

# STATE COURTS AND FEDERAL AUTHORITY: A THREAT TO JUDICIAL INDEPENDENCE?

*Report of the 2002 Forum for  
State Appellate Court Judges*



**ROSCOE POUND  
INSTITUTE**

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~FORUM ENDOWED BY HABUSH HABUSH & ROTTIER S.C.~

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# Table Of Contents

<b>FOREWORD . . . . .</b>	<b>1</b>
<b>INTRODUCTION . . . . .</b>	<b>3</b>
<b>PAPERS, ORAL REMARKS, AND COMMENTS . . . . .</b>	<b>5</b>
“Trends in Federalism and What They Mean for the State Courts” <i>Professor Georgene M. Vairo, Loyola Law School, Los Angeles . . . . .</i>	<i>5</i>
Oral Remarks of Professor Vairo. . . . .	25
Comments by Panelists, Response by Professor Vairo, Questions and Comments. . . . .	30
“A Historical Perspective on Maintaining Judicial Independence,” Luncheon Address <i>Honorable Frank J. Williams, Chief Justice of Rhode Island. . . . .</i>	<i>42</i>
“Issues State Courts Face When Considering Federal Preemption of State Court Procedures: An Analysis for State Judges” <i>Professor Wendy E. Parmet, Northeastern University School of Law. . . . .</i>	<i>51</i>
Oral Remarks of Professor Parmet. . . . .	67
Comments by Panelists, Response by Professor Parmet, Questions and Comments. . . . .	71
<b>THE JUDGES’ COMMENTS . . . . .</b>	<b>80</b>
<b>POINTS OF AGREEMENT . . . . .</b>	<b>113</b>
<b>APPENDICES . . . . .</b>	<b>117</b>



# Foreword

The Roscoe Pound Institute's tenth annual Forum for State Appellate Court Judges was held in July 2002, in Atlanta, Georgia. In the tradition of our past Forums, it featured outstanding scholars and panelists who expressed informative insights about the relationship between the state courts and federal authorities. During the program, judges engaged with these panelists and each other in a thought-provoking and spirited discussion about the impact of federal actors on the operation of the state courts.

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

Our previous nine Forums for State Appellate Court Judges have examined such important topics as the jury's role in the civil justice system, judicial independence, the scientific evidence controversy, secrecy in the courts, the controversy surrounding discovery, the American Law Institute's Restatement on products liability, the impact of the budget crisis on judicial functions, and the impact on state courts of the Long Range Plan for the Federal Courts. We are proud of our Forums and are gratified by the increasing registrations we have experienced since their inception, as well as the very positive feedback from judges who have attended.

The Pound Institute is indebted to many people for the success of the 2002 Forum for State Court Judges:

- Professor Georgene M. Vairo, of Loyola Law School, Los Angeles, and Professor Wendy E. Parmet, of the Northeastern University School of Law, who wrote the papers that started our discussions;
- Our panelists: Honorable Gerald W. Vandewalle, Honorable James D. Moyer, Honorable Stanley Feldman, Honorable John L. Carroll, Kenneth M. Suggs, Robert S. Peck, Patrick A. Long, and John H. Beisner;
- Our luncheon speaker, Honorable Frank J. Williams, Chief Justice of Rhode Island;
- The moderators of our small-group discussions for helping us to arrive at the essence of the Forum, which is to highlight what experienced state court judges think about the issues we discussed;
- Dr. Richard H. Marshall, Executive Director of the Roscoe Pound Institute, and his staff, Marlene Cohen and LaJuan Campbell, for developing and running the Forum,

and publishing and distributing this report. Thanks also to Jeffrey Rowe, Esq., who while a law student, interned at the Pound Institute and assisted in the preparation of this report; and

- James E Rooks Jr., Esq., the Forum Reporter, for his important assistance in developing the 2002 Forum and co-editing this Forum report with Dr. Marshall.

It goes without saying that we appreciated the attendance of the distinguished group of judges, who took time from their busy schedules so that we might all learn from each other.

We hope you enjoy reviewing this Report of the Forum, and that you will find it useful when considering the relationship between the state courts and the federal government.

