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Countermajoritarian Federalism

Cover Page Footnote

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COUNTERMAJORITARIAN FEDERALISM

*Thomas H. Lee**

An overlooked theme in Justice John Paul Stevens's jurisprudence of federalism is a respect for the autonomy of state judges as opposed to state legislators or executives. I shall call this theme "countermajoritarian federalism." The seeming oxymoron reflects the tension between general deference to subnational governance ostensibly motivated by a preference for more popularly responsive rule ("federalism") and specific deference to judges who—to the extent they are insulated from the political process like their federal counterparts¹—would seem to be the least democratic subnational governmental unit type ("countermajoritarian").

The ultimate reason for Justice Stevens's countermajoritarian federalism, in my view, is his strong belief in the crucial role of state judges in dispensing customized and empathic retail justice to state citizens. State judges protect people from the excesses and impersonality of distant majoritarian political processes at both the national and state levels by supervising the application of laws resulting from those processes to real-life cases. They also make custom-tailored local law in the many common-law enclaves that have survived codification trends. Moreover, state judges are the front-line guardians of people's state and federal constitutional rights by virtue of the prerogative of judicial review. Finally, citizens' encounters with the justice system—whether as litigants, jurors, or witnesses—are most likely to occur in the courtrooms of state judges.

More generally put, federalism for Justice Stevens is not the routine undifferentiated call for democracy on a smaller scale. Rather, it is centered upon a respect for state judges as retail-justice providers—a collective institution delivering empathic justice for the reasons mentioned above. The performance of this task requires autonomy and respect from the national government—in particular, the national judiciary—and also from the democratic influence of the people themselves. In Justice Stevens's own words,

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1. The federal mechanisms of insulation from democratic political forces are appointment by the President with senatorial advice and consent, U.S. Const. art. II, § 2, cl. 2, and lifetime tenure and salary protection, U.S. Const. art. III, § 1, cl. 2. Many state judges are elected or appointed subject to retention reelections. As discussed below, I believe that Justice Stevens sees a tension between such non-insulating, majoritarian features of state judicial selection and the essential roles he recognizes for state judiciaries.

[t]here is a critical difference between the work of the judge and the work of other public officials. In a democracy, issues of policy are properly decided by majority vote; it is the business of legislators and executives to be popular. But in litigation, issues of law or fact should not be determined by popular vote; it is the business of judges to be indifferent to unpopularity.²

This Essay has three parts. The first responds to the most common counter-theory to countermajoritarian federalism: the view that Justice Stevens does not value federalism at all. The second part identifies the reasons why state judges warrant autonomy. The final part addresses the question why relatively autonomous state judges are necessary even with respect to questions in which federal judges present a functional substitute.

I. INSTRUMENTAL FEDERALISM?

An off-the-cuff assessment of Justice Stevens's statements on federalism might point out that he generally favors individual rights against the government, state or federal.³ A possible conclusion from this trend might be that he promotes state autonomy if and only if state autonomy tangibly benefits individual rights. Justice Stevens has advocated, for example, declining U.S. Supreme Court review of state-court decisions upholding federal individual rights,⁴ resolving ambiguity in favor of state-law grounds where it is unclear whether a decision rested on federal or state law (such cases generally having been decided in favor of individual rights),⁵ and,

2. *Republican Party of Minn. v. White*, 536 U.S. 765, 798 (2002) (Stevens, J., dissenting).

3. Notable exceptions to this inclination would appear to be Justice Stevens's attitude toward flag burning and religious free exercise, where it seems he is more inclined to defer to governmental regulation of individual rights. *See, e.g., United States v. Eichman*, 496 U.S. 310, 319-321 (1990) (Stevens, J., dissenting) ("[T]he Government may—indeed, it should—protect the symbolic value of the flag without regard to the specific content of the flag burner's speech."); *United States v. Lee*, 455 U.S. 252, 262 (1982) (Stevens, J., concurring in the judgment) ("In my opinion, it is the [religious] objector who must shoulder the burden of demonstrating that there is a unique reason for allowing him a special exemption from a valid law of general applicability.").

