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The State

THESE ARE INTERESTING TIMES FOR THE JUDICIARY. TACKLING QUESTIONS OF JUDICIAL INDEPENDENCE, THE BALANCE OF POWERS, JUDICIAL SELECTION METHODS AND MORE, A PANEL OF DUKE LAW FACULTY AND ALUMNI JUDGES JOINED DEAN DAVID F. LEVI AT DUKE LAW SCHOOL RECENTLY TO DISCUSS THE STATE OF THE JUDICIARY. HERE'S WHAT THEY HAD TO SAY.

A time for wisdom



Our topic is “the state of the judiciary,” which could encompass a huge amount of territory. The topic is not self-defining. We can look at the judiciary from many points of view — its independence, selection process, efficacy, quality, institutional support, reputation, and so forth. There are also many judiciaries, federal and state, and also local and administrative judges who are sometimes members of the executive branch of government.

How should we think about the topic, and in what respects should we be concerned about the health of our judiciary, so critical to what we conceive of as the rule of law? Here we have a terrific panel of Duke faculty and alumni who are thinking about these issues every day. Each of their short discussions briefly and cogently expresses deep thoughtfulness, the result of years of study and practice. **Professor Maggie Lemos** discusses judicial independence and introduces us to the concepts of decisional independence and institutional independence. She then asks the provocative questions: How can we measure judicial independence, and how would we know when it is threatened?



of the Judiciary

Professor H. Jefferson Powell looks at the state of the judiciary from the point of view of an executive branch lawyer. This perspective yields rich insights into the functioning of the courts, particularly the United States Courts of Appeals.

Judge Carolyn Kuhl offers reflections from the point of view of a distinguished trial judge in California, much admired for her handling of complex civil cases. Judge Kuhl notes that judges are accustomed to criticism and do not cower before it. However, in a moving plea, she discusses the institutional threat posed when law enforcement officials conduct arrests and dragnet-type operations within state courthouses.

Justice Don Willett of the Texas Supreme Court gives us a lively review of the state election and selection processes for judges, noting that the perfect system has not yet been implemented, let alone conceived. He also reviews the wide variation in resources among the state courts. Our different systems are so varied that it is hard to generalize about our judiciaries.

Finally, Professor Ernest Young takes us right into the heart of current controversies involving the federal courts and the sometimes harsh criticism of the courts and individual judges from the two political branches. He discusses three questions: Whether this level of criticism of the federal courts is unusual, historically speaking? Is it a bad thing to have criticism of the federal courts? And what is the role of judges themselves, and of the academy, in creating the climate in which criticism is flourishing?

There is a story about an English judge who is said to have expressed frustration at the close of an oral argument: “Counsel, you have been going on at some great length, and I am no wiser now than when you began.” And in that great English tradition of wit and defiance, counsel replied: “No wiser, my lord, but better informed, perhaps.” And so while our discussants agree it is not possible to sum up the “state of the judiciary” in a single grade or measurement, our thinking is much enriched. We are both wiser and better informed.

— DAVID F. LEVI, *Dean and Professor of Law, Duke Law School* ▶

The legal literature on judicial independence tends to draw a distinction between two kinds of judicial independence. One is decisional independence, and the other is institutional.¹ Another way of describing this distinction is to think about the difference between the independence of an individual judge and the independence of the judiciary as a whole. When most people talk about judicial independence they mean the first kind — the decisional independence kind. And they mean something like the idea that judges should be able to decide cases impartially, “without fear or favor”² based on the particular facts presented in the case and the judge’s own best understanding of the law.

Justice Sandra Day O’Connor had this to say about judicial independence recently, referring to decisional independence:

“Judicial independence is the vital mechanism that empowers judges to make decisions that may be unpopular but not less correct. In so doing, the judiciary vindicates the principle that no person or

group, however powerful, is above the law, and it gives life to the promise that the rule of law safeguards the minority from the tyranny of the majority.”³ For most observers, this kind of independence is indispensable in a constitutional democracy. At the federal level, of course, it’s secured by constitutional provisions that give Article III judges life tenure during good behavior, and a guaranteed salary.

But even if we keep our focus on the federal government, where judicial independence seems so strong, if we look at institutional independence we will find quite quickly that the judiciary as a whole is hugely dependent on the political branches. The Constitution gives Congress the power to create lower federal courts or to decline to create them, to fund those courts, to regulate their jurisdiction, to make and adjust rules of procedure that govern what happens in those courts, to create alternate court systems under Articles I and IV, to impeach judges, to override nonconstitutional decisions. The President, for his part, has the power to appoint judges, and to enforce — or maybe not fully enforce — judicial orders. And political actors also can play an important role in shaping public opinion about the courts in terms of mobilizing support from the courts or mobilizing opposition to the courts.

One question that we might ask about judicial independence is which kind is more important — decisional or institutional? Or, which is the bigger threat — attacks on individual judges or more general efforts to weaken the power of the judiciary as a whole?

The former tends to get more attention; attacks on individual judges get a lot of press, and they certainly are cause for concern. But it may be the case that the larger threat to judicial independence is the slow chipping away of judicial power and institutional capacity: things like shunting cases out of the

courts and into administrative tribunals, facilitating or encouraging private arbitration as an alternative to litigation in court, changing court procedures so that it’s difficult for certain types of claimants to make use of the courts, failing to nominate judges so that the courts don’t have the people they need to do their jobs, being stingy with budgets, or half-hearted enforcement of judicial orders. Those kinds of measures tend to fly below the radar, and any one on its own might not seem like a critical threat to the independence of the judiciary. It’s only by looking at the combined effect that one might start to get worried.

But that then brings me to the last question that I want to flag, which is probably the hardest one: How would we know if we should be worried? How can we measure judicial independence (of either variety), or identify actions that could be real threats?

There are a number of different approaches to this last question in the literature on judicial independence, none entirely satisfactory. One approach, which is common in comparative assessments of judicial independence across nations, is just to focus on formal structural rules that govern the interaction between the judiciary and the political branches. If we took that approach within the United States, we’d look at constitutional provisions and probably would conclude that federal judges are quite independent, at least in the sense of decisional independence, given the protections that I mentioned earlier. We might worry a lot about state judges, most of whom are elected and, maybe more importantly, almost all of whom face some sort of retention moment, whether it’s reconfirmation by the governor or legislature, or reelection or retention election. If we were just looking at formal provisions, we might conclude that that federal judges are terribly independent and state judges not at all.

