<sup>th</sup> ed. 2015).
- <sup>57</sup> See *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1854, 1860 (2017).
- <sup>58</sup> See *id.* at 1860–61.
- <sup>59</sup> See, e.g., *Palsgraf v. Long Island Railroad*, 162 N.E. 99 (1928) (defining tort liability in a novel way).
- <sup>60</sup> Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1156 (1999).
- <sup>61</sup> See, e.g., *Sheff v. O’Neill*, 678 A.2d 1267, 1289–90 (Conn. 1996).
- <sup>62</sup> See generally Helen Hershkoff, “Just Words”: *Common Law and the Enforcement of State Constitutional Social and Economic Rights*, 62 STAN. L. REV. 1521, 1551 (2010) (describing how some courts have crafted effective remedies).
- <sup>63</sup> See *The History of Abbott v. Burke*, EDUC. L. CTR., <http://www.edlawcenter.org/litigation/abbott-v-burke/abbott-history.html> (last visited May 31, 2018).
- <sup>64</sup> See Long, *supra* note 20, at 300, 302 n.155.
- <sup>65</sup> See, e.g., Helen Hershkoff, *The Michigan Constitution, Judicial Rulemaking, and Erie-Effects on State Governance*, 60 WAYNE L. REV. 117, 118 (2014).
- <sup>66</sup> See, e.g., MICH. CONST. art. VI, § 5; Jason Bologna, Comment, *An Abuse of Power: How the Pennsylvania Supreme Court Uses Article V, Section 10(c) of the Pennsylvania Constitution to Dominate Procedural Lawmaking, and Why Pennsylvania Should Amend this Constitutional Provision*, 71 TEMP. L. REV. 711, 712 n.9 (1998); Kent R. Hart, Note, *Court Rulemaking in Utah Following the 1985 Revision of the Utah Constitution*, 1992 UTAH L. REV. 153, 161 (1992).
- <sup>67</sup> See, e.g., ILL. SUP. CT. R. 3 (describing court’s power to promulgate rules of procedure without reference to constitutional support).
- <sup>68</sup> See generally WILLIAMS, *supra* note 5, at 291–92.
- <sup>69</sup> See *Sibbach v. Wilson & Co.*, 312 U.S. 1, 7–10 (1941).
- <sup>70</sup> See, e.g., IOWA CONST. art. V, § 14 (assigning the legislature authority over civil procedure).
- <sup>71</sup> See, e.g., VA. CONST. art. VI, § 5 (declaring that court-made rules of procedure shall not conflict with statutes).
- <sup>72</sup> With the exception of Connecticut, where a committee of trial court judges (albeit chaired by a supreme court justice, presumably so the trial judges do not get out of hand) crafts the rules. See RULES OF THE SUPERIOR COURT, *supra* note 15.
- <sup>73</sup> See ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 291–92 (2009).
- <sup>74</sup> See John H. Wigmore, Editorial Note, *All Legislative Rules for Judiciary Procedure are Void Constitutionally*, 23 ILL. L. REV. 276, 277 (1929).
- <sup>75</sup> *Winberry v. Salisbury*, 74 A.2d 406 (N.J. 1950).
- <sup>76</sup> *Id.* at 407.
- <sup>77</sup> *Id.* at 408.
- <sup>78</sup> *Id.* at 412–13.
- <sup>79</sup> *Id.* at 412.
- <sup>80</sup> *Id.* at 412–14.
- <sup>81</sup> *Id.* at 414.
- <sup>82</sup> *Id.* at 413.
- <sup>83</sup> 597 N.W.2d 148, 157, 167 (Mich. 1999).

<sup>84</sup> See Steve Carmody, *State Lawmakers Look at Tightening Michigan's Medical Malpractice Laws*, MICH. RADIO (June 11, 2012) (describing the “major” tort reform process in Michigan in the 1990s), available at <http://www.michiganradio.org/post/state-lawmakers-look-tightening-michigans-medical-malpractice-laws>.

<sup>85</sup> *Id.* at 151, 153 n.9 (citing MICH. COMP. LAWS § 600.2169 (1993)).

<sup>86</sup> *Id.* at 150–51.

<sup>87</sup> *Id.* at 151–52.

<sup>88</sup> See *id.* at 152–53 (citing MICH. R. EVID. 702).

<sup>89</sup> *Id.* at 153–54.

<sup>90</sup> *Id.* at 156, 158, 159.

<sup>91</sup> *Id.* at 158.

<sup>92</sup> Even trial lawyers would be unlikely to spend lobbying efforts on procedural rules unless they had an effect on public policy, such as the ability for injured parties to recover compensation.

<sup>93</sup> See *id.* at 158–59.

<sup>94</sup> *Id.* at 159.

<sup>95</sup> See Administrative Order No. 1997-11, 456 Mich. clxxviii (1997–1998). See also Michigan Courts, *Public Administrative Hearings*, available at <https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/Pages/Public-Administrative-Hearings.aspx>.

<sup>96</sup> See, e.g., *Ashcroft v. Iqbal*, 556 U.S. 662, 667–79 (2009) (changing the settled meaning of Rule 8 of the Federal Rules of Civil Procedure by case law rather than through the rule-amendment process).

<sup>97</sup> MICH. COMP. LAWS ANN. §§ 168.391–168.467 (West 2018).

<sup>98</sup> 930 N.E.2d 895, 899 (Ill. 2010).

<sup>99</sup> See *id.* at 902.

<sup>100</sup> *Id.* at 905–08.

<sup>101</sup> *Id.* at 914.

<sup>102</sup> *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1071 (Ohio 1999).

<sup>103</sup> *Id.* at 1087.

<sup>104</sup> *Id.* at 1087–88.

<sup>105</sup> *Id.* at 1096–97, 1111.

<sup>106</sup> 28 U.S.C. § 2072 (2012).

<sup>107</sup> *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9–10 (1941).

<sup>108</sup> *Longstanding Employment Patterns for Law School Graduates Interrupted*, NALP Bulletin (July 2011), available at [https://www.nalp.org/employment\\_patterns\\_classof2010](https://www.nalp.org/employment_patterns_classof2010).

<sup>109</sup> See generally Elizabeth Olson, *Law Schools Debate a Contentious Testing Alternative*, N.Y. TIMES (Apr. 5, 2018) (noting that LSAT scores are correlated with race and other identity factors); Elizabeth Olson, *Harvard Law, Move to Diversify Applicant Pool, Will Accept GRE Scores*, N.Y. TIMES (Mar. 8, 2017); Christian C. Day, *Law Schools Can Solve the “Bar Pass Problem” — “Do the Work!”*, 40 CAL. W. L. REV. 321, 326–30 (2004) (demonstrating the link between LSAT scores and bar passage rates).

<sup>110</sup> See, e.g., Shannon Achimalbe, *4 Types of People Who Shouldn't Go to Law School*, ABOVE THE LAW (July 15, 2015, 10:02 AM), <https://abovethelaw.com/2015/07/4-types-of-people-who-shouldnt-go-to-law-school/>; David Lat, *Dear 16-Year Old Me, Don't Go to Law School*, ABOVE THE LAW (Feb. 29, 2012, 7:02 PM), <https://abovethelaw.com/2012/02/dear-16-year-old-me-dont-go-to-law-school/>; Joe Patrice, *Deciding to Go to Law School Is One Epic Flowchart*, ABOVE THE LAW (Oct. 3, 2013, 5:13 PM), <https://abovethelaw.com/2013/10/deciding-to-go-to-law-school-in-one-epic-flowchart>.

<sup>111</sup> See, e.g., David Segal, *Is Law School a Losing Game?*, N.Y. TIMES (Jan. 8, 2011). See also Lawrence E. Mitchell, *Law School is Worth the Money*, N.Y. TIMES (Nov. 29, 2012) (referring to attacks on legal education); Noam Scheiber, *An Expensive Law Degree, and No Place to Use It*, N.Y. TIMES (June 17, 2016).

<sup>112</sup> See, e.g., Steven Davidoff Solomon, *Law School a Solid Investment, Despite Pay Discrepancies*, N.Y. TIMES (June 21, 2016) (describing the popular (but largely mistaken) view that the vast majority of law schools would not produce enough high-paying jobs for students to repay their loans).

<sup>113</sup> See Elizabeth Olson, *Not Only Elite Law Schools Offer Great Return on Investment*, N.Y. TIMES (Jan. 24, 2017); Carol Goforth, *Why the Bar Examination Fails to Raise the Bar*, 42 OHIO N.U. L. REV. 47, 47 (2015).

<sup>114</sup> See, e.g., Eric A. Zacks & Dustin A. Zacks, *Not a Party: Challenging Mortgage Assignments*, 59 ST. LOUIS U. L. J. 175 (2014) (describing how banks, as sophisticated repeat litigators, have won procedural advantages in foreclosure proceedings that debtors' lawyers have been unable to redress); see also Cathryn Miller-Wilson, *Harmonizing Current Threats: Using the Outcry for Legal Education Reforms to Take Another Look at Civil Gideon and What It Means to be an American Lawyer*, 13 U. MD. L. J. RACE, RELIGION, GENDER & CLASS 49, 64 n.48 (2013).

<sup>115</sup> *The Unmet Need for Legal Aid*, Legal Svcs. Corp. (“Nearly a million poor people who seek help for civil legal problems are turned away because of the lack of adequate resources.”), available at <https://www.lsc.gov/what-legal-aid/unmet-need-legal-aid>.

<sup>116</sup> See Terri Gerstein and Sharon Block, *Ending the Dead-End-Job Trap*, N.Y. TIMES (July 12, 2018) (describing how state attorneys general are filling in the worker-protection role that workers' own lawyers would do if they could afford to).

<sup>117</sup> See Paula Lustbader, *Painting Beyond the Numbers: The Art of Providing Inclusive Law School Admission to Ensure Full Representation in the Profession*, 40 CAP. U. L. REV. 71, 79–82 (2012) (describing the benefits of a diverse bar); Eli Wald, *A Primer on Diversity, Discrimination, and Equality in the Legal Profession or Who is Responsible for Pursuing Diversity and Why*, 24 GEO. J. LEGAL ETHICS 1079, 1102–03 (2011) (same).

<sup>118</sup> See William C. Kidder, *The Bar Examination and the Dream Deferred: A Critical Analysis of the MBE, Social Closure, and Racial and Ethnic Stratification*, 29 L. & SOC. INQUIRY 547, 555–58 (2004).



<sup>119</sup> See Lustbader, *supra* note 11, at 81–82.

<sup>120</sup> See *id.* at 564–65, 569–82.

<sup>121</sup> *Id.* at 566.

<sup>122</sup> See generally Miller-Wilson, *supra* note 114, at 49 (advocating for the implementation of “teaching law firms” to solve the related problems of access to legal education and access to legal services).

<sup>123</sup> Heiberger v. Clark, 169 A.2d 652, 654–55 (Conn. 1961).

<sup>124</sup> *Id.* at 659.

<sup>125</sup> *Id.* at 657–59.

<sup>126</sup> Tonya L. Brito et al., *What We Know and Need to Know About Civil Gideon*, 67 S.C. L. REV. 223, 225 (2016).

<sup>127</sup> See, e.g., *id.* at 223–225.

<sup>128</sup> Gideon v. Wainwright, 372 U.S. 335, 344 (1963). See generally Steven D. Schwinn, *Faces of Open Courts and the Civil Right to Counsel*, 37 BALT. L. REV. 21 (2007).

<sup>129</sup> J.N.S. v. A.W. (*In re* Adoption of A.W.S. & K.R.S.), 2014 MT 322, ¶ 1, 377 Mont. 234, 339 P.3d 414.

<sup>130</sup> *Id.* at ¶¶ 22–26, n.2.

<sup>131</sup> *Id.* at ¶¶ 16–17.

<sup>132</sup> *Id.* at ¶ 27.

<sup>133</sup> See, e.g., Schwinn, *supra* note 128, at 22–24.

<sup>134</sup> *Id.* at 35–38.

<sup>135</sup> See generally *id.*

<sup>136</sup> See Brito, *supra* note 126, at 223, 224, 233, 237.

<sup>137</sup> An example of courts’ power to regulate the bar occurred in *Persels & Associates v. Banking Commissioner*, when the Connecticut Supreme Court invalidated, on state constitutional grounds, a statute purporting to authorize the Banking Commissioner to regulate attorneys engaged in debt negotiation in lieu of the judiciary’s relevant attorney regulations. The court held that only the courts could define the obligations of holding a law license. 122 A.3d 592, 607 (Conn. 2015).

<sup>138</sup> This is possible because of the lawyers’ duty under widely adopted rules of professional responsibility. See Model Rules of Prof. Resp. R. 6.2 (noting a lawyer’s obligation to accept assignments with noted exceptions).

<sup>139</sup> See, e.g., Schwinn, *supra* note 128, at 55–58.

<sup>140</sup> 678 A.2d 1267, 1270–71, 1290 (Conn. 1996).

<sup>141</sup> See Long, *supra* note 20, at 290–96.

<sup>142</sup> See *Commonwealth ex rel. Carroll v. Tate*, 274 A.2d 193, 199 (Pa. 1971).

<sup>143</sup> *Id.* at 194–195, 199.

<sup>144</sup> *Id.* at 194.

<sup>145</sup> *Id.* at 199–200.

<sup>146</sup> *Id.* at 198–99.

<sup>147</sup> *Id.* at 197.

<sup>148</sup> *Id.* at 199–200.

<sup>149</sup> 925 N.E.2d 899, 914–15 (N.Y. 2010).

<sup>150</sup> *Id.* at 904–05.

<sup>151</sup> *Id.* at 905.

<sup>152</sup> *Id.* at 915, 917.

<sup>153</sup> *Id.* at 917 (citing *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

<sup>154</sup> See G. Gregg Webb and Keith E. Whittington, *Judicial Independence, the Power of the Purse, and Inherent Judicial Powers*, 88 JUDICATURE 12, 14–15 (2004).

<sup>155</sup> *Commonwealth ex rel. Carroll v. Tate*, 274 A.2d 193, 199 (Pa. 1971); *Maron*, 925 N.E.2d at 916–17. See generally Andrew W. Yates, Note, *Using Inherent Judicial Power in a State-Level Budget Dispute*, 62 DUKE L. J. 1463 (2013).

<sup>156</sup> See *Bates v. Dir. of Office of Campaign & Political Fin.*, 763 N.E.2d 6, 10–11 (Mass. 2002).

<sup>157</sup> See *id.* at 29.

<sup>158</sup> See *id.* at 30–31; Long, *supra* note 20, at 302 n.155.

<sup>159</sup> See Mark C. Miller, *Conflicts Between the Massachusetts Supreme Judicial Court and the Legislature*, 4 PIERCE L. REV. 279, 291 (2006).

<sup>160</sup> See generally Michael L. Wells & Walter Hellerstein, *The Governmental-Proprietary Distinction in Constitutional Law*, 66 VA. L. REV. 1073 (1980).

<sup>161</sup> *Jones v. Municipal Emps.’ Annuity & Benefit Fund of Chicago*, 50 N.E.3d 596 (Ill. 2016), ¶ 1.

<sup>162</sup> MICH. CONST. art. IX, § 24.

<sup>163</sup> U.S. CONST. pmbl.

<sup>164</sup> *Jones*, Chicago, 50 N.E.3d 596, ¶ 4 (quoting ILL. CONST. art. XIII, § 5 (2007)).



<sup>165</sup> *Id.* at ¶ 47.

<sup>166</sup> *Id.* at ¶ 43.

<sup>167</sup> See *In re City of Detroit*, 504 B.R. 97, 150, 161 (Bankr. E.D. Mich. 2013).

<sup>168</sup> Alaska, Hawaii, New Hampshire, New Jersey, Tennessee, and Wyoming have Attorney Generals appointed by the Governor. See ALASKA STAT. § 44.23.010 (1962); HAW. CONST. art. V, § 6; N.H. CONST. pt. II, art. 46; N.J. CONST. art. V, § 4; TENN. CONST. art. VI, § 5; WYO. STAT. ANN. § 9-1-601 (2013). In Maine, the Attorney General is elected by the legislature. See ME. CONST. art. IX, § 11. All other states have direct elections, as established either by state constitution or statute. See ALA. CONST. art. V, § 114; ARIZ. CONST. art. V, § 1; ARK. CONST. art. VI, § 3; CAL. CONST. art. V, § 11; COLO. CONST. art. IV, § 3; CONN. CONST. art. IV, § 1 (amended 1970); DEL. CONST. art. III, § 21; FLA. CONST. art. IV, § 5; GA. CONST. art. V, § 3; IDAHO CONST. art. IV, §§ 1–2; ILL. CONST. art. V, § 1; IND. CODE § 4-6-1-2 (2013); IOWA CONST. art. V, § 12; KAN. CONST. art. I, § 1; KY. CONST. § 93; LA. CONST. ANN. art. IV, § 3 (2006); MD. CONST. art. V, § 1; MASS. CONST. amend. art. XVII; MICH. CONST. art. V, § 21; MINN. CONST. art. V, § 1; MISS. CONST. art. VI, § 173; MO. CONST. art. IV, § 17; MONT. CONST. art. VI, § 2; NEB. CONST. art. IV, § 1; NEV. CONST. art. V, § 19; N.M. CONST. art. V, § 1; N.Y. CONST. art. V, § 1; N.C. CONST. art. III, § 7; N.D. CONST. art. V, § 2; OHIO CONST. art. III, § 1; OKLA. CONST. art. VI, § 4; OR. REV. STAT. ANN. § 180.02 (West 2007); PA. CONST. art. IV, § 4.1; R.I. CONST. art. IV, § 1; S.C. CONST. art. VI, § 7; S.D. CONST. art. IV, § 7; TEX. CONST. art. IV, § 1–2; UTAH CONST. art. XXIV, § 12; VT. STAT. ANN. tit. III, § 151 (2010); VA. CONST. art. V, § 15; WASH. CONST. art. III, § 1; W. VA. CONST. art. VII, § 2; WIS. CONST. art. VI, § 1.

<sup>169</sup> See Jim Ryan and Don R. Sampen, *Suing on Behalf of the State: A Parens Patriae Primer*, 86 ILL. B.J. 684 (1998).

<sup>170</sup> The New York Attorney General pursues both criminal and civil litigation. See <https://ag.ny.gov/bureaus>. Connecticut, on the other hand, has independent prosecutors selected by a special commission to preserve their independence from politics. CONN. CONST. art. IV (amended 1984). The Attorney General has no criminal law enforcement authority. CONN. GEN. STAT. ANN. § 3-125 (West).

<sup>171</sup> See Ryan and Sampen, *supra* note 169, at 685–87.

<sup>172</sup> See generally *Green v. Allen*, 24 Tenn. (5 Hum.) 170, 198–203 (1844) (describing the English origins of the doctrine).

<sup>173</sup> See, e.g., *In re S.G.*, 677 NE2d 920, 928 (Ill. 1997).

<sup>174</sup> See generally Allan Kanner, *The Public Trust Doctrine, Parens Patriae, and the Attorney General as The Guardian of the State's Natural Resources*, 16 DUKE ENVTL. L. & POL'Y F. 57, 59, 100–12 (2005).

<sup>175</sup> See, e.g., Kirsten H. Engel, *State Standing in Climate Change Lawsuits*, 26 J. LAND USE & ENVTL. L. 217, 227–30 (2011).

<sup>176</sup> See *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 258–59, 264–65 (1972) (distinguishing between the state's cause of action in its proprietary capacity based on the state government's direct losses and its *parens patriae* cause of action on behalf of its citizens injured by the misconduct).

<sup>177</sup> <https://www.publichealthlawcenter.org/sites/default/files/resources/master-settlement-agreement.pdf>. See also Gregory W. Taylor, Note, *Big Tobacco, Medicaid-Covered Smokers, and the Substance of the Master Settlement Agreement*, 63 VAND. L. REV. 1081 (2010).

<sup>178</sup> See Peter Pringle, *The Chronicles of Tobacco: An Account of the Forces That Brought the Tobacco Industry to the Table*, 25 Wm. Mitchell L. Rev. 387 (1999) (describing how other states followed Mississippi's lead in suing the tobacco manufacturers).

<sup>179</sup> See *id.*

<sup>180</sup> See *id.*

<sup>181</sup> Cf. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331–33 (1979) (allowing non-mutual offensive collateral estoppel where the investor-plaintiffs benefitted from facts determined in a prior action by the SEC against the same corporate defendant).

<sup>182</sup> See *supra* note 168 and accompanying text.

<sup>183</sup> See Engel, *supra* note 175, at 236.

<sup>184</sup> For example, the Maine Attorney General caused the state to join as a plaintiff in an action against federal immigration policy, over the governor's strident opposition. See Michael Shepherd, *LePage Throws Another Legal Jab at Mills as Poll Shows Her Leading in Race to Replace Him*, BANGOR DAILY NEWS (Oct. 23, 2018) (describing the conflict between constitutional officers).