4. *See, e.g., Delaware v. Van Arsdall*, 475 U.S. 673, 695 (1986) (Stevens, J., dissenting) (objecting to hearing cases that "operate[] to expand this Court's review of state remedies that overcompensate for violations of federal constitutional rights"); *Michigan v. Long*, 463 U.S. 1032, 1068 (1983) (Stevens, J., dissenting) ("I believe that in reviewing the decisions of state courts, the primary role of this Court is to make sure that persons who seek to vindicate federal rights have been fairly heard."); *cf. Pennsylvania v. Labron*, 518 U.S. 938, 947 (1996) (per curiam) (Stevens, J., dissenting) (objecting to the majority's characterization of a state-court ruling in favor of a criminal defendant as possibly based on federal law). This is a position consistent with the U.S. Supreme Court's statutory authorization to review state-court decisions from 1789 until 1914. *Compare* Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85-86 (supplying no provision for Supreme Court review of state-court decisions in favor of federal rights), *and* Act of February 5, 1867, ch. 27, 14 Stat. 385 (same), *with* Act of December 23, 1914, ch. 2, 38 Stat. 790 (authorizing, for the first time, Supreme Court review of state-court decisions upholding claims of federal right).

5. *See Labron*, 518 U.S. at 947 (Stevens, J., dissenting); *Long*, 463 U.S. at 1066 (Stevens, J., dissenting).

overall, shaping these and other doctrines to create incentives for States to extend protections to individuals under state constitutions and statutes where relevant federal law is more circumscribed.⁶ A theory of federalism yoked to maximal individual rights would also appear to explain why Justice Stevens does not favor federal preemption in certain cases;⁷ perhaps, the exceptions are instances where state law might be more responsive to individual rights.⁸

On this view, Justice Stevens's resort to federalism could be characterized as instrumental—a charge often leveled against Justice William J. Brennan, Jr. An instrumental federalist, so it goes, does not think it very important to privilege the State *qua* state; rather it is only important to agitate for state independence of action when the State does more for the substantive rights of its citizens than the national government would. Taken to an extreme, if an instrumental federalist were to believe that a platonic national government did more for individual rights than any state government did or could ever do, then—if this were Justice Stevens's true view of federalism—he ought to take no issue with getting rid of the State and its governance institutions altogether, or, in functional terms, dismissing entirely the power of any state institution to regulate its citizens independently. It is not clear to me that Justice Stevens would go that far, even as a theoretical matter.

But in a larger sense, I have never understood this sort of objection against seeing federalism as a means to an end. Even the most ardent states-righter today (in the aftermath of the Civil War and the civil-rights struggles of the twentieth century) must concede that in essence federalism is instrumental.⁹ The modern theory and doctrines of federalism do not purport to protect the State *qua* state, they protect the State as an institution that is crucial to realizing individual freedoms¹⁰—particularly freedoms

6. See *Long*, 463 U.S. at 1066; see also *Michigan v. Mosley*, 423 U.S. 96, 120-21 (1975) (Brennan, J., dissenting).

7. See, e.g., *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 886 (2000) (Stevens, J., dissenting).

8. In *Geier*, for instance, the holding of no preemption that Justice Stevens advocated would have allowed the plaintiff to pursue an action under Washington, D.C., tort law against the defendant manufacturer for defective design.

9. One could make similar claims about nationalism. That is a question beyond the scope of this Essay, but, in my view, the two might be distinguished on the grounds that cultural, historical, and material conditions and—specifically relevant here—definitions of individual rights, are vastly more divergent as among the nations of the world than among the States of the United States. Accordingly, it is harder to assert that we should go beyond the nation-state in our quest for individual rights than it is to make such a claim about federalism in the American context.

10. Cf. *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.10 (1982) (noting that characterizations of personal jurisdiction as “reflect[ing] an element of federalism and the character of state sovereignty vis-à-vis other States” are misleading because restrictions on state sovereign power “must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause”).

likely to be perceived as idiosyncratic by the majority of the nation¹¹—in ways that the national government, entrusted with the responsibility of shaping and enforcing a general, uniform framework of rules for many millions more souls, could not.¹² Thus, the normative point of federalism is to preserve a mosaic form of granular governance viewed as superior to one-size-fits-all national rules in responding to differences in how individuals define liberty.

