

CHIEF JUSTICE MAUREEN O'CONNOR: A LEGACY OF JUDICIAL INDEPENDENCE

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With great pleasure and pride, I write to introduce this special edition of the *Akron Law Review*, which celebrates the work of Chief Justice Maureen O'Connor during her first decade as a member of the Supreme Court of Ohio.

I have spent a significant part of my legal career in service to the Chief Justice and confess at the outset that I have great affection for her, personally and professionally. She has always treated my family and me with great kindness and integrity. As important, she has challenged me to work harder and achieve more through her own example rather than by her edict.

Although we come from different backgrounds and political parties, practiced in different areas of law and parts of the country, and often have different views of the law, she earned my respect many years ago. Law clerks, or in more contemporary terms, “judicial attorneys,” work closely with judges and justices as they conduct legal research, draft opinions and memoranda, and sometimes serve as confidants and liaisons.¹ In some ways, we are the judges’ associate attorneys and ambassadors, working under their direction to effectuate their decisions.²

Our relationships with our judges are symbiotic and can be uniquely personal and professional. As former Chief Judge Wald of the U.S. Court of Appeals for the D.C. Circuit once said, a “judge-clerk

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1. See, e.g., Harvey Gee, *Judicial Perspective and Mentorship at the Supreme Court*, 51 DUQ. L. REV. 217, 218 (2013) (reviewing IN CHAMBERS: STORIES OF SUPREME COURT LAW CLERKS AND THEIR JUSTICES (Todd C. Peppers & Artemus Ward eds. 2012)).

2. Laurie A. Lewis, *Clerkship-Ready: First-Year Law Faculty are Uniquely Poised to Mentor Stellar Students for Elbow Employment with Judges*, 12 APPALACHIAN J. L. 1, 5 (2012) (citing JOSEPH L. LEMON, JR., *FEDERAL APPELLATE COURT LAW CLERK HANDBOOK* 3 (2007)).

relationship is the most intense and mutually dependent one I know outside of marriage, parenthood, or a love affair.”³

True, as judicial attorneys, we often see the good, the bad, and the ugly of the judicial process during our tenures with our judges. But we do so with an understanding of the unique perspective we gain driven by loyalty to the judge, court, and constitution and undertaken while serving in a position of public trust.⁴ Thus, despite having the privilege of writing this foreword, many factors constrain what I write.

In searching for a way to properly convey some sense of the Chief, I repeatedly returned to the same topic that caused me to continue in her service: the Chief Justice’s strong sense of fairness and judicial independence.

As in most states, the people of Ohio believe that judges and justices should be accountable to the electorate.⁵ But at the same time, we expect our judges and justices to remain impartial and issue rulings based on principled interpretations of the law applied to the facts.⁶ In other words, we expect our justices to be independent. But what does that mean?

In the colonial era, judicial independence signified not only “the ability of judges to be free from political pressure and to rely upon their own legal interpretations or conscience,” but also “independence from the Crown, independence from the elected branches of government, and independence from party patronage machines and special interests, as well as independence from public opinion.”⁷ Those same considerations hold true today.

Primarily though, we now speak of judicial independence in the more limited sense of judges deciding cases based on what the law requires, regardless of public or political backlash. We think of judicial independence in terms of decision-making free from external influences (rewards and punishments) and with impartiality,⁸ and judicial canons

3. Patricia M. Wald, *Selecting Law Clerks*, 89 MICH. L. REV. 152, 153 (1990).

4. See, e.g., Todd C. Peppers, *Of Leakers and Legal Briefers: The Modern Supreme Court Law Clerk*, 7 CHARLESTON L. REV. 95, 104-05 (2012).

5. Judge Leslie Miller, *The Impact of Judicial Selection on an Independent Judiciary*, 37 WTR BRIEF 24, 25 (2008) (describing the evolution of judicial elections in the states, and noting that 39 states directly elect their judges and 85% of them have some aspect of an elective process).

6. Barry T. Albin, *The Independence of the Judiciary*, 66 RUTGERS L. REV. 455, 455-56 (2014).

7. Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1142-43 (2010).

8. Daniel B. Rodriguez, Mathew D. McCubbins, & Barry R. Weingast, *The Rule of Law Unplugged*, 59 EMORY L.J. 1455, 1479 (2010).

direct that judges must act without fear or favor.⁹ As former U.S. Supreme Court Justice Sandra Day O'Connor succinctly explained, “judicial independence is so important because there has to be a safe place where being right is more important than being popular; where fairness trumps strength.”¹⁰ Even that basic notion is not without controversy, however.

In modern America, it is not uncommon for the public to readily express its views of government, including the courts. In the contemporary culture wars, the tone has been decidedly lacking in civility and sanity from all points on the political continuum. People of all ideologies and affiliations are guilty of expressing ignorant and offensive views. Most recently, factions of conservatives who reject specific judicial holdings have called for the interrogation, impeachment, or imprisonment of judges who rendered those decisions¹¹ and criticize judges as “activists” and “secular, godless humanists trying to impose [their] will on the rest of the nation.”¹² Disagreements with specific court decisions have led to cutting state courts’ budgets and curtailing

9. See OHIO CODE JUD. CONDUCT Canon 1 cmt. (1973) (superseded 2009) (“The integrity and independence of judges depends in turn upon their acting without fear or favor.”); see also MODEL CODE OF JUD. CONDUCT R. 2.4 cmt. (2011) (“An independent judiciary requires that judges decide cases according to the law and facts, without regard to whether particular laws or litigants are popular or unpopular with the public, the media, government officials, or the judge’s friends or family.”).