But that’s not very satisfying. We know that state judges can in fact be quite independent, and that we might have reason to worry about the independence of federal judges, notwithstanding these formal provisions. So a second approach is to look at what the political branches are doing vis-à-vis the courts, to try to identify actions that appear to be threats. In one sense that’s pretty easy to do, because the acts or omissions that we’re interested in are things we can observe. We can read the President’s tweets; we can see what sort of legislation is being proposed or passed in Congress. What we can’t know, though, is how that’s affecting the judiciary, or affecting individual judges — and at the end of the day that might be what we really want to know.

Part of the challenge here is that, particularly if we’re talking about institutional independence, we run quickly into a really difficult baseline question. Institutional dependence of the courts is not necessarily a four-letter word. It is just a fact in our system that the courts need the political branches in order to do their jobs effectively. In order to assess whether, for example, particular regulations coming from Congress constitute a permissible or impermissible effort to regulate the courts, we would have to get some sense of magnitude, a sense of how much is too much. Or, maybe we would need to get a sense of motivation; we might want to distinguish between actions that are

A time for concern?

motivated by some sort of good-governance norm as opposed to actions that are motivated by a desire to change how judges are deciding individual cases. None of those questions is going to be easy to answer.

A final approach to measuring judicial independence is to look at what judges themselves are doing and to try to identify indicia of independent decision-making or its absence. But that, too, is no easy task. Suppose we look at the Supreme Court over five years, and we find that the Court has ruled against the government in some significant proportion of cases in which the government was a party. Could we conclude that judicial independence is thriving and that the Court is in no way cowed by threats from the political branches? No, of course not. The Court may be ruling against the government only in cases that it knows aren't very important. Or the Court may simply be declining to take cases that would prove to be controversial. At the extreme, in a system with a really weak judiciary, litigants may not even bother bringing cases that would involve a clash between the judiciary and the government.

On the other side, suppose we see what appears to be a clear threat to an individual judge and then we see that judge back down. What can we deduce from that? One semi-recent example involves Judge Harold Baer of the Southern District of New York, who in 1996 decided a case called *United States v. Bayless*,⁴ which proved to be very controversial. It was a criminal case involving the apparent trafficking of a great deal of heroin. Judge Baer ruled against the government on a suppression motion, excluding almost all of the drug evidence on the ground that the police hadn't had reasonable suspicion to make the stop that led to the arrest and the search that revealed the drugs. In the course of his opinion he also included some pointed language about possible corruption by the NYPD and the public's perception of the police. He then faced a firestorm of criticism in the press and from political actors. Republican members of Congress wrote President-elect Clinton a letter calling for Judge Baer to be impeached or to step down. It was an election year, and both President Clinton and Senator Bob Dole, who was his opponent, made statements in the press implying that maybe Judge Baer should change his mind or resign, or that maybe impeachment should be on the table. When Clinton's press secretary was asked whether the President would ask for Judge Baer's resignation, he told reporters that the White House was "interested in seeing how [Baer] rules" on reconsideration.⁵ Maybe not surprisingly, that was interpreted in the media as a thinly veiled threat to Judge Baer. And, indeed, Judge Baer granted the government's motion for reconsideration, heard new evidence on the suppression motion, and ended up reversing himself. The defendant eventually was convicted and went to jail for a long time.

So, is that evidence of a judge caving in the face of political pressure? Or did Judge Baer sincerely change his mind in the face of new evidence? It's almost impossible to answer that question from the outside. It might even be impossible for Judge Baer to answer that question if we could ask him.

What this suggests, other than pessimism about our ability to measure independence and threats to independence, is that we probably need to put together all of these different kinds of measures and look at formal provisions alongside actions by political officials and institutions, as well as what we see happening with judges. We'd probably also want to include some sense of public opinion or public support for the courts, because political reprisals are not going to carry nearly as much heft if they're not backed by the public.

If we look at public opinion, we find ourselves in a good news/bad news situation: Efforts to measure the public's confidence in the courts, or the Supreme Court specifically, suggest that the public has a fairly high level of confidence in the Court as compared to Congress. The number of respondents reporting a high level of confidence in the Supreme Court has hovered around 30 percent since the 1970s. That number has sunk in the last decade, going down from 35 percent to a low of 23 percent in 2014, although it's now coming back up. Even with the decline, though, it's still a lot higher than confidence levels in Congress and the President, which are about six and ten percent now, respectively. So that might feel like good news for the courts.

There is still a reason to worry, though, that our rather toxic political environment might spill over to how the public feels about the courts. Studies of state court systems, which have different methods of selecting judges, suggest that the more political the judicial-selection system, the lower the public's sense of the legitimacy of the courts. Public confidence in the courts tends to be lower in states with partisan judicial elections than in other kinds of selection systems.⁶ When the public hears about judges accepting campaign contributions or being subjected to or using attack ads, public support for and confidence in the courts diminishes.⁷ That gives us some reason to worry, I think, that what's going on elsewhere in our political system may have negative consequences for how the public thinks about other government officials and institutions, including judges and courts.

— MARGARET H. LEMOS, *Robert G. Seaks LL.B. '34*
Professor of Law, Duke University ▶

THERE IS STILL A REASON TO WORRY, THOUGH, THAT OUR RATHER TOXIC POLITICAL ENVIRONMENT MIGHT SPILL OVER TO HOW THE PUBLIC FEELS ABOUT THE COURTS.



I want to talk about the state of the judiciary, and specifically the state of the federal courts, from a different perspective: the perspective of an executive branch legal advisor, a role I've had the privilege of serving in for two administrations. But I first need to say a word about what that role is.

When I was working on my first book on the matter, I gave part of it to a friend to read and when he came back to me he said, "Well, it's sort of interesting, but none of this is law," by which he meant — being a little bit too polite to say it bluntly — "What legal 'advisors' *really* do is write the rough draft of the propaganda that is going to be put out in defense of whatever the administration's policymakers decide, isn't it?"

A time for clarity

Although of course sometimes people don't do their jobs properly, the answer is no. The answer is also no to an equal and opposite mistake, which is the picture of the executive branch legal advisor as

the little naysaying judge inside the executive. The policymaker wants to do something, and the executive branch lawyer's job is to say "no you can't."