**Mark S. Mandell**

President  
Roscoe Pound Institute  
2001-2003

**Mary E. Alexander**

President  
Roscoe Pound Institute  
2005-2006

# Introduction

Ninety judges, representing 31 states, took part in the Roscoe Pound Institute's 2002 Forum for State Appellate Court Judges, held on July 20, 2002, in Atlanta, Georgia. Their deliberations were based on original papers written for the Forum by Professor Georgene M. Vairo of Loyola Law School, Los Angeles ("Trends in Federalism and What They Mean for the State Courts") and Professor Wendy E. Parmet of the Northeastern University School of Law ("Issues State Courts Face When Considering Federal Preemption of State Court Procedures: An Analysis for State Judges"). The papers were distributed to participants in advance of the meeting, and the authors delivered oral presentations of their papers to the judges. Each presentation was followed by a panel discussion with distinguished commentators, and a break between the morning and afternoon sessions provided time for lunch and a talk by Honorable Frank J. Williams, the Chief Justice of Rhode Island.

Responding to Professor Vairo's paper were Kenneth M. Suggs, a plaintiff lawyer based in Columbia, South Carolina; Patrick A. Long, a defense attorney from Santa Ana, California; the Honorable Gerald W. VandeWalle, Chief Justice of North Dakota; and the Honorable John L. Carroll, Dean of the Cumberland Law School of Samford University.

Responding to Professor Parmet's paper were Robert S. Peck, an appellate attorney from Washington, D.C.; John H. Beisner, a defense attorney from Washington, D.C.; the Honorable James D. Moyer, a U.S. Magistrate Judge from Kentucky; and the Honorable Stanley G. Feldman, an Associate Justice on the Arizona Supreme Court.

After each paper presentation and commentary, the judges separated into small groups to discuss the issues raised in the papers, with Fellows of the Roscoe Pound Institute serving as group moderators. The paper presenters and commentators visited the groups to share in the discussion and respond to questions. The discussions were recorded on audio tape and transcribed by court reporters, but, under ground rules set in advance of the discussions, comments by the judges were not made for attribution in the published report of the Forum. A selection of the judges' comments appears later in this Report.

At the concluding plenary session, the moderators summarized the judges' views of the issues under discussion, and all participants in the Forum had a final opportunity to make comments and ask questions.

This report is based on the papers written and presented by Professors Vairo and Parmet and on transcripts of the plenary sessions and group discussions.

**James E. Rooks Jr.**  
**Forum Reporter**

**Richard H. Marshall**  
**Executive Director**  
**Roscoe Pound Institute**



# Papers, Oral Remarks, and Comments

## TRENDS IN FEDERALISM AND WHAT THEY MEAN FOR THE STATE COURTS

### **GEORGENE M. VAIRO**

**B**eginning her paper with the apt rhetorical question, “Is the federal government a threat to state judiciaries?,” Professor Vairo examines federal government activities in a number of areas. She discovers significant incursions into the traditional, constitutional role of the state courts, despite the United States Supreme Court’s recent federalism decisions that seem to show a determination to give states their due role as a joint sovereign.

*In Part II on federal legislative developments, Professor Vairo demonstrates the evident desire of Congress to remove significant numbers of actions filed in state courts to the federal courts—in apparent contradiction of the federal Judicial Conference’s strong call in 1995 to restrict federal court jurisdiction. Examples of enacted legislation with this effect include the Securities Litigation Uniform Standards Act of 1997 and the “Y2K” Act. Examples of proposed legislation include statutes that would (1) allow easier removal of class actions to federal courts without complete diversity of citizenship and (2) set up compensation funds as exclusive remedies for asbestos-related injuries.*

*In Part III, Professor Vairo examines a number of federal court trends tending to enhance federal judicial powers at the expense of the state courts. These include: aggressive use of bankruptcy statutes to stay litigation against debtors and in some cases, third parties; increased use of the All Writs Act to enjoin state litigation that might frustrate federal court settlements; use of anti-forum shopping sanctions against attorneys who file parallel class actions in state courts despite the fact that the state court found the attorneys’ actions appropriate; application of varying rules for service to permit late removals to federal courts; including a party’s cost of compliance with an injunction in the calculation of the amount in controversy; and expressions of support by committees of the Judicial Conference of the United States for relaxed standards for diversity jurisdiction.*

*Despite those findings, Professor Vairo is careful to point out that there are also exceptions to this trend. For instance, federal courts (1) have been striking down use of “settlement classes” to resolve major segments of the asbestos litigation and other complex litigation, (2) recognizing a state court settlement of a class action as precluding a federal securities class action, (3) and denying All Writs Act injunctions against state court litigation in some cases.*

*Finally, in Part IV, Professor Vairo considers how the federal courts have come to dominate the field of complex state-claim based litigation and calls for a more balanced approach by Congress and the federal courts to choosing the proper forum to resolve such cases.*