10. Hon. Sandra Day O’Connor, *Judicial Independence and 21st Century Challenges*, DEL. LAW., Summer 2011, at 8, 10.

11. See, e.g., Bill Raftery, *Arkansas: Legislative Council Adopts Resolution Condemning State Judge for Same Sex Marriage Ruling. Possible Hints of Impeachment?*, GAVEL TO GAVEL (June 20, 2014), <http://gaveltogavel.us/2014/06/20/arkansas-legislative-council-adopts-resolution-condemning-state-judge-for-same-sex-marriage-ruling-possible-hints-of-impeachment/>; Chrissie Thompson, *Rep.: Impeach Judge Who Will Overturn Gay Marriage Ban*, CINCINNATI ENQUIRER (Apr. 7, 2014, 6:34 PM), <http://www.cincinnati.com/story/news/politics/2014/04/07/rep-impeach-judge-will-overturn-gay-marriage-ban/7426067/>; Press Release, John Becker, Rep. Becker Repeats Calls to Impeach Judge Black for Abuse of Power (Apr. 7, 2014), available at <http://www.ohiohouse.gov/john-becker/press/rep-becker-repeats-call-to-impeach-judge-black-for-abuse-of-power>; Ruth McGregor & Randall Shepard, *Keep Politics Out of the Courthouse*, WASH. POST (May 18, 2014), http://www.washingtonpost.com/opinions/keep-politics-out-of-the-courthouse/2014/05/18/065ec3de-dc46-11e3-8009-71de85b9e527_story.html; Brett Emison, *Did You Know... Newt Gingrich Does Not Understand the Constitution or the Civil Justice System?*, LEGAL EXAMINER (Dec. 19, 2011, 11:15 AM), <http://kansascity.legalexaminer.com/wrongful-death/did-you-know-newt-gingrich-does-not-understand-the-constitution-or-the-civil-justice-system/>; Lucy Madison, *Gingrich: Gov’t Branches Should Rule 2 Out of 3*, FACE THE NATION (Dec. 18, 2011, 1:28 PM), <http://www.cbsnews.com/news/gingrich-govt-branches-should-rule-2-out-of-3/>; Thomas H. Wells, Jr., *Promoting Fair and Impartial Courts*, A.B.A. J. (Mar. 2, 2009, 4:20 AM), http://www.abajournal.com/magazine/article/promoting_fair_and_impartial_courts.

12. Robert Barnes, *O’Connor Breaks Ground Again, This Time as a Former Supreme Court Justice*, WASH. POST (Nov. 6, 2011), http://www.washingtonpost.com/politics/oconnor-breaks-ground-again-this-time-as-a-former-supreme-court-justice/2011/10/24/gIQA3KRWtM_story.html.

jurisdiction, and even viable presidential candidates have argued for the abolition of an entire federal circuit court perceived as too favorable to opposing political views or constitutional interpretations.¹³ Voters are asked by special interest and political groups to refuse to retain elected judges with whose decisions they disagree, and voters sometimes comply.¹⁴ The impact of successful efforts to reject judges or justices by their votes is not felt solely by those who were ousted from their offices; those losses resonate with every member of the judiciary who must stand for reelection or retention.¹⁵

In at least some parts of society, then, judicial independence must be contained because of the fear that an “[a]n independent, unchecked judiciary may simply decide cases according to its own whims and predilections, rather than according to the rule of law.”¹⁶ In other words, judicial independence is not necessarily seen by all as an unalloyed good.¹⁷

The notion of judicial independence thus remains an amorphous one that often flows into debates about judicial selection and judicial decision-making.¹⁸ But wherever a person falls on the continuum of that

13. John P. Freeman, *Protecting Judicial Independence*, 6 CHARLESTON L. REV. 511, 515-18 (2012); Day O’Connor, *supra* note 10, at 9.

14. See, e.g., Heidi Hall, *Ex-Tennessee Supreme Court Justice Lashes Out About Ads*, TENNESSEAN (July 19, 2014, 9:21 PM), <http://www.tennessean.com/story/news/2014/07/19/tennessee-supreme-court-justice-subject-attack-ads/12883861/>; Joyce Russell, *Another Iowa Judge Faces Ballot Box Battle Due to Same-Sex Marriage Ruling*, NPR: IT’S ALL POLITICS (Sept. 26, 2012, 5:48 PM), <http://www.npr.org/blogs/itsallpolitics/2012/09/26/161830542/another-iowa-judge-faces-ballot-box-battle-due-to-same-sex-marriage-ruling>; Mark Curriden, *Judging the Judges: Landmark Iowa Elections Send Tremor Through the Judicial Retention System*, A.B.A. J. (Jan. 1, 2011, 6:59 AM), http://www.abajournal.com/mobile/article/landmark_iowa_elections_send_tremor_through_judicial_retention_system.