Neither one of these describes, in principle or in practice, the role of the executive branch legal advisor. There is an internal executive branch legal process, but it is not the same as the judicial process. To oversimplify, when the courts decide cases, they are doing things within the central responsibility of the judiciary. That's what courts do; they sit to "do law." And when a court has done so, it has discharged its central function. The executive's central function is not to "do law." It is to execute the acts of Congress and to carry out the president's independent constitutional responsibilities within the bounds of law. And what that means is that when the executive branch legal advisor gives her advice, that's not the end of the story. That's not the point at which the executive has done its job. That's just one of the factors that goes into the ultimate decision.

So I want to put on my executive branch lawyer hat and look at the functioning of the federal judiciary as I see it at the moment. I have three observations. First, on the substance of the law, I think the federal courts, other than the Supreme Court, are doing, generally speaking, an extremely good job in ways that merit public trust, because their decisions and their opinions explaining their decisions generally display clarity in judgment and professional rigor in their reasoning, and on important and contested issues, the judges are displaying that kind of commitment to independent judgment that is a crucial component of judicial independence.

Here are a couple of examples. Just this past Tuesday [April 4, 2017], the Seventh Circuit, sitting en banc, decided a case titled *Hively v. Ivy Tech Community College*, on the application of Title VII to a claim of sexual orientation discrimination. The Seventh

Circuit was badly divided; in fact there was not just a dissent, but four opinions. Each of these opinions was a model of independent, rigorous, and admirable judicial thinking. The basic underlying issue, even broader than the important one that was officially before the court, is: What are sound methods of statutory construction? Each of the four opinions gave a clear and principled statement of the judge's views on that important issue, and then did an admirable job of applying that particular judge's views to the question before the court. *Hively* is a wonderful example of a court handling a very difficult question that has a big meta-question underneath it, and doing both in ways that I admire.

A second example, more briefly: *Chevron* deference, for decades a central feature of judicial review of administrative interpretation of statutes, is a matter about which I think it's fair to say the federal judges have begun a lively debate. That seems to me to be a great example of an important issue on which people disagree, and it's a debate in which the federal courts of appeals and district judges are playing a valuable role.

The reason this positive observation about the state of the judiciary leaps out to me, wearing my executive branch lawyer hat, is that in the role of a legal advisor to executive branch policymakers, what I want most of all from the courts is not that they agree with my personal views, or even that they take the position that is most favorable to the executive's own institutional interests, but that the judiciary give statements of the law that are clear, carefully reasoned, and free of inappropriate political or ideological coloration.

Why do I need that in particular as an executive branch lawyer? Because in that role of giving advice to policymakers, I am giving advice that should be principled, in a context that by definition is political and ideological. The executive is a political branch, that's what it's supposed to be. But the more that the judges do their job in ways that are independent of politics and ideology, the more able I am to do my different lawyer's job in a political and ideological context.

My second observation, wearing my executive branch lawyer hat, is that I think the federal courts make far too much use of their tools for avoiding decisions on the merits. Standing is probably the most common means, but there are others I have in mind as well. When the courts avoid reaching the merits and making a substantive decision on an issue that affects the executive branch, the immediate effects for policymakers are almost always good. The long-term effects on the executive branch's decision-making process, which includes law, are almost always bad. That is in part because policymakers, like nonlawyers, often find it very hard to distinguish a decision like "Well, the plaintiff didn't have standing," from a decision like "There's just no law there; the law is irrelevant." That's quite different from where the court reaches the merits and gives a decision, even if the court defers very substantially to the executive's decision and rules for the executive.

In that second context, it's clear there is law, and when I as an executive branch legal advisor am trying to provide sound legal

advice to my clients, to the policymakers that I'm advising — when the courts have reached the merits and said something, I have something to work with from the judiciary. When the judiciary avoids decisions, I am left with what may well seem to my policymaking superiors to be just my view.

My third observation, wearing my executive branch legal advisor hat, is that in a number of recent decisions, federal courts of appeals judges are showing that they are being influenced, understandably but unfortunately, by the bad example of the Supreme Court with respect to writing opinions. The Supreme Court's members have, for many decades, been under the unfortunate, mistaken impression that a judicial opinion should be a personal opinion: "It's what I think. And since I think what I think, I'm going to go ahead and tell you." That's not the proper role of a judicial opinion. It is — or should be — an institutional statement, even if it is a separate opinion.

The result of thinking "well, an opinion is just my opinion and therefore I will tell you" is a proliferation of unnecessary and unhelpful separate opinions. I'm not saying that dissents and concurrences are illegitimate. When they advance the institution's and the entire profession's understanding of the legal issue, they are profoundly beneficial. All four of the opinions in this recent Seventh Circuit case do that. They are useful; I admire the judges not just for the craftsmanship, but for the decision to write and file the opinions. But when a separate opinion primar-

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ily serves the writer's personal interest in telling us what he or she thinks, I think the judge should think twice before filing it. At the moment, I think the Supreme Court is a lost cause, but if Court of Appeals judges model good opinion writing behavior, perhaps even the justices could be brought around in time.

Why does this particularly strike me from the standpoint of an executive branch lawyer? It's because executive lawyers never have the luxury of just expressing their opinion when they're doing their job right. They don't always do that, of course; there are unfortunate and well-known examples of them failing to do so. But when executive branch legal advisors, in formal advice-giving capacities, render advice, they are always giving advice as an expression of institutional rather than personal

opinion. And when the judges suggest that, well, our opinions are just opinions, this in fact models bad behavior for executive branch lawyers, suggesting to an executive branch lawyer with a particular bee in the bonnet that "just like the judges I can use this opportunity to advance my particular personal views, too." There are some unfortunate examples of this happening in recent years.

So from the particular perspective I've taken, I think that there are good things to be said about how the federal courts are doing and some unfortunate things as well.

— H. JEFFERSON POWELL, *Professor of Law, Duke University*

California's Chief Justice Tani Cantil-Sakauye, in her State of the Judiciary speech to the California Legislature, spoke about what she called unprecedented polarization in our national dialogue about politics and about the courts. She was referring, in part, to decisional independence, as described by Professor Lemos.

I would like to suggest we should be slow to conclude that criticism of the judiciary and criticism of judicial decisionmaking is a significant threat to the Third Branch. Judges for

the most part understand that enduring criticism is part of their job. Trial judges often say that whenever we decide a case we make 50 percent of the people before us unhappy because, after all, someone loses in just about every case we decide. Trial judges are especially aware of the reactions of a losing party or attorney. We often see them again in our court for a subsequent

proceeding or in a subsequent case, and often it's not hard to detect their attitudes.