## I. Introduction

Is the federal government a threat to state judiciaries? In this day and age, it would seem that the answer to that question would be a resounding “No!” Are we not at the dawn—actually by now, the late afternoon—of the “New Federalism”?<sup>1</sup> In a series of cases decided since 1995, the United States Supreme Court has redefined the relationship of the federal government to the states.<sup>2</sup> The decisions immunize states from lawsuits of various kinds in federal and state courts, and from privately initiated proceedings before federal administrative agencies; and they strike down federal legislation that reaches matters that the Court perceives to be solely within the states’ prerogatives.<sup>3</sup>

Ironically, at the same time, Congress, through recently enacted and proposed legislation, has taken a surprisingly anti-federalist approach to federal court and state court subject matter jurisdiction.<sup>4</sup> Equally ironic, given the recommendations of the Judicial Conference of the United States in its 1995 Long Range Plan to restrict diversity jurisdiction,<sup>5</sup> the federal judiciary as well has moved in very important ways in the direction of facilitating access to federal courts, rather than state courts, for the resolution of many state court causes of action.

We all know that we live in a world of concurrent jurisdiction, in which litigants often have the choice of state or federal courts, or both. Diversity cases serve as the prime, and, for the purposes of this paper, relevant, example.<sup>6</sup> Increasingly, plaintiffs’ attorneys seem to view state courts as more hospitable to the claims of their clients, while defense attorneys, on the other hand, typically seek the refuge of the federal courts which they perceive as less receptive to the claims filed against their clients. For example, when the Supreme Court decided *Amchem*<sup>7</sup> and *Ortiz*,<sup>8</sup> which took a restrictive approach to the use of class actions to settle mass tort cases in federal courts, many plaintiffs’ lawyers believed that, because state courts might be more likely to certify class actions, they should bring their class action cases in state courts. Also accelerating the trend toward plaintiff preference for state courts is the desire to escape the effect of *Daubert v. Merrill Dow Pharmaceuticals, Inc.*,<sup>9</sup> the Supreme Court’s decision making federal district judges the gatekeepers for the admission of expert testimony in federal court. Many federal courts have invoked *Daubert* to exclude plaintiff’s scientific evidence,<sup>10</sup> and, the decision is viewed as a serious obstacle to plaintiffs seeking to prove causation in many mass tort cases, and other state-based causes of action.

It is axiomatic that the plaintiff is the master of the complaint, and that the plaintiff’s choice of forum should be disturbed only rarely. We all know that this well-worn axiom is subject to numerous exceptions—forum non-conveniens dismissals, transfer of venue, abstention, and removal, to name a few. However, as the stakes have risen, in terms of the value of state based causes of action, it appears that both Congress and the federal judiciary are taking steps that shift the equation somewhat dramatically in favor of litigation in federal court, especially litigation of complex state-based causes of action.

## II. Federal Legislative Developments

Congress has been unusually active in considering specialized subject matter jurisdiction statutes that have the effect of denying state court jurisdiction over state-law based causes of action. In response to the flight of state-claim based class actions to state court, Congress has enacted

several statutes and is considering others that permit the removal of increasing numbers of such cases to federal court.

#### A. Four Examples of Existing Federal Statutory Intrusion

1. **Securities Litigation.** Congress passed, and President Clinton signed into law, the Securities Litigation Uniform Standards Act of 1997<sup>11</sup> (“SLUSA”), which bars most securities class actions based on state law fraud theories. SLUSA supplements the Private Securities Litigation Reform Act of 1995 that was designed to heighten the standards for prosecuting securities class actions in federal court. SLUSA is designed to close a perceived loophole in the 1995 Act. Supporters of SLUSA believed that the 1995 Act was being undermined by the increased filing of class actions in state courts based on state law fraud theories of liability. SLUSA amends Section 16 of the Securities Act of 1933 and Section 28 of the Securities Exchange Act of 1934 to prohibit class actions brought by private parties based on such theories.<sup>12</sup> It further provides that state court class actions brought on such theories are removable to the federal court in the district in which the state action was filed. Moreover, it permits federal courts to stay discovery in state court actions.

There is no question that Congress was well within its powers to cut back on the federal remedies for securities violations. There also is no question that Congress has the power to preempt state remedies, though such power is normally exercised in unusual cases. However, Congress’s use of a device like removal of cases to federal court to prevent state courts from providing relief for specific types of state law claims, rather than exercising its preemption powers, is quite unusual, and it raises serious federalism problems.