15. See, e.g., Sharyn Jackson, *Iowa Gay Marriage Ruling a Turning Point for Justices*, USA TODAY (Apr. 2, 2014, 11:40 PM), <http://www.usatoday.com/story/news/nation/2014/04/02/iowa-gay-marriage-ruling-a-turning-point-for-justices/7237453/>; Ryan C. Cicoski, *Judicial Independence and the Rule of Law: A Warning from Iowa*, DEL. LAW., Summer 2011, at 16, 19; Wells, *supra* note 11.

16. See, e.g., Frank B. Cross, *Thoughts on Goldilocks and Judicial Independence*, 64 OHIO ST. L.J. 195, 195, 198 (2003). I do not suggest that any recent decision, whether on same-sex marriage rights, election law, reproductive health, or voting rights is not based on constitutional principles and precedent. I do suggest that those decisions often are decried as lacking a proper foundation because of the outcome of the decision rather than a thoughtful analysis of its legal foundations.

17. *Id.*

18. Michael D. Gilbert, *Judicial Independence and Social Welfare*, 112 MICH. L. REV. 575, 594-95 (2014). Debates about judicial independence in America began in the colonies. Chief Justice Marshall asserted that “the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent judiciary.” *Id.* at 577 (quoting another source). And Federalists like Hamilton considered judicial independence a key to securing “a

debate, most Americans agree that we must promote and protect proper judicial independence, “the cornerstone of the judicial function”¹⁹ that safeguards litigants and “the integrity of government itself”²⁰

Judging is usually hard work, often filled with long hours of focused attention on the rights of the parties in cases in which a resolution is difficult.²¹ In addition to intelligence, a strong work ethic, and common sense, judges must have strength of character. And as Alexander Hamilton recognized more than two centuries ago, if they are to be “faithful guardians of the constitution,” judges must have “an uncommon portion of fortitude” and courage.²² Those words are equally true today. The opinions discussed in the articles in this symposium exemplify some of the Chief’s best work, and some of the most difficult. They also reflect her independence and courage, and the fortitude that I have observed so often.

Each article in this edition of the *Akron Law Review* identifies important cases that exemplify the Chief Justice’s independent thinking. Written by some of Ohio’s most eminent lawyers, the articles demonstrate why the Chief cannot be reduced to a mere caricature or dismissed as a result-driven justice.²³

steady, upright and impartial administration of the laws.” *Id.* (quoting another source). But Anti-Federalists like Brutus argued that if “power is lodged in the hands of men independent of the people and of their representatives . . . no way is left to control them.” *Id.* (quoting another source). Thus, even 250 years ago, the tension in the topic was between the need for judicial independence and the cognizance that unbridled independence could become tyranny. By the mid-19th century, the states had moved from the appointment of their judges to their election, by popular vote, often for short terms. Cicoski, *supra* note 15, at 16. The movement to an elected state judiciary was driven by populism and the belief that governors and legislators were appointing judges based on party loyalty rather than legal ability, judicial temperament, and fairness. *Id.* By the mid-20th century, however, judges and others began to assert that appointment through a judicial selective process with retention elections to promote an apolitical judiciary. *Id.* at 16-17.

19. Freeman, *supra* note 13, at 513-14 (citing Stephen Breyer, *Judicial Independence: Remarks by Justice Breyer*, 95 GEO. L.J. 903, 903 (2007)).

20. *Id.* at 514.

21. See generally Tod Aronovitz, *A Tribute to Judges*, 76 FLA. B.J. 6 (2002) (discussing the preparation and time required to serve as an effective judge). Judges not only accept their position of responsibility, but also make personal sacrifices. *Id.* at 7. Judge Jeffrey J. Colbath, a former president of the Florida Council of County Judges and later appointed Florida Circuit Court judge, stated that “[b]eing a judge not only means having to do your best to do the right and proper thing, but also leaving all parties with the sense that you arrived at your decision after carefully considering and weighing their individual points of view.” *Id.*

22. Albin, *supra* note 6, at 456-57 (citing THE FEDERALIST NO. 78, at 416 (Alexander Hamilton) (J.R. Pole ed., 2005)); see, e.g., Jackson, *supra* note 15 (discussing how three Iowa Supreme Court justices lost reelection after supporting an unpopular decision).

23. For example, some considered the Chief to be part of the Ohio Supreme Court’s purported “knee-jerk, ‘pro-business’ posture” and accused her “of aggressively working to enact a ‘conservative’ or ‘pro-business’ legal agenda.” JONATHAN H. ADLER & CHRISTINA ADLER,

In *Flexible Predictability: Stare Decisis in Ohio*,²⁴ Richard Garner describes one of the Chief's first significant opinions, *Westfield Insurance Co. v. Galatis*.²⁵ Rendered early in her tenure on the Court, *Galatis* seemingly reinforced a doctrinal change in the Court that came along with the arrival of a new justice, and it did so in the style in which the Chief works: by directly confronting a problem with a pragmatic eye.