You may not have noticed this — I don't think the event received much press outside California — but one of the most remarkable political challenges to a judicial decision occurred in the last election. I'm not referring to anything that happened in the presidential race. Last November, California voters were asked to vote on the propriety of a United States Supreme Court constitutional decision. (We always have such interesting ideas in California. I think the rest of the country is better for it because the other states can watch what we do and decide whether it was a good or a bad experiment.) The California Legislature voted to put on the ballot a referendum on a United States Supreme Court decision.

The first thing that happened, of course, was a challenge to the ballot initiative, arguing it was not a proper subject to be put to the voters. That issue went all the way up to the California Supreme Court. The California Supreme Court, including the Chief Justice, ruled that, yes, a referendum on a United States Supreme Court decision was a proper subject for a ballot initiative in the State of California. ▶

*A time for
justice*

The text of the initiative asked voters the following: “Shall California’s elected officials use all of their constitutional authority to overturn *Citizens United v. Federal Election Commission*” — and the voters even were provided the case citation, 558 U.S. 310 (2010). The voters answered “yes,” overwhelmingly. So that was it. The voters said they wanted their Legislature to take up all constitutionally available arms and lead them into battle against the United States Supreme Court’s *Citizens United* case. In the national debate, for the most part, no one noticed. Perhaps nobody noticed because nobody cares what California thinks. But certainly there was not a flurry of op eds or scholarly articles saying that separation of powers or the rule of law was threatened.

I think there’s a serious point here: Perception of the potency of a threat to judicial independence based on criticism of a judicial decision can depend on the extent to which the observer agrees or disagrees with a decision. We have to be careful to check our perception of what actually is a threat to the independence of judicial decision-making. We need to consider whether we are reflecting our own bias as to the correctness of a decision when we worry about politicization of the judiciary based on criticism of judicial decisions.

Turning to institutional independence, in her State of the California Judiciary address, our Chief Justice made a very specific point about what she perceived as a threat to the work of the state courts based on immigration enforcement in state courthouses. As she put it, we should step back and look at why we have checks and balances and recognize what the justice system stands for and what it promises. Our Chief Justice wrote to the Attorney General and to the Secretary of the Department of Homeland Security and asked them to refrain from seizing undocumented individuals within the walls of our state courthouses. The Attorney General wrote back and communicated an unqualified “no” to that request, and, indeed, schooled the Chief Justice on what the Attorney General said was her misuse of the word “stalking.”

I don’t want to get into the political rhetoric about sanctuary states and sanctuary counties and sanctuary cities and sanctuary campuses. But I do want to talk about our state courthouses. They don’t look like federal court. They perform functions that federal courts do not need to perform. State courthouses are places where real people with real problems that can’t be solved anywhere else come to seek justice under law.

If you can envision this in your mind, there is one floor of our largest state courthouse in Los Angeles that to me embodies the needs of the people who come into state courts. On that one floor you can see people waiting outside of our restraining order

THE STATE COURTS HAVE TO BE A FORUM WHERE THE PEOPLE WHO LIVE IN OUR COMMUNITY CAN COME INTO OUR COURTROOMS.



center to seek an order to protect themselves from domestic violence, or violence in their communities or from their neighbors, or violence in their workplace, or from elder abuse. They wait in the hallway outside the courtroom where we do that work. You can see people on that same floor who are old, who sometimes are in wheelchairs. They look confused, and they are in the courthouse for a conservatorship proceeding because their family is arguing about who will take care of them now that they no longer can take care of themselves. And on that same floor of the courthouse you also can see people who are waiting for child custody evaluations, because they are in conflict about who is going to take care of the kids and who will make decisions about the kids in the circumstances of a broken family. Elsewhere in our court we have unlawful detainer courts, which are eviction courts, and we have depen-

gency courts, which adjudicate what happens to children who are living in families where they are being abused, either physically or otherwise, and judges are trying to see to the protection of those children.

There are an estimated one million undocumented persons in Los Angeles and Orange Counties. There are ten million persons in Los Angeles County. Close to one-tenth of our Southern California population arguably is undocumented. The federal government has exclusive authority under the Constitution for enforcement of the immigration laws. Without pointing fingers about what has happened with immigration enforcement over the last ten or 20 years, at the local level we have been left to try to shape a community that incorporates these individuals. We strive for a society where everyone is protected from criminal violence and where children are protected and where we have remedies for sex trafficking and domestic violence and abuse in the workplace.

The state courts have to be a forum where the people who live in our community can come into our courtrooms. We need witnesses to appear for criminal cases. We need a forum for marital disputes and community disputes. We need to protect children from abuse and sex trafficking. If employer sanctions are not being vigorously enforced, then we need to address abuses of people in the workplace.

So in my judgment, this issue concerns the institutional independence of our state courts. I think our Chief Justice was absolutely correct in saying that the federal government should not act to deter any person from coming into our state courthouses. We must back away from an absolutist approach that could decrease rather than increase the safety of our communities.

— CAROLYN B. KUHLE, Judge (and Former Presiding Judge),
Superior Court of California, County of Los Angeles

A time for reform

In the late 19th century, the 19th governor of Texas, Sul Ross, said the loss of public confidence in the judiciary is the greatest curse that can ever befall a nation. Governor Ross presided over the dedication of the majestic Texas Capitol and is also the only Texas governor to convene a special session of the Legislature to deal with budget surplus. And he was right about the distinctive role of the judiciary in our constitutional architecture.

Dean Levi asked me to discuss judicial selection and reform efforts currently percolating around the country. *Judicature* recently published a helpful article that I'm sure you've all scoured and dog-eared. And I'm going to draw a lot of my material from that terrific overview of current state-level reforms. Judicial selection is certainly an issue that implicates judicial independence and public confidence, but it's fair to say the perfect system has proven elusive. I think there are just varying degrees of imperfection — and, I confess, I have not cracked the code. I'm intimately acquainted with all the downsides to my state's partisan-election system. I've gotten very up close and personal with all the drawbacks in the Lone Star State.