Nor could a states-righter credibly say that the State is the perfect institution for performing this individual-freedom maximizing function. State borders track individual tastes in liberty only imperfectly, and people do not have perfect liberty even to choose to live in the State that most closely suits their tastes in freedom. And not even the most ardent states-righter would claim that, to address these imperfections of fit and portability, we must, for federalism's sake, create more new States (like Utah for the Mormons) or subsidize poor citizens so that they have the ability to choose their States of preferred residence.¹³

Once we expose the analytical poverty of a wholesale charge of instrumental federalism, it becomes possible to perceive the most fervent states-righter (short of the extinct secessionist) and the most ardent nationalist (short of the unconstitutional state-abolitionist¹⁴) as opposite points on the same spectrum. That spectrum encompasses a range of beliefs on how essential one believes a State and its governance institutions are to the fundamental liberty of its citizens in the present day. It is useful, in order to see how Justice Stevens stands on this spectrum, to frame the difference between one end and the other not in the customary fashion of the substantive content of the basic rights of freedom, but rather as turning upon the particular state institutions one believes crucial to individual liberty and thus worthy of deference from the organs of national governance, regardless of the decisions those state institutions make on

11. The paradigmatic case of such idiosyncratic accommodation in the original Constitution was slavery. *See, e.g.*, U.S. Const. art. IV, § 2, cl. 3 ("No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.").

12. The national rules selected might themselves default to state rules. *See, e.g.*, *United States v. Kimbell Foods Inc.*, 440 U.S. 715, 728 (1979) ("[W]hen there is little need for a nationally uniform body of law, state law may be incorporated as the federal rule of decision.").

13. Nor are such proposals clearly justifiable as a normative matter, out of concern for the Balkanization that might ensue. Of course, although in theory, an individual may choose the state that meets his or her liberty preferences, in reality such preferences are often shaped by the culture of the state in which he or she is born or raised.

14. The Constitution provides that "no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned." U.S. Const. art. IV, § 3.

substantive questions.¹⁵ Those institutions, of course, are the state legislature, the state executive, and the state judiciary.

In other words, I believe that framing federalism as a theory of process independent of substance is the best way to understand Justice Stevens's position on federalism. This is a frame that is 180 degrees removed from the first cut at Justice Stevens's theory of federalism as entirely contingent on substantive outcomes. The question then arises as to why he believes it so important that the judiciary, among state governance institutions, should be accorded autonomy.

II. THE IMPORTANCE OF AUTONOMOUS STATE JUDGES

Under the Supremacy Clause, state judges, unlike state legislators and governors, are expressly "bound" by federal law, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."¹⁶ The Federal Constitution thus appears to contemplate that state judges—just like federal judges—decide questions of federal law. These decisions are subject to appellate review by the U.S. Supreme Court by statute,¹⁷ but the chances of actual review are very small given current certiorari practices.¹⁸ State judges are thus an integral part of the national court system, subject to light-touch supervision in this capacity by the U.S. Supreme Court. From this perspective, if state judges give more protection to a federal right than federal judges would, it does not seem as important to correct them as when they rule against the federal right and thereby implicate the Supremacy Clause. Moreover, frequent corrections might encourage state judges to engage in reactionary contractions of federal rights as self-overcorrection.

15. The ardent states-righter would presumably believe that the state executive, legislature, and judiciary are jointly worthy of autonomy: Individual freedom would be best served if the State makes, enforces, and reviews as much law as possible. Of course, most important is the power to make the laws, which is why states' rights advocates especially object to extensions of federal legislative power over the States and their citizens. To be sure, Congress itself consists of politically elected representatives of the States, but the states' rights objection to the adequacy of the "political safeguards of federalism," Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543 (1954), is that the accommodations necessary and natural in a national legislative body will frequently result in outcomes affecting a State's citizens that a State on its own might not have reached. The Rehnquist Court sought to roll back national legislative power by, among other things, restricting the scope of Congress's Commerce Clause power, see *United States v. Morrison*, 529 U.S. 598 (2000), *United States v. Lopez*, 514 U.S. 549 (1995), but see *Gonzales v. Raich*, 125 S. Ct. 2195 (2005), by expanding state sovereign immunity doctrine to blunt the force of federal law on the State's own governance institutions, see *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002), *Alden v. Maine*, 527 U.S. 706 (1999), *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), and by limiting the scope of federal statutory claims against state officials actionable under 42 U.S.C. § 1983 (2000), see *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002).