Galatis is known primarily for two reasons: announcing for the first time in Ohio a test of stare decisis, and the application of that test to overturn the holding of *Scott-Pontzer v. Liberty Mutual Fire Insurance Co.*²⁶ When the opinion was released, the latter holding attracted most of the attention. But in the following years, “the *Galatis* test”²⁷ for overturning precedent has become the compelling topic of debate,²⁸

FEDERALIST SOC’Y, A MORE MODEST COURT: THE OHIO SUPREME COURT’S NEWFOUNDED JUDICIAL RESTRAINT 18 (2008). *See also Incumbent Says Court Must Project ‘Image of Stability’*, BLADE (Sept. 28, 2008), <http://www.toledoblade.com/Politics/2008/09/28/Incumbent-says-court-must-project-image-of-stability.html>. Similarly, though once derided as “a no-quarter-given ballbuster” and ambitious prosecutor who “pound[ed] even low-level criminals with a dizzying array of charges,” ADLER & ADLER, *supra*, at 5 (quoting another source), she has authored or joined opinions that recognize and expand the rights of juveniles charged with crimes: *see, e.g.*, State v. D.W., 133 Ohio St. 3d 434, 2012-Ohio-4544, 978 N.E.2d 894; *In re M.W.*, 133 Ohio St. 3d 309, 2012-Ohio-4538, 978 N.E.2d 164 (O’Connor, C.J., dissenting); she has upheld constitutional commands in cases presenting murders and sex offenses: *see, e.g.*, State v. Gunnell, 132 Ohio St. 3d 442, 2012-Ohio-3236, 973 N.E.2d 243; State v. Williams, 129 Ohio St. 3d 344, 2011-Ohio-3374, 952 N.E.2d 1108; State v. Bodyke, 126 Ohio St. 3d 266, 2010-Ohio-2424, 933 N.E.2d 753; State v. Gondor, 112 Ohio St. 3d 377, 2006-Ohio-6679, 860 N.E.2d 77; and she has vacated death sentences that were not imposed lawfully: *see, e.g.*, State v. Roberts, 137 Ohio St. 3d 230, 2013-Ohio-4580, 998 N.E.2d 1100; State v. Diar, 120 Ohio St. 3d 460, 2008-Ohio-6266, 900 N.E.2d 565; State v. Roberts, 110 Ohio St. 3d 71, 2006-Ohio-3665, 850 N.E.2d 1168; State v. Williams, 103 Ohio St. 3d 112, 2004-Ohio-4747, 814 N.E.2d 818. The Chief’s concern is not whether her decisions are popular; her concern is whether they are correct, regardless of whom the decision protects or what it promotes. Thus, her legacy as an independent jurist and her adherence to the constitution belies labels based on preconceived perceptions rather than her decisions, which are often constrained by statutes that were enacted by the legislature, and reflect the legislature’s decisions on public policy in Ohio.

24. Richard M. Garner, *Flexible Predictability: Stare Decisis in Ohio*, 48 AKRON L. REV. 15 (2015).

25. *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 213, 2003-Ohio-5849, 797 N.E.2d 1256.

26. *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.*, 710 N.E.2d 1116 (Ohio 1999).

27. The *Galatis* test contains three requirements that must be satisfied before a decision can be overruled: (1) the challenged decision must have been wrongly decided at the time, or changed circumstances no longer justify continued adherence to the decision; (2) the decision defies practical workability; and (3) overruling the decision will not create undue hardship for those who have previously relied upon it. *Galatis*, 2003-Ohio-5849 at ¶ 47.

28. *See, e.g.*, State v. Cook, 128 Ohio St. 3d 120, 2010-Ohio-6305, 942 N.E.2d 357, at ¶ 62 (Brown, C.J., dissenting); *Bodyke*, 2010-Ohio-2424 at ¶¶ 76-86 (O’Donnell, J., dissenting in part); State v. Silverman, 121 Ohio St. 3d 581, 2009-Ohio-1576, 906 N.E.2d 427, at ¶ 35 (Moyer, C.J., dissenting); *id.* at ¶ 62 (Lanzinger, J., dissenting); *Louden v. A.O. Smith Corp.*, 121 Ohio St. 3d 95, 2009-Ohio-319, 902 N.E.2d 458, at ¶¶ 38-40 (Pfeifer, J., dissenting); *Arbino v. Johnson & Johnson*,

while the *Scott-Pontzer* holding recedes in import with time. Mr. Garner describes that evolution and the impact of *Galatis* on Ohio law.

A second article describes the Chief Justice's opinion in *City of Norwood v. Horney*,²⁹ the first state high court decision on sovereign takings after the United States Supreme Court announced *Kelo v. City of New London*, which held that the federal constitution did not forbid the use of eminent domain to seize an individual's private property purely for economic benefit of the community.³⁰ In *City of Norwood v. Horney – Much More Than Eminent Domain: A Forceful Affirmation of the Independent Authority of the Ohio Constitution and the Court's Power to Enforce It*,³¹ Kathleen Trafford not only discusses *Norwood*'s well-known holding that the Ohio Constitution limits the power of the government to take individual property, but also explains the overlooked aspects of the analysis, which embrace the independent force of the Ohio Constitution and the importance of the separation of powers doctrine. *Norwood* and Ms. Trafford's article make clear that reports of the death of new judicial federalism in Ohio were greatly exaggerated.³²

116 Ohio St. 3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 213 (Pfeifer, J., dissenting).

29. *City of Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115.