2. **The “Y2K” Act.** Congress also enacted a bill governing so-called Y2K litigation. Anticipating a storm of state court class actions over losses stemming from possible computer problems at the beginning of the year 2000, members of the information technology industry persuaded Congress to enact a bill to provide relief.<sup>13</sup> The legislation provides certain substantive and procedural standards for the resolution of these suits. Many of these standards appear designed to protect the information technology industry and those dependent upon it from claims Congress perceived as essentially nuisance claims or claims with little merit but which, if aggregated, could threaten some members of the industry with ruinous liability. Accordingly, the statute limits punitive damages, imposes strict pleading requirements, and provides special rules governing class actions and jurisdiction.

**Congress’s use of a device like removal of cases to federal court to prevent state courts from providing relief for specific types of state law claims...raises serious federalism problems.**

Y2K actions could be brought in state or federal court. However, they could be brought as class actions only if the court in which they are filed finds that the defects alleged are material for a majority of the members of the class.<sup>14</sup> Reflecting the perception that some state courts

may be overly friendly to class actions alleging Y2K related claims, section 6614(c) provides for original federal district court subject matter jurisdiction over many Y2K actions brought as class actions. Of course, therefore, because Congress provided original jurisdiction over Y2K class actions, they are removable under 28 U.S.C. § 1441(a).<sup>15</sup> Fortunately, the so-called Y2K problem resulted in little litigation. Nonetheless, this statute is another instance of Congress creating federal jurisdiction in class actions that otherwise would be beyond the federal courts' jurisdictional reach.<sup>16</sup>

**3. September 11<sup>th</sup> Victims Compensation Fund.** The Victims Compensation Fund (VCF) that was enacted in the wake of the 9/11 attacks sets up an administrative scheme supervised by a Special Master that compensates the victims of the 9/11 attacks and their families.<sup>17</sup> Setting up a mechanism for quick and speedy compensation, without requiring proof of causation for losses, is a very laudable goal. The victims of the 9/11 attack or their families may elect a remedy through the VCF or they may elect to litigate their claims. However, if a victim decides to forgo the opportunity to seek compensation from the VCF and wants to litigate instead, the act establishing the VCF limits venue options. The act creates a federal cause of action for damages sustained in the attacks, and provides for exclusive federal jurisdiction of all personal injury, property damage and death case actions arising out of the 9/11 attacks in the United States District Court for the Southern District of New York. Thus, none of these such cases may be brought in a state court.<sup>18</sup>

**4. The Bankruptcy Code.** The Bankruptcy Reform Act of 1994 added section 524(g) to the Code, which allows a party related to a Chapter 11 debtor, but not itself a debtor, to obtain a permanent injunction against future litigation in cases involving asbestos. Section 524(g) makes it clear, however, that this subsection is specifically designed to apply in asbestos cases only, where there is a settlement fund trust mechanism and the debtor can prove, among other things, that it is likely to be subject to future asbestos claims.<sup>19</sup>

This provision is a powerful tool. It was recently invoked by PPG in connection with the Chapter 11 filing of its subsidiary, Pittsburgh Corning, a major asbestos defendant. The obvious effect of section 524(g) is that it deprives plaintiffs of the opportunity to litigate their claims in state courts.

## **B. Two Examples of Proposed Federal Legislation**

In addition to the examples described above, Congress is considering more dramatic legislation. While passage of the bills described below remains highly uncertain, support for them appears to be growing.

**1. Class Action Fairness Act.** The most wide-ranging bill is the Class Action Fairness Act. The Act would allow either defendants or plaintiffs to remove most class actions based on state causes of action to federal court. The Class Action Fairness Act, most recently introduced in the House as H.R. 2341, 107th Cong. (2001), and in the Senate as S. 1712, 107th Cong. (2001), would allow removal to federal courts notwithstanding a lack of complete diversity. Variations on this bill have been proposed for several years.<sup>20</sup> The House passed its version of the bill on March 13, 2002, by a vote of 233-190. The Senate version of the bill is still under consideration by the Senate Judiciary Committee.<sup>21</sup> These bills would amend 28 U.S.C. § 1332, the diversity jurisdiction statute, to allow original jurisdiction over class actions so long as any member of the

class is diverse from any defendant. They further would enact a removal provision that allows for any such case filed as a class action in state court to be removed to federal court. The purpose of these amendments is to keep plaintiffs in state court class actions from preventing such cases from being removed by naming local defendants. The bills also would allow the federal district court to decline to exercise jurisdiction and remand when the amount in controversy is relatively small (less than \$1 million), when class members number fewer than 100, when a substantial number of the purported class members are citizens of the same state as the primary defendants, or when the claims asserted would be governed primarily by the law of the state.