16. U.S. Const. art. VI, cl. 2; see also *Printz v. United States*, 521 U.S. 898, 907 (1997).

17. See 28 U.S.C. § 1257 (2000).

18. See Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 Ind. L. Rev. 335 (2002) (detailing the decline of state cases in the Court's docket).

Consider, also, the importance of the federal-question function of the state courts in light of Congress's power to restrict and perhaps to eliminate the original jurisdiction of the lower federal courts and the appellate jurisdiction of the Supreme Court. From time to time, congressional bills have called for stripping the federal courts' jurisdiction over controversial subject matter such as abortion, the pledge of allegiance, and school prayer.¹⁹ It is not inconceivable that such an initiative might one day get enacted and be upheld by the Court, in which case the pertinent federal right—even if constitutional—might be left solely to the state courts for enforcement. Thus, state judges, in a very real sense, are the last refuge of those individual rights most vulnerable to majoritarian condemnation at the national level.

Additionally, unlike federal judges cabined by the constitutional separation-of-powers principle, a large part of a state judge's job is to "make" law by deciding common-law suits.²⁰ This has endured notwithstanding the tendency toward greater codification in the states. These common-law cases concern subject matter such as contracts, property, torts, family law, and probate, of great importance to the everyday lives and activities of ordinary people. Wise decisions here require not just legal knowledge but accumulated local knowledge of customs and expectations, and insight into the human actors embroiled in controversy.

If one believes, as I think Justice Stevens does, that regulation of these sorts of life activities are best governed by rules applied in a customized way by state judges (and not top-down by legislators whether state or national), then this area of jurisprudence is the very heartland of countermajoritarian federalism. A resistance to federal preemption in common-law enclaves is accordingly more a matter of letting on-the-ground judges as opposed to high-altitude legislators decide the issue than a pragmatic preference for state substantive law because it better advances individual rights. As Justice Stevens put it,

Because of the role of States as separate sovereigns in our federal system, we have long presumed that state laws—particularly those, such as the provision of tort remedies to compensate for personal injuries, that are within the scope of the States' historic police powers—are not to be pre-

19. *E.g.*, S. 1297, 108th Cong. (2003) (amending the jurisdiction of both the Supreme Court and lower federal courts over cases involving the pledge of allegiance); H.R. 1624, 104th Cong. (1995) (modifying the jurisdiction of the federal courts with respect to abortion); S. 74, 101st Cong. § 1260(a) (1989) (exempting from Supreme Court appellate jurisdiction "any case arising out of any State statute, ordinance, rule, regulation, practice, or any part thereof, or arising out of any act interpreting, applying, enforcing, or effecting any State statute, ordinance, rule, regulation, or practice, which relates to voluntary prayer, Bible reading, or religious meetings in public schools or public buildings").

20. Federal judges do make federal common law, but the guiding principle is that such lawmaking should be interstitial and limited, even as the scope of national governmental legislation and regulation has expanded. *See generally* Richard H. Fallon, Jr., Daniel J. Meltzer, & David L. Shapiro, *Hart and Weschler's the Federal Courts and the Federal System* 685-730 (5th ed. 2003).

empted by a federal statute unless it is the clear and manifest purpose of Congress to do so.²¹

If liability standards, as a general matter, are more likely to be set top-down by state legislators and remedies bottom-up by state judges, one might be ambivalent about federal preemption of liability standards but strongly oppose such preemption of remedies. Additionally, raising the bar insofar as preemption of state common law is concerned creates an incentive for state legislatures to restrain codification impulses as a defense against preemption, deferring more lawmaking to bottom-up formulation through state judiciaries.