Americans are sharply divided — first, about how judges *do* their jobs, but also about how judges *get* their jobs. In Texas, we elect judges on a partisan ballot, and if you were to ask voters — because as Professor Lemos mentioned, partisan elections inspire the least confidence among people — but if you were to ask my fellow Texans, 'Hey, do you suspect that donations drive decisions? Do you suspect that politics seeps in?' they might reply, 'Yeah, I bet it probably does.' And if you were then to follow up, 'So, are you willing to give up your right to elect your judges?' they would probably say, 'Over my dead body.'

There's been substantial activity around the country lately on judicial-selection reform. Historically, reform efforts wax and wane and ebb and flow, but in the last half-decade, there's really been a definite uptick, a lot of proposals and a lot of recent activity. But, strangely, there's no prevailing mood or direction. And again, giving credit where it's due, I'm drawing heavily here from the recent *Judicature* article [William Raftery, *Trends in Judicial Selection Methods*, JUDICATURE, Vol. 100 No. 1, Spring 2016]. States are both adopting and repealing the very same reforms. State A may adopt X as the greatest idea, and State B may rescind or repeal X because they've tried it and don't like it, so they're scrapping it for something new. Most of the reform activity is occurring in states that use a judicial nomination commission for judge picking, which is roughly half the states. There's interest in *amending* that system, and there's also interest in *ending* that system. There are a lot of contentious political fights and tugs of war over who picks the pickers. Who gets to name the members of the nominating commission? How are those members chosen? How many are chosen? What sorts of hard-wired biases are baked into such entities? Are they prone to capture? There are turf battles galore.

Governors are pressing legislatures for more discretion; they want more names on the list, they want a deeper pool, they want

a second list or maybe a third list if they're dissatisfied with the prospects. They want wide-open autonomy. Legislatures are pressing for a greater role, too. It's not enough that the governor picks from a list that legislators may have helped put together; lawmakers want enhanced picking power. And in those states where the appointed judge has a retention election after

they're named, there are proposed reforms to alter the threshold vote required to retain your seat. In every state but two it's a simple majority: You get 50 percent, you survive. In Illinois, it's 60 percent. In New Mexico, it is, of course, 57 percent. Some states are considering boosting the percentage required to keep your seat.

Two states have scrapped their merit-commission system altogether. Kansas did it for the Court of Appeals in 2013; Tennessee did it in 2014, replacing their merit-commission system in favor of a straight-up governor-appoint-and-senate-confirm system. But while some states are *repealing* their merit-commission system, other states like Minnesota and Pennsylvania are considering *adopting* such a system.

Moreover, states that elect judges seem split on the question of partisan versus nonpartisan elections. West Virginia ended partisan elections for all courts in 2015. North Carolina, which had nonpartisan elections, has now adopted partisan elections for appellate courts, and just recently the legislature passed, over the governor's veto, a return to partisan trial court elections.

There is also a lot of activity on how judicial campaigns are being funded around the country and how that impacts recusal. In West Virginia, they've moved to public financing of appellate court races. On the other hand, some states that had public financing, like Wisconsin and North Carolina, are repealing it.

Four states now have mandatory recusal for a set amount of donations; some of these rules are by statute and some are by court rule. In California, they require disqualification if a judge received campaign contributions from a party or an attorney over a certain amount. In Alabama, there's sort of a sliding-scale rebuttable presumption for recusal or disqualification based on the percentage that a judge received. The Wisconsin Supreme Court is debating a rule to create set-amount limits on recusal and disqualification.

Two states today elect judges on a partisan ballot with straight-ticket voting. About nine states have a partisan ballot, but only two of those nine couple that with straight-ticket voting — Alabama and Texas, though Texas lawmakers are poised to scrap straight-ticket voting for *all* races, not just judicial ones. And there's a powerful tendency for party-line voting and for high-profile, executive-branch, top-of-the-ballot races to drive outcomes, to determine victors and victims in down-ballot judicial races. The overwhelming majority of judges in my state are elected, frankly, not so much on their legal qualifications, not so much on their judicial philosophy, not so much on how awesome or awful of a campaign they run, but rather on how their party

performs at the top of the ballot. Judges are swept in and out of office because of these partisan tidal waves. They're just along for the ride, carried along by the grander political current. If their party's having an up year, good for them. If they're having a down year, bad for them. As I mentioned, Texas has a pending bill to eliminate straight-ticket voting, meaning voters could no longer click the straight-ticket option on the voting screen and be done with it. They would physically have to take the time, invest the effort, break the sweat, go down their ballot line by line, and vote for judges individually. *{Editor's note: The Texas bill to eliminate straight-ticket voting was signed into law on June 1, 2017, leaving Alabama as the only state that marries partisan judicial elections with straight-ticket voting.}*

There is another piece of interesting judicial-selection news in Texas: Last summer, 2016, a Voting Rights Act lawsuit was filed challenging the at-large, statewide method of electing Texas high-court judges. In Texas, high court judges run border to border, 254 counties and a couple of time zones. The claim in the lawsuit is that because judges are elected statewide, minorities don't have a fair shot at electing candidates of their choice, and the plaintiffs are proposing that we move to a system where high court jurists are elected by districts, as in some other states.

That's the lay of the land in terms of judicial selection reform.

Dean Levi also asked me to tackle court funding. In terms of resources and how courts are funded, here, too, I will draw heavily from a recent article in *Judicature* [Roundtable discussion, *Money or Justice? How Fees and Fines Have Contributed to Deep Distrust of the Courts — And What Chief Judges Are Doing About It*, JUDICATURE, Vol. 100 No. 4, Winter 2016.]. In Texas, the judiciary gets a whopping one-third of one percent of the state budget. *The judicial branch of government gets roughly one-third of one percent of the state budget.* I'm told we're still flush compared with judiciaries in other states like California and North Carolina. The recession from almost a decade ago is over, but there is an overall sense that many state courts are still feeling the impact. There are still court closures and furloughs taking place or planned for the next fiscal year in states like Alaska, Iowa, and New Mexico. The Connecticut judiciary has endured some large-scale layoffs. In Kansas, many trial court employees have reported needing to take a second job in order to make ends meet.

As noted in *Judicature*, people perceive the courts as being flush with cash, maybe because courts take in fees and fines and costs, which I think skyrocketed during the financial downturn as courts became looked upon as a revenue-generating center by state and local governments. But the public doesn't really grasp how little of that money stays within the judiciary.