30. *Kelo v. City of New London*, 545 U.S. 469, 470 (2005).

31. Kathleen M. Trafford, *City of Norwood v. Horney – Much More Than Eminent Domain: A Forceful Affirmation of the Independent Authority of the Ohio Constitution and the Court's Power to Enforce It*, 48 AKRON L. REV. 35 (2015).

32. In the wake of Justice Brennan's famous 1977 article on the importance of state constitutional theory, William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977), there was a renaissance, or perhaps a revolution, in state constitutional theory. See Randall T. Shepard, *The Maturing Nature of State Constitution Jurisprudence*, 30 VAL. U. L. REV. 421, 421 (1996) ("The renaissance in state constitution jurisprudence has extended for nearly a generation. . . . The celebration of this renaissance is widespread, especially among state court judges and attorneys who practice civil liberties and civil rights law."); Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 171 (1983) ("We are experiencing a new 'Constitutional Revolution' in the judicial interpretation of state constitutions."). Although the movement initially was celebrated, it also was subject to criticisms. Shepard, *supra*, at 421. Less than ten years after Justice Brennan's article was published, commentators in Ohio already were decrying the Supreme Court of Ohio for failing to more fully embrace the notion that the Ohio Constitution necessarily gave rise to greater protections than its federal counterpart. See generally Mary Cornelia Porter & G. Alan Tarr, *The New Judicial Federalism and the Ohio Supreme Court: Anatomy of a Failure*, 45 OHIO ST. L.J. 143 (1984). Those commentators reflect the expansionist view of the state constitutional law movement, which looks to the expansion of positive rights and liberties. See Shepard, *supra*, at 432 (citing Peter R. Teachout, *Against the Stream: An Introduction to the Vermont Law School Symposium on the Revolution in State Constitutional Law*, 13 VT. L. REV. 1, 34-35 (1988)). But by 2004, there was increasing recognition that the Court, at least in some cases, recognized the Ohio Constitution as a source of rights. See, e.g., Marianna Brown Bettman, *Ohio Joins the New Judicial Federalism Movement: A Little To-ing and a Little Fro-ing*, 51 CLEV. ST. L. REV. 491 (2004). But see Richard C. Sapphire, *Ohio Constitutional Interpretation*, 51 CLEV. ST. L. REV. 437, 482 (2004) ("I have suggested that the record of judicial federalism in Ohio since 1984 is, to put it charitably, marked by

In a third article, former Ohio Supreme Court Justice Yvette McGee Brown and a former assistant state solicitor general, Kimberly Jolson, describe the Chief's work in the development of Ohio's juvenile law.³³ By focusing on *In re C.S.*,³⁴ McGee Brown and Jolson illustrate how the Chief's holding in that case, and her intention "to abide by the principles that underlie the founding of the juvenile courts, but [] with pragmatism and an understanding of modern realities,"³⁵ have helped define Ohio's judicial and legislative responses to the increasingly complex world of juvenile law, which continues to evolve in responses to decisions by the United States Supreme Court, social science and medical research, and societal beliefs.

Like her opinions, the Chief's positions and initiatives do not fall neatly into categorical boxes, but they share the common threads of fairness and independence. That legacy is important in its own right, particularly given that we often label our justices based on preconceived perceptions rather than their actions. The Chief's efforts to end the significant delays and notorious inefficiencies in the Ohio Court of Claims were lauded by plaintiffs' trial attorneys³⁶ – a group that greeted her with skepticism when she arrived on the high court. In other efforts, she has used her position as the head of the Ohio judiciary to react quickly when she learned that some Ohio courts had continued the archaic and unconstitutional practice of creating de facto debtors' prisons.³⁷ She created task forces to look at the issues impacting access

inconsistency and ambivalence."). *Norwood* is one clear example that state constitutional arguments often remain quite relevant to the disposition of an appeal. *See generally Norwood*, 2006-Ohio-3799. In that regard, the Court seems to fall within a different view of state constitutional law movement – the "independent state jurisprudence" model – which sees the objective of the movement as one that reflects the unique expression of a state's particular heritage and traditions. Shepard, *supra*, at 432 (citing Teachout, *supra*). That heritage and tradition may or may not reflect the principles enshrined in the federal constitution. Regardless, *Norwood* is an important addition to the larger, ongoing conversation about the value of state constitutional claims. *See, e.g.*, EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL OF THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS 1-4 (2013) (summarizing an approach toward understanding movements to protect basic rights in state constitutions).

33. Yvette McGee Brown & Kimberly A. Joler, *Chief Justice O'Connor's Juvenile Justice Jurisprudence: A Consistent Approach to Inconsistent Interest*, 48 AKRON L.REV 57 (2015).

34. *In re C.S.*, 115 Ohio St. 3d 267, 2007-Ohio-4919, 874 N.E.2d 1177.

35. *Id.* at ¶ 75.