<sup>185</sup> See Justin Ewers, *California Attorney General Jerry Brown Asks Court to Overturn Prop 8*, U.S. NEWS & WORLD REP. (Dec. 22, 2008), <https://www.usnews.com/news/articles/2008/12/22/california-attorney-general-jerry-brown-asks-court-to-overturn-prop-8>. See generally Niraj Chokshi, *Seven Attorneys General Won't Defend Their Own State's Gay-Marriage Bans*, WASH. POST: GOVBEAT (Feb. 20, 2014), <http://www.washingtonpost.com/blogs/govbeat/wp/2014/02/20/six-attorneys-general-wont-defend-their-own-states-gay-marriage-bans>.

<sup>186</sup> See generally Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013).

<sup>187</sup> See MICH. CONST. art. VIII, § 5 (1963).

<sup>188</sup> See MICH. COMP. LAWS § 168.286 (1963).

<sup>189</sup> See *Sterling v. Regents of the Univ. of Mich.*, 68 N.W. 253, 256–57 (Mich. 1896).

<sup>190</sup> See FLA. CONST. art. IV, § 9 (1998).

<sup>191</sup> Fla. Stat. 20.25 (17) (creating the Dep't).

<sup>192</sup> Fla. Dep't of Nat. Res. v. Fla. Game & Fresh Water Fish Comm'n, 342 So. 2d 495, 497 (Fla. 1977).

<sup>193</sup> *Whitehead v. Rogers*, 223 So. 2d 330, 331 (Fla. 1969) (per curiam).

## Oral Remarks of Professor Long

I thank the Pound Institute for turning its attention to this important field, from which I earn my bread, and I thank all of you for being here to discuss and engage with these very timely questions.

We heard from my teacher and mentor, Professor Williams, this morning about individual rights, and I am billed to talk about structural organization of states, particularly with emphasis on the judiciary. But my real purpose is to elide some of that distinction, to show that and to make hazy the difference between what we think of as individual rights or private law questions and public law questions and the structure of the government side of constitutional interpretation.

And I want to make that distinction hazy because, for all of the examples we learned about from Professor Williams' paper, they depend on institutions of government that are capable of protecting and enforcing those rights. Every garden variety, common-law tort claim decided for the plaintiff or for the defendant is also an assertion about the judiciary's power with respect to the other branches of the government, about the judiciary's power with respect to the private forces in the economy that structure people's lives, and, thus every single exercise of protection for individual rights is simultaneously a comment on separation of powers, on the structure of the state government, on which institution is the appropriate location for resolving these important questions that face us.

We have seen this morning, and at our lunchtime talk with Justice Liu, some of the tension between the states and the federal government. The areas of state constitutions that I am talking about today have no analog in the federal system, though that has not always stopped state high courts in particular from interpreting them as if they were analogous.

But I want to start off from the idea that the states are not structured like the federal government. In other parts of the world there are federal organizations, federal nations, that structure their subnational units of government in clean mimicry of the national structure of government, but we do not have that. Each state does not have the same structure. To take an easy example, consider the U.S. Senate. The Federal Constitution calls for senators to come from specified geographic districts (the states), but if a state attempted to implement the same districting approach, it would violate the one person, one-vote standard. So, right away, one of the defining features for how we get judges in the federal system—confirmation in a Senate whose members are picked based on geography rather than population—is structurally different from any state that we have. Each state is different from every other one and also structurally different from the federal Government.

But I want to start off from the idea that the states are not structured like the federal government. In other parts of the world there are federal organizations, federal nations, that structure their subnational units of government in clean mimicry of the national structure of government, but we do not have that.

What that implies is that the judiciary, and the job of being a judge, just isn't one where we can unthinkingly import what we teach in the law schools about what it means to be a judge, which is the federal model, or what gets argued in the briefs or what we read from the U.S. Supreme Court. There are ample cases of the federal judges getting vapors about doctrines like standing and how inconceivable it would be for the judiciary to exercise authority where there isn't a ripe, actual injury or controversy. And then we have state courts that are

So we have a fundamental possibility, a capability in the states, granted by the state constitutions, to imagine a different way of being judges and a different kind of judiciary.

issuing advisory opinions, and the world runs merrily along, none of the parade of horrors that the federal courts talk about is happening, and everybody goes on with their day.

So we have a fundamental possibility, a capability in the states, granted by the state constitutions, to imagine a different way of being judges and a different kind of judiciary. And I am hoping to convince you today that that is not only a possibility—it's what the state constitutions call for. The state constitutions, unlike the Federal Constitution, are not grants of power, because the states inherited the sovereignty that they then yielded to the federal government, somewhat grudgingly, through the plan of the convention in Philadelphia. The states have all

the power they need to do anything that is not prohibited by a higher source of law.

That means that, if we put anything at all in a state constitution, it's something other than a grant of power. It must in some way be a restriction on power—and, to some degree, that's why the state constitutions can run a bit long. The people have consistently been disappointed by their elected representatives in the legislature, by their governors, and by their judges, so they keep putting clauses into their state constitutions to *restrain* the state's power that would otherwise be plenary.

Those kinds of restrictions are often directed at the legislatures. For example, every state constitution has rules about legislative procedure. The Federal Constitution says each house shall make its own rules. In some states, those rules about what hoops the legislature must jump through to pass legislation are enforced by the courts, and in other states some version of heightened deference applies and the courts say, "Well, that's the legislature's problem."

We just saw recently in my state of Michigan a controversy centered on our constitutional provision requiring certain kinds of legislation to be suspended, not to take effect until 90 days after passage, unless they are declared an emergency, and that emergency can only be declared by a super-majority. So the trend for the last few years in the Michigan legislature has been for the presiding officer of that house of the legislature to say, "Okay, all in favor of the bill?" A slight majority votes yes. And then the presiding officer will say, "Okay, all in favor of a super-majority to declare it an emergency that will take immediate effect, say aye." And a slight majority says aye. Then the presiding officer says "The Chair hears a super-majority, so it will be given immediate effect." The ruling of the Chair is then challenged and submitted to the normal legislative appeal from a ruling of the Chair, which is the body. Then the house votes, "Yes, we agree with the Chair"—by a slight majority! So, that blatant evasion of the procedure outlined in the Constitution has not resulted in the invalidation of any legislation. The courts regard that as internal business to the legislature, a problem for them to solve politically in their own branch.

I give that example specifically because it's about rules in one of the more important areas of the law, procedure. I think one of the areas that will be increasingly contested in the states is the state high court's power to regulate procedure and evidence. We have seen various challenges to what kinds of medical expertise qualifies as expert evidence, or other kinds of challenges to what needs to be in a complaint to satisfy pleadings standards, both at the federal and state levels.

The state constitutions, in a big majority of states, typically grant the state high court the power to create rules. They do that either explicitly or by the inherent power of the court to make its own rules. The idea here is that,

if the legislature makes its rules, then the courts can make theirs. That's a sort of a fair balance in the view of the constitutional ratifiers.

The result of that, though, has been very varied across the states, even in states with explicit grant of constitutional authority to the high court to create rules of procedure and evidence. Occasionally you will find cases like we had in Michigan in the case called *McDougal*,<sup>1</sup> where the Supreme Court said, "Yes, the constitution gives us the power to make rules of procedure; obviously, we don't have the power to legislate generally on substantive topics. How do we tell the difference between where our power stops and the legislature's picks up when a statute conflicts with the Michigan rule of court?" And the court held that the court can make rules of procedure, but if the legislature passes a statute that has any purpose other than the mere administration of justice, then the statute is substantive and therefore trumps the rule promulgated by the Michigan court.

The state constitutions, in a big majority of states, typically grant the state high court the power to create rules. They do that either explicitly or by the inherent power of the court to make its own rules.

Well, in practice, the legislature doesn't pass anything that has to do only with the mere administration of justice. We are in this election season now and you don't find candidates running around bragging about how effectively they required double-lined paper for court filings. So, the essence of the *McDougal* holding, despite a lot of rhetorical heat around the idea that the court has its own prerogatives under the Michigan Constitution, has been to yield any oversight of civil procedure to the legislature.

You might wonder why it matters if one branch or another has a particular power in a particular area. It turns out that it matters greatly because of the kinds of interests that are able to exercise influence in the different branches. The bars, both plaintiff's side and defense side, have much more influence over the Supreme Court in promulgating rules of procedure and evidence than they do in the legislature. As some people have been saying this morning, legislatures seem to be increasingly not staffed by lawyers. And instead, the interests in the economy that have no inherent or intuitive respect for the rule of law, but are following their own special interests in their own segment of the economy, are able to influence the legislatures.

That is partly amplified by constitutional limitations on term limits and limitations on, for a while, the staff available to the legislators and, to some degree, limitations on the days of the year which would permit them to build up the experience to become experts in arcane areas of regulation such as civil procedure. North Dakota for a while was considering whether to make it a felony for legislators to meet beyond the constitutional maximum of 80 days in a year. The jails didn't fill up. The legislators were happy to go back to their homes. But 80 days a year is not enough to learn what lay legislators need to know to be effective regulators for complex social systems like civil procedure.

The location in the state government where different kinds of public policy debates get resolved matters. And when it's the judiciary that is responsible for a particular area of public policy it changes who the voices are who get heard the loudest.

The location in the state government where different kinds of public policy debates get resolved matters. It is not determinative. It doesn't tell you, "if you want answer A put it there, and if you want answer B put it here," but

it puts a thumb on the scale in different directions. And when it's the judiciary that is responsible for a particular area of public policy it changes who the voices are who get heard the loudest.

In the area of access to civil justice, the theme of our conference, that means that areas like the regulation of the bar or the regulation of admission to the bar can have an important effect, putting the litigation itself in context. Who are the lawyers who can come forward to implement that access to justice?

The New York courts not too long ago were debating whether to raise the raw score that is necessary to pass the New York bar, and they knew, and there was statistical evidence presented to them, that each increase of a point for bar passage would change the racial composition of the New York bar, so that marginalized communities, people of color and other groups who had been excluded from the bar historically, would be a smaller and smaller percentage of the bar as the weight given to a standardized multiple choice test went up higher.

So the debate about how to set the score, from some angles, looked extremely technocratic, bordering on dull, and from other angles looked very important because we also know that admitting more lawyers from marginalized social communities translates down the line to more lawyers willing to serve clients in those communities. So the high court's control over admissions to the bar has consequences for whether people are going to be able to find a lawyer, like the Arabic-speaking citizens in Dearborn near where I live.

The other kinds of structural changes and separation of powers problems that we see in the state courts make a lot of judges nervous, and I think it comes, again, from this notion that the federal judge is the standard. That's what we were taught in the first year of law school, that the federal judiciary is the paragon of American notions of judging. But even if the title is the same, the job is different. State constitutions direct policymaking tasks to state

judiciaries, and it's up to state judges to determine whether those constitutional provisions allocating power to the state courts are going to be given effect as their ratifiers expected, or whether those will be deemed dead letters.

The constitutions are allocating power to state judiciaries that would be strange and unsettling in the federal context—the power to create the common law, the power to reach inherent power decisions about sanctioning lawyers, about even funding the courts themselves.

The most common way that state judiciaries turn sections of their state constitutions into dead letters is to treat them as if they were identical to the Federal Constitution's provisions, even where there is no analog. There was a decision from the Illinois Supreme Court<sup>2</sup> deciding that there was no right to education under the Illinois Constitution, applying the same

principles that the United States Supreme Court did when finding that there was no right to education under the United States Constitution. The U. S. Supreme Court's decision in *San Antonio v. Rodriguez*<sup>3</sup> was largely based on the absence of any clause in the United States Constitution establishing a right to education—but Illinois did have such a clause. That did not slow down the court from concluding, "We will just decide this the same way as the Federal Supreme Court did."

So the constitutions are allocating power to state judiciaries that would be strange and unsettling in the federal context—the power to create the common law, the power to reach inherent power decisions about sanctioning lawyers, about even funding the courts themselves. Those kinds of choices that state constitutions push towards state judiciaries are not at all what the Federal Constitution contemplates, so it understandably makes people uncomfortable.



But the flip side is the humility that judges assume they are exercising by refraining from carrying out these powers that would be so atypical, and frowned upon, in the federal system. It isn't actually humility if you think about the people of the state trying to restrain their state legislators. I talked with some of you this morning about judicial selection. Judges who are elected still commonly find themselves hearing their colleagues from the other branches referred to as "the representative branches," and I know I have talked to a number of judges who have been very keenly aware of what low salience judicial elections have, where they exist, where voters just don't know who or what they are voting for.

The jurist in residence at Wayne State, the former Chief Justice of Michigan, Marilyn Kelly, tells a story about meeting someone at a campaign event at a county fair when she was running for the Supreme Court. He said to her, with his three-year old on his shoulder, "I recognize your name. My daughter voted for you. I always pull the lever for the important offices, but I let her pick the ones down the ballot."

So, how "representative" are we, really if that's the kind of election that judges are facing? On the other hand, how representative are the state representatives? When I asked my first year law students how many knew who their state representative was, maybe 50 percent knew.

There isn't a problem with judges being unaccountable, or being activist, or lacking humility when they carry out the functions that their state constitutions assigned to them. Someone is going to exercise that power. Someone is going to regulate the procedure, someone is going to regulate the bar, someone is going to regulate the rules of evidence. Is it going to be the courts? Or is that power going to slip away into the hands of other branches? There may be good reasons why, as judges, you think it should be the other institutions, but the important thing is that each individual rights decision is simultaneously also a decision about which is the right institution, and how we should be making these decisions together as a society.

There isn't a problem with judges being unaccountable, or being activist, or lacking humility when they carry out the functions that their state constitutions assigned to them. Someone is going to exercise that power.

I will now turn it over for reactions from my colleagues, thank you.

## Comments by Panelists

### Professor Jonathan Marshfield

It's a great thrill for me to be here today. I spend a large part of my day-job thinking about and trying to figure out why and how you all decide cases the way that you do, so to be able to be here with you and to hear some of you share a few of your secrets is truly thrilling for me.

I also feel very privileged to be able to comment on Justin's paper. I have learned a great deal from him. So, as I read his paper, I was very happy to be able to stand here and say I agree with him wholeheartedly. Everything that he says, to me, makes perfect sense.

I especially think that his core institutional claim is really important for judges to be mindful of, and to be thinking about because, a lot of times, the substance can seem to take priority, when in fact the substance doesn't have any teeth unless we are aware of and conscious of the institutions that are in place to enforce that substance.



To me, that claim seems not only correct but very, very important for judges to be thinking about. The best that I can do is to try and build on that claim.

The amendment power under state constitutions is a whole different animal than the amendment process under the Federal Constitution.

As I read through Justin's paper, it occurred to me that there might be another institutional component to all of this that is very, very important for the discussion about the effectiveness of protecting civil justice guarantees and civil justice opportunities.

Before I reveal that, let me first start by saying that one of the themes I think throughout the day has been the extent to which state courts should, and how they should, practice the power of judicial review under state constitutions. That seems to be a large part of what Professor Williams talked about in his paper this morning. He has identified a bunch of often-overlooked provisions in state constitutions that provide the material, the substance of the law, for state judges to push back and to invalidate legislation that is inconsistent with the state constitution. It's the practice of judicial review by state courts under their state constitutions.

To me, the elephant in the room of that whole situation is the other institution that needs to be added to the list, and that is the amendment power under state constitutions. As we all know, the amendment power under state constitutions is a whole different animal than the amendment process under the Federal Constitution.

The Federal Constitution has been amended 27 times over its 200-plus years of existence. That number is probably exaggerated, because the first 10 amendments were really a bundle, and the reconstruction amendments were another bundle, so the amendment rate and the ability to amend the Federal Constitution is significantly limited, and that has a really big impact on judicial review.

When the United States Supreme Court makes a decision, for all intents and purposes that decision is final—unless they decide that they want to reconsider it and they want to get rid of it. Effectively speaking, although the Article V amendment process is there in the document, in reality, being able to use it to make any changes in response to a single Supreme Court decision is almost impossible, and a lot of scholars have called it practically impossible under the Federal Constitution.

State constitutions, as you all know probably too well, are much more flexible. Even Vermont, the state that has amended its constitution the least, is amended on average about once every four years. I know in today's political climate a four-year term can feel like an eternity, but, nevertheless, four years is a pretty short period of time for a document to be amended substantively.

This frequency of amendment is not just theoretically relevant to civil justice. It's directly relevant. There are lots of states who have amended their constitutions to constitutionalize worker's compensation schemes, constitutionalize damage caps, etc. In the state of Arkansas, where I teach currently, there's a ballot measure that will be voted on this fall that imposes a non-economic damages cap and imposes a cap on the contingency fees that attorneys can collect, and completely restructures the court's rulemaking authority so that the legislature would have a really powerful veto, and also have the power to originate its own rules for the practice of the courts. So there, in that one amendment, you have three of the major institutions that Professor Long has noted.

All of this is to say that I think that if we're going to talk about how state courts practice judicial review in response to these questions about civil justice, we have to be thinking and talking about the amendment power.

What's interesting to me—and this is one of the mysteries that I love to hear about from you all—is that, in my experience anecdotally, talking with judges and then, more systematically, in collecting thousands of your opinions and reading them, coding them, systematizing them, you are very hesitant to acknowledge the existence of the amendment power when you exercise judicial review. In the opinions that exercise the power of judicial review and strike down statutes, or interpret the state constitution, very infrequently is there any mention of or reference to the fact that the amendment power is out there and it's out there as something that could react to state court decisions.

A very small portion of all state courts exercise the power of judicial review where there is any acknowledgement of the existence of the amendment power.

In my estimation, from a random sampling, and hours and hours and hours of tedious review, a very small portion of all state courts exercise the power of judicial review where there is any acknowledgement of the existence of the amendment power. Alabama, for reasons again I would love to know, seems to love bootstrapping the amendment power to judicial review, so they have quite a few opinions where there's reference to the fact that the people can amend whenever the court takes on the power or exercises the power of judicial review. After that, it's kind of hard to identify any trends and the references seem kind of chaotic and anecdotal.

So, as I have thought about that and tried to demystify it and think about it and think about whether there's a more appropriate proactive way for state courts to be integrating the amendment power into these decisions, there might be a few reasons why those references are not there and where that contextualization is not happening. It could just be that the parties don't argue it, which is also another frequent theme here today. It could be that it's kind of like this vague constitutional truism that's not really going to provide any guidance in a particular case anyway and so, busy, pragmatic judges just sort of know that it's out there but it's not worth mentioning.

But I think there are two other reasons that might also be at play. The first is that I think it's kind of scary. The amendment power is that one thing that can come back to bite you. I learned as a litigator that judges do not want to be overruled, so do not give them arguments or don't rest your case on arguments that make them vulnerable to being overruled. And there is a sense in which the amendment power is a scary thing for state judges because maybe they could be overruled through an amendment, and so we want to avoid that kind of thing so we just sort of don't mention it.

Another reason I think is that there's a lot of language in state court opinions exercising state judicial review that is very reminiscent of the way the Supreme Court talks about judicial review. In fact, some of the language feels like Chief Justice Marshall is screaming for *Marbury v. Madison*<sup>4</sup>—it's the duty and provenance of the courts to decide what the law is.

To me, that tone reflects something that's a little bit more appropriate in the federal context, where the courts do truly finally decide in many instances what the law is, but in the state context that's not really the case. When a state high court reaches a decision on a particular constitutional issue, in many respects all they're doing is teeing it up for anybody who is going to now mobilize and get involved in the amendment process. There's a sense in which,

when a state high court exercises the power of judicial review, all they have done is take what might up until that point have been primarily a private dispute between litigants and has now been megaphoned into the public sphere as precedent for the state in order to mobilize or for people to react to it, and for amendment actors to begin.

So I think we need to consider how that reality might be integrated into our analysis and our thinking as state courts consider the power of judicial review. And I would suggest that acknowledging it and including in opinions reference to the fact that “this is not the final say,” that the people reserve to themselves the final say on the substance of a state constitution, can be beneficial. It can change the narrative about judicial activism, because the courts are taking a more humble position on what their role is within the constitutional structure, and it might also provide fewer straw men for reformers to be able to push back against.

I think there are some other ways that amendment rules can be used in this context, and if you are interested in any of those there’s a shameless, self-promoting law professor from Arkansas who has some articles that he would be happy to share with you. Thank you again.

## Honorable Judy Cates

Good afternoon. My name is Judy Cates, and I sit on the Fifth District Appellate Court that covers 37 counties in southern Illinois. I was elected to the court in 2012, and prior to that I was a trial lawyer for 34 years.