Technology is helping a bit, but technology often requires a big outlay on the front end. You have savings down the road over time, but the big up-front cost is often too daunting for lawmakers to swallow. But people want court technology. There was a survey last year that said only 39 percent of Americans view courts as innovative — 39 percent! That was down about six points from just one year before. Many states are moving to e-filing and

e-docketing systems, but for the most part, those are local options, where County A might have a robust e-filing system, but County B next door might have nothing. There is a big ongoing debate about the impact that access to online court records might have on individuals. In criminal cases, for example, should a defendant's case or docket information be put online at the time of arrest, or at the time of docket-

ing as it is in most jurisdictions? Or maybe only upon conviction — which is how it is in New Jersey? If a person is found not guilty, should the info be pulled from the court's online system? Alaska passed a law last year requiring that, and a lot of other states have debated it. What about family cases? What about cases involving minors?

There's also the tension between having a uniform border-to-border statewide system versus lots of little bitty discrete county-level systems, similar to the localized e-filing and e-docketing systems. States are debating whether to end the practice of individual county case management and other e-systems in favor of a statewide system that serves all courts. And then how is it all going to be paid for? By a court technology fee on all cases? Or more kind of pay-per-view model, like PACER, where you view a document and you pay a fee?

As you can see, debates over both judicial selection and judicial resources are high stakes and high-spirited.

— DON R. WILLET, Justice, Texas Supreme Court

THE RECESSION FROM ALMOST A DECADE AGO IS OVER, BUT THERE IS AN OVERALL SENSE THAT MANY STATE COURTS ARE STILL FEELING THE IMPACT.



A time to reflect

I'm going to take us back to the more general questions raised by public criticism of the decisions, role, and authority of the federal courts. President Trump has been quite critical of certain judicial decisions, particularly those involving his controversial travel bans. I want to ask three things about this current round of public actors criticizing federal courts: One, is this level of criticism of the federal courts unusual, historically speaking? Second, is it a bad thing to have criticism of the federal courts? And then third, what is the role of judges themselves, and of the academy, in creating the climate in which criticism is flourishing?

My Con Law students always seem to think that the sky is falling, and that this is the most contentious and polarized and awful age that we've ever lived in. So I love telling them about the early Republic, because if you think things are bad now, just imagine what the people in the early Republic had to go through. When the Jeffersonian party came in after the election of 1800 and the Federalists retreated into the judiciary — which they'd appointed all of, mind you — the Jeffersonians did a little more than criticize. They refused to honor certain appointments that hadn't been finalized, like Mr. Marbury's.⁸ They eliminated a lot of judicial positions that the Federalists had created and therefore threw those judges out of office, notwithstanding Article III's quaint idea of life tenure.⁹ They stripped the jurisdiction of the federal courts by eliminating federal question jurisdiction, which wouldn't come back until 1875. They cancelled the entire term of the Supreme Court, so the Supreme Court couldn't pass judgment on what they had done, and then the Jeffersonians started impeaching federal judges — not because the judges in question were drunks or crooks but pretty clearly because the dominant party in Congress disagreed with those judges' decisions.¹⁰

That was a little worse than now.

If you fast forward to the Civil War and Reconstruction, Congress packed and unpacked the Court. Congressional Republicans expanded the Court to ten justices so that President Lincoln could appoint new justices to out-vote the people that brought you *Dred Scott*; then when Andrew Johnson became president and Congress didn't like him, they decreased the number of justices to seven so that Johnson wouldn't have any appointments.¹¹ Then there was Lincoln himself, who — in response to Justice Taney's ruling on circuit in *Ex parte Merryman*¹² that the president did not have unilateral authority to suspend the writ of habeas corpus — not only defied the ruling and criticized it in a speech to Congress, but also seriously considered locking Justice Taney up.¹³ And when, during Reconstruction itself, the Supreme Court was preparing to consider the legality of continuing military government over the South, Congress simply eliminated the Court's jurisdiction to do so.¹⁴

That was also a little worse than “attacks” on the judiciary today.

Then there's the New Deal. After the Supreme Court struck down a couple of key New Deal programs, President Roosevelt devoted an entire “fireside chat” to telling the nation — at length and in detail — that the Supremes were not doing their job, not behaving like justices, and standing in the way of economic recovery. FDR also made a huge effort to pack the court, of course. And there are also lesser-known examples. Most significantly, when FDR worried that the Supreme Court might invalidate his abrogation of the “gold clauses” in government contracts and Treasury bonds, the President prepared a speech announcing that he would defy the Court's order. (Ultimately, the Court ruled FDR's way and the speech stayed in the drawer.)¹⁵

We do not see, in the contemporary era, any comparable proposals to alter the federal courts' structure, strip their jurisdiction, or defy their orders. Nor is simple criticism of the courts new

with President Trump. In the modern era, Professor Lemos has already mentioned President Clinton's criticism of federal district judge Harold Baer for being soft on crime.¹⁶ Certainly President Obama criticized the Court over its *Citizens United* decision with the justices sitting right in front of him at the State of the Union.¹⁷ More importantly, there was a lot of pretty ominous talk out of the White House about why the Court should not dare to strike down the Affordable Care Act that may have actually had some influence on what happened in that case.¹⁸

So I think what we're seeing now under the present administration is really a big deal in the media and the academy mostly because Trump is doing it, and whatever he is doing is outrageous almost by definition. My point is not simply that the current criticism is not unusual in historical context. Fundamentally, I do think that the present period is unusual. What is unusual, however, is the astounding level of deference that the federal courts get from the political process in the contemporary era, and the remarkably low level of public criticism of their decisions. What is remarkable, historically speaking, is the very high level of judicial independence that we see at the present moment.

I don't think that the reasons for that are hard to find. Consider the sorts of things that the federal courts were deciding in the old days when the level of conflict was so much higher: They were deciding cases about slavery; they were assessing the validity of a vast bureaucratic regulatory state; they were considering challenges to segregation in the South and upending the South's entire way of life. Those were big questions. Those were truly polarized times. There is a technical sense in which our politics now are more polarized than ever, and that is the sense in which for the first time in American history, ideology, and party affiliation largely dovetail.¹⁹ That is a new situation, to be sure, and it has important implications for law. But at bottom, this is a technical meaning of polarization. I think the more natural meaning of polarization would be about the size of the gap that divides the people on one side of the debate from the people on the other, and the size of the stakes involved in political and legal disputes. We don't have fights anymore about whether you can legitimately own human beings. We don't have fights anymore about whether there should be a significant federal regulatory state. We don't have fights about segregation and whether it is fundamentally legal or not. And so it's not surprising, given that the Supreme Court is not intervening on levels of that magnitude anymore, that judges get high levels of deference and the general temperature of criticism of the Court is historically low. We should remember this before we wring our hands overmuch about the President's latest anti-judicial Tweet.

