

Remarks on Constitution Day

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In conversations about courts, it's usually the federal courts that get all the attention. State courts are forgotten, despite being the place where most real litigation happens. So, in defense of state courts, I'd like to make a few comments on their role in our national government and their relationship to the federal courts: First, they are older; second, they are bigger; and third, they are innovators.

State courts are older. America's oldest, continually operating appellate court isn't the US Supreme Court, but, rather, is the Supreme Judicial Court of Massachusetts, established in 1692 – almost one hundred years before the founding of the federal courts in 1789. In that Court, before America had even declared independence, John Adams argued cases concerning the Boston Massacre.

It was against this historical backdrop that Alexander Hamilton wrote the Federalist Papers relating to the establishing of the federal courts. Hamilton was forced to defend against claims by the antifederalists that the federal courts would “swallow up” all the powers of the state courts. He wrote that the very idea of a federal judiciary as a coequal third branch of government was an idea derived directly from the constitutions of the states, whose wisdom should be applauded.

Hamilton had respect for the competency of state judges, and he wrote that, under the Constitution, they would retain the jurisdiction they then had unless it was expressly taken away under the Constitution. He therefore foresaw the concurrent jurisdiction of state and federal courts as a vital part of America's legal landscape. Which brings me to the next point:

State courts are bigger. The Judiciary Act of 1789 created a federal judiciary comprised of *nineteen* judges, six of whom were on the Supreme Court. That left one district judge per state, which was fine, because not a lot was happening in federal court. Rather, the great bulk of federal litigation remained in state courts, and it was not until

1875 that Congress finally granted general federal question jurisdiction to the federal district courts. And, more importantly, the most important litigation – that which Hamilton called “those controversies . . . in which the great body of the people are likely to be interested” – remained in state courts because it was based on state law, over which the federal courts had no cognizance.

What was true at the founding remains true today: the size of the state courts dwarfs the federal judiciary. There are slightly fewer than 700 federal district court judges – a huge increase in size over the last two hundred years. However, it’s tiny compared to the states, which, together, have nearly *thirty thousand* trial court judges. In Texas alone, there are more trial court judges than there are Art. III judges in the whole country.

And these state court judges handle a truly extraordinary caseload, one consisting of the type of cases that tend to most closely affect people as individuals, things like tort and criminal cases. In 2007, there were nearly four hundred thousand (400,000) cases filed in federal court; in state courts, the number exceeded *forty-seven million* (47M). That’s more than 100 times more filings in state court than in federal. In Texas courts alone, 5.5-million non-municipal court cases were filed that same year – that’s two thousand cases for every judge.

Thus, throughout this nation’s history, its state courts have been the primary judicial actors. And, in dealing with this huge mass of litigation, state courts have pioneered our legal system’s development in the modern era.

State courts are innovators. Justice Brandeis famously called the states laboratories of democracy, places where new ideas could find a foothold before being brought to the national stage. This is a role the state courts have always played, beginning with the founders modeling the federal judiciary off those of the several states – by whose example Hamilton defended the constitution’s plan.

At the time of the founding, state courts were seen as the primary defenders of individual rights. Years later, Justice Brennan dismissed those who would argue that state jurisprudence merely followed that of the federal courts, noting that the historical “pattern of state court decision puts to rest the notion that state constitutional provisions were adopted to mirror the federal Bill of Rights.” “The lesson of history,” he went on,

“is otherwise.” Each of the rights protected by the Bill of Rights was first protected by a state constitution, and, before the 14th Amendment incorporated the Bill of Rights against the states, it was these state constitutional provisions alone that protected the individual rights of the citizenry.

And the state courts have continued to serve their role as laboratories, guiding the development of federal constitutional law with their precedents. For instance in *Cruzan v. Missouri Department of Health*, in which case President Starr argued as Solicitor General, the Court had dealt with the constitutional right to refuse medical treatment and its applicability in the case of a woman in a persistent vegetative state. There, the Court looked to the precedents of ten different states to determine the scope of that right when it came to withholding artificial nutrition or hydration. More recently, the federal courts’ first foray into the gay marriage debate, in *Perry v. Schwarzenegger*, comes only after many years of state court decisions trying to work out the same issue.

The state courts, then, are of undeniable importance to our constitutional system. And, given this importance, it is interesting to note that very often the judges in these courts come to the judiciary in a very different manner than do their federal counterparts. They are elected.

Judicial elections provide some benefits to state judges that federal judges may lack. Because they must campaign, their role is more often a democratic one. They are closer to the community and may understand it better, which is especially important given the fact that their cases - the crimes, the torts - are the ones that most often will effect local people.

That said, judicial elections have serious downsides as well. For the judge, the need to call and ask for contributions seems undignified. For the attorney, that same call can feel coercive. And for the citizens in general, the apparently incompatibility of asking parties for financial help while promising to remain at all times independent and impartial diminishes faith in the judiciary’s integrity.