36. Randy Ludlow, *Court of Claims Lean, Green*, COLUMBUS DISPATCH (Jan. 14, 2013), <http://www.dispatch.com/content/stories/local/2013/01/14/court-of-claims-lean-green.html>. The Ohio Court of Claims handles legal actions when plaintiffs seek damages from state agencies and public universities. *Id.* Because these cases "became notorious for taking a long time," the court became jokingly labeled as the "Court of No Claims." *Id.* (quoting another source).

37. Jeremy Pelzer, *Ohio Supreme Court Takes Lead in Cracking Down on Illegal 'Debtors' Prisons*, CLEVELAND PLAIN DEALER (updated July 22, 2014, 4:34 PM),

to the civil justice system and to ensure that all those with language barriers are able to use and benefit from the courts,³⁸ and she advocated to expand the scope of the Ohio Criminal Sentencing Commission so that it provides a more comprehensive, holistic approach to issues in the Ohio criminal justice system.³⁹ Her leadership in these efforts illustrates that she is attentive to the needs of all litigants rather than only the powerful. Nowhere is that more true than in her leadership in reviewing the administration of the death penalty in Ohio.

As Dean Phyllis L. Crocker of the Detroit Mercy School of Law describes in her essay, *O'Connor's Firsts*,⁴⁰ the Chief made the welcome but "surprising" announcement in her inaugural address that one of her focuses as Chief Justice would be to review Ohio's compliance with the American Bar Association's death penalty review, which had suggested there were many systemic problems with the way Ohio administered the death penalty.⁴¹ Nine months later, the Chief announced she was creating a task force to review the administration of the death penalty in Ohio and "ensure that Ohio's death penalty is administered in the most, fair, efficient and judicious manner possible."⁴² After more than two

http://www.cleveland.com/open/index.ssf/2014/07/ohio_supreme_court_takes_lead.html; Editorial Board, *End 'Debtors' Prisons' in Ohio and the Nation: Editorial*, CLEVELAND PLAIN DEALER (updated June 3, 2014, 4:48 PM), http://www.cleveland.com/opinion/index.ssf/2014/06/end_debtors_prison_in_ohio_and.html (commending Chief Justice O'Connor for her "fast action" and "tough stand" against the practice by some courts); Matthew T. Mangino, *Chief Justice O'Connor Slams Door on Debtors' Prisons*, VINDICATOR (Apr. 6, 2014, 12:00 AM), <http://www.vindy.com/news/2014/apr/06/chief-justice-oconnor-slams-door-on-debt/>.

38. The Chief created the Task Force on Access to Justice to focus on evaluating Ohio's civil justice system and identifying effective practices in other states. *See Task Force on Access to Justice*, SUPREME CT. OF OHIO, <http://www.supremecourt.ohio.gov/Boards/accessJustice/default.asp> (last visited Nov. 17, 2014). One such practice is a program launched in 2013 that created a statewide system to ensure access to Ohio courts regardless of a person's language. *See* Jenna Gant, *Chief Justice: Supreme Court to Offer Support for Court Interpretation*, CT. NEWS OHIO (Sept. 12, 2013), http://www.courtnewsohio.gov/happening/2013/SOJ_091213.asp (discussing the Chief's program that focuses on building a network of interpreters and common practices for Ohio courts in supporting different languages). A component of this program is the Advisory Committee on Interpreter Services. *See Advisory Committee on Interpreter Services*, SUPREME CT. OF OHIO, <http://www.supremecourt.ohio.gov/Boards/interpreterSvcs/default.asp> (last visited Nov. 17, 2014).

39. Bret Crow, *Proposal Would Expand Scope of Criminal Sentencing Commission*, CT. NEWS OHIO (Jan. 17, 2014), http://courtnewsohio.gov/happening/2014/sentencingScope_011714.asp.

40. Phyllis L. Crocker, *O'Connor's Firsts*, 48 AKRON L. REV. 79 (2015).

41. Chief Justice Maureen O'Connor, Swearing-in Ceremony at the Supreme Court of Ohio (Jan. 7, 2011) (transcript available at http://www.supremecourt.ohio.gov/PIO/Speeches/2011/CJOSwearingIn_010711.asp); Marianna Brown Bettman, *Much Ado About the Death Penalty*, LEGALLY SPEAKING OHIO (Apr. 24, 2014), <http://www.legallyspeakingohio.com/2014/04/much-ado-about-the-death-penalty/>.

42. Jim Leckrone, *Ohio Justices, Lawyer Task Force to Study Death Penalty*, REUTERS

years of debate and work, that task force provided more than 50 recommendations, some with dissenting views, to improve the state's system.⁴³

Dean Crocker also recognizes that the Chief made history as the first woman elected to the position of chief justice in Ohio.⁴⁴ The Chief recognizes her accomplishment with humility, typically deflecting it by pointing to other women who broke the glass ceilings in other branches of government.⁴⁵ It is remarkable that she has never once suggested that she was ever the victim of discrimination, even though at the time she graduated from law school she was a distinct minority.⁴⁶ A former female colleague once remarked that she appreciated the courage of women like the Chief; the colleague described the Chief as not only opening doors for women, but opening them so far that they could not be slammed shut on those that followed her.