I want to talk to you about my reaction to the paper today because, having lived through many of the damage cap discussions that have been discussed, and having had to take cases to the appellate courts, I think it’s a really important process for me to challenge you regarding some of the concepts raised by the distinguished authors of the papers before us. Many of you sit on committees who will make a difference with your supreme courts, and perhaps you can take back some of the ideas you’ve heard about today and say, “Maybe we can do it better.”

I think people have less confidence in their judicial system because so much money is flowing into these elections.

The first thing I want to talk to you about is the notion that elected judges somehow have democratic legitimacy, whereas those who are appointed do not. I would say to you quite the contrary—that today, because of the money that’s coming into judicial races, as our Colorado justice said to us this morning, trust in the court system is actually declining. I think people have less confidence in their judicial system because so much money is flowing into these elections.

In the 37 counties covered by our appellate court, the amount of money spent on the elections is always published. When I ran in 2012 we had 880,000 voters, and the people always want to know why I have to raise \$1 million to run for judge. Why do you have to raise \$1 million? “Well,” I said, “if I put up a yard sign in every one of the voters’ yards for \$1.00, that’s \$880,000 right there.”

But the public, in my view, truly does not understand money. If you think about it, if money were not an issue, why did the U.S. Supreme Court have to decide *Caperton*<sup>5</sup>? If all the judges in this room, or in the judiciary as a whole, could self-police, why did we need that decision? So we need to think about money and the impact it has on the perception of the voter, as well as the impact it has on us in deciding cases.

In Illinois, we are about to be embarrassed, I think. Of course, in Illinois in 2004, we had the most expensive race for a state supreme court seat in the history of the United States. Our chief justice is scheduled to testify in a case that has been brought as a RICO class action in federal court in southern Illinois. The chief justice who sits on our supreme court now, and who won that 2004 race, was the deciding vote reversing a \$1 billion class action. And that class has now come back and said that State Farm Insurance and the other special-interest groups conspired to select the chief justice so that he would cast the deciding vote to reverse that decision. So the class sued State Farm and the Civil Justice League, and we will see what happens. But it is coming, and I am sure the newspapers will cover it with great vigor.<sup>6</sup>

The other matter I want to talk to you about with regard to damage caps is this: in 2006, when caps were suggested in Illinois again, for the third time, I was President of the Illinois Trial Lawyers Association. I learned that the legislators were influenced by the special-interest groups who claimed, “We have got to have caps. We have got to have caps.”

We can’t be distracted by these special-interest groups—we must remember the plight of the people who are depending upon us to get access to the courts.

Part of my job then, as president of the Trial Lawyers Association, was to go to Springfield and talk to the legislators. This was after the doctors had showed up in force and marched around the Capitol Rotunda in their white coats. That year, I had the opportunity to meet a senator named Barack Obama. I said, “Senator Obama, what are you going to do if caps hit the floor of the Senate in Illinois?” He told me, “I’m going to vote for them.” I said, “But you’re against them.” He responded, “But the people want them.” Well, the doctors wanted them, the special-interest groups wanted them. The courts had already said twice that they were unconstitutional, but the legislature was going to pass them again. And do you know what they told the trial lawyers in Illinois? “You guys take care of it.”

Well, what happens to the victims during that period of time? If you look in Missouri, Missouri has split—caps, no caps, caps. What about the victims of medical malpractice, the real victims, the ones with really meritorious cases? Where are they left but in a vacuum during that period of time, while resources are amassed to overturn what should never have been passed in the first place? This is why Justin’s discussion of which institution controls becomes so important.

In 2006, *Lebron v. Gottlieb Memorial Hospital*<sup>7</sup> was filed. It was brought on behalf of a brain-damaged child, and we reversed caps for the third time. But that required the organization of a lot of resources—including Bob Peck, who spoke this morning. I met Bob for the first time in 2006 when I was a lawyer, because we needed help on this issue. And it was decided, again, on a separation-of-powers issue.

In Illinois, in a separation-of-powers issue, it doesn’t matter that there was a healthcare crisis. The issue was whether the legislature encroached upon the judiciary’s authority, and the answer was yes. It is up to us, the judiciary, to determine whether a remittitur is necessary, and if a remittitur is necessary, we make those decisions, not the legislature.

So, don’t be distracted by the issues that are irrelevant noise in the courtrooms we occupy. We need to make sure that we recognize that the special-interest groups have it out for the little guy. We can’t be distracted by these special-interest groups—we must remember the plight of the people who are depending upon us to get access

to the courts. If we delay, if we are too patient, and allow others to control our courtrooms, the victim is always left waiting for access to justice. And the special-interest groups don't stop.

So I just urge you, in closing, to think about the person who is waiting for his or her day in court before you. Thank you.

## John Lebsack

My name is John Lebsack. I am a defense lawyer from Denver. My office is across the street, so this was a very convenient meeting for me to attend. I was honored when I was asked to speak to the Pound Forum this year, and I am honored to speak to such a large group of appellate judges. This is, I'm sure, going to be the biggest panel I am every going to speak in front of, but the great thing about it is I don't think you can interrupt me and ask questions while I'm giving my remarks.

The slot I am sitting in is the designated representative of the defense side of things. I have always said that there is a lot more that the two sides have in common than that they differ on, in terms of access to justice, fairness of the rules, those things. John Cuttino said the same thing. He has a national perspective on this. I don't have a national perspective; I have a Colorado perspective. I have been a Colorado lawyer for 39 years, always doing defense work, so my comments are based more on an in-depth view of the Colorado situation rather than on an national perspective.

Professor Long wrote a very detailed, nuanced paper discussing an important topic that I did not know much about until I was asked to prepare remarks for this forum. It turns out there's a reason for that, and that is that Colorado is one of the few states where this whole issue of state constitutional challenges to civil injury cases and civil litigation has just not gained any traction. So I looked up what our experience has been with caps in particular and challenges under the state constitution to so-called tort reform. I looked up those cases and you can count them on one hand.

I get the impression from other states that there are cases coming out all the time on this, but it just has not been our experience in Colorado. Maybe the single reason for that is that our constitution does not have a constitutional right to a jury trial. It could be just as simple as that. But if you get that basis then so much falls into play after that. We have a constitutional provision that talks about rights to criminal trials. The language is really convoluted and really is difficult to understand, but it has been interpreted for many years as not giving a constitutional right to a civil jury trial.

I want to talk about some particular themes where, at least based on my experience in Colorado, things are not quite as clear as they are in the topics Professor Long discussed. It's more of a mixed bag. And Judge Cates just referred to the issue of elected judges and whether there is any enhanced democratic legitimacy from judicial elections.

For those of you who are concerned about money and politics, I would ask you to consult with a Colorado judge, who can tell you there is no money in judicial elections in Colorado. We have what we call "merit selection." It's basically a non-partisan system. I have not worked in other states, so I can't comment on whether there's any different perception of judges in those states where they are elected.



In my view, in Colorado there is no reduction in the legitimacy of our judicial branch because they are not elected in a contested partisan election. Colorado judges stand for retention, on a yes/no ballot, without an opponent. From what I have seen in 40 years of watching our judicial retention elections, the electorate takes this responsibility seriously, and votes out a few judges every election, usually because those judges get bad reviews from the Judicial Performance Commission.

The next issue, where I think there's more of a mixture of things rather than a clear, consistent theme, is what legislatures do in terms of their statutes affecting civil litigation. In my experience, without trying to put numbers on it, in my experience there are as many issues created by the legislature that the plaintiff's side takes advantage of as limitations that the defense side takes advantage of. I'm speaking in particular of statutory causes of action. These are creatures of statute, where the legislature, for reasons that are never fully explained, end up being passed by the legislature, and then very skillful and imaginative plaintiff's attorneys figure out a way to use these statutes in a way to really push litigation. And so I'm not sure, in a lot of cases, that the legislature actually intended to create such a large number of cases, but they wind up doing that.

Let me give an example of a Colorado statute. It's the first part of the "insurance payment" statute. The story I heard was that a legislator got upset that a health insurance claim had been denied—a small hospital bill, something like that. So the legislator, who had either direct experience or a relative who had direct experience, decided, "We're going to put a penalty in here for health insurance companies that will make it worth taking them to court, even if it's for just a small amount of money." So they put in a penalty clause that provides that, if you win the case, you get the benefit that was denied, plus double damages and attorney's fees, to make it at least worth taking the case.

In my view, in Colorado there is no reduction in the legitimacy of our judicial branch because they are not elected in a contested partisan election.

Well, the legislature phrased that as any "first party insurance benefit." Well, uninsured motorist coverage is a first-party insurance benefit, so now, every uninsured motorist case is now brought under this statute, and instead of a limit of \$100,000, the insurance companies are now facing a \$300,000 claim because the legislature created this statute.

So we have statutory consumer protection acts, statutes abolishing contributory negligence and replacing it with comparative negligence. We have a variety of things that the legislature has done. I have to disclose that I am married to the Deputy Director of the Colorado Trial Lawyers Association, so, throughout our entire 35-year marriage she has done a great job of building up as much litigation as possible so that I can defend it!

I know a little bit about how the legislature works and it scares me that it's so haphazard, so seat-of-the-pants. There is no deliberation to it. The effort that the judicial branch goes through to make a decision, compared to how a legislature committee makes a decision, it's amazing to me.

I know that there's a battle going on among the lobbyists, and I know that the Trial Lawyers Association employs some very good lobbyists, and everybody is entitled to have lobbyists and that's great. Judge Cates mentioned doctors. The most vigorous and zealous people in support of clamping down on civil litigation is the medical profession. I thought it was just unique in Colorado where they have the idea of going around in their white coats, but it must be nationwide because, apparently, it really works. They come in to testify at the hearings and they are all in their white coats.

On the issue of amendments, in Colorado it's too easy to amend the constitution. Two years ago, we passed an amendment making it harder to amend! We have ended up with a state constitution that has a grab bag of various things in it and some of it cannot be carried out simultaneously. We have a "taxpayer bill of rights" that Justice Márquez talked about this morning, that mandates that you cannot increase taxes more than inflation and population growth. We also have another amendment that mandates spending on higher education at a certain rate of increase. You can't do both at the same time. So, a lot of what our supreme court does is deal with how to deal with these tax things.

And, with one exception, I don't remember any constitutional amendments on civil litigation in Colorado in the time that I have lived here, which is 60 years. The tort reform legislation that passed in 1986 has never been the subject of an amendment process to try to change any of it, with one exception. The legislature passed a "construction defect reform act" that restricted the ability of condominium owners to sue the developers, and it restricted the plaintiffs.

So the plaintiff's construction bar proposed an amendment to overturn that, and if you have ever seen realtors and developers put their money together to fight something, you would have seen something like that. The proponents were out-spent \$4 million to \$700,000, and these were well-heeled lawyers doing it. There were TV ads showing the name and a picture of one lawyer, a really good lawyer. All they did was attack the lawyers, and the whole effort by the consumer homeowners fizzled and it was voted down five to one. So, the amendment process is a grab bag.

## Andre M. Mura

I am a plaintiff's attorney in Oakland, California. Previously I was at the Center for Constitutional Litigation where Bob Peck and John Vail hired me. They had to; I kept showing up.

If you haven't had a chance to read Professor Long's paper, you should. It's short, it has a good sense of humor, and it's a worthy piece of scholarship on an important topic. But don't stop there. Give it to your law clerks. It's just as important that they read Professor Long's article.

The statement "judges don't make law" is not accurate at the state level.

Your clerks, as you know, spent three years learning federal civil procedure, federal evidence, federal criminal law, federal constitutional law. They watched Justice Gorsuch's confirmation hearing. They watched Justice Sotomayor's confirmation hearing. They did not watch Judge Garland's confirmation hearing but I'm

sure they would have heard him say the same thing that Justice Gorsuch and Justice Sotomayor said, and that is: "Judges don't make law."

We all have opinions about how accurate that is as a description of judging at the federal level, but the statement "judges don't make law" is not accurate at the state level. As Professor Long teaches, "State governments are the inheritors of the sovereignty enjoyed by medieval English kings. In other words, state governments have plenary powers." And by state governments, Professor Long means state legislatures and state courts.

"State courts are constrained," he writes, "only by superior sources of law and the prerogatives of other branches. And yet, far too often, state courts take their cues from federal courts in ways that disregard important structural differences between state constitutional systems and our federal system."

Let me give you an example, courtesy of one of your discussion group moderators, John Vail. That example is the standing doctrine. Standing doctrine in the federal system reflects a limit on the jurisdiction of federal cases and controversies. But, unlike federal courts, which are limited in jurisdiction, state courts are courts of general jurisdiction and they are not governed by Article III. Nevertheless, a recent survey of constitutional standing in state courts by Wyatt Sassman<sup>8</sup> found that almost one-half of the states have adopted the federal test for standing articulated by the U.S. Supreme Court in *Lujan v. Defenders of Wildlife*.<sup>9</sup> Most adopted it in full, and some adopted it in parts.

Of course, there may be some other source of state law or rationale for adopting such a doctrine of standing. Some courts, for example, have found such limits as a matter of separation of powers, again analogizing to federal law, although this also seems problematic. Professor Williams has written that federal separation of powers “should be even less persuasive” in state courts than federal constitutional rights interpretation, because the federal separation of powers doctrine has not been held to constrain the states.<sup>10</sup>

So, whatever the reason on the state level for adopting a limitation on standing, adopting the U.S. Supreme Court’s decision in *Lujan* as the test for standing in state court suggests inattention to state interests, to the plenary power of state courts and, more broadly, to state constitutional design, all of which may demand greater access to courts than is available in our federal system.

Let me turn to another aspect of Professor Long’s paper, which is that certain structural aspects of state constitutions foster democratic legitimacy. In this regard, Professor Long writes that “most state judges have direct democratic legitimacy in that they have stood for election and won.” Perhaps you found that statement a bit controversial. Implicit here is the notion that judicial selection is critical to judicial independence, which we ordinarily take to mean that judges must be accountable to democratic institutions, but also free of them.

In the early 19th Century popular elections for judges were presented as a solution to the problem that the executive and legislative branches, which were then primarily responsible for judicial selection in many states, were exercising undue influence over judicial appointees.

There is historical support for Professor Long’s insights about judicial elections. As the legal historian Jed Sugarman, has documented, in the early 19th Century popular elections for judges were presented as a solution to the problem that the executive and legislative branches, which were then primarily responsible for judicial selection in many states, were exercising undue influence over judicial appointees.<sup>11</sup> For an initial period, Sugarman writes, giving the people a direct say in judicial selection advanced judicial independence. Judges began to exercise more robust judicial review, and, surprisingly, these elected judges began to write opinions that were critical of democratic excess.

But then, in the next century, as special interests again took hold, there arose a concern that judicial elections made judging less independent. Judicial reformists thus began to develop mechanisms of judicial selection that might free judges from political control. These reforms included merit appointment plans such as the Missouri Plan.

I don’t intend to take sides in the debate today over which appointment process best guarantees judicial independence and democratic legitimacy. I simply want to highlight that there has been a rich debate at the state

level about fundamental questions such as how judges should be selected, how long their appointments should last and, more generally, the proper role of the judiciary in our system of government. These questions all touch on constitutional structure.

The ability to experiment at the state level with different constitutional structures allows the people to learn from the past and also to reach answers that reflect the politics of their times. That is all well and good for, as Sugarman writes, “the notion of what politics judges [should be] independent from changes over time in part because the notion of what kinds of politics [are] necessary[, rather than corrupting,] also changes over time.”<sup>12</sup> Unlike the U.S. Constitution, which is really the product of late 18th Century political thought, most state constitutions were written by a more modern set of founders who may more closely reflect the political thought and experience of our times.<sup>13</sup>

Let me leave you with this question: If Professor Long is right that this experimentation in constitutional structure at the state level fosters, “democratic legitimacy,” what does that say about our federal constitutional structure, where there is little experimentation, where there is little possibility of constitutional amendments, where the development of fundamental rights in constitutional structure have effectively turned on the views of one person over a decade and will now hinge on the views of one other person for the next decade or for longer?

I am beginning to think Professor Long is onto something when he says we should look to the states, our laboratories of democracy, for inspiration and guidance on what constitutional structure we want to govern us. Thank you.

## Response by Professor Long

Thank you, panelists, for your engagement with my paper and your remarks today. Your remarks are very helpful for better understanding the issues I have tried to address. Professor Marshfield reminds us that,

There is more in common between lawyers on the defense side and the plaintiff’s side than there is different.

regardless of how judges are selected, there is a democratic check on decisions that might uncharitably be called activist in the form of the amendment process, a check that the people keep in a way that is vastly more meaningful at the state level than we see at the federal level.

Thank you, Judge Cates, for your reminder about the people and human suffering that lies underneath the injuries that get reported in the state reporters and in the pages of the law reviews. These are real people that we’re talking about. And even if we can abstract their problems to make solutions easier through reference to structure of government, constitutional clauses and the arcana of the law, we must always do so with a recollection of the real human stories underneath those experiences.

I absolutely agree with John Lebsack that there is more in common between lawyers on the defense side and the plaintiff’s side than there is different. I think the thrust of my argument about the structure of state government affecting access to justice should not be interpreted as one suggesting that if you want plaintiffs to win then we should empower state judiciaries to a greater degree. The question is only who is better situated to make these decisions. Some of you might be trigger happy with remittitur, and you have the professional judgment and experience and deep wisdom to make those decisions. That is why you sit in your seats.

The question isn't are some awards too high or are juries giving out too much for too many irrational reasons. The question is who gets to decide that check on the structure of civil litigation, and whether judges do it or legislatures do it has profound consequences for the kinds of voices that get heard and the kinds of reasoning that gets employed.

And thank you to Andre for the flattering selling of my paper. I would love to see more law clerks read about state constitutions generally. I was saying earlier this morning in one of the small groups that it's kind of a perverse cycle where judges say, "Well, we would love to make more state constitutional decisions but the lawyers don't argue them." Then the lawyers say, "Well, we don't argue them because we weren't taught them in law school." And the law professors say, "Well, we don't teach them because we don't have opinions to teach." So I think each of us has to take our part in that cycle to heart and figure out how to do that.

One of the areas that attracts me to the study of the structure of state constitutions is that there is really no choice. If there's a fight between the elected attorney general and the elected governor about whether the attorney general can choose not to appeal an adverse decision in the courts, that has to be resolved. The resolution is going to have consequences that will seep out to the marginalized, the vulnerable and the injured. And those are all concerns that we should be thinking about, even at the level of abstraction that we see in those great battles between the institutions of state government.

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## Notes

<sup>1</sup> McDougall v. Schanz, 597 N.W.2d 148 (1999).

<sup>2</sup> Committee for Educational Rights v. Edgar, 672 N.E.2d 1178, 1193-95 (Ill. 1996) (applying the *Rodriguez* fundamental-rights analysis to a claim brought under the state constitution).

<sup>3</sup> San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

<sup>4</sup> Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

<sup>5</sup> Caperton v. A. T. Massey Coal Co., 556 U.S. 868 (2009).

<sup>6</sup> On September 4, 2018, a settlement agreement was entered into between State Farm and the class, whereby State Farm agreed to pay \$250 million dollars to the class. Chief Justice Karmeier was included as a released party, although he was not named in the actual lawsuit. *See* Hale v. State Farm, No. 12-cv-006600-DRH-SCW, U. S. Dist. Ct. S. D. Ill., <https://halevstatefarmclassaction.com>.

<sup>7</sup> Lebron v. Gottlieb Memorial Hospital, 930 N.E.2d 895 (Ill. 2010).

<sup>8</sup> Wyatt Sassman, *A Survey of Constitutional Standing in State Courts*, 8 Ky. J. Equine, Agric. & Nat. Resources L. 349 (2015-16).

<sup>9</sup> 504 U.S. 555 (1992).

<sup>10</sup> Robert F. Williams, *Why State Constitutions Matter*, 45 NEW ENGLAND L. REV. 901, 907 (2011), available at [https://student.nesl.edu/userfiles/file/lawreview/Vol45/Williams\\_Final.pdf](https://student.nesl.edu/userfiles/file/lawreview/Vol45/Williams_Final.pdf).

<sup>11</sup> JED HANDELSMAN SHUGERMAN, *THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA* (2012); *see also* Zeder, *Elected vs. Appointed? Shugerman explores the history of judicial selection in the U.S.*, HARVARD LAW BULLETIN 1212; Laurie L. Levenson, 62 J. LEGAL EDUC. 631 (2013) (reviewing JED HANDELSMAN SHUGERMAN, *THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA* (2012)).

<sup>12</sup> Levenson, 62 J. LEGAL EDUC. at 633 (quoting JED HANDELSMAN SHUGERMAN, *THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA* (2012)) (Levenson's alterations omitted).