**2. Asbestos Bills.** The Asbestos Compensation Bill (H.R. 1283), originally introduced in 1999 and resubmitted in the Spring of 2000, would establish a federal compensation system for asbestos personal injury claims.<sup>22</sup> The Act would set up an administrative compensation fund replenished by contributions from asbestos defendants. The bill has not been resubmitted in the 107th Congress, but other bills that would provide tax relief to asbestos defendants who pay into settlement funds have been introduced.<sup>23</sup> There is also talk that Congress will enact bills that deal with “unimpaired claims.”<sup>24</sup> The fact that these bills keep coming up is one indication that Congress will continue to focus on the asbestos problem.

The climate for the passage of an asbestos compensation bill has improved. Congress is showing an increasing willingness to deal with personal injury claims when there is a “disaster.” For example, Congress acted with dispatch simultaneously to (1) prevent the airline industry from collapsing and (2) help the victims of the 9/11 terrorist attacks get quick compensation.<sup>25</sup> It remains to be seen how well the VCF will work, because only a few hundred claims have been filed thus far with the VCF. But, especially if the VCF succeeds, it may well be the camel’s nose of federalization under the tent of the states’ common law. Certainly, the asbestos litigation problem does not present the same kind of disaster as the various damages resulting from an act of terrorism. Congress is showing an increased propensity to step in to prevent the decimation of an entire industry or set of industries. The insurance industry, for example, is likely to convince Congress to limit its liability in future terrorist cases.<sup>26</sup> And Congress has now amended the bill creating the VCF to open its doors to the victims of the 1993 World Trade Center bombing and the Oklahoma City Bombing.<sup>27</sup> As the asbestos problem—or some similar mass tort or other problem—begins to engulf whole new industries and companies, Congress may believe that further action would be justified. The effect of such litigation would be to curtail further the state judiciaries’ role in resolving the various claims that arise in connection with that litigation.

**The fact that these bills keep coming up is one indication that Congress will continue to focus on the asbestos problem.**

### **III. Action by the Federal Judiciary**

Notwithstanding the Supreme Court’s recent federalism decisions (discussed above), the federal judiciary as a whole is, in many important respects, moving toward greater federal

judicial power at the expense of the state courts as well. There are many important exceptions to this proposition, including:

- the Supreme Court’s decisions in *Amchem* and *Ortiz* striking down the use of Rule 23 settlement classes to resolve major aspects of the asbestos litigation;
- the Supreme Court’s decision in *Epstein*,<sup>28</sup> holding that a state class action settlement may preclude a federal securities class action; and
- the Third Circuit’s refusal to grant an All Writs Act injunction in the GM “sidesaddle” fuel tank litigation.<sup>29</sup>

However, the trend overall appears to be toward a greater federal court role in managing and resolving especially complex cases. There are a number of examples.

#### **A. Aggressive Use of the Bankruptcy Statutes**

A bankruptcy filing under Chapter 11 provides the debtor with an automatic stay of all litigation against it, including all tort actions filed against it in both state and federal courts.<sup>30</sup> Beginning with Johns Manville in 1982, many corporations, including those enmeshed in the asbestos, Dalkon Shield, and breast implant litigations, have used Chapter 11 filings as a way of resolving personal injury claims filed against them and controlling their liability costs.

Moreover, the bankruptcy power in some cases provides some third parties to ride on the coattails of the debtor to the federal courts, and to seek similar protections. Section 1334 vests the federal district courts with subject matter jurisdiction over cases “related to” a Chapter 11 bankruptcy case.<sup>31</sup> This provision then provides a third party with claims against it in state court, that arguably are related to the tort claims against the debtor, the opportunity to remove the state cases where they would then be resolved as part of the bankruptcy proceedings. Some federal courts have been interpreting § 1334 quite broadly.<sup>32</sup> Indeed, co-defendants in some cases may be able to channel cases against them away from the state courts to the federal court handling the bankruptcy case. Third parties in the Dalkon Shield, for example, were successful in resolving the claims against them by participating in a global settlement and in return receiving permanent injunctive relief that channeled all claims against them through the settlement vehicle set up by the bankruptcy court.<sup>33</sup> Most recently, the Sixth Circuit affirmed the power of federal courts to provide such relief but remanded for further fact finding by the bankruptcy court.<sup>34</sup>

The Chief Judge of the Third Circuit is pushing the courts handling Chapter 11 asbestos cases to use the cases pending there to resolve major aspects of the asbestos litigation. For example, the recent announcement by PPG that it has an agreement with most plaintiff lawyers and most of its insurers to settle all possible asbestos-related liability relating to its ownership of Pittsburgh Corning, a Chapter 11 debtor, is undoubtedly a direct result of the pressure to use the federal court’s bankruptcy power to settle pending and future asbestos litigation.