Notably, when the Chief graduated from law school in 1980, women comprised only one-third of the students, and only 7% of lawyers in firms with more than 50 lawyers were women.⁴⁷ The Chief initially worked as a solo practitioner, taking criminal defense and civil cases, before her appointment as a magistrate to the Summit County Probate Court in her adopted hometown of Akron, Ohio.⁴⁸ She continued to succeed, becoming a judge on the Summit County Common Pleas Court before her election as the Summit County Prosecutor. Her election as lieutenant governor in 1998 marked her first statewide office and set the stage for her first election as a justice of the Ohio Supreme Court in 2002. She was reelected in 2008 by carrying each of Ohio's 88 counties, garnering 68% of the vote.⁴⁹ In the wake of Chief Justice Thomas

(Sept. 8, 2011, 10:09 PM), <http://www.reuters.com/article/2011/09/09/us-ohio-deathpenalty-idUSTRE7880SQ20110909>.

43. Chief Justice Maureen O'Connor, First State of the Judiciary Address (Sept. 8, 2011) (transcript available at http://www.supremecourt.ohio.gov/PIO/Speeches/2011/SOJ_090811.asp); Chris Davey, *Death Penalty Task Force Releases Final Report*, CT. NEWS OHIO (May 21, 2014), http://www.courtnewsohio.gov/happening/2014/deathPenaltyTFReport_052114.asp#.VAt8YWjD9SE.

44. Crocker, *supra* note 40, at 79-80

45. O'Connor, *supra* note 41.

46. The Chief earned her law degree from Cleveland-Marshall College of Law in 1980.

47. SUSAN EHRLICH MARTIN & NANCY C. JURIK, *DOING JUSTICE, DOING GENDER: WOMEN IN LEGAL AND CRIMINAL JUSTICE OCCUPATIONS* 113 (2nd ed. 2007).

48. The Chief was born in Washington, D.C., when her father was enrolled in graduate school at Georgetown University. Her family returned to Northeast Ohio soon thereafter. Despite her frequent and sometimes exotic travels around the globe, the Chief takes great pride in Ohio and her citizenship here.

49. More information about the Chief's background is available on the Supreme Court of Ohio's website. *Chief Justice Maureen O'Connor*, SUPREME CT. OF OHIO,

Moyer's death, she ran for chief justice in 2010 and defeated the incumbent chief justice by a two-to-one margin, again carrying every county.⁵⁰

Many people are aware of these watermarks in the Chief's career but do not get to see the Chief that I see. It is easy to devolve into unfettered complaints about elected officials, including judges and justices. Indeed, public perceptions of the judiciary are often ones of animosity and ambivalence. In part, these perceptions are driven by a lack of education about the role of courts. "Only a citizenry knowledgeable about civics and government can appreciate and protect judicial independence."⁵¹ As other judges have recognized, "public ignorance is the ultimate enemy, and not the ally, of legitimate government."⁵²

The Chief recognizes that education is critical to good government. She is at the fore of the battle to educate all Ohioans about the courts and how they impact our communities. As Chief Justice, she has called, quite publicly, for reform in the way Ohio elects its judiciary.⁵³ Rather than simply criticize an elected judiciary as a second-class one, the Chief has promoted a series of incremental refinements in the way Ohio elects its judges.⁵⁴

In a related vein, the Chief remains a steadfast supporter of civic education programs for Ohio's students at every level of education. For younger students in elementary, middle and high schools, she actively promotes and supports the works of two statewide organizations: the Ohio Center for Law-Related Education⁵⁵ and the Law and Leadership

http://www.supremecourt.ohio.gov/SCO/justices/oconnor/default.aspx (last visited Nov. 17, 2014).

50. *Id.*

51. Day O'Connor, *supra* note 10, at 10.

52. Hon. Bruce M. Selya, *The Confidence Game: Public Perceptions of the Judiciary*, 30 NEW ENG. L. REV. 909, 913 (1996).

53. The Chief created *OhioJudicialReform.org* to share research about judicial reform in Ohio. See OHIOJUDICIALREFORM.ORG, <http://ohiojudicialreform.org/about/> (last visited Nov. 16, 2014) (providing more information about this project and the research already completed on reform).

54. See generally CHIEF JUSTICE MAUREEN O'CONNOR, A PLAN TO ELEVATE JUDICIAL ELECTIONS (2014), available at <http://ohiojudicialreform.org/wp-content/resources/plan.pdf>.

55. The Ohio Center for Law-Related Education began in 1983 as a collaborative effort between the Ohio State Bar Association, Ohio Attorney General Anthony Celebrezze, and the American Civil Liberties Union of Ohio. See OHIO CTR. FOR LAW-RELATED EDUC., <http://www.ocbre.org/programs/ocbre> (last visited Nov. 16, 2014). The program focuses on providing Ohio students and teachers with law-related information, developing problem-solving and critical thinking skills for students, and encouraging student engagement within their communities. *Id.* The Supreme Court of Ohio became a program sponsor in 1988. *Id.*

Institute of Ohio.⁵⁶ These programs help ensure that all students have a basic understanding of government, consider careers as lawyers, judges and leaders, and foster constructive discourse on courts and judges.⁵⁷