<sup>13</sup> G. Alan Tarr, *State Constitutional Design and State Constitutional Interpretation*, 72 MONT. L. REV. 7, 9 (2011).



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# Closing Plenary

**Question from the audience:** I am from Illinois, and our supreme court has very strictly followed the lockstep doctrine, under which they will interpret the Illinois Constitution's provisions which parallel a provision in the U.S. Constitution exactly as the U.S. Supreme Court has done. They will not interpret the Illinois Constitution's rights more broadly than the U.S. Supreme Court has interpreted the parallel right.

If we see the U.S. Supreme Court as it's changing in its membership, perhaps reversing course on some important precedents, are the state supreme courts that currently follow the lockstep doctrine going to have to find themselves forced to step away from it, or do you think they will maintain their position and continue the lockstep adherence to what's going on from the court in D.C.?

**Professor Williams:** Let me take a crack at that to begin with. It's something that we haven't discussed in the large group, and there are a couple of things I want to say about this.

When a state supreme court adheres to the lockstep doctrine prospectively—what I have called “protective lockstepping”—announces “We are going to interpret our search and seizure clause the same as the Supreme Court interprets the Fourth Amendment in this case and in the future,” I don't believe that is a precedent. I don't believe that's a valid, binding precedent on future cases.

It's worse than dictum, frankly. How can a court adjudicate cases out into the future that it has never heard yet? The problem with it is that it stifles creative lawyering. People come away from a conference like this aware of what's happening, and lawyers think, “Well, I'm in Illinois and I can't really argue for a slightly more protective search and seizure doctrine or right to counsel,” or any of these other things that we have talked about.

I remember a case from Alaska in the last five years or so that said, “Look, we have said that we were going to follow the U.S. Supreme Court.” I think the court actually used the term “lockstep.” Counsel for one side of the case argued that that bound the court—“We have already decided that. That's a binding precedent.” But the court said, “No, that can't be right.” I love this case because the court cited an article I wrote about this, about lockstep.

In a given individual case, a court that's aware that it has the independent authority to interpret its state constitution to be more protective obviously doesn't always do that.

Of course, in a given individual case, a court that's aware that it has the independent authority to interpret its state constitution to be more protective obviously doesn't always do that. But if the court is aware of that and decides in a particular case to decide the case the way the U.S. Supreme court interprets the federal clause, that's fine. And people who count these cases up conclude that that's a majority of state cases. There's nothing wrong with that if the court has its eye open and realizes it can be *more* protective, not less.

But when the court goes on and says, “We're going to do this in the future,” I think people have to understand that can't be binding. How could it be? But again, it has this problem of stifling independent argument.

The last thing I would say is, just the same way that the personnel in the United States Supreme Court change, the personnel on your courts change. And I have seen courts that are quite sophisticated about state constitutional law and personnel changes, and people come in who practice in a different area and they are not as familiar with it. So this is an ongoing issue, this question of independence from the U.S. Supreme Court, which Justice Liu talked about as well. It's not going to go away.

But I think we should be very careful of thinking that a prospective, lockstepping decision is binding precedent.

**Professor Long:** Bob Williams is the world's leading expert on lockstepping so we should all be glad to hear from him on that.

But beyond that, I want to take a moment to emphasize that there are elements of state constitutions that are structural, that would tend to make a much bigger difference on the ground than either lockstepping or not lockstepping on the Fourth Amendment, for example. So, regardless of what the substantive law is on the

search and seizure protection in dispute, if the judiciary changes the way public defenders are appointed to be more effective, or if there's a reallocation of power according to an interpretation of the state constitution between the attorney general and local prosecutors, those kinds of structural differences are likely to have durable effects because there is no misleading federal model available to follow.

There are elements of state constitutions that are structural, that would tend to make a much bigger difference on the ground than either lockstepping or not lockstepping on the Fourth Amendment, for example.

We have a president who seems to think at the moment he can't fire the attorney general, but in Illinois you *really* have a governor who can't fire the attorney general. Those structural things are unlikely ever to fall into that lockstepping box that way, and they matter enormously on the ground.

**Question from the audience:** Are there lockstepping provisions written into some state constitutions?

**Professor Williams:** Definitely. And it goes back to John Marshfield's point about the amendment process. In response to some of these more protective decisions interpreting state constitutions, there have been amendments that overturn particular decisions. But then, for example, in Florida, after the amendment in the 1980s to the search and seizure doctrine, the courts in Florida were required by the state constitution to interpret search and seizure cases the same way the U.S. Supreme Court interpreted the Fourth Amendment.

For another example, California has a busing amendment that limits student-busing remedies to those that would be required by federal constitutional law. Those I don't think are avoidable by state courts, although there are questions about whether it's a plurality decision by the U.S. Supreme Court, and do those have to be followed.

# The Judges' Comments

In the discussion groups, the judges were invited to consider prepared questions relating to the Forum papers and oral remarks. The judges devoted more time to some questions than to others, and they raised other interesting topics.

Remarks made by judges during the discussions are excerpted below and arranged according to the discussion questions. These remarks have been edited for clarity only. Conversational exchanges among judges are indicated with dashes (—).

The excerpts are individual remarks, not statements of consensus. For general points of convergence that arose out of the discussion groups, please see page 121 of this report. We have tried to ensure that all viewpoints expressed in the group discussions are represented in the following excerpts.

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## How often do you see cases (for instance, challenges to statutes and regulations) that invoke state constitutional protections?

In our midwestern state it is creeping in. We are having more challenges, specific actions based on our state constitution.

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In our northeastern court we hear very few cases as of right. We get quite a range of issues.

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In our midwestern court, if it's a facial challenge to a statute, that will also bypass our court. However, if it's an as-applied question then we would hear those constitutional questions.

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In our midwestern state court we see a lot. In fact, the last case we just filed in the term when we struck down the three-day waiting period for abortions based on the state constitution. We see it so frequently that the legislature this year tried to pass a statute that requires a five-two vote (we have seven members) to rule a statute unconstitutional. It didn't go anywhere, and our question was, "Can we declare it unconstitutional with a four-three vote?" In 2003 we started being very active in the state constitution. We don't even rely on the Federal Constitution anymore because we haven't had any cases taken for cert lately, so we just try to do it that way.

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As a state trial judge, I get constitutional issues every two or three weeks.

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In our southwestern state we are now required, when we file a published opinion, to state whether the opinion affects a determination of the constitutionality of a statute. That apparently is intended to enable searches of judges to see how often they have struck down legislation in some constitution. I have to say we don't pay attention to it.

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In our southeastern state we see a lot of these. It's sort of the independent state grounds.

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Never. We have to transfer it to the supreme court if it does come up because they do all constitutional challenges. The supreme court takes them, sure. We had one very recently in our southern state on the right to trial by jury.

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In our southern state, I would say today, it is extremely rare for us to see one at all. In the late '90s, early 2000s, we had a lot of them, mostly on the right to trial by jury. A sufficient number of those were taken to the United States Supreme Court and knocked down.

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In our midwestern state, people tend to overlook making a separate state constitution argument. And that is because for a lot of the jurisprudence, we interpret it consistent with SCOTUS. When I would give seminars, I would encourage lawyers, "Don't forget, you have got a separate constitution to make arguments under." And ironically, it is a federal circuit judge in our state who has been kind of championing that cause, reminding litigators that you have got a separate document to use in making your case.

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In our southwestern state, historically, we haven't seen a lot of separate state and constitutional arguments. But we are seeing more now, and that is at least somewhat in part due to a new justice we have, who spent a lot of years litigating under state constitutional provisions and has at least once put a footnote in an opinion saying, "Gee, it is too bad litigants didn't raise the state constitutional issue. There is language in our state constitution that is different from the federal constitutional, and you should take advantage of that."

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So many state constitutions are creatures of their times. We have provisions in our constitution that are creatures of that time period. They've received national recognition.

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In our mid-Atlantic state, it comes up a fair bit. On the civil side, we see it come up a lot with respect to substantive claims.

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In our southern state we very seldom see any issues raised by the appellant or the appellee under the state constitution. But several times we kind of reach in there and use that and stick it in our opinion even though it wasn't really argued before us.

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There aren't that many resources or people learned enough to advance these arguments. You have pockets of activism in some states. That's it.

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We don't see a lot of these challenges, and I think part of it may be there's not a history of case law development like you may have in other states. But I think a good part of the problem is that the practitioner, let alone the judiciary, have not focused on the state constitution in matters they bring before our appellate branch.

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In our southern state, we see these issues fairly routinely in the intermediate court. Our supreme court has interpreted the various matters more expansively. However, we are among those like Justice Gurich spoke about this morning. We have been corrected by our brethren upstairs, particularly in case involving arbitration and some of these areas like that. They aren't necessarily right, but they are the final authority.

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## Do you see the right to jury trial invoked more than the right to remedy? How about due process and equal protection provisions? Any others?

- In our southern state the biggest fight lately has been about the threshold amount to get a jury trial. The defense bar wants to lower the threshold, because the business community believes that the trial judges are more leaning toward the plaintiff's bar so they would prefer not having judge trials; they would prefer having jury trials.
- We had a somewhat similar fight. In the wee hours of the legislative session they passed a law providing for six-person juries in civil cases, and this was basically an initiative of the Democrat side of the aisle. Our supreme court struck it down, reasoning that, under our constitution, civil juries are 12, not six.

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In our southern state our constitution delegates it to the legislature to determine what that remedy is, so judges really are not free in that context to develop remedies that have not emanated from the legislature. So even when some judges are wanting to do away with damage caps, say, when it gets to the supreme court the issue is that the legislature has a right to set med mal caps and to limit the type of remedies that are available.

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- In our southern state, the statutes now are definitely attacking the remedy more than the right to jury trial. I think that is a better selling point politically. All of our judges are elected. Limitation of damages is huge, and I think it is going to continue to go that way. Our court gets reversed quite often on those issues.
  - I'm from a different southern state, and the right to remedy is very big. A lot of major legislation has been stricken by the state supreme court.

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We have cases involving our constitutional "no abrogation" clause, which is different from right to remedy but related.

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- In our northeastern state, there's no right necessarily to cross examination in an administrative agency proceeding. For instance, in Title IX student disciplinary hearings, and that's been upheld. I'm not seeing yet the constitutional attack on due process grounds on these student disciplinary hearings where kids are getting expelled and being labeled as sexual abusers and not having a right to cross-examine. That's kind of a lightning rod at this point, but that happens in all of our administrative hearings.
  - The administrative cases have become something like kangaroo courts, in my humble opinion. There are no protections.
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I've seen the due process issue a lot in housing, loss of government benefits cases, but it's not well developed.

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In our state we have a lot of asbestos litigation, and we have some of the broadest interpretations of liability in the country. The defense bar has been coming in on many of those cases and arguing that it violates due process to the fourth person down the line—they are bringing in amicus briefs. So it's not always the plaintiff side bringing in amici on these cases.

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In our state the court has been very supportive of expanding tort liability. Going back to the '80s and '90s, we had a lot of very important tort cases, and the court has been very forward thinking. We've had a lot of asbestos litigation. And we've had a lot of pollution cases on multiple insurance liabilities for subsequent polluters and so forth, and I think our laws are very liberal on those areas, but not in the medical malpractice area.

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In our western state the one constitutional provision that is used more than any other is the right to privacy, and it's an interesting right because it's one word, it's one of the inalienable rights, they put in "comma, privacy, comma," and went on. It has been interpreted very broadly over the years. And I think that's one right that has been vigorously upheld in the courts.

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For courts that have declared statutes (like damages caps, abrogation of collateral source rules, pre-suit notice requirements) unconstitutional on the basis of state constitutional law provisions, which factors drove the decision-making processes among your state's justices? How much impact do such provisions have on your state's civil justice system?

Plain language is very important. We look at that first.

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In our state we look at other states and how they've interpreted state constitutional provisions, similar provisions, and it's so much easier nowadays with the computers and the law clerks. They can do all of that work. They enjoy doing it.

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In our midwestern state we had damage caps "enacted" last year for the first time, but there is an exception if you have a death, permanent injury or permanent disfigurement, so the caps will probably never take effect in any serious case. They wanted to say that our state has caps, but in reality I don't think we have caps. No one has challenged it yet because of those exceptions, and we have never had caps for the 40 years I have been in our state, or in my 27 years of practice.

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In our western state we have a medical malpractice damage cap that has been litigated for 30 years and nobody has been able to overturn it. It's \$250,000, which after 30 years is a very small amount for non-economic damages. They tried in the legislature, they tried in the courts, and no court has invalidated it. Every year they try to repeal it and they can't do it. The doctors are strong.

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In our southern state, a damage cap in medical negligence cases was said to be necessary because of an emergency, but the court concluded that there was no evidence any longer of an emergency, and so no rational basis to continue the cap, so equal protection considerations prevailed.

In our state an intermediate appellate court struck a damage cap on the ground that \$500,000 today was not like \$500,000 was when the cap was passed.

In our midwestern state we do have damages caps and the state supreme court has not found that to be unconstitutional. That seems to be the death of jury trial for us—access to justice for people seems to be limited.

In our southern state, our constitution was written in the late 1800s. We have many drafts since that say that any common law right available to the general public before that constitution, which was not limited by that constitution, cannot be limited by the legislature. There has to be a constitutional amendment to abridge common law rights.

We've had people hire former supreme court justices at \$900 an hour to testify about a law. It's fundamentally an intrusion on our legal decision making.

In our state the business associations weigh in a lot with amicus briefs, and they're very good. Defense counsel do, too. That's very helpful, because as everyone has been pointing out, often the parties aren't that thorough on state constitutional issues.

In our western state we have organizations that file amicus briefs in almost everything. You don't have to invite them in—they're there.

We have not traditionally invited help from amici. We did invite participation by the attorney general. Any time there's a constitutional challenge, the attorney general is entitled to file and participate, and sometimes if the parties want to allow the attorney general to participate in oral argument (if we have oral argument), they also share some of that time. So that is the only specific entity that we invite to comment on anything that's a constitutional challenge.

We find that amicus briefs are usually very helpful as long as they're not duplicative of what the parties write, and in those cases we see ramifications that may not be obvious for another area of law or for another set of parties that might be within this area of law. And when they do that, we think that that's helpful, but it all depends on how well they do it.

Our constitution dates from the 1850s, as a lot of them do, and we have a very robust constitutional history. We have 2,000 pages of verbatim transcripts of the debates from the constitutional convention. We will dig into those, and that part I like doing myself. I don't trust it to the law clerks on that job.

Even after the merger of law and equity in most states, and at a time when jury trials are increasingly infrequent, why do legislators who are drafting new legislation and/or creating new causes of action tend to deny or avoid jury trial as a method of dispute resolution?

They are afraid.

There are issues of perception. I was a defense lawyer for 17 years. There was a perception that the McDonald's hot coffee case was representative of every trial. I won more cases than plaintiffs won cases, but there is a perception that if you go to a jury trial, that you are going to get a multi-million-dollar jury verdict. We all know that is not true. That is not going to happen.

In our midwestern state, I was a trial judge for 28 years before I went on the appellate court. Juries in our areas weren't handing down big verdicts.

I am from a mid-Atlantic state, and I'm still a trial court judge. I have an Excel spreadsheet, and I get all of my colleagues to tell me their verdicts. It is primarily defense verdicts. The other cases are settled, but a plaintiff did get a \$10 million verdict in my courtroom. And because of that, I am asked to do a lot of high-low arbitrations.

Legislators don't understand the law. We used to have 50 percent lawyers in our legislature. Now we're down to five percent.

The United States Supreme Court's interpretation of arbitration is so expansive. It has destroyed so much case law dealing with contract contexts, injury contexts, all kinds. They took that statute from the 30s, the early 30s, and destroyed doctrine that existed for a long time.

—I think arbitration is the big problem, with the Federal Arbitration Act. Our state supreme court is in a growing battle. Every time the United States Supreme Court decides a mobility case, it comes back to California and they try to get around it, and it goes back up and the court slaps them down again. Our court has been very consistent in not supporting the advancement of arbitration. But the Federal Arbitration Act, I think, is the guiding principle in that area of taking jury trials away. I don't think our legislatures reduced the jury trials in any area.

—Has anyone yet found a provision in the Federal Arbitration Act where our Congress ever said it was to apply in consumer claims?

—I don't know how you get around a five to four vote at the U.S. Supreme Court.

In our midwestern state our constitution specifically allows the legislature to provide for arbitration and mediation and so forth if agreed to by the parties. We have had a couple of cases lately in our supreme court where the issue has been whether or not the parties did actually agree to it, and they have been pretty careful in that regard that it has to be an express agreement and not just something that was buried. I think both of these cases had to do with an issue of the contract signed for nursing home care,

and I think in one of them they decided that it was apparent enough that the person had agreed, but in the other one they said, “No, we are not going to force the person into arbitration based on that.” But in our court historically, in any context, if there’s a federal provision that applies, they are not going to depart from the way the Federal Constitution has been interpreted.

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We have lawyers who have never tried a case. So it has a dramatic impact in the way civil justice and criminal justice systems will be managed.

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You’re going to have a wave of judges retiring in the next six years, and they’re going to be replaced by judges, many of whom have no trial experience. The number of jury trials have dropped tremendously in both state courts and federal courts, so it’s impacting the legal profession too.

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It’s got a lot to do with money and power.

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## How does Professor Long’s “structural” analysis manifest itself in your state? Can you give specific examples?

- Our state has a legislative research commission, and basically it writes the laws. The legislator will say, “I want a law that limits trucks in the third lane.” And there’s a lot of preapproval that goes through there. Do other states have similar functions?
  - We all have to have those, otherwise nothing would ever get written.
  - There’s no such thing in our northeastern state, and lots of bills get rewritten, like about 11:00 at the end of the June session.
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A state legislator could ask the legislative reference service, “This is the bill I propose, will it pass muster under our single subject rule?” Our legislative service is nonpartisan and works for the legislature itself. The attorney general is an independent executive branch official, he or she provides advice to the legislature. I was an assistant attorney general doing that work. But essentially, they came to us and said, “Will this pass constitutional muster? Can I put this in? Can I attach this onto that? Will it cause it to violate the simple subject rule?”

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In our state we have an accommodation that the presiding officers generally don’t allow an amendment that doesn’t get checked by the attorney general.

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- There is a lot of preapproval in that legislative research commission, because the legislator or the governor might say, “I want this law,” and then they come back and say, “Okay, we can do it this way. We can’t do it that way.”
  - We have no such procedure. You take your chances and you start back at the bottom of the trial court. If you want to challenge it you have to find a person who has standing, which in our state is not easy to do—somebody who has been aggrieved. So you may have no ability to challenge that law because it just may sit there.
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Often times what we've experienced is negotiated proposals where the lobbyist is from the plaintiff bar, the defense bar, the businesses lobby together, and come up with a package and submit it for approval. But it would still go through that same sort of reference service to get the language right.

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If he's talking about getting a supermajority in the legislature, that's impossible in almost every state in the United States. It would have to be internally in their own body, and it's not just going to happen.

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## Does your courts' authority over the legal profession affect your state's civil justice system? If so, how?

There has always been a struggle when you are trying to get legal access to those who could not afford a lawyer. Our state bar, which is a mandatory bar, was publishing legal forms. It is a quasi-government created by the state legislature and answering to the legislature, but it is supervised by the state supreme court. It is a little bit of a combination of both. They were trying to provide access to justice and put like legal forms on our website, so people could go to the kiosk and download forms and fill them in.

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We're trying to get more people back in the courtroom. Our courts started our own system of expediting case processing where, if it's under a certain amount, you're guaranteed a trial within a year from when you filed it, and the trial is limited to so many hours. Now you can have expert witnesses, reports, things like that, and I think the lawyers are coming back because of that. We have captured a lot more people back into the court system.

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Our state bar association is under the control of the state supreme court. It administers most of the things the supreme court has to do, render a separate opinion on every disbarment, and you have the right to a hearing before them. The bar association is a separate corporation, so I don't know if the legislature could go in and do anything to it. I think the supreme court would if they could.

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In our southern state the supreme court has jurisdiction over the courts and the legal profession, and that includes the bar association and the bar foundation. The supreme court has jurisdiction over that. The bar foundation has several programs, law and civic education for schools across the state.

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In our southern state there is, and has been for decades, an all-out assault against the judiciary and lawyers, by trying to take away the supreme court's ability to regulate lawyers, to regulate the profession, to pass rules of criminal and civil procedure. Legislators are term-limited. They don't realize that that was a bad idea ten years ago, so let's not try to do it again.

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If you are talking about having non-lawyers basically practice law, who regulates the non-lawyers? Lawyers can get disbarred. Are the non-lawyers going to get disbarred?

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We're talking about allowing paralegals to basically practice law—to set up an office and say, "I can help you get a divorce for \$99." In the meantime, the U.S. Supreme Court encourages mediations and other forms of the resolution of cases.