#### **B. The All Writs Act: Injunctions**

Some federal courts are making increased use of the All Writs Act, 28 U.S.C. § 1651 to enjoin the filing or prosecution of state court actions that might compete with or interfere with a

federal court's ability to achieve a global settlement. Generally, the federal Anti-Injunction Act<sup>35</sup> embodies Congress's intent that federal courts should not interfere with ongoing state litigation.<sup>36</sup> Over the years, however, federal courts have crafted an exception, based loosely on the express exceptions of the Anti-Injunction Act and the federal All Writs Act, that is designed to help them achieve global settlements of complex litigation. The idea is that, in a multidistrict litigation, once the federal court designated by the Judicial Panel on Multidistrict Litigation to handle the MDL is close to achieving a settlement, it has the power to restrain state court actions that might interfere with the ability to settle the case.

Several recent cases show how the All Writs Act can be used by federal courts to facilitate global settlements.<sup>37</sup> Although good arguments can be made that global settlements are a good thing because they tend to reduce transaction costs and result in payments to claimants sooner rather than later, one effect of the use of the All Writs Act is to prevent litigants from invoking the power of state courts to resolve their disputes, which has an erosive effect on the traditional, constitutional role of state courts as the primary forum for the resolution of state-based claims.

Most recently, in the Diet Drug Litigation, the United States Court of Appeals for the Third Circuit affirmed the grant of an injunction against a pending Texas state court class action that it believed would frustrate the settlement of the federal litigation.<sup>38</sup> The Third Circuit surveyed its own cases and those of its sister federal courts that have used the All Writs Act to achieve that goal. The Third Circuit recognizes that complex MDL litigations involve an enormous amount of time and expenditure of resources because the parties often seek complicated, comprehensive settlements to resolve as many claims as possible in one proceeding. In fact, these are the very types of cases that are especially vulnerable to parallel state court actions that may frustrate the settlement process in the federal courts. In a very broad statement of its authority to enjoin state court proceedings, the Third Circuit states:

In complex cases where certification or settlement has received conditional approval, or perhaps even where settlement is pending, the challenges facing the overseeing court are such that it is likely that almost any parallel litigation in other fora presents a genuine threat to the jurisdiction of the federal court.<sup>39</sup>

Not surprisingly, therefore, the Third Circuit affirmed the power of the District Court to restrain the Texas state court proceeding.

Numerous other federal courts have invoked the All Writs Act to enjoin state litigation that they believed would frustrate the global settlement of mass tort and other state claim based complex litigation. In the asbestos litigation that ultimately became *Amchem*, the Third Circuit affirmed a district court order preliminarily enjoining absent members of the plaintiff class, including future class claimants, from prosecuting separate state court actions.<sup>40</sup> Settlement of the federal class action was imminent, and the plaintiffs would have the opportunity to opt out pursuant to the class action rule. A key reason for upholding the injunction was the fact that the state actions sought to challenge the propriety of the federal class action, thereby

implicating the “necessary in aid of jurisdiction” exception to the Anti-Injunction Act and the All Writs Act.<sup>41</sup>

Similarly, the Ninth Circuit has used the All Writs act in a consumer protection case. In the *Chrysler* defective liftgate latch litigation, the Ninth Circuit held that it is proper to use the All Writs Act to enjoin temporarily state court litigation pending the final approval of a class action

**More controversially, some federal courts use the All Writs Act to effect removal of state cases to federal court.**

settlement.<sup>42</sup> And, the Seventh Circuit has affirmed the use of an injunction under the All Writs Act in the Blood Products Litigation to prevent attorneys from suing in state courts to enforce contingency fee agreements that were inconsistent with the federal settlement decree.<sup>43</sup>

### C. The All Writs Act: Removal of Parallel State Proceedings to Federal Court

More controversially, some federal courts use the All Writs Act to effect removal of state cases to federal court. For example, the United States Court of Appeals for the Second Circuit affirmed the use of the All Writs Act to remove to federal court parallel state court proceedings to prevent them from frustrating the federal settlement of the Agent Orange litigation.<sup>44</sup> In that litigation, two groups of veterans and their families brought actions in state court asserting tort claims against chemical companies which manufactured the defoliant Agent Orange. Plaintiffs alleged that injuries they sustained did not manifest themselves or were not discovered until after the settlement date of a prior federal class action suit involving Agent Orange. The cases were removed to federal court, which remanded claims of two civilian plaintiffs, but denied a motion to remand brought by veteran plaintiffs and their family members. The district court then dismissed the veteran plaintiffs’ claims as barred by the settlement of the prior federal class action and issued an order enjoining future suits by class members.