Now is criticism bad? I would say no. I think criticism is the primary check, for all practical purposes, on judicial power. My Con Law casebook, for example, includes FDR's Fireside Chat criticizing the judiciary in its entirety. It's a remarkable document. It's the President of the United States sitting down with the American people and talking about the Constitution. How great is that? He's trying to have a serious discussion about whether the Supreme Court is getting it right or getting it wrong and why. I think that is an

incredibly healthy activity for the body politic to be involved in.

Criticism has to be the primary check on courts because most of the other checks that Congress and the President have on the federal courts are effectively “nuclear options.” They are very, very difficult to employ in practice. Consider the tools the political branches have:

Stripping the jurisdiction of the Supreme Court. That is a very serious thing to do, and it has hardly ever happened in practice despite numerous proposals meant to limit judicial power in particular areas.

Impeachment. We haven’t had a serious attempt at impeachment on the grounds that Congress disagrees with what the Court is up to since the early Republic. And thank goodness for that, as it would seriously undermine the rule of law.

Constitutional amendment to override Supreme Court decisions. We have had a few of these but generally on decisions that, while controversial, did not involve basic social controversies. Most recently, the 26th Amendment “overruled” the Supreme Court’s decision that Congress could not require states to let 18-year-olds vote without amending the Constitution.²⁰ When that decision was overruled, it wasn’t so much an expression that the Supreme Court was out of touch and had gotten it wrong, it was simply a general consensus that the Constitution in fact needed to be changed on that question. But basic social controversies like abortion or same-sex marriage are, by definition, too controversial to permit resolution by constitutional amendment.

In any event, I think these institutional checks on the courts are unlikely to be used often or effectively. That leaves criticism as a crucial check on judicial error and overreach.

Now, I do want to underscore Professor Lemos’ point that there is a whole different set of issues that go to the role of the courts in dispute resolution throughout the society, the increasing use of arbitration, the increasing difficulty of bringing class actions and other forms of getting things into court. Change in what you have to show to survive a motion to dismiss, in how expensive litigation is, and the general level of access to justice are all terribly important issues. And when the political branches intervene on these issues, they can certainly affect the weight and independence of the courts in society. But I think that’s a separate set of questions from the phenomenon of politicians criticizing specific judicial decisions.

The third point is, what do the judges and the professors have to do with all this? I would suggest that part of the impetus for criticism of the Court is self-inflicted. And I would suggest that to the extent that there is an increasing cynicism about whether the Court is political, that might be partly the academy’s fault. So let’s talk about the judges first. Now keep in mind, I clerked for Justice David Souter. So I clerked for a justice who would vastly

CRITICISM [IS] A CRUCIAL CHECK ON JUDICIAL ERROR AND OVERREACH.



prefer that most Americans not be able to pick him out of a lineup. This is a man who doesn’t go on trips, who doesn’t give speeches. When he finally was talked into giving that address at Harvard after he retired, I accused him of having become a publicity hound, and I think that’s probably the meanest thing I could possibly have said to him. So I start from a baseline that judges should shut up and judge, and not give interviews, and not talk to the media. But it does seem like the judges are out there a lot, they’re giving a lot of speeches, they’re giving

a lot of interviews, and I think that encourages the rest of us to think of them as part of the political process.

Lately their participation has taken a more overtly political tone. Ruth Bader Ginsburg has given multiple political interviews, stating “I can’t imagine what this place [the Court] would be — I can’t imagine what the country would be — with Donald Trump as our president.”²¹ She has suggested in interviews that particular decisions — like *District of Columbia v. Heller* — would be ripe for overruling with a new liberal appointee to the Court.²² This sort of thing encourages people to think about judges politically. Likewise, when Richard Posner gives interviews and talks about his colleagues at the court as stupid or ridiculous or completely political,²³ when he writes that in the Foreword to the *Harvard Law Review* and then popularizes it at every chance he gets,²⁴ that’s not great for the perception that judges are doing something different from politics.

What about the academy? What’s happened in the academy is that we’ve got a fad, if you will, about political science analysis of judicial decisions. It’s called the attitudinal model. The thesis is that courts decide based on their political attitudes and not based on the law.²⁵ And I think this has become popular in the press, too. For instance when Linda Greenhouse retired at the *New York Times* and was replaced by Adam Liptak, his first columns in his new capacity as Supreme Court reporter were all about this attitudinal work in political science and how the Supreme Court is driven largely by ideology.²⁶

I think that’s dangerous because I think much of it is very, very bad work, frankly. The most fatal problem is that if you’re going to have a scientific analysis of judicial behavior, you need to be able to define what you’re testing against.²⁷ So what is a political decision? What is a legal decision? What is the difference? That is something that jurists have struggled with for centuries, and it’s something the political scientists have really no answer for. But how can you say the “attitudinal model” triumphs over the “legal model” if you can’t define the difference? Moreover, there are hopeless coding problems in trying to figure out what counts as a conservative decision or a liberal decision; the coding criteria are completely indeterminate and contradictory.²⁸ And you can’t code for relative

effect: For instance, if you decide a case points in a conservative direction, there's no way to code for the possibility that a court could have gone a lot further but it didn't, so maybe it wasn't such a conservative decision after all. So it's just not very good work. And yet it's become the focus of the media's reporting on the Court and has also become the focus of a lot of law professor commentary on the Court — from people who really ought to know better.²⁹

Finally, I think the judges have also contributed to an ideology-based view of the courts by behaving in certain ways that make the attitudinal model seem intuitively plausible. I'll just focus on two. One is the tendency to vote as blocks on the Supreme Court. I think Justice Ginsburg commented a couple of years ago that “[w]e [on the Court's left] have made a concerted effort to speak with one voice in important cases.”³⁰ I thought that was a shocking thing to say. When you have very different justices — for instance, justices who have as different a judicial philosophy as Steven Breyer, a highly-sophisticated consequentialist, and David Souter, the historian and the lover of complicated doctrines, the more complicated the better — who always vote together and join common opinions, it's hardly surprising that some observers conclude something else besides the law must be going on.