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In our western state, I attended a full-day session last Friday on access to justice. Our chief justice and several justices were there and trial judges. They were advising ways to have non-lawyers do certain things because of the huge number of people who really need to talk to a lawyer, and need some advice, and help triaging through the system. The court was actually, in an informal way, planning this out. How are we going to do this?

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- Interestingly, about three years ago, in our Midwest state, we had an integrated bar. The bar association took positions on some issues that some members of the bar disagreed with. They said, “Why are we having to pay our dues to an organization that doesn’t represent us.” They filed a lawsuit against the bar, and they won, and the state supreme court held that the existing system was unconstitutional, and they de-integrated it.
  - In our state the de-integration of the bar led to a disagreement among judges. Some judges said, “Should I be a member of the bar association now that it’s not required, and is active politically?” So, some judges opt to no longer stay a member of the bar association.
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What I have seen over the years is that lawyers are afraid to litigate anymore. They are practicing defensively instead of aggressively. Our supreme court is propounding rules of civility, also, which also tends to make lawyers want to settle things versus have jury trials.

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In our Midwest state our supreme court took control of the disciplinary process because we perceived it had become a kind of “good old boy” system. If you were from a certain firm or a certain person you didn’t get the same treatment as other people, so we’re trying to stop that.

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In our southwestern state we do all of the lawyer disciplinary matters in jury trials. We are kind of all alone in this sense. Every lawyer and every judge is obligated to make a complaint if they see unethical conduct, and you can be the subject of a grievance if you don’t file a complaint. There have been cases where associates have had grievances filed against them for failing to turn in a partner who was being unethical.

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Our northwestern state has one of the most amazing systems for dealing with lawyers whose practice has been affected by drugs, alcohol, and other impairment issues. It’s been established by the court system for them to be rehabilitated and returned to practice, which I think is just wonderful. Working with recovering alcoholics, in my view, is giving them an opportunity to return to work as they recover. It is much better than saying, “Just go practice somewhere else.”

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In our northeastern state we do have a very active lawyers’ assistance program because a lot of problems do stem from that. But when we encounter issues of dishonesty or deceit, that sort of conduct, it will come before the mid-level appellate courts for suspension and disbarment. What has become controversial of late is whether or how that system deals with public officials, the district attorneys, and whether they, too, are subject to discipline as members of the profession.

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- When it comes to mounting state constitutional challenges, how do your attorneys get around Rule 11? Do the trial courts just say “Okay, go ahead and argue it out, we don’t care?”
- We don’t care about Rule 11. It’s a very collegial bench, it’s a very collegial bar, we’re all very nice to one another.
- And Rule 11 allows you to argue overruling or expanding existing law also. As long as your challenge is legal and not factual, Rule 11 is pretty good.
- Our chamber of commerce wants Rule 11 sanctions to be issued automatically at the beginning of every case.

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## Do you favor expanding the right to counsel into additional areas of civil litigation (the “civil *Gideon*” concept)?<sup>1</sup>

Money would be the issue.

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A big problem with access to justice is funding. The county commissioners and the general assemblies are the ones with the pocketbooks. All the judiciary can do is advocate for funding those kinds of things.

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In our southeastern state, if we get an appeal from a pro se litigant, and we think that the underlying case has merit, we have a program to appoint pro bono appellate lawyers. These are not just new lawyers. It is difficult for a lot of lawyers to do appeals in our state, and a lot of lawyers want the experience to see how it feels. So, we have a lot of seasoned attorneys who are willing to take pro bono appeals on the side, just so they can learn the appellate process.

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In our state a child can get appointed counsel if there’s a conflict with the guardian, but that’s the only area in civil litigation where we have that.

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In our western state we have attorneys appointed for juvenile dependency cases of all kinds. We’re attempting to move forward to have attorneys to expand the civil right to counsel.

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—Where I sit, the city council has just enacted new legislation providing for a significant amount of funding for eviction cases.

—So do some other cities.

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Our constitution provides for that in criminal proceedings and in any proceeding where life, liberty, etc. may be at risk. We have expanded it in the civil area dealing with contempt and post-conviction relief, which are civil actions.

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In our southern state we don’t have the money to deal with criminal defense, let alone civil cases. As a matter of fact, there are several class action lawsuits saying that the legislature isn’t funding the criminal defense adequately.

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If there is a high volume of cases, it becomes a money issue at some point.

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If it is *Gideon*, it is effective assistance of counsel. When you put that over in the civil litigation court, they appoint the worst lawyer. “Why are you appointing this guy? He can’t write a brief. He can’t do anything. But they are paying him 25 bucks an hour.”

When you take the *Gideon* concept and you expand it far enough, you’re thinking, “Are we going to have real estate lawyers suddenly representing people in divorces, and who knows what else?” There’s a lot of specialties, and there are a lot of things, as a lawyer, I would never touch with a million-foot pole because I wouldn’t know what I was doing.

We had a program in one of the districts of the court in our western state to provide assistance to self-represented victims before the appellate court. They got the support of the local appellate bar and provided attorneys to consult with pro se litigants. In some cases, where the volunteer attorney found the case potentially meritorious and having potential far-reaching consequences, they even undertook representation of the case.

For pro se litigants, what standards are you going to hold them to? Because that’s the only way they’re going to get to court.

—I have a real concern about judges and the courts stepping in and becoming part of a litigation process by saying, “Here, let’s give you a second chance. Go back and do this again. And let’s focus on this one issue.” To me, that is hitting mightily close to practicing the case for somebody, and that makes me a little nervous.

—On the other side, we are a court of equity. And if we don’t believe that someone is, for whatever reason, putting the issues right in front of us as they should be., we are not giving them a second chance. We are giving them the first chance to do it.

Our midwestern state supreme court provides a lot of literature. For example, if you want to be a pro se litigant, there is information on legal terminology information. But, pro se litigants are held to the same standard. You can’t say, “Well, I am pro se, I don’t know.” There are some things that judges aren’t as hard on pro se litigants about as they are with lawyers. I mean, like an oral argument or an appellate brief, we don’t necessarily hold their feet to the fire as hard as we would a lawyer with preparing their briefs. So we give them their 15 minutes, and we listen respectfully.

The big fear is malpractice. You just talk briefly to somebody, trying to help them out. And then all of a sudden, they are accusing the lawyer of giving them bad advice. And the lawyer just talked to them for a few minutes, without formally representing them.

Our state supreme court realized attorneys won’t take certain cases because, once they filed the appearance, they were stuck with the cases. They now have limited appearances. That has really helped litigants get an attorney to just do a little part of it, so they don’t get stuck on it. I think that has helped.

In our court, whenever a prisoner case came in, it would automatically be assigned to the informal briefing track. They would get the informal brief from the prisoner and go through it. If it looked like

there might be something of merit, then they would hire a big law firm that would have junior associates working on it. That is almost always the way it happened. They always rebrief the issue. The court would specify which of the issues they thought merited briefing.

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I personally think the whole judicial system—everybody, lawyers and judges—need to focus on “customer service.” How do we bring people back in? That is very important, because the cost of getting from A to Z is driving people out of the system, and we have to find a way to still do justice but reduce that cost.

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I read a book a couple of years ago by Robert Putnam, entitled *Our Kids: America’s Dream in Crisis*. It focuses on how income inequality, class inequality, impacts families, schools, and communities. It’s something I knew because I grew up that way, but they took 280 pages of data to highlight all of that, and it’s really scary. It predicts that the income gap will continue to expand, become even more egregious. So access to court is like the Affordable Care Act: you have access to *coverage*, you don’t have access to care. That inequality continues to exist, how are folks getting to court? Sure, you have the *right* to go, but how are you going to *get there*?

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At the end of the day, it is all about funding.

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In our state the cost of filing a civil lawsuit, which has nothing to do necessarily with the administration of justice, has gotten so high that you can’t even get in the courthouse door.

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I hate it when I have to say, “No, you can’t have a lawyer.”

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## Does your state have an independently-elected attorney general? Do autonomous attorneys general provide beneficial checks and balances on state government, or do they complicate governance?

The question is checks and balances. I can safely say that in our southeastern state, our judges would never know if they checked and balanced anything. But in litigation, I have never seen the attorney general tell an agency, “What you are doing is stupid and illegal.” They defend the agency. That is their job. It is somebody else’s job to make the other case. They take a position and that is that. But they voluntarily undertake the policy position that they are defending the state agency and the public purse, and they don’t have any role other than that. Two of our past four governors have been attorney generals. And when they bring these cases, they get millions of dollars in damages. They then put it into a fund at the attorney general’s office that they control. It doesn’t go through the legislature.

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—Our state is the poster child for this issue. We have a fiercely Democrat attorney general, and a fiercely Republican governor and legislature, and they’re suing all the time. It’s a check and balance, but whether you think it’s beneficial or harmful depends on what party you’re in.

—In our southern state we have the reverse. We have a Democrat governor, and a Republican attorney general. It’s a constant local battle, on the issue of appointment of lawyers to bring cases on behalf of

the state, and funding for that. The attorney general is trying to get away from executive funding and wants to get his own funding mechanism.

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Funding is always an issue at that level of litigation. Think about the advent of the tobacco litigation decades ago. The Mississippi AG conceived of that idea. Of course, it has exploded to opioids, roofing, shingles, windows, drywall, and other things like that. But the problem of course is funding the litigation. The rationale we hear most often is, "They can hire us and we can fund it privately, the state can move forward." The state doesn't have the resources to pay lawyers to go take depositions, much less pay for deposition transcripts. So it facilitates litigation, but there's always the tension of who controls it.

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I don't know whether you're protecting government or you're protecting the rule of law or it's just dependent on how you feel. For example, if it's an abortion issue or it's whether we are going to spend millions of dollars to litigate something the legislature passes. It really kind of depends on your perspective, whether you think the attorney general is really protecting the rule of law and protecting the government or whether the governor is doing it.

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We have an elected attorney general, and per our constitution the attorney general is part of the judicial branch. He is always independent. He is a Democrat. The governors have been Republican for the most part. I don't know if he provides a real check. He will represent the state even when he doesn't agree with them.

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Our northeastern state has the same situation where the AG can decide not to represent the state or the legislature or the governor. Our attorney general can decide whether or not to support the constitutionality of a statute or take some other position.

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Our attorney general has gone above and beyond. We have dealt with him over the years, and when somebody asks for a cert proceeding against a district court judge or a mandamus proceeding, there's no one representing the district court judge. There is no provision for that. But if we grant the petition, our attorney general will step in and actually represent the court, even though they don't have an obligation to do it. Even with their limited budget, when we have asked them to do it, they do it, so we don't get a mess up there.

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We have an elected attorney general whose office, of course, has had its funding cut because our attorney general is a Democrat. But we have had, in the last several years, many instances of the legislature hiring its own attorney because they don't trust the attorney general to do lots of things. So they have spent a lot of money. They have done really well for some law firms that have been representing the legislature.

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I remember years ago in a mid-Atlantic state there was a candidate running for attorney general who said she fully intended to sue on behalf of injured people and groups of people whose rights were affected, on her own initiative. She wasn't talking about suing the government or representing the government; she was talking about going out as a public advocate as attorney general.

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In our state there was an attorney general who brought a suit on the mortgage fraud cases, and from settlement went to our client security fund in order to pay for damages when lawyers stole money from



people. I think it's pretty common that attorneys general do that.

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We had a somewhat unusual situation a few years ago in our state, where the elected attorney general refused to enforce the illegal gambling laws of our state. The governor sought to appoint his own counsel to do that. And of course, that was challenged by the attorney general. And our court held that, under our constitution, the governor is the chief executive officer of the entire state and had the right to do that if the attorney general did not fulfill his responsibilities.

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I think it is a check on government. And yes, it does complicate it, but perhaps government should be complicated.

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## Other Topics Discussed by the Judges

### State Courts Following the U.S. Supreme Court

We have had cases over the last 15 or 20 years where our courts have said, "Well, our constitution interprets due process slightly differently than the United States Supreme Court does."

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How many states in here followed the Supreme Court's *Daubert* decision?<sup>2</sup> *Daubert* was a federal case, right? And yet, almost every state in this room adopted it. I think this is illustrating what the state judiciary does not do, and that is we don't stay true to ourselves sometimes. I think it's important, based on the papers we've had at the Forum today, that we stay true to our own constitution.

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I don't think we should follow the U.S. Supreme Court in lockstep. I think an issue or a concept of separate sovereignty has been lost nationally in everything, not just in the judicial branch, but in the executive branch, as well. So I think that is something that we need to assert because you can throw out any number of issues. The one-size-fits-all approach may make sense on the federal level, but there are other issues where it could be very different state-by-state, let alone within a state. I think we need to protect our sovereignty as state courts.

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I think in the states, it appears that when you deal with the due process or equal protection in state constitutions, there had been a long trend that interpreted it as the U.S. Supreme Court does. It is an area where you have specific state constitutional rights like special legislation where the state's approach was different from the U. S. Supreme Court's approach. I think you see states moving in those areas where you have specific provisions different from the U.S. constitution, that you see the more expansive use of state constitutions. You have got this long line of state authority, going back a long time, interpreting due process and equal protection.

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Our court has said more than once that our due process clause offers more expansive protections than the federal. So sometimes you get those kinds of claims, but the equal protection clause is co-terminus

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with the federal right, so we don't hear that as much. People might mention it, but again, it's not fully developed, and in some contexts it is co-terminus so it is not going to matter.

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I think there is a difference between staying true to whatever is the history or the culture or the ethos of the state, and looking around and saying, "You know, that's a good idea." So I think we have to be cautious. It is not always a bad approach or bad analysis just because the U.S. Supreme Court announces it as such, or because a federal district judge announces it as such. The reality is that so much of this is political at the end of the day.

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I was just talking to one of our supreme court justices, and we can think of only three cases where the supreme court has used independent state grounds.

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Obviously there are a fair number of idiosyncratic provisions in some constitutions that don't appear in the Federal Constitution. Some states have a long history of independent state grounds decisions.

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As more state court judges go to seminars with the federal judges, you have this overflow of some of these federal concepts that really, in my humble opinion, don't belong in the state courts. State courts are different from the federal courts, which are limited by the Federal Constitution.

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We had a big issue on what courts had jurisdiction, and I went back to our state constitution to see if our appellate court had jurisdiction on this matter, and I said, "Oh, it is all spelled out." Traditionally we were comfortable with federal analysis, and now we are not comfortable with it—or at least I am not comfortable with it.

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## Do Judges "Make Law"?

You should not address or resolve a case constitutionally if you don't have to. That is like the last resort.

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In our southern state, we don't do common law anymore. Everything is a statutory construction. But my question, to those who say we don't make law anymore because what we find ourselves mostly doing now is doing statutory construction, is aren't we still making law? Our opinions regarding what the statute means or doesn't mean— isn't that making law?

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Someone this afternoon said that the phrase you hear all the time, that "judges don't make law," is not applicable to state law judges. I won't debate whether that is really true or not. I will just say that the people of our southern state believe it is true, and so we don't do it, even if we have the authority to.

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In the new administration, with the new appointments to the U.S. Supreme Court, there seems to be an appetite to reconsider some precedents that most of us thought were settled. If we have prospective court

appointees even suggesting that cases like *Brown v. the Board of Education* are ripe for reconsideration, lord knows what other decisions that we considered to be etched in stone may be changed. I would expect that there may be a new era of activism at the state level to respond to that.

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We had a justice of the supreme court of our midwestern state some time ago who said, “On the supreme court, we justices don’t make new law, but we do discover what the law is.” Some things weren’t always presented, so we’re finding them out.

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## The State Constitutional Amendment Process

In our southern state we don’t have referendums or initiatives; it takes two-thirds of the votes of both houses in our legislature to get a constitutional amendment on the ballot. That is pretty problematic in terms of constitutional change arising from the people.

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It is a basic rule for me that the constitution does represent the will of some people at some point in time. At the moment, for the most part, it certainly did not represent the will of women because they weren’t at the table, and it didn’t represent the will of black people because they weren’t at the table. So it does, at different points in time. So I absolutely agree with that.

But, of course, there is an amendment process to try and address where the constitution is not representative, or the people who made it are no longer working and maybe it was a good idea then but not such a good idea now.

But I do agree that, to the extent the constitution provides certain authority and power for the judiciary, that is a decision for the judiciary to wield their power and it should do so. And if the people feel uncomfortable with it, there is an amendment process to deal with it. That is the mechanism we have. To me all of the constitutions are flawed; none of them are ideal or perfect. They all have problems, but they are the constitutions that we have. If you want to change them you have to vote to change them.

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## Separation of Powers

Our constitution very heavily favors the legislature.

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In our southwestern state, there are some separation-of-powers challenges in connection with rulemaking. Our state supreme court, because of a constitutional amendment in the early 1960s, has rulemaking authority. When the legislature passes a statute that affects the judiciary, there’s the question whether this is impinging on the state supreme court’s rulemaking authority. Then there are debates about whether it affects procedural rights versus substantive rights, with the legislature supposedly having the authority over substantive rights, and the supreme court having control over procedural

aspects of court business. This has been an ongoing debate as to whether the legislature has gone too far impinging on the supreme court's exclusive rulemaking authority or not.

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Our court of appeals was wrestling a few years ago with whether to drop contributory negligence for comparative negligence. We are one of the very few states left that still has contributory negligence. In our state, and in most other states, a lot of this developed from the common law. So even though our general assembly has never spoken on the issue and never said you have to have contributory negligence, and it is a creature of the common law that has come down through the courts. There was basically a back and forth from the majority opinion and dissent about whether that is something that should be done, even though it is clearly within the power of the court to do.

Ultimately, the court said, "We have had it for long enough. At this point, if anybody is going to change it, it should be the legislature." But then we had a change in the membership of the supreme court, and the court said, "Well, we waited long enough for the legislature. We are going to do it." But once the supreme court did it, then they started doing legislation about the issues.

So our state has gone back and forth, with a lot depending on the membership of the state supreme court.

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In our southern state, the supreme court has rulemaking authority. But under our constitution, the legislature has the explicit authority to change our rules of procedure. They can just change them. They don't very often change our rules. But if they choose to do so, they will do it. They don't have to approve rules we adopt, but they have the authority to change them.

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In our southern state we have a pretty strict constitutional separation between substantive and procedural law. It is probably true in a lot of states. The court system, mainly the supreme court, has the right over procedural protections, and they will occasionally strike down legislation because they say it intrudes upon the state supreme court's authority.

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In our southeastern state we have a debate about the old common law torts of the criminal conversation and alienation of affection. And after *Lawrence v. Texas*,<sup>3</sup> people have been bringing cases saying that, because the state doesn't have the right to regulate such matters, those tort causes of action are now unconstitutional. But our view generally is that, once something has been in place a long time under the common law, we won't amend the common law. We will leave that for the legislature to do if they want to.

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If the judiciary doesn't do what the state constitution asks it to do, then somebody else will take that power. The power doesn't just go away.

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## Standing and Error Preservation

- A lot of times constitutional issues aren't raised at trial and are not properly presented in a brief or argued below, to try to make sure that our words aren't going to be turned around and used in a different way, or at least before the trial court. So one thing that I struggle with, a lot of times, is working around the lack of an argument.
- In our southern state we have a uniform rule for the courts of appeal which says that we are authorized to address any specification in an area that we choose, if the interest of justice requires it. That's a judicial rule.
- We call it a "trialable" error. If we find an error and it has not been raised, we say it's a trialable error. If it is a manifest injustice, we're going to address it.
- We have the "fundamental error" rule—if the error is so fundamental that it influences the outcome of the case, we can do that.
- If it's not raised in trial court, we don't entertain it. We find on our own that we think it really merits review, we have a provision to allow to send that issue back to the attorneys to re-brief that issue.

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Our state has a very liberal approach to standing. You have to really try not to have standing.

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Unless a lawyer brings the question to us, we can't use our authority to raise the equity level in society.

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If the lawyers don't raise it, or they mention it but present no arguments, judges are not advocates. Lawyers have got to make that argument.

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The nice thing about state constitutional litigation is that it is *de novo*. It doesn't matter what the trial court says. It doesn't matter what the intermediate appellate court says. When you get to the state supreme court, if you can win that one argument, you can lose every other case. Look at the guy who brought the case about the SEC's administrative law judges, which was just decided by the U.S. Supreme Court.<sup>4</sup> I didn't think that guy had a chance in hell. But he won. That is an amazing case.

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In our midwestern state we have developed a fairly liberal error preservation doctrine. If you mention equal protection, we will decide it under the state and Federal Constitution. But, if you don't make a separate argument as to why the state constitution should be interpreted differently from the Federal Constitution, we will then interpret our state constitution using the same test as the Federal Constitution, but with more teeth, if we so desire.