The Second Circuit affirmed the district court’s denial of the motion to remand, finding that a district court, “in exceptional circumstances, may use its All Writs authority to remove an otherwise unremovable state court case in order to ‘effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained.’”<sup>45</sup> The court explained that a state court addressing a victim’s tort claim would first need to decide the scope of the Agent Orange class action and settlement. However, the Second Circuit said, the federal district court that approved the settlement and entered the judgment enforcing it was best situated to make such a determination. Accordingly, it held, removal was an appropriate use of federal judicial power under 28 U.S.C. § 1651.

**The Debate Over the All Writs Act.** There is, however, some debate among the federal appellate courts whether it is appropriate to use the All Writs Act to remove state court cases. In *Pacheco de Perez v. AT&T Co.*,<sup>46</sup> the Eleventh Circuit first noted that the All Writs Act may permit removal, but only in extraordinary cases. The court held that the case before it was not removable, following the analysis of the Supreme Court in *Rivet v. Regions Bank of Louisiana*<sup>47</sup> that an otherwise non-removable case may not be removed on the theory that it is precluded by a prior federal judgment. The Eleventh Circuit has now definitively ruled that the All Writs Act does not

permit removal.<sup>48</sup> The Tenth Circuit also has rejected the Second Circuit's *Agent Orange* approach as well.<sup>49</sup> On the other hand, the Seventh Circuit, citing *Agent Orange*, has endorsed the use of the All Writs Act to remove and enjoin state court litigation in order to enforce its ongoing orders.<sup>50</sup>

The United States Supreme Court has granted certiorari in the Eleventh Circuit case to determine whether the All Writs Act empowers federal courts to remove state court lawsuits.<sup>51</sup> The question is a complicated one. On the one hand, removal is a powerful and practical tool that can be used by federal courts to protect their ability to achieve global settlements in complex litigation. On the other hand, removing cases from the state court system arguably creates far more tension with federalism principles than does enjoining a state court proceeding that may be precluded by an existing federal court judgment.

Despite the broad language in many of the cases decided in the United States Courts of Appeals justifying the imposition of All Writs Act injunctions or removals, it is important to understand that the federal courts are not anxious to use their All Writs Act power. For example, the Third Circuit, which upheld the use of the All Writs Act in the context of the asbestos (*Amchem*) and diet drug ("Fen-Phen") cases discussed above, refused to allow All Writs Act relief in a consumer protection case, the GM "sidesaddle" fuel tank litigation.<sup>52</sup> That case, another involving state-federal dueling class actions, provides an example of how the federal courts generally continue to show deference to the state courts.

#### D. Other Case Law Supporting Removal

It used to be axiomatic that the removal statute be construed narrowly against removal, and that axiom is repeated in the boilerplate part of most federal court decisions on removal. However, there are significant deviations from that principle in numerous removal cases that make it easier for defendants to remove cases to federal court.

*Time Limit for Removal.* First, in *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*,<sup>53</sup> the United States Supreme Court ruled that the 30-day period to remove does not begin to run until after formal service on the defendant. The removal statute states that the 30-day period runs from the time the defendant learns of the case through "service or otherwise."<sup>54</sup> Before *Murphy* was decided, construing the statute narrowly, federal courts found that receipt of a courtesy copy of the complaint triggered the period.

*"Unanimity" and "Last Served" Rules.* Second, the federal appellate courts have increasingly adopted the "last served" rule in place of the prior "unanimity rule" followed by the majority of courts. The removal statute requires all defendants to join in the motion to remove an action to federal court.<sup>55</sup> Thus, if the first served defendant failed to file a notice of removal within 30 days, the presumption arose that that defendant did not want to remove, and therefore the lack of unanimity precluded removal, whether or not the later served defendants wanted to remove. The "last served" rule extends the time to remove, which makes it more likely that cases will be removed from state court.<sup>56</sup>

*Jurisdictional Amount.* Third, in an increasing number of cases, the federal courts are finding the diversity jurisdictional amount requirement satisfied. A review of the court of

appeals cases over the last ten years does shows a variance in the different courts of appeals, but anecdotally, it appears that many the federal courts are more likely today to find that the amount in controversy requirement is met. For example, the Ninth Circuit has held that it is proper to use the “either viewpoint” rule in class action cases involving injunctive relief.<sup>57</sup> When considering whether the jurisdictional amount is satisfied under the “either viewpoint” rule, the court can look to the overall cost to the defendant, or to the much smaller value to any individual plaintiff, when determining whether to allow removal. If, for instance, the defendant’s cost to comply with an injunction is included in the amount in controversy, it is far easier to satisfy the jurisdictional amount requirement. The United States Supreme Court has granted certiorari on the question.