The other practice I would say would be persistent dissent. By this I mean that a judge, after losing on an issue in a particular case, continues to dissent from future applications of that principle because he just refuses to accept the prior decision as settled law.³¹ This has occurred most prominently in the Court's state sovereign immunity cases, but it also seems to characterize the Court's jurisprudence on affirmative action, campaign finance, and other crucial issues. When Justices continue to treat their own view of the law as equally valid despite having seen it rejected in prior decisions, the cost is to encourage the view that law is simply politics. Everything, as Justice Ginsburg said of *Heller*, can be fixed if we get one more vote. Better, I think, to reject the notion that the content of the law can be changed through a few new appointments, as the Court did in *Planned Parenthood v. Casey*.³² Say what you will of that opinion's result or its reasoning, it demonstrated the continued existence of a practical gap between law and politics.

I think judges and professors have to be really careful if we want to maintain that vital separation. The federal courts surely enjoy more deference and independence today than they have at virtually any point in our history. The greatest threat to that autonomy is not bombastic presidents, but rather the gradual erosion of faith that judges are doing something other than politics.

— ERNEST A. YOUNG, *Alston & Bird Professor of Law, Duke University*

¹ For a terrific overview, from which much of the following discussion is drawn, see John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353 (1999).

² *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1666 (2015).

³ Sandra Day O'Connor, *Judicial Accountability Must Safeguard, Not Threaten, Judicial Independence: An Introduction*, 86 DENV. U. L. REV. 1, 1 (2008).

⁴ 913 F. Supp. 232 (S.D.N.Y. 1996).

⁵ Alison Mitchell, *Clinton Pressing Judge to Relent*, NY TIMES, March 22, 1996.

⁶ See, e.g., Sara C. Benesh, *Understanding Public Confidence in American Courts*, 68 J. POL. 697 (2006); Damon M. Cann & Jeff Yates, *Homegrown Institutional Legitimacy: Assessing Citizens' Diffuse Support for State Courts*, 36 AM. POL. RES. 297, 316 (2008).

⁷ See, e.g., James L. Gibson, “New-Style” *Judicial Campaigns and the Legitimacy of State High Courts*, 71 J. POL. 1285 (2009); James L. Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and ‘New-Style’ Judicial Campaigns*, 102 AM. POL. SCI. REV. 59 (2008); James L. Gibson et al., *The Effects of Judicial Campaign Activity on the Legitimacy of Courts: A Survey-Based Experiment*, 64 POL. R. Q. 545 (2011).

⁸ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

⁹ See *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803) (upholding Congress's action).

¹⁰ See generally ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT 23-30* (4th ed. 2005).

¹¹ See Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L. J. 255, 271-72 (2017).

¹² 17 F. Cas. 144 (C.C.D. Md. 1861).

¹³ See generally WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 11-39 (2000).

¹⁴ See *Ex parte McCordle*, 74 U.S. 506 (1869) (upholding the jurisdiction strip).

¹⁵ See generally Gerard N. Magliocca, *The Gold Clause Cases and Constitutional Necessity*, 64 FLA. L. REV. 1243 (2012).

¹⁶ See Margaret Lemos comments, p. 10-11 of this article; see also Alison Mitchell, *Clinton Pressing Judge to Relent*, N.Y. TIMES, March 22, 1996, available at <http://www.nytimes.com/1996/03/22/nyregion/clinton-pressing-judge-to-relent.html>.

¹⁷ See Greg Jaffe, *Why does President Obama criticize the Supreme Court so much?* WASH. POST, June 20, 2015, available at https://www.washingtonpost.com/politics/why-does-president-obama-criticize-the-supreme-court-so-much/2015/06/20/b41667b4-1518-11e5-9dce-e3353542100c_story.html?utm_term=.7976941d0ee1.

¹⁸ See *id.*

¹⁹ See, e.g., Thomas Mann, *Foreword*, in AMERICAN GRIDLOCK: THE SOURCES, CHARACTER, AND IMPACT OF POLITICAL POLARIZATION, xxii-xxiv (James A. Thurber & Antoine Yoshinaka, eds. 2015).

²⁰ See *Oregon v. Mitchell*, 400 U.S. 112 (1970).

²¹ Pete Williams, Anna Merod & Aliyah Frumin, *Ruth Bader Ginsburg Doubles Down on Donald Trump Criticism*, NBC NEWS, July 13, 2016, available at <http://www.nbcnews.com/politics/2016-election/ruth-bader-ginsburg-doubles-down-trump-criticism-n608006>.

²² See Adam Liptak, *Ruth Bader Ginsburg, No Fan of Donald Trump, Critiques Latest Term*, N.Y. TIMES, July 10, 2016, available at <https://www.nytimes.com/2016/07/11/us/politics/ruth-bader-ginsburg-no-fan-of-donald-trump-critiques-latest-term.html>.

²³ See, e.g., Casey C. Sullivan, *Posner's War on the Supreme Court Continues*, FINDLAW, Dec. 5, 2016, available at http://blogs.findlaw.com/supreme_court/2016/12/posners-war-on-the-supreme-court-continues.html; see also Debra Cassens Weiss, *Posner says Supreme Court is 'awful,' top two justices are OK but not great*, ABA JOURNAL, Oct. 25, 2016, available at http://www.abajournal.com/news/article/posner_says_supreme_court_is_awesome_top_two_justices_are_okay_but_not_great.

²⁴ See Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 32 (2005); see also sources in note 16, *supra*.

²⁵ See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002).

²⁶ See, e.g., Adam Liptak, *Court Under Roberts is Most Conservative in Decades*, N.Y. TIMES, July 24, 2010, available at <http://www.nytimes.com/2010/07/25/us/25roberts.html>.

²⁷ See, e.g., Ernest A. Young, *Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival after Gonzales v. Raich*, 2005 SUP. CT. REV. 1, 14-15.

²⁸ See *id.* at 9-13.

²⁹ See, e.g., Posner, Foreword, *supra* note 17.

³⁰ Jess Bravin, *For Now, Justice Ginsburg's 'Pathmarking' Doesn't Include Retirement*, WALL ST. J., May 2, 2014, available at <https://www.wsj.com/articles/for-now-justice-ginsburgs-pathmarking-doesnt-include-retirement-1399026261?tesla=y>.

³¹ See generally Allison Orr Larsen, *Perpetual Dissents*, 15 GEO. MASON L. REV. 447 (2008).

³² 505 U.S. 833 (1992).