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Anybody who reads briefs understands that they are not very well written most of the time. You can't let the rights of the people who are involved be compromised because someone writes a lousy brief or doesn't fully develop the argument. As long as it's raised and the district court ruled on it and it's in their appellate brief, we will do what we need to do.

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We have a joke, among the seven of us, that if they have a copy of the state constitution in the courtroom, the error is preserved.

## Judicial Selection

Judicial selection is pretty chaotic. But the process seems to shake out, and you get so many people with good heart and good will and good work, even with different political spectrums.

Quite frankly, if I ran around our southern state at election time saying, “These are my policy preferences,” a majority of the voters say, “No, thank you.” When I’m presented with a case in which my policy preferences are implicated, I see my job as a judge and to get to the right answer. I need to be skeptical of whether I am indulging my predispositions to exercise my judicial authority, and not to let my predispositions drive me in my preferred result and not be a willful judge.

I went around the state, I ran two and one-half years straight, and I talked to a lot of people. They had no idea they were speaking to an appellate judge or a probate judge or whatever. They knew what a judge was, and people understood the expectation of impartiality. And I think if I took every opportunity to exercise the powers that I am given and tried to push my policy preference, number one, my colleagues would stop me; number two, I think I would be violating the covenant that I made with the people who elected me.

In our midwestern state, in the last 20 or 30 years, in states where judges are elected, massive amounts of money have been spent on state court elections, especially for the supreme court. People in the Chamber of Commerce, the defense bar, the plaintiffs bar, they see that this matters. Each election, it was like breaking all kinds of records on how much money is spent. It is happening all over the country.

—Our state constitution was adopted in the early 20<sup>th</sup> century, at the height of American populism. It is an extremely populist document, covering every one of the special laws, the whole works. The state supreme court enforces that constitution, and they take a lot of heat for enforcing that constitution. We have a judicial nominating commission which selects the judges and then all of the intermediate appellate court judges stand for retention.

The legislature, because they constantly had statutes declared unconstitutional, are now launching a major campaign to eliminate the judicial nominating commission, to have all appellate judges run for office on a non-partisan basis. And in the state senate there is another cockeyed system whereby the state senate will have to approve advisements and approve all the appellate judges. So this is an indirect attack on the state constitution. It’s interesting to see how it unfolds.

—We’ve lived with people taking heat for making difficult decisions year after year after year. Is the retention system better for dealing with these sort of state constitutional challenges?

—I think it is, because it sure is more independent. This system has created a better judiciary, a more independent judiciary, but a judiciary that enforces the constitution.



In our midwestern state we have open elections for the state supreme court and appellate court, all judges. And in my experience, as the political makeup of the supreme court changes, so does the law. The amount of money involved becomes a very political issue.

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Judicial selection seems to kind of work out. It's an amazing mess—but it seems to work out.

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## Court Funding

Our state supreme court budget, which is less than 1 percent of the state line budget, has remained the same for the last five or six years.

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In our southwestern state we have had a change as far as who the party in control is. But regardless of who the party is, I think you face the same issues. In our last redistricting experience, when our state supreme court held the legislative redistricting unconstitutional, the leader stood on the floor and said, “Wait until your budget comes up.” And so, we have been hurt terribly by the budgeting process. Everyone talks of the “nuclear option,” with the judiciary taking a case to the U.S. Supreme Court about “You shall budget for the judiciary,” but we have not gone there, because that would burn a lot of bridges. But we sometimes seem to get punished for doing our job.

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In our midwestern state it took us 15 years to get a raise.

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Pay raises are significant for us, but they're part of a whole budget. It is our staff. It is our buildings. It is the ability to provide service. I think the DRI speaker this morning was correct about how much our legislature has changed, and what a difference that has made, not only to the budget, but to the rule of law.

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Our state supreme court is all Republicans. Those are their friends on the floor of the legislature, and they still can't get it. We had a huge budget cut two years ago, and next year we are just trying to get back—not just salaries, but our budget, which encompasses so much more: funding for the outreach programs, the access to justice programs. It is just huge. It is just huge.

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One of the big tensions that we have in our northeastern state is that the legislature hasn't gotten a raise themselves in 13 years, or maybe even longer. There has always been a tension between the legislature and the judiciary, saying “Why do you guys get it and we can't get it?” We also have internal tension between the legislators from urban areas versus those from rural areas, who control the legislature.

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In our midwestern state the legislators talk openly on the floor about how much they can cut our budget. They are not even shy about it. They actually cut the attorney general's budget \$600,000, which is a substantial amount of money, because he signs onto cases fighting Donald Trump. They acknowledge that's why they're doing it.

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## Legal Education and Bar Admission

You should have as many law students as possible come and spend a semester with you and see what you do on your court. I do that. We have two law schools, and I try to get one student from each law school every semester, and two in the summer. Once they have spent time with us, they understand the importance of the law being developed under our state constitution. But it's almost a one-on-one thing.

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In our midwestern state, we have a law professor who has written her own book on the state constitution. It took her 30 years to write the book. She went to the school and said, "Can I teach a course on the state constitution?" They said "Sure," but she generally only gets five to eight students to sign up for it and the school will not allow her to teach it unless she gets six students. She said they have a course on international rights of refugees and they get 160 students for that course! Now, how likely is it that we're going to have students who actually work in the field of international human rights of refugees out of one law school? Zero. How likely is it that our graduates are going to need to know about the American Constitution? 100 percent.

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We have a rather lengthy bar admission rule that provides that applicants have to be prepared to practice, and have to have exposure and understanding of the practice skills necessary to practice in the state, and be familiar with the values of the profession. We then provide what we call "pathways" to satisfy the rule. One pathway has to do with the law school itself demonstrating that it has set up a curriculum that provides the required skills. Another way is by the total number of credits the student earns. Another pathway lets students complete law school basically in two and one-half years. The last semester is full-time working, and then they can take the bar exam.

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In our northeastern state we have a mandatory requirement now for all newly admitted attorneys into the bar, that they have to serve a certain number of hours of pro bono service. They can do anything, any legal services, civil or criminal. And you can start doing that in law school before you graduate to satisfy that requirement.

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We have a rule that allows applicants who were not able to acquire the skills in law school (like attorneys from outside the U.S.) to do an internship post-graduate.

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I think the way to get state constitutional law taught in the law schools is to get it put on the bar exam.

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## Notes

<sup>1</sup> See *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding unanimously that states are required under the Sixth Amendment to provide an attorney to defendants in criminal cases who are unable to afford their own attorneys).

<sup>2</sup> *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (determining the standard for admitting expert testimony in federal courts; holding that the enactment of the Federal Rules of Evidence implicitly overturned the standard of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)).

<sup>3</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating Texas sodomy law and making same-sex sexual activity legal in the U.S.).

<sup>4</sup> *Lucia v. Securities and Exchange Commission*, \_\_\_ U.S. \_\_\_, 138 S.Ct. 2044 (2018).

# POINTS OF CONVERGENCE

In the discussion groups, the moderators were asked to note areas in which the judges' thinking on issues raised in the Forum appeared to converge. These observations were summarized and announced during the Forum's Closing Plenary.

## **Frequency of state constitutional issues (for instance, challenges to statutes and regulations) in state appellate court cases**

- State constitutional issues are not raised often.
- State constitutions are invoked in few tort cases. They are argued more often in criminal cases, school funding matters, family law litigation, and challenges to special legislation.
- State constitutions are raised more often in some states than in others.
- Most of these issues go to state supreme courts. Intermediate appellate court judges rarely deal with legal issues pertaining to their state constitutions.

## **The bar's handling of state constitutions**

- For whatever reasons, lawyers do not often raise state constitutional arguments. It's an afterthought. This leads to a dearth of court decisions on state constitutional issues, which in turn may further diminish lawyers' familiarity with the issues.
- In states that have a robust constitutional law tradition, failure to raise constitutional issues almost constitutes ineffective assistance of counsel.
- State constitutional law should be: (a) taught in law schools; (b) taught by state bar associations; and (c) included on the bar exam.

## **Factors influencing courts' decision-making processes on constitutional issues**

- *De novo* review frees appellate courts from bad trial court decisions.
- First and foremost, we look at the plain text of the state constitution; examining the constitutional and legislative history comes second.
- Professors or others with expertise are seldom queried or called as witnesses.
- The "one size fits all" approach may work for federal constitutional cases, but it doesn't work in the states.

### **Legislation that restricts access to civil justice, or avoids or eliminates jury trial as a method of dispute resolution**

- Most judges fear legislation like damages caps, abrogation of collateral source rules, and pre-suit notice requirements threatens the civil justice system and has already undermined trial by jury.
- Restrictions are created because the legislature fears jury trials, but there is no basis for this. It results in part from paranoia over highly publicized cases such as the McDonald's case.<sup>1</sup>
- The driving forces behind restricting consumer access to a civil jury trial are money, power, and greed.
- Procedural rules that create barriers to jury trial allow someone other than the jury to decide a fact.
- Legislators pass measures like this because of who facilitated their campaigns and voted for them. The public needs to elect the people who will work for them.
- This may be a result of the decline in the number of lawyer-legislators. Non-lawyers don't see the value in jury trial that lawyers do.
- The movement toward arbitration and mediation has driven down state caseloads in general, and the number of jury trials in particular.
- Most judges don't believe summary judgment violates the right to jury trial, but some consider it a valid question.

### **Special legislation which benefits only certain individuals, groups, industries, or professions**

- Such legislation sparks immense conflict over separation of powers, privileges and immunities, and the substantive v. procedural distinction.
- The success of a challenge to such legislation depends on whether the court majority is from the same political party as the legislature.
- This kind of legislation invades the province of juries and poisons the jury pool.

### **The impact of the structure of state constitutional schemes on the civil justice system**

- State structures promote diversity and open extra avenues for change in the legal system.
- Easy amendment processes can make state constitutions unwieldy.
- Legislative budget authority and action affects court operations and can influence judges' willingness to continue serving.
- Courts are essential to democracy, yet court budgets are cut to the bone, even by lawyer-legislators who should understand the vital role of courts.
- Some judges see deep hostility between the legislature and the courts in their states.

## **The impact of the courts' authority over the legal profession on the state's civil justice system**

- Areas of regulation include: rulemaking, licensure, discipline, access to the courts for indigents, supervision of the Interest on Lawyers Trust Accounts (IOLTA) programs.
- IOLTA account interest can be used to fund legal assistance in indigent custody cases.
- The system can be impacted by who has disciplinary authority over lawyers.
- Access to justice can be improved by "limited scope" representation, but it's a burden on the courts to regulate it.
- Increasing the number of solo attorneys tends to increase filings with the discipline authorities and grievance filings by clients.

## **Expanding the right to counsel into additional areas of civil litigation (the "civil *Gideon*" concept)**

- There is a huge need to do this, but who will pay for it?
- Cases in which litigants need assistance of counsel include foreclosures and divorces.
- The legislature is not motivated to provide funding to citizens to sue corporations or prosecute civil cases.
- It's difficult to even get criminal representation, much less appointments for civil cases.
- We need to think of the societal costs of not affording quality representation for those in need. The problem will continue to get worse as economic disparity increases.

## **Independently-elected attorneys general**

- An independent attorney general is essential to good governance.
- Some state attorneys general provide beneficial protections for the public, e.g. in the consumer protection area.
- An elected attorney general is a check and balance on the executive, but conflict between the governor and the attorney general can slow or even stop government action.

## **Does the extra protection of individual rights that is afforded by state constitutions make state judges' work easier or harder?**

- It is not easier or harder; it gives you a floor to work with.
- *Pro se* litigation does make it harder.
- It can be easier in the sense that you don't have to start from first principles.
- It's easier if constitutional arguments are well thought-out and presented, harder if they aren't.
- It's our job. It doesn't matter if constitutional protections make it easier or harder.



## The importance of the judiciary

- The health of the judiciary is the strongest measure of a country's resistance to and freedom from corruption.

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### Notes

<sup>1</sup> *Liebeck v. McDonald's Restaurants, P.T.S., Inc.*, No. CV 93-02419, 1995 WL 360309 (D.N.M. Aug. 18, 1994). Prof. Nancy Marder has commented on the news media's treatment of the *Liebeck* case as follows:

When a jury awarded Stella Liebeck \$2.7 million in punitive damages after she had suffered third-degree burns from a spilled cup of McDonald's coffee, many members of the public and press denigrated the result, describing it as "outrageous" and the jury as "runaway." What was often ignored in these accounts of the case was that the eighty-one-year-old woman's injuries were very serious, that McDonald's had known about the problem of its exceptionally hot coffee but had declined to warn consumers or to change the temperature at which it served its coffee, and that the trial judge subsequently reduced the \$2.7 million punitive damage award to \$480,000.

Sheila Liebeck's case, though involving punitive damages, illustrates several problems with the way in which civil juries' damage awards in general are covered in the press and perceived by the public. One problem is that awards that are dramatic are the ones that receive press attention. The more mundane, less sensational damage awards that are decided by juries everyday are often overlooked. One consequence of such coverage is that jury verdicts appear to be more inconsistent than they actually are. Another problem is that the damage awards that are described in the press are not the ones that are necessarily received. A jury's award does not mark the end of the process; the verdict must still be reviewed by the judge. This means that both press and public may be judging damage awards prematurely, before judges have reviewed them.

Nancy S. Marder, *Juries and Damages: A Commentary*, 48 DePaul L. Rev. 427 (1998) (Introduction to Symposium, The American Civil Jury: Illusion and Reality) (footnotes omitted).

# Appendices

## Faculty Biographies

### Paper Writers and Speakers

**Honorable Goodwin Liu (LUNCHEON KEYNOTE SPEAKER)** is an Associate Justice of the California Supreme Court. He was confirmed to office by a unanimous vote of the California Commission on Judicial Appointments on August 31, 2011, following his appointment by Governor Edmund G. Brown, Jr. on July 26, 2011. The Governor administered the oath of office to Justice Liu in a public ceremony in Sacramento, California on September 1, 2011. Before joining the state's highest court, Justice Liu was Professor of Law at the UC Berkeley School of Law (Boalt Hall). His primary areas of expertise are constitutional law, education law and policy, and the U.S. Supreme Court. He has published widely on these subjects in books, law reviews, and the general media. Justice Liu graduated from Yale Law School in 1998. He clerked for Judge David Tatel on the U.S. Court of Appeals for the D.C. Circuit and then worked as Special Assistant to the Deputy Secretary of the U.S. Department of Education. He then clerked at the U.S. Supreme Court for Justice Ruth Bader Ginsburg during the October 2000 Term. In 2001, he joined the appellate litigation practice of O'Melveny & Myers in Washington, D.C. Justice Liu has published articles on constitutional law and education policy in the *California Law Review*, *Michigan Law Review*, *NYU Law Review*, *Stanford Law Review*, and *Yale Law Journal*.

**Justin Long (AFTERNOON PAPER PRESENTER)** teaches at Wayne State University Law School, specializing in state constitutionalism, civil procedure, public education law, urban law, and federalism. He is affiliated with the Damon J. Keith Center for Civil Rights and regularly works with civil rights activists. Prior to teaching at Wayne State, he was a visiting assistant professor of law at the University of Connecticut School of Law and practiced as an assistant solicitor general in the New York Office of the Attorney General. He clerked for Hon. Albert Rosenblatt of the New York State Court of Appeals and Hon. Myron Bright of the U.S. Court of Appeals for the Eight Circuit. Prof. Long is a graduate of Harvard College and University of Pennsylvania Law School, where he was the Technology Editor of the Law Review.

**Honorable Monica M. Márquez (JUDICIAL WELCOME)** was sworn in as Justice of the Colorado Supreme Court on December 10, 2010. Before joining the Court, Justice Márquez served as Deputy Attorney General at the Colorado Attorney General's Office, where she led the State Services section in representing several state executive branch agencies and Colorado's statewide elected public officials, including the Governor, Treasurer, Secretary of State, and Attorney General. Justice Márquez also served as Assistant Solicitor General and as Assistant Attorney General in both the Public Officials Unit and the Criminal Appellate Section. Before joining the Attorney General's Office, Justice Márquez practiced general commercial litigation and employment law at Holme Roberts & Owen, LLP. Justice Márquez earned her bachelor's degree from Stanford University, then graduated from Yale Law School, where she served as an Editor of the *Yale Law Journal* and Articles Editor of the *Yale Law & Policy Review*. Upon graduation, she clerked for Judge Michael A. Ponsor of the United States District Court for the District of Massachusetts, and for Judge David M. Ebel of the United States Court of Appeals for the Tenth Circuit.

**Robert F. Williams (MORNING PAPER PRESENTER)** is Distinguished Professor of Law at Rutgers University of School of Law and Director, Center for State Constitutional Studies. Professor Williams earned his B.A. cum laude in 1967 at Florida State University, where he was elected to Phi Beta Kappa and Phi Kappa Phi. He earned his J.D. with honors in 1969 at the University of Florida School of Law, where he was executive editor of the law review, and then earned his LL.M. in 1971 at New York University School of Law. In addition, he earned an LL.M. at Columbia University Law School in 1980. He is admitted to the bars of Florida, New Jersey, and the United States Supreme Court. He has been the legislative advocacy director and executive director of Florida Legal Services, Inc.; and a reporter for the Florida Law Revision Council's Landlord-Tenant Law Project. In addition, he served as a legislative assistant to Florida Senator D. Robert Graham; a staff attorney with Legal Services of Greater Miami, Inc.; and a law clerk to Chief Judge T. Frank Hobson of the Florida Second District Court of Appeals. He has authored numerous publications and articles on state constitutional law and other topics.

**Ellen Relkin (FORUM MODERATOR)**, President of the Pound Civil Justice Institute (2016-2018), is of counsel to Weitz & Luxenberg, P.C. in New York City and Cherry Hill, New Jersey. She is licensed to practice in New York, New Jersey, Pennsylvania, and the District of Columbia, and is certified by the New Jersey Supreme Court as a Certified Civil Trial Attorney. Ms. Relkin is an elected member of the American Law Institute. She serves on the Board of Governors of the New Jersey Association for Justice and the Board of Visitors of the University of California at Irvine Law School. She is a former chair of the Toxic, Environmental and Pharmaceutical Torts Section of the American Association of Justice.

## Panelists

**Honorable Judy Cates** is a justice on the Illinois Fifth District Court of Appeal. She attended Cornell University, receiving a B.A. in Government in 1973. She went on to receive her juris doctorate in 1977 from the Washington University School of Law - St. Louis. Before joining the Appellate Court, Judy Cates first practiced law as an Assistant State's Attorney for St. Clair County, Illinois. After leaving the State's Attorney's office, she entered private practice, concentrating in complex litigation cases, such as personal injury, class actions, mass actions, sexual harassment, and corporate disputes. Justice Cates was engaged in the private practice of law for 30 years prior to being elected to the 5th District Appellate Court in 2012. She was admitted to practice law in Illinois, Missouri, and Florida. She was a member of the Illinois State Bar Association, Missouri Bar Association, and Florida Bar Association. She was also admitted to practice in many federal courts across the country.

**John E. Cuttino** is a Shareholder at Gallivan White & Boyd P.A. in Columbia, South Carolina. He is a 1979 graduate of Wofford College and a 1982 graduate of the University of South Carolina School of Law. Mr. Cuttino is the Immediate Past President of *DRI-The Voice of the Defense Bar* and serves on DRI's six-person Executive Committee. He has 32 years of experience as a trial attorney in the state and federal courts of South Carolina. Cuttino has tried more than 75 cases to verdict in 40 of South Carolina's 46 counties, and in the U.S. District Court in South Carolina. He is a Permanent Member of the U.S. Fourth Circuit Judicial Conference and a member of the American Board of Trial Advocates (ABOTA). His practice includes design and construction defects, toxic and mass torts, insurance coverage, tort and personal injury, intellectual property, products liability, and professional negligence.

**Honorable Noma D. Gurich** has served as a Justice on the Supreme Court of Oklahoma since February 15, 2011. She has been a member of the Oklahoma judiciary for 30 years. She currently serves as Vice Chief Justice. She received a bachelor's degree Magna Cum Laude in political science in 1975 from Indiana State University. She earned her Juris Doctorate from the University of Oklahoma College of Law in 1978, where she served on the *American Indian Law Review*. After ten years as a litigator in the private practice of law in Oklahoma City, she was appointed to the Oklahoma Workers' Compensation Court where she served from 1988 to 1998, including 4 years as Presiding Judge. She was appointed and elected to serve as a District Judge in Oklahoma County from 1998 to 2011, where she also served as Presiding Judge. The Oklahoma Chapter of ABOTA named her Judge of the Year in 2011. She has the distinction of being appointed to judicial office by four Oklahoma governors: Governor Henry Bellmon, Governor David Walters, Governor Frank Keating and Governor Brad Henry.