She does not leave the work to others, however. The Chief has continued to support the Court's own civic education program, which brings thousands of visitors to the Thomas J. Moyer Ohio Judicial Center each year to learn about the importance of Ohio's courts and judicial system. Indeed, under her leadership, the Court has offered grants to school districts to cover the costs of transportation if those districts are otherwise unable to afford it. Through the Court's off-site program, the Court sits in remote locations throughout Ohio to hear arguments in venues where students and citizens can observe the Court's work being done before their eyes.⁵⁸ And she has continued innovative programs, such as the Forum on the Law Lecture Series, which features regional or national speakers who address contemporary or historic legal topics as a means to engage the public, with the aim of enhancing an appreciation for our legal system.⁵⁹ And the Chief has been a steadfast proponent of maintaining the Court's work as a partner to developing democracies around the world, including the Ukraine, Russia, Kazakhstan, Kyrgyzstan, Turkmenistan, Armenia, Libya, and Serbia, who send their attorneys, judges, and leaders to Columbus, Ohio, to learn more about our judicial system.⁶⁰

The Chief also advocates for the practical, applied education of law students.⁶¹ During her tenure on the Court, the Chief has significantly expanded opportunities for judicial externships in her office. Her staff has now mentored over 150 law students. Significantly, she has worked to ensure that all students, including those from diverse personal and

56. The Law and Leadership program began in 2008 after a retreat with the Court and all nine Ohio law schools. *See* LAW & LEADERSHIP INST., <http://www.lawandleadership.org/> (last visited Nov. 17, 2014). The program is a version of New York's Legal Outreach program and provides programming focused on law, leadership, analytical thinking, problem solving, writing skills, and professionalism. *Id.* Today, the program serves over 400 high school students on eight law school campuses across the State of Ohio. *Id.*

57. Day O'Connor, *supra* note 10, at 8.

58. Chief Justice Thomas J. Moyer created the Off-Site Court program in 1987. *Off-Site Court Program*, SUPREME CT. OF OHIO, <http://www.supremecourt.ohio.gov/VisitorInfo/offsiteCourt/default.asp> (last visited Nov. 17, 2014). The program has enabled over 35,000 Ohioans to personally observe Supreme Court proceedings and engage both justices and attorneys. *Id.*

59. For more information, see *Forum on the Law Lecture Series*, SUPREME CT. OF OHIO, <http://www.supremecourt.ohio.gov/VisitorInfo/forum/default.asp> (last visited Nov. 17, 2014).

60. For more information about these partnerships, see *International House of Justice*, CNO REV., May 2014, at 6-7, 11-12, available at <http://www.courtnewsohio.gov/CNOReview/2014/May2014.pdf>.

61. O'Connor, *supra* note 41.

professional backgrounds, are provided with the chance to learn from her, her staff, and the Court.⁶²

The Chief's work on diversity is with purpose. As she once explained during a keynote address at Youngstown State University in Youngstown, Ohio:

When we talk about diversity, it's not just about race or gender . . . It's cultural and ethnic diversity and sexual orientation, even economic diversity. There is a spectrum of different circumstances for different people, and they should all have the same access to our profession.⁶³

This focus on diversity, she explained, would "[make] the legal profession and the judiciary more inclusive 'across the board' [and] will lead to 'greater respect for the rule of law' . . ."⁶⁴

The Chief practices what she preaches. She has extended the same opportunities to those interested in positions on her staff and gives every applicant fair consideration, regardless of pedigree. Although she has hired attorneys for clerkships who graduated from Ivy League law schools, she more often than not prefers those who graduated from Ohio's own law schools. Her judicial attorneys come from a variety of practice areas and include lawyers who have worked in large, medium, and small firms; in government practice and public interest positions; or held other clerkships in the state and federal courts. And her judicial attorneys are more diverse in race, gender and sexual orientation than those of any other justice in the history of the court.⁶⁵ That said, her selection of attorneys is not borne of political correctness; it is borne of her sense of fairness and independence.

Dostoevsky wrote that humans want independent choice, "whatever that independence may cost and wherever it may lead."⁶⁶ There are high costs for any independence, and the costs of judicial independence come in many forms – personal, professional, and political. But I also know that independent choices can lead to invaluable outcomes, at least when they are made by a true leader like Chief Justice Maureen O'Connor of the Supreme Court of Ohio.

I could not be more proud to be a small part of her history of

62. See SUPREME COURT OF OHIO, DIVERSITY EFFORTS AT THE SUPREME COURT OF OHIO [hereinafter DIVERSITY EFFORTS], available at <http://www.supremecourt.ohio.gov/SCO/justices/oconnor/statsMemo.pdf> (last visited Nov. 17, 2014).

63. Bob Jackson, *Justice O'Connor Stresses Diversity*, VINDICATOR (Mar. 26, 2010, 12:08 AM), <http://www.vindy.com/news/2010/mar/26/o8217connor-stresses-diversity/>.

64. See *id.* (summarizing remarks made during the keynote address).

65. DIVERSITY EFFORTS, *supra* note 62.

66. FYODOR DOSTOEVSKY, *Notes From the Underground*, in THREE SHORT NOVELS OF DOSTOEVSKY 150-51 (Avrahm Yarmolinsky ed., Constance Garnett trans., 1960).

independence.