Although the theme of countermajoritarian federalism may be most clearly evident in Justice Stevens's opinions advocating deference to state-court decisions upholding federal rights and opposing federal preemption of state common law made by judges, it is also manifest in other less obvious ways. For instance, his commitment to countermajoritarian federalism helps to explain Justice Stevens's refusal to strike down state restrictions on campaign statements by state judicial candidates on federal constitutional grounds, notwithstanding his strong commitment to First Amendment protection of political speech.²² This is because the capacity to dole out justice fairly requires insulation from political pressure—it is, after all, countermajoritarian federalism. Justice Stevens's special solicitude for the state (and federal) judges in the trenches is also evident in his oft-professed enthusiasm for percolation of federal issues among state supreme courts and federal circuit courts before the Supreme Court grants certiorari:

[T]he existence of differing rules of law in different sections of our great country is not always an intolerable evil [E]xperience with conflicting interpretations of federal rules [of law] may help to illuminate an issue before it is finally resolved and thus may play a constructive role in the lawmaking process.²³

Countermajoritarian federalism even illuminates a noteworthy aspect of Justice Stevens's jurisprudence viewed as hostile to federalism, namely, his groundbreaking opinion for the Court in *BMW of North America v. Gore*, applying the Fourteenth Amendment Due Process Clause to punitive damages awarded by state-court juries.²⁴ From the perspective of countermajoritarian federalism, the decision makes sense because it gives state judges a powerful tool to discipline and curtail runaway juries, whose excesses might shake the public's confidence in the state and national judicial systems.

21. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 894 (2000) (Stevens, J., dissenting).

22. *Republican Party of Minn. v. White*, 536 U.S. 765, 797 (2002) (Stevens, J., dissenting).

23. John Paul Stevens, *Some Thoughts on Judicial Restraint*, 66 *Judicature* 177, 183 (1982); see, e.g., *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J.) (advising the denial of certiorari when a question would benefit from "further study" in lower courts).

24. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 602 (1996).

It bears noting, however, that the theme of countermajoritarian federalism does not mean the Supreme Court should not exercise any discretion over the decisions reached by state courts on traditional common-law subjects. For instance, if a state judge rules that a child should be taken from a white mother who has married a black man, then the Court ought to step in to correct the equal-protection violation, as it did in *Palmore v. Sidoti*,²⁵ a unanimous opinion by Chief Justice Warren E. Burger. Nor does it mean that the Court ought to look the other way when state criminal proceedings prosecuted by the state executive and umpired by the state judge, particularly those involving punishment by death, are tainted by federal constitutional violations.²⁶ The constant theme here is that respecting state judicial autonomy does not mean abdication of responsibility to supervise state judges when federal constitutional issues are at stake.

III. THE STATE JUDGE AND JUSTICE AS SOCIAL FACT

The last point above raises an interesting question from an opposite direction. To the extent that state judges are important for the enforcement of federal rights, why should they have any autonomy in their exercise of this function given the parallel and overlapping option of original or removal jurisdiction in the lower federal courts?

One obvious response is a red herring. Unlike federal judges, many state judges are elected for finite terms or initially appointed and then subject to election for follow-on terms. The fact of election appears to render moot the principal criticism of federal judges appointed for life subject to good behavior by the President with the Senate's advice and consent—their lack of democratic pedigree, the so-called “countermajoritarian difficulty.”²⁷ But, as I have said, Justice Stevens values state judicial autonomy precisely for this countermajoritarian feature.²⁸

The real answer to the question lies in the radically different scales of the federal and the various state judicial operations. There are less than nine hundred active Article III judges;²⁹ there are tens of thousands of state

25. 466 U.S. 429 (1984).

26. See, e.g., *Mickens v. Taylor*, 535 U.S. 162, 179 (2002) (Stevens, J., dissenting) (urging the setting aside of a conviction on federal collateral review in a capital case where the judge appointed a murder victim's lawyer as the defendant's counsel).

27. Alexander M. Bickel, *The Least Dangerous Branch* 16-23 (1962); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 4-9 (1980).

28. The test to see if I am correct on this would be to see whether his doctrinal position on, for instance, preemption of state common law, would change in a counterfactual world where every state judge was elected in a politicized partisan election.