**John Lebsack** joined White and Steele, P.C. in Denver upon his admission to the bar in 1979, and has been of counsel since 2018. His practice is comprised of a variety of defense cases, with an emphasis on appeals, coverage disputes, and professional liability defense. John has argued before the United States Court of Appeals for the Tenth Circuit, the Colorado Supreme Court, and the Colorado Court of Appeals. From 2011 through 2017, John was appointed to the Committee on Conduct, United States District Court for the District of Colorado, and served as chair of that committee in 2013-2014. In 2017, the Colorado Supreme Court appointed Lebsack to the Civil Rules Committee, which is charged with making recommendations to the court about changes to the rules of procedure that govern all civil cases in the state.

**Jonathan Marshfield** teaches at the University of Arkansas School of Law. His research focuses on constitutional procedure and design, state constitutional law, and constitutional change. His work explores how procedural rules and political institutions can affect constitutional outcomes. Prior to joining the University of Arkansas faculty, Professor Marshfield practiced as a commercial litigator with Latham & Watkins LLP and Saul Ewing LLP. He also clerked for Judge Robert B. Kugler, United States District Judge for the District of New Jersey, and Chief Justice James R. Zazzali of the Supreme Court of the State of New Jersey. Professor Marshfield's work has appeared in the *Michigan Law Review*, the *Boston University Law Review*, and other leading journals. Most recently, the *New England Law Review* dedicated an issue to scholarly commentary on Professor Marshfield's empirical research regarding state constitutional change. Professor Marshfield holds an LL.M. in legal theory of New York University School of Law, a J.D. (high honors) from Rutgers School of Law – Camden, and a B.A. (honors) from Cedarville University.

**Andre M. Mura** is a partner at the Gibbs Law Group, LLP in Oakland, California, representing plaintiffs in class action and complex litigation concerning consumers' and workers' rights, products liability, drug and medical devices, federal jurisdiction, and constitutional law. Previously he was senior litigation counsel at the Center for Constitutional Litigation PC, in Washington, D.C., where he represented plaintiffs in state and federal appellate courts, including the United States Supreme Court. In *Watts v. Lester E. Cox Medical Centers*, 376 S.W.3d 633 (Mo. 2012), Mura successfully argued that a state law limiting compensatory damages in medical malpractice cases violated his client's constitutional right to trial by jury. He contributes to Consumer Law Watch, a blog analyzing developments in the law of consumer class actions and is a member of the Lawyers Committee of the National Center for State Courts, a member of the American Association for Justice, and a Fellow of the Pound Civil Justice Institute.

**Robert S. Peck** is founder and president of the Center for Constitutional Litigation. He regularly appears before the U.S. Supreme Court and state supreme courts, with cases pertaining to state and federal constitutional law, complex civil litigation, federal preemption, punitive damages, products liability, mass torts, consumer protection, and more. Peck has taught advanced constitutional law and state constitutional law at The George Washington University Law School and American University Washington College of Law. Bob is a member of the advisory board of the Civil Justice Research Institute at Berkeley Law School. He is a past chair of the Board of Overseers of the RAND Corporation's Institute for Civil Justice; and former member of the Board of Directors and co-chair of the Lawyers Committee at the National Center for State Courts.

**Honorable David Schuman** served as a judge of the Oregon Court of Appeals from 2001 to 2014. He received his B.A. from Stanford University, his Ph. D. from the University of Chicago, and his J.D. from the University of Oregon Law School. He served as a clerk to Justice Hans Linde, Oregon Supreme Court, in 1985; as Assistant Attorney General in the Oregon Department of Justice from 1985 to 1987; and was a professor at the University of Oregon Law School from 1987 to 1996. He was Deputy Attorney General in the Oregon Department of Justice from 1997 to 2001, when he was appointed to the Oregon Court of Appeals. Since 2014 he has been a Senior Judge in the Oregon Judicial Department, and Professor of Practice at the University of Oregon Law School.

## Discussion Group Moderators

**Linda Miller Atkinson** is of counsel to the firm of Atkinson, Petruska, Kozma & Hart, with offices in Gaylord and Channing, Michigan. She is licensed in Michigan and Emeritus member of Wisconsin and Georgia bars. A 1963 graduate of Oberlin College, Oberlin, Ohio, and a 1973 graduate of Wayne State University Law School in Detroit, Michigan, she is an author and editor of *TORTS: MICHIGAN LAW AND PRACTICE*, published by the Institute of Continuing Education since 1994, and of *LAWYERS DESK REFERENCE* (8<sup>th</sup> edition, Thomson-West), and is author of the "Depositions" chapter of *LITIGATING TORT CASES* (AAJ Press, published by Thomson-West). She is a past president of the Michigan Association for Justice, a member of the American Association for Justice President's Club and a Fellow and trustee of the Pound Civil Justice Institute. In her life outside the courtroom she teaches firearm and hunter safety for the Michigan Department of Natural Resources and is in her 25th year with the National Ski Patrol.

**Leslie A. Brueckner** is a Senior Attorney at Public Justice, a national public interest law firm, where she specializes in appellate litigation in the state and federal courts. A 1987 magna cum laude graduate of Harvard Law School, Brueckner's current areas of practice include class actions, constitutional law, federal preemption, consumer rights, personal jurisdiction, food safety, and combating court secrecy. She just celebrated her 25th anniversary with Public Justice. Among other victories, Ms. Brueckner recently won a landmark ruling from the California Supreme Court in *T.H. v. Novartis*, holding that brand-name prescription drug manufacturers can be sued for failing to warn of the dangers of mislabeled, generic versions of their drugs. She and her co-counsel Ben Siminou were awarded the Pound Institute's 2018 Appellate Advocacy Award for their work on the case. In addition to her litigation work, Ms. Brueckner has taught appellate advocacy at American University Law School and Georgetown University School of Law.



**Kathryn H. Clarke** is a sole practitioner in Portland, Oregon, who specializes in appellate practice and consultation on legal issues in complex tort litigation. She served as President of the Pound Civil Justice Institute from 2011 to 2013. She is a member of the Oregon Trial Lawyers Association, and has been a member of its Board of Governors for over 25 years, served as President from 1995 to 1996, and received that organization's Distinguished Trial Lawyer award in 2006. She is also a member of the Board of Governors of the American Association for Justice. She was a member of the adjunct faculty at Lewis and Clark Law School, and taught a seminar in advanced torts for several years. In 2008 she served as a member of a work group on Tort Conflicts of Law for the Oregon Law Commission, which resulted in a bill passed by the 2009 legislature. She has served as member and Chair of Oregon's Council on Court Procedures, and has been a member of the Oregon State Bar's Uniform Civil Jury Instructions Committee. In 2016 she was honored by the Pound Institute for her lifetime achievement as an appellate advocate.

**Caragh Glenn Fay** is managing partner of the Fay Law Group in Washington, D.C. Her practice includes personal injury, medical malpractice, general civil litigation, and terrorism and Foreign Sovereign Immunities Act cases. She is admitted to practice in Maryland, the District of Columbia, and a number of federal courts. She holds a B.A. degree from the University of Maryland and a J.D. degree from the David A. Clarke School of Law of the University of the District of Columbia, where she was a member of the *University of the District of Columbia Law Review*. She is a member of the Maryland and District of Columbia Bars, the Trial Lawyers Association of Metropolitan Washington, D.C., and the American Association for Justice, and is a Fellow of the Pound Civil Justice Institute. Her pro bono activities include representation of children with disabilities and those in need of special education support.

**Thomas Fortune Fay** practices in Washington, D.C. with the Fay Law Group, P.A. In addition to a general civil trial litigation practice, the firm prosecutes cases arising from foreign state-sponsored terrorist attacks carried out against American citizens and employees. Mr. Fay is a graduate of Notre Dame University and Rutgers School of Law. He is a Supporting Fellow of the Pound Civil Justice Institute, a member of the American Board of Trial Advocates, a trustee of Public Citizen, and a director of No Greater Love, an organization whose mission is the recognition and remembrance of persons who lost their lives in service to others.

**Michelle L. Kranz** is a Partner at Zoll & Kranz, LLC in Toledo, Ohio. She is a 1993 graduate of the University of Toledo College of Law and a 1990 cum laude graduate of Miami University. She joined the firm immediately upon graduation from law school. Kranz has extensive litigation experience before both state and federal courts as well as appellate court experience. She focuses her practice in the areas of national pharmaceutical and product liability mass torts, anti-trust, and personal injury. She is admitted to the bar in the State of Ohio, the United States Supreme Court, the Federal District Court for the Northern and Southern Districts of Ohio, and the United States Sixth and Seventh Circuit Courts of Appeals. She is a member of the Toledo Bar Association, the Ohio State Bar Association, the American Association for Justice, and the Ohio Association for Justice.



**Patrick A. Malone** practices law in Washington, D.C., representing seriously injured people in professional liability and pharmaceutical products liability litigation. He is co-author of *RULES OF THE ROAD: A PLAINTIFF LAWYER'S GUIDE TO PROVING LIABILITY* and the author of *WINNING MEDICAL MALPRACTICE CASES WITH THE RULES OF THE ROAD TECHNIQUE*. He has also published a book for consumers: *THE LIFE YOU SAVE: NINE STEPS TO FINDING THE BEST MEDICAL CARE—AND AVOIDING THE WORST*. His recent articles include “Paying It Forward by Pressing for Safety Changes” (TRIAL, June 2014), and “Unethical Secret Settlements: Just Say No” (TRIAL, Sept. 2010, co-author with Jon Bauer). Mr. Malone is a graduate of Yale Law School, an elected member of the American Law Institute, a fellow of the International Academy of Trial Lawyers, and an Officer of the Pound Civil Justice Institute.

**Wayne Parsons** practices in Honolulu, Hawai'i. He received B.S. and M.S. degrees in engineering, physics, and mathematics from the University of Michigan. After college he went to work with NASA on the Apollo space project, which took him to the astronomical observatory on the Island of Maui. After seeing Hawai'i, he went to the University of Michigan Law School and moved to Hawai'i permanently. He specializes in personal injury matters for plaintiffs and engages in consumer advocacy in the construction industry. Mr. Parsons has been president of the Hawai'i State Bar Association, was a founder of the Consumer Lawyers of Hawai'i, has served as a governor of the American Association for Justice, and has been the Hawai'i chair of the Public Justice organization. He is a Fellow of the Pound Civil Justice Institute and a member of several construction, engineering, and architecture organizations.

**Gale Pearson** is senior partner of the law firm of Pearson, Randall & Schumacher, P.A., in Minneapolis. Her practice concentrates on environmental, pharmaceutical, medical device, and corporate fraud litigation, including Qui tam. She received her bachelor's degree from California State University at Northridge with a major in Laboratory Medicine, Physics and Chemistry, and her law degree from Loyola Law School in Los Angeles. She is a Certified Clinical Laboratory Scientist. She is a member of the Minnesota and American Associations for Justice and a board member for Public Justice. She has served in the speakers' bureau for Minnesota's “We the Jury” project and is a frequent lecturer on topics that intersect science and law.

**Alinor Sterling** practices law as a member of Koskoff, Koskoff & Bieder, PC in Bridgeport, Connecticut. She handles complex civil cases at trial and on appeal. Alinor received her undergraduate degree from Princeton University, where she took her major in the Woodrow Wilson School of Public and International Affairs and her minor in Russian Studies. After a year-long graduate fellowship in Moscow, Alinor attended the UCLA School of Law, where she was elected to the Order of the Coif and was an editor of the *UCLA Law Review*. Alinor is a Fellow of the Pound Civil Justice Institute and Chair of the Connecticut Trial Lawyers Association's Rules Committee. She enjoys teaching Connecticut practice and procedure at CLE programs.

**John Vail** is the proprietor of John Vail Law PLLC, “An appellate voice for the trial bar.” Since 1997 Mr. Vail has focused his work solely on access to justice issues, representing clients in numerous state supreme courts and in the Supreme Court of the United States. He has received the Public Justice Achievement Award from Trial Lawyers for Public Justice for his “outstanding work and success challenging the constitutionality of legislation limiting injury victims' access to justice.” Mr. Vail spent seventeen years doing legal aid work, concentrating on major litigation to advance individual rights. He was an original member of the Center for Constitutional Litigation, where he was Vice President and Senior Litigation Counsel. Mr. Vail has served as Professorial Lecturer in Law at the George Washington University School of Law. He is a graduate of the College of the University of Chicago and of Vanderbilt Law School.

**David G. Wirtes, Jr.** is a member of Cunningham Bounds, LLC of Mobile, Alabama, where he focuses on strategic planning, motion practice and appeals. Mr. Wirtes is licensed in all state and federal courts in Alabama and Mississippi, the Fifth and Eleventh Circuit Courts of Appeals and the United States Supreme Court. He is active in numerous professional organizations, including as a member of the Alabama and Mississippi State Bar Associations, long-time member of the Alabama Supreme Court's Standing Committee on the Rules of Appellate Procedure, Sustaining Member of the Alabama Association for Justice (and Member of its Board of Governors and Executive Committee (1990-present); Member and/or Chairman, Amicus Curiae Committee (1990-present); and Co-editor, the Alabama Association for Justice Journal (1996-present)), and the American Association for Justice where he serves as a Member of its Amicus Curiae Committee (1999-present). Mr. Wirtes is also a Sustaining Fellow and Trustee of the Pound Civil Justice Institute; a Senior Fellow of the Litigation Counsel of America; a Founder and former Executive Director of the American Institute of Appellate Practice; and a Sustaining Member of Public Justice. He has published numerous law review and journal articles and is a frequent lecturer at continuing legal education seminars.



## 2018 Judicial Participants

### ALABAMA

Hon. Michael F. Bolin, Supreme Court  
Hon. Jacquelyn Stuart, Supreme Court

### ALASKA

Hon. Peter J. Maassen, Supreme Court

### ARIZONA

Hon. James Patrick Beene, Court of Appeals  
Hon. Maria Elena Cruz, Court of Appeals  
Hon. Philip G. Espinosa, Court of Appeals  
Hon. Diane Johnsen, Court of Appeals  
Hon. Paul J. McMurdie, Court of Appeals  
Hon. John Pelander, Supreme Court  
Hon. Jennifer Perkins, Court of Appeals  
Hon. Peter Swann, Court of Appeals  
Hon. Jon W. Thompson, Court of Appeals  
Hon. Ann A. Scott Timmer, Supreme Court

### ARKANSAS

Hon. Mark Klappenbach, Court of Appeals

### CALIFORNIA

Hon. Terence L. Bruiniers, Court of Appeals  
Hon. Ming William Chin, Supreme Court  
Hon. Luis Lavin, Court of Appeals  
Hon. Goodwin Liu, Supreme Court  
Hon. Vance Raye, Court of Appeals  
Hon. Ronald Boyd Robie, Court of Appeals

### COLORADO

Hon. Stephanie Dunn, Court of Appeals  
Hon. Terry Fox, Court of Appeals  
Hon. Elizabeth Harris, Court of Appeals  
Hon. Robert Hawthorne, Court of Appeals  
Hon. Daniel Marc Taubman, Court of Appeals

### DELAWARE

Hon. Charles E. Butler, Superior Court

### FLORIDA

Hon. Cory J. Ciklin, Court of Appeal  
Hon. Alan Forst, Court of Appeal  
Hon. Nelly N. Khouzam, Court of Appeal  
Hon. Mark Klingensmith, Court of Appeal  
Hon. Joseph Lewis, Jr., Court of Appeal  
Hon. Morris Silberman, Court of Appeal  
Hon. Bradford L. Thomas, Court of Appeal  
Hon. Thomas Winokur, Court of Appeal

### GEORGIA

Hon. Anne Elizabeth Barnes, Court of Appeals  
Hon. Christopher James McFadden, Court of Appeals

### HAWAII

Hon. Sabrina Shizue McKenna, Supreme Court  
Hon. Paula A. Nakayama, Supreme Court  
Hon. Richard W. Pollack, Supreme Court  
Hon. Lawrence Reifurth, Court of Appeal

### ILLINOIS

Hon. John B. Barberis, Jr., Appellate Court  
Hon. Robert Lee Carter, Appellate Court  
Hon. Judy Cates, Appellate Court  
Hon. Mathias W. Delort, Appellate Court  
Hon. Richard P. Goldenhersh, Appellate Court  
Hon. Alexander White, Cook County

### INDIANA

Hon. Patricia A. Riley, Court of Appeals  
Hon. Geoffrey Slaughter, Supreme Court

### IOWA

Hon. Brent Robert Appel, Supreme Court  
Hon. David Ray Danilson, Court of Appeals  
Hon. Edward Mansfield, Supreme Court  
Hon. David Wiggins, Supreme Court

### KANSAS

Hon. Kevin P. Moriarty, Johnson County Court

## KENTUCKY

Hon. Allison Emerson Jones, Court of Appeals  
Hon. Joy Kramer, Court of Appeals  
Hon. Irvin G. Maze, Court of Appeals  
Hon. Christopher Shea Nickell, Court of Appeals  
Hon. Kelly Thompson, Court of Appeals

## LOUISIANA

Hon. John Michael Guidry, Court of Appeal  
Hon. Marc E. Johnson, Court of Appeal  
Hon. Edwin Lombard, Court of Appeal  
Hon. J. Michael McDonald, Court of Appeal  
Hon. Ulysses Gene Thibodeaux, Court of Appeal  
Hon. Jewel E. Welch, Jr., Court of Appeal

## MARYLAND

Hon. Andre M. Davis (ret.), City Solicitor of Baltimore  
Hon. Matthew J. Fader, Court of Special Appeals  
Hon. Dan Friedman, Court of Special Appeals  
Hon. Joseph M. Getty, Court of Appeals

## MICHIGAN

Hon. Jane Marie Beckering, Court of Appeals  
Hon. William Murphy, Court of Appeals  
Hon. David H. Sawyer, Court of Appeals

## MINNESOTA

Hon. Carol Ann Hooten, Court of Appeals  
Hon. John Richard Rodenberg, Court of Appeals

## MISSISSIPPI

Hon. Tyree Irving, Court of Appeals  
Hon. James W. Kitchens, Supreme Court

## MISSOURI

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Hon. Mary Hoff, Court of Appeals  
Hon. Karen King Mitchell, Court of Appeals  
Hon. Nancy Steffen Rahmeyer, Court of Appeals  
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Hon. Michael W. Pirtle, Court of Appeals  
Hon. Francie Riedmann, Court of Appeals

## NEVADA

Hon. Michael L. Douglas, Supreme Court

## NEW YORK

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Hon. Jeffrey Kakui Oing, Supreme Court,  
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Hon. Rosalyn Richter, Supreme Court,  
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Hon. Jenny Rivera, Court of Appeals  
Hon. John William Sweeny, Jr., Supreme Court,  
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## **NORTH CAROLINA**

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Hon. Mark Davis, Court of Appeals  
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Hon. Robert Neal Hunter, Jr., Court of Appeals  
Hon. Hunter Murphy, Court of Appeals  
Hon. Donna S. Stroud, Court of Appeals  
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## **NORTH DAKOTA**

Hon. Jerod E. Tufte, Supreme Court

## **OHIO**

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Hon. Jennifer L. Brunner, Court of Appeals  
Hon. Frank Daniel Celebrezze, Jr., Court of Appeals  
Hon. Mary DeGenaro, Supreme Court  
Hon. William Brian Hoffman, Court of Appeals  
Hon. Marie Hoover, Court of Appeals  
Hon. Anita Laster Mays, Court of Appeals  
Hon. Cynthia Westcott Rice, Court of Appeals

## **OKLAHOMA**

Hon. Robert Bell, Court of Civil Appeals  
Hon. Kenneth Buettner, Court of Civil Appeals  
Hon. Jerry Lynn Goodman, Court of Civil Appeals  
Hon. Noma D. Gurich, Supreme Court  
Hon. Kendal Huber Minmier, Oklahoma  
Corporation Commission  
Hon. Paul Thomas Thornbrugh, Court of Civil Appeals

## **OREGON**

Hon. Rex Armstrong, Court of Appeals

## **PENNSYLVANIA**

Hon. Lesa S. Gelb, Luzerne Co. Court of  
Common Pleas

## **SOUTH CAROLINA**

Hon. Donald W. Beatty, Supreme Court  
Hon. John Cannon Few, Supreme Court

## **TEXAS**

Hon. Gina M. Benavides, Court of Appeals  
Hon. Dori Contreras, Court of Appeals  
Hon. David Evans, Court of Appeals  
Hon. Russell Lloyd, Court of Appeals  
Hon. Rebeca C. Martinez, Court of Appeals  
Hon. Greg W. Neeley, Court of Appeals  
Hon. Robert Pemberton, Court of Appeals

## **UTAH**

Hon. Michele M. Christiansen, Court of Appeals  
Hon. David Mortensen, Court of Appeals  
Hon. Gregory K. Orme, Court of Appeals  
Hon. John A. Pearce, Supreme Court

## **VIRGINIA**

Hon. Elizabeth McClanahan, Supreme Court

## **WASHINGTON**

Hon. George B. Fearing, Court of Appeals  
Hon. Susan J. Owens, Supreme Court  
Hon. Laurel H. Siddoway, Court of Appeals

## **WISCONSIN**

Hon. Joan F. Kessler, Court of Appeals

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## About the Pound Civil Justice Institute

The Pound Institute is a legal think tank, supported by member Fellows, dedicated to the cause of promoting access to the civil justice system through its programs and publications. Since 1956, the Institute has promoted open, ongoing dialogue among the academic, judicial, and legal communities on issues critical to protecting the right to trial by jury. To bring positive change to American jurisprudence, Pound promotes and organizes:

**Annual Forum for State Appellate Court Judges**—Since 1992, Pound’s annual Judges Forum has brought together state appellate judges, legal scholars, attorneys, and policymakers to discuss major issues affecting the U.S. civil justice system. Lauded by attending judges as “one of the best seminars available to jurists in the country,” the Forum is unique in its mission to educate state judiciaries on the role of the civil justice system in protecting citizens’ rights. Our 2018 Forum, *State Court Protection of Individual Constitutional Rights*, took place on July 7 in Denver.

**Academic Symposia**—The Institute holds periodic Academic Symposia in conjunction with the nation’s law schools in an effort to produce new empirical research supportive of the civil justice system. The academic papers prepared for the symposia are published in the co-sponsoring law schools’ Law Reviews. Recent symposia include *The “War” on the Civil Justice System*, with Emory Law 2015; *The Demise of the Grand Bargain* with Rutgers and Northeastern 2016; and *The Jury Trial And Remedy Guarantees* with Oregon Law Review and the Oregon Jury Project 2017.

**Appellate Advocacy Award**—This award recognizes excellence in appellate advocacy in America, and is given to legal practitioners who have been instrumental in securing a final appellate court decision with significant impact on the right to trial by jury, public health and safety, consumer rights, civil rights, and access to civil justice.

**Civil Justice Scholarship Award**— This award for legal academics recognizes current scholarly research and writing focused on the U.S. civil justice system, including access to and the benefits of the civil justice system, and the right to trial by jury in civil cases.

**Howard Twigg Memorial Lecture on Legal Professionalism**—Founded in 2010 to honor former Pound President Howard Twigg, this annual lecture series is held during the AAJ Annual Convention to educate attorneys on legal ethics and professionalism. The 2018 lecture was delivered by Andre M. Davis, City Solicitor of Baltimore, and addressed the topic of bias in jury deliberation.

**Papers of the Pound Institute**—Pound has an expansive library of research resulting from its Judges Forums, Warren Conferences, research grants, Academic Symposia, Roundtable discussions, and other sources. This research, Papers of the Pound Civil Justice Institute, is available via Pound’s website. Pound Fellows receive complimentary copies of Pound’s publications.

**Alliance with Academics** —The Institute has developed strong relationships within the legal academic community. Currently, 51 Academic Fellows keep Pound abreast of emerging legal trends.

**Pound Fellows**—Attorneys who care about preserving the civil justice system are invited to join Pound’s important dialogue with judges and legal academics by becoming a Pound Fellow. We offer several affordable, tax-deductible membership levels, with monthly options available.

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# Papers of the Pound Civil Justice Institute

## Reports of the Annual Forums for State Appellate Court Judges

(All Forum Reports or academic papers are available for download at [www.poundinstitute.org](http://www.poundinstitute.org).)

### 2018 • STATE COURT PROTECTION OF INDIVIDUAL CONSTITUTIONAL RIGHTS

Robert F. Williams, Rutgers Law School, *State Constitutional Protection of Civil Litigation*

Justin L. Long, Wayne State University School of Law, *State Constitutional Structures Affect Access to Civil Justice*

### 2017 • JURISDICTION: DEFINING STATE COURTS' AUTHORITY

Simona Grossi, Loyola Law School, Los Angeles, *Personal Jurisdiction: Origins, Principles, and Practice*

Adam Steinman, The University of Alabama School of Law, *State Court Jurisdiction in the 21st Century*

### 2016 • WHO WILL WRITE YOUR RULES—YOUR STATE COURT OR THE FEDERAL JUDICIARY?

Stephen B. Burbank, University of Pennsylvania Law School and Sean Farhang, University of California, Berkeley, School of Law, *Rulemaking and the Counterrevolution Against Federal Litigation: Discovery*

Stephen Subrin, Northeastern University School of Law and Thomas Main, University of Nevada, Las Vegas, Boyd College of Law, *Should State Courts Follow the Federal System in Court Rulemaking and Procedural Practice?*

### 2015 • JUDICIAL TRANSPARENCY AND THE RULE OF LAW

Judith Resnik, Yale Law School, *Contracting Transparency: Public Courts, Privatizing Processes, and Democratic Practices*

Nancy Marder, IIT Chicago-Kent College of Law, *Judicial Transparency in the Twenty-First Century*

### 2014 • FORCED ARBITRATION AND THE FATE OF THE 7TH AMENDMENT: THE CORE OF AMERICA'S LEGAL SYSTEM AT STAKE?

Myriam Gilles, Cardozo Law School, Yeshiva University, *The Demise of Deterrence: Mandatory Arbitration and the "Litigation Reform" Movement*

Richard Frankel, Drexel University School of Law, *State Court Authority Regarding Forced Arbitration After Concepcion*

### 2013 • THE WAR ON THE JUDICIARY: CAN INDEPENDENT JUDGING SURVIVE?

Charles Geyh, Indiana University Maurer School of Law, *The Political Transformation of the American Judiciary*

Amanda Frost, American University, Washington College of Law, *Honoring Your Oath in Political Times*

### 2012 • JUSTICE ISN'T FREE: THE COURT FUNDING CRISIS AND ITS REMEDIES

John T. Broderick, University of New Hampshire School of Law, and Lawrence Friedman, New England School of Law, *State Courts and Public Justice: New Challenges, New Choices*

J. Clark Kelso, McGeorge School of Law, *Strategies for Responding to the Budget Crisis: From Leverage to Leadership*

### 2011 • THE JURY TRIAL IMPLOSION: THE DECLINE OF TRIAL BY JURY AND ITS SIGNIFICANCE FOR APPELLATE COURTS

Marc Galanter, University of Wisconsin Law School, and Angela Frozena, *The Continuing Decline of Civil Trials in American Courts*

Stephan Landsman, DePaul University College of Law, *The Impact of the Vanishing Jury Trial on Participatory Democracy*

Hon. William G. Young, Massachusetts District Court, *Federal Courts Nurturing Democracy*

### 2010 • BACK TO THE FUTURE: PLEADING AGAIN IN THE AGE OF DICKENS?

A. Benjamin Spencer, Washington and Lee University School of Law, *Pleading in State Courts after Twombly and Iqbal*

Stephen B. Burbank, University of Pennsylvania Law School, *Pleading, Access to Justice, and the Distribution of Power*

### 2009 • PREEMPTION: WILL TRADITIONAL STATE AUTHORITY SURVIVE?

Mary J. Davis, University of Kentucky College of Law, *Is the "Presumption against Preemption" Still Valid?*

Thomas O. McGarity, University of Texas School of Law, *When Does State Law Trigger Preemption Issues?*

### 2008 • SUMMARY JUDGMENT ON THE RISE: IS JUSTICE FALLING?

Arthur R. Miller, New York University School of Law, *The Ascent of Summary Judgment and Its Consequences for State Courts and State Law*

Georgene M. Vairo, Loyola Law School, Los Angeles, *Defending against Summary Justice: The Role of the Appellate Courts*

## **2007 • THE LEAST DANGEROUS BUT MOST VULNERABLE BRANCH: JUDICIAL INDEPENDENCE AND THE RIGHTS OF CITIZENS**

Penny J. White, University of Tennessee College of Law, *Judicial Independence in the Aftermath of Republican Party of Minnesota v. White*

Sherrilyn Ifill, University of Maryland School of Law, *Rebuilding and Strengthening Support for an Independent Judiciary*

## **2006 • THE WHOLE TRUTH? EXPERTS, EVIDENCE, AND THE BLINDFOLDING OF THE JURY**

Joseph Sanders, University of Houston Law Center, *Daubert, Frye, and the States: Thoughts on the Choice of a Standard*

Nicole Waters, National Center for State Courts, *Standing Guard at the Jury's Gate: Daubert's Impact on the State Courts*

## **2005 • THE RULE(S) OF LAW: ELECTRONIC DISCOVERY AND THE CHALLENGE OF RULEMAKING IN THE STATE COURTS**

Discussions include state court approaches to rule making, legislative encroachments into that judicial power, the impact of federal rules on state court rules, how state courts can and have adapted to the use of electronic information, whether there should be differences in handling the discovery of electronic information versus traditional files, and whether state courts should adopt new proposed federal rules on e-discovery.

## **2004 • STILL COEQUAL? STATE COURTS, LEGISLATURES, AND THE SEPARATION OF POWERS**

Discussions include state court responses to legislative encroachment, deference state courts should give legislative findings, the relationship between state courts and legislatures, judicial approaches to separation of powers issues, the funding of the courts, the decline of lawyers in legislatures, the role of courts and judges in democracy, and how protecting judicial power can protect citizen rights.

## **2003 • THE PRIVATIZATION OF JUSTICE? MANDATORY ARBITRATION AND THE STATE COURTS**

Discussions include the growing rise of binding arbitration clauses in contracts, preemption of state law via the Federal Arbitration Act (FAA), standards for judging the waiver of the right to trial by jury, the supposed national policy favoring arbitration, and resisting the FAA's encroachment on state law.

## **2002 • STATE COURTS AND FEDERAL AUTHORITY: A THREAT TO JUDICIAL INDEPENDENCE?**

Discussions include efforts by federal and state courts to usurp the power of state court through removal, preemption, etc., the ability of state courts to handle class actions and other complex litigation, the constitutional authority of state courts, and the relationship between state courts and legislatures and federal courts.

## **2001 • THE JURY AS FACT FINDER AND COMMUNITY PRESENCE IN CIVIL JUSTICE**

Discussions include the behavior and reliability of juries, empirical studies of juries, efforts to blindfold the jury, the history of the civil jury in Britain and America, the treatment of juries by appellate courts, how juries judge cases in comparison to other fact-finders, and possible future approaches to trial by jury in the United States.

## **2000 • OPEN COURTS WITH SEALED FILES: SECRECY'S IMPACT ON AMERICAN JUSTICE**

Discussions include the effects of secrecy on the rights of individuals, the forms that secrecy takes in the courts, ethical issues affecting lawyers agreeing to secret settlements, the role of the news media in the debate over secrecy, the tension between confidentiality proponents and public access advocates, and the approaches taken by various judges when confronted with secrecy requests.

## **1999 • CONTROVERSIES SURROUNDING DISCOVERY AND ITS EFFECT ON THE COURTS**

Discussions include the existing empirical research on the operation of civil discovery; the contrast between the research findings and the myths about discovery that have circulated; and whether or not the recent changes to the federal courts' discovery rules advance the purpose of discovery.

## **1998 • ASSAULTS ON THE JUDICIARY: ATTACKING THE "GREAT BULWARK OF PUBLIC LIBERTY"**

Discussions include threats to judicial independence through politically motivated attacks on the courts and on individual judges as well as through legislative action to restrict the courts that may violate constitutional guarantees, and possible responses by judges, judicial institutions, the organized bar, and citizens.

## **1997 • SCIENTIFIC EVIDENCE IN THE COURTS: CONCEPTS AND CONTROVERSIES**

Discussions include the background of the controversy over scientific evidence; issues, assumptions, and models in judging scientific disputes; and the applicability of the *Daubert* decision's "reliability threshold" under state law analogous to Rule 702 of the Federal Rules of Evidence.

## **1996 • POSSIBLE STATE COURT RESPONSES TO AMERICAN LAW INSTITUTE'S PROPOSED RESTATEMENT OF PRODUCTS LIABILITY**

Discussions include the workings of the American Law Institute's (ALI) restatement process; a look at provisions of the proposed restatement on products liability and academic responses to them; the relationship of its proposals to the law of negligence and warranty; and possible judicial responses to suggestions that the ALI's recommendations be adopted by the state courts.

### 1995 • PRESERVING ACCESS TO JUSTICE: EFFECTS ON STATE COURTS OF THE PROPOSED LONG RANGE PLAN FOR FEDERAL COURTS

Discussions include the constitutionality of the federal courts' plan to shift caseloads to state courts without adequate funding support, as well as the impact on access to justice of the proposed plan.

### 1993 • PRESERVING THE INDEPENDENCE OF THE JUDICIARY

Discussions include the impact on judicial independence of judicial selection processes and resources available to the judiciary.

### 1992 • PROTECTING INDIVIDUAL RIGHTS: THE ROLE OF STATE CONSTITUTIONALISM

Discussions include the renewal of state constitutionalism on the issues of privacy, search and seizure, and speech, among others. Also discussed was the role of the trial bar and academics in this renewal.

## Law Reviews from Academic Symposia

### 2017 • THE JURY TRIAL AND REMEDY GUARANTEES: FUNDAMENTAL RIGHTS OR PAPER TIGERS?

Oregon Law Review, Vol. 96, No. 2

### 2016 • THE DEMISE OF THE GRAND BARGAIN: COMPENSATION FOR INJURED WORKERS IN THE 21ST CENTURY

Rutgers University Law Review, Vol. 69, No. 3

### 2015 • THE "WAR" ON THE U.S. CIVIL JUSTICE SYSTEM

Emory Law Journal, Vol. 65, No. 6

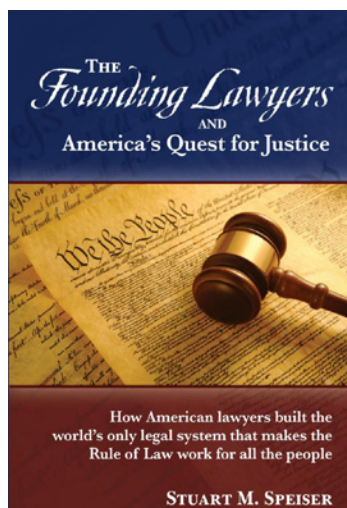
### 2005 • MEDICAL MALPRACTICE

Vanderbilt Law Review, Vol. 59, No. 4

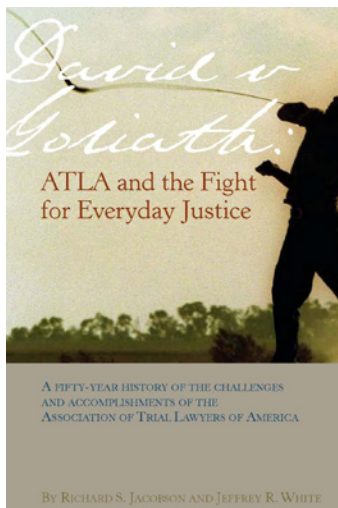
### 2002 • MANDATORY ARBITRATION

Law and Contemporary Problems, Vol. 67, No. 1 & 2, Duke University School of Law

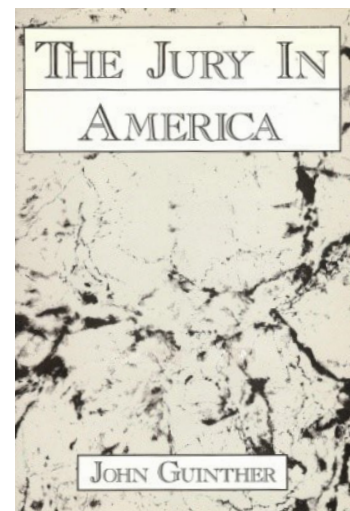
## Books distributed by the Pound Civil Justice Institute



*The Founding Lawyers and America's Quest for Justice*  
by Stuart M. Speiser (2010)



*David v. Goliath: ATLA and the Fight for Everyday Justice*  
by Richard S. Jacobson & Jeffrey R. White (2004)  
(Free viewing and downloading at [www.poundinstitute.org](http://www.poundinstitute.org).)



*The Jury In America*  
by John Guinther (1988)



## Reports of the Chief Justice Earl Warren Conferences on Advocacy

- |                                                           |                                               |
|-----------------------------------------------------------|-----------------------------------------------|
| 1989 • MEDICAL QUALITY AND THE LAW                        | 1979 • THE COURTS: THE PENDULUM OF FEDERALISM |
| 1986 • THE AMERICAN CIVIL JURY                            | 1978 • ETHICS AND ADVOCACY                    |
| 1985 • DISPUTE RESOLUTION DEVICES IN A DEMOCRATIC SOCIETY | 1977 • THE AMERICAN JURY SYSTEM               |
| 1984 • PRODUCT SAFETY IN AMERICA                          | 1976 • TRIAL ADVOCACY AS A SPECIALTY          |
| 1983 • THE COURTS: SEPARATION OF POWERS                   | 1975 • THE POWERS OF THE PRESIDENCY           |
| 1982 • ETHICS AND GOVERNMENT                              | 1974 • PRIVACY IN A FREE SOCIETY              |
| 1981 • CHURCH, STATE, AND POLITICS                        | 1973 • THE FIRST AMENDMENT AND THE NEWS MEDIA |
| 1980 • THE PENALTY OF DEATH                               | 1972 • A PROGRAM FOR PRISON REFORM            |

## Reports of Roundtable Discussions

### 1993 • JUSTICE DENIED: UNDERFUNDING OF THE COURTS

Report on the 1993 Roundtable, examining the issues surrounding the current funding crisis in American courts, including the role of the government and public perception of the justice system, and the effects of increased crime and drug reform efforts. Moderated by Chief Justice Rosemary Barkett of the Florida Supreme Court.

### 1991 • SAFETY OF THE BLOOD SUPPLY

Report on the Spring 1991 Roundtable, written by Robert E. Stein, a Washington, DC, attorney and an adjunct professor at Georgetown University Law Center. The report covers topics such as testing for the presence of HIV and litigation involving blood products and blood banks.

### 1990 • INJURY PREVENTION IN AMERICA

Report on the 1990 Roundtables, written by Anne Grant, lawyer and former editor of Everyday Law and TRIAL magazines. Topics include “Farm Safety in America,” “Industrial Safety: Preventing Injuries in the Workplace,” and “Industrial Diseases in America.”

### 1988-89 • HEALTH CARE AND THE LAW III

Report on the 1988–1989 Roundtables, written by health policy specialist Michael E. Carbine. Topics include “Drugs, Medical Devices and Risk: Recommendations for an Ongoing Dialogue,” “Health Care Providers and the New Questions of Life and Death,” and “Medical Providers and the New Era of Assessment and Accountability.”

### 1988 • HEALTH CARE AND THE LAW

Report on the 1988 Roundtables, written by health policy specialist Michael E. Carbine. Topics include “Hospitals and AIDS: The Legal Issues,” “Medicine, Liability and the Law: Expanding the Dialogue,” and “Developing Flexible Dispute Resolution Mechanisms for the Health Care Field.”

### 1988 • HEALTH CARE AND THE LAW II—POUND FELLOWS FORUM

Report on the 1988 Pound Fellows Forum, “Patients, Doctors, Lawyers and Juries,” written by John Guinther, award-winning author of *The Jury in America*. The Forum was held at the Association of Trial Lawyers Annual Convention in Kansas City and was moderated by Professor Arthur Miller of Harvard Law School.



## Research Monographs

**Demystifying Punitive Damages in Products Liability Cases: A Survey of a Quarter Century of Trial Verdicts.** This landmark study, written by Professor Michael Rustad of Suffolk University Law School with a grant from the Pound Foundation, traces the pattern of punitive damages awards in U.S. products cases. It tracks all traceable punitive damages verdicts in products liability litigation for a quarter century and provides empirical data on the relationship between amounts awarded and those actually received.

**The Pound Connective Tissue Injury Research Project: Final Report, by Valerie P. Hans, Ph.D.** Each year, automobile accidents account for a substantial number of deaths and other personal injuries nationwide. Lawsuits over injuries suffered in auto accidents constitute the most frequent type of tort case in the state courts. The Pound Institute supported a series of research studies on the public's views of whiplash and other types of soft tissue and connective tissue injuries within the context of civil lawsuits. The 2007 final report presents and integrates key research findings and identifies some of their implications for trial practice.

## The American Lawyer's Code of Conduct

## Pound's Civil Justice Digest



A quarterly newsletter on current and emerging legal trends. Distributed 1994-2003 to judges, law school professors, and attorneys. Back issues available at [www.poundinstitute.org](http://www.poundinstitute.org).

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