29. There are 879 authorized Article III judges: nine Supreme Court Justices, 179 Circuit Court judges, 679 District Court judges, and twelve Court of International Trade judges. Administrative Office of the United States Courts, *Judicial Business 2004*, at 33 tbl.12, <http://www.uscourts.gov/judbus2004/front/JudicialBusiness.pdf> (numbers of authorized circuit and district judges as of September 30, 2004); *Judges of the United States Court of International Trade*, <http://www.cit.uscourts.gov/Judges/judges.htm> (last visited Feb. 15, 2006) (listing twelve active judges of the court). The active judges are

judges. An oft talked-about feature associated with this numerical imbalance is the perceived lack of parity in the quality of state as compared to federal judges.³⁰

But one can as easily see the benefits that greater numbers confer in terms of the delivery of retail justice. More judges means more cases decided and more custom-tailoring in the dispensation of justice. And more citizens will be called to serve as state jurors and interact with state judges, who will instruct them in the performance of their civic duty. From a potential litigant's perspective—particularly litigants of limited means—the greater scale of the state judicial system means that it may be cheaper and more convenient for her to litigate in a state forum, which is likely to be closer to home.

State judges come not only in greater numbers, they also have a greater scope of power to protect the individual from majoritarian excess at the state as well as the federal level. A state judge can decide most federal-law questions as well as any state-law question, but the compact federal judicial corps has only limited power to decide state-law questions.³¹ Thus, federal judges generally cannot protect state citizens from questionable state laws that do not rise to the level of federal violations, even though state majorities will surely find ways to oppress “discrete and insular minorities”³² by federally permissible means. In other words, although state and federal judges overlap in function, the limited subject-matter jurisdiction of the federal judiciary necessarily makes it an inferior institution for the countermajoritarian protection of state citizens in a federal system. And so if the question boils down to which we would keep

supplemented by about 400 senior judges with reduced workloads. Administrative Office of the United States Courts, *supra*, at 33 tbl.12.

30. Empirical studies have largely failed to confirm the perception; some argue that it is illusory. Compare Michael E. Solimine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 *Hastings Const. L.Q.* 213 (1983), with Burt Neuborne, *The Myth of Parity*, 90 *Harv. L. Rev.* 1105 (1977).

31. Federal courts, whether lower courts through their original jurisdiction or the Supreme Court through its appellate jurisdiction, do have some power to decide state-law questions notwithstanding that state courts formally have the last word. For instance, district courts may decide state-law questions in diversity cases, 28 U.S.C. § 1332 (2000), or when they are part of the same case or controversy in a federal-question suit, 28 U.S.C. § 1367(a) (2000), and all federal courts may reexamine state-law questions decided by the state courts that are antecedent to deciding the validity of a federal claim. See, e.g., *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938) (“On such a question, one primarily of state law, we accord respectful consideration and great weight to the views of the State’s highest court but, in order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a contract was made, what are its terms and conditions, and whether the State has, by later legislation, impaired its obligation.”); *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304 (1816). A good recent example of federal courts deciding state-law questions is *Ayotte v. Planned Parenthood of Northern New England*, 126 S. Ct. 961 (2006), where the Court unanimously vacated a U.S. Court of Appeals for the First Circuit decision striking down a New Hampshire statute with instructions to the federal appellate court to sever the parts of it found to be unconstitutional—a state-law issue.

32. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

if forced to keep just one, it is the state judiciary—not the federal—which seems the essential justice-serving institution.

After all, justice, as a social fact, is what judges do. And most citizens' experience of judges is at the state level. State judges are the infantry of a governance institution that is the backbone of a nation initiated and dedicated to the rule of law. They should be encouraged and given responsibility, with light supervision the general rule, subject to more active oversight by the Court only when they have abdicated or flouted their federal constitutional duties. Justice Stevens wrote some words much to this effect in a case a few years ago:

What must underlie petitioners' entire federal assault on the Florida election procedures is an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed. Otherwise, their position is wholly without merit. The endorsement of that position by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law.³³

At bottom, then, the reason to encourage and respect state judges is not an Olympian ideal of a judicial elite with superhuman ability to reason who reject politics as a vulgar activity beneath their station. Rather, it is an image of tens of thousands of publicly minded men and women, with wisdom born more of empathy, familiarity with local circumstances, dedication to the judicial task, and common sense, who are wary of politics because it is too often motivated by self-interest. In short, men and women of Midwestern sensibility and impeccable integrity cut in the bow-tied mold of the longest-serving member of the highest court in the land.

33. *Bush v. Gore*, 531 U.S. 98, 128 (2000) (Stevens, J., dissenting).