*Novel Claims Under State Law.* Finally, whether a case can be removed to federal court or not is obviously of great importance to the litigants. Some federal courts in removed cases have declined to adopt novel state law claims made by the plaintiff.<sup>58</sup> Obviously, then, if removed to federal court, plaintiffs will effectively be denied the opportunity to present novel claims in the state court—the very court that the plaintiffs chose—that is responsible for determining the state law applicable to their case.

#### **E. Punishing Suspected Forum-Shoppers**

Some federal judges are punishing lawyers who file actions in state courts when they perceive them to be forum shopping. For example, in one federal class action, the court enjoined a law firm from pursuing a parallel state court action based on the same cause of action—even though the judge presiding over the parallel state court action believed that the same law firm’s actions were entirely appropriate.

In September 1998, BankAmerica Corporation and NationsBank Corporation merged to form a new BankAmerica. Within a month and a half, 24 class actions were filed in six federal district courts and seven more were filed in California state courts, all alleging fraudulent conduct in connection with the merger. One of the federal class action lawsuits was filed by a prominent securities class action firm, Milberg Weiss Bershad Hynes & Lerach, which also filed five of the California state court class actions. The Multidistrict Litigation Panel transferred the federal cases to the Eastern District of Missouri, and Judge John F. Nangle was appointed to handle the litigation. When it became apparent that Milberg Weiss could not be chosen as lead counsel, because its clients lacked the financial stake necessary under the Private Securities Litigation Reform Act, it sought to dismiss the federal action to pursue the California state court actions, which had been consolidated as the *Desmond* case, where it would not be faced with the federal financial stake rules.<sup>59</sup> The other federal plaintiffs and defendants objected to the dismissal because they feared that at some point the state court class actions would conflict with the federal proceedings. Finding no such current conflict, Judge Nangle allowed Milberg Weiss to dismiss its federal case.

For the next nine months, Milberg Weiss repeatedly sought class certification of the state court actions. The federal plaintiffs eventually moved in Judge Nangle’s court for an injunction barring the state proceedings. Concluding that his trust that Milberg Weiss would cooperate with the federal litigants and that the firm would not create conflicts between the state and federal

lawsuits was misplaced, Judge Nangle entered an injunction barring Milberg Weiss from prosecuting the state court actions. He found that Congress' intent to have those with the highest financial stake control securities class actions was frustrated by Milberg Weiss's efforts that "succeeded in having premature settlement negotiations ordered by the California court." Further, Judge Nangle excoriated Milberg Weiss's conduct.<sup>60</sup>

In contrast to Judge Nangle's stinging rebuke, Judge Cahill, who presided over the California state court actions, issued an order addressing the injunction stating that Milberg Weiss and defendants' counsel were all "of the highest quality" and that they had "conducted themselves in a professional and ethical manner throughout this litigation in the California Superior Court."<sup>61</sup> Judge Cahill's statement finding that Milberg Weiss' conduct was ethical is important for two reasons. First, it demonstrates that the evil of forum shopping exists more in the mind of the beholder than anywhere else. Second, it raises the point missed by Judge Nangle: if the state court does not view the proceedings before it as frivolous, why is it wrong for litigants to seek access to state courts for state-law based claims?

#### **F. Proceedings of the Judicial Conference of the United States**

Committees of the Judicial Conference, which is the governing authority for the federal courts, have considered changes to court rules and support of legislation that would increase opportunities for federal courts to enjoin state court proceedings when there are overlapping class actions and abolish the complete diversity rule in favor of a "minimal diversity" standard.<sup>62</sup>

### **IV. Perspectives**

#### **A. How the Federal Courts Came to Dominate Complex State Law Cases**

While they were also important in the 1970s, mass tort cases and other complex cases came to dominate the discussion about civil litigation in the last two decades of the last millennium. Such cases, based on state law liability theories, have no inherent claim to federal court resolution. Indeed, as we all learn in the first year of law school, according to the *Erie* doctrine,<sup>63</sup> the law to be applied to such cases is state law whether they are litigated in state court or federal court.<sup>64</sup> And, state courts of general jurisdiction can and generally do resolve the vast majority of cases turning on state law.<sup>65</sup> Of course, in appropriate cases, diversity jurisdiction permits such cases to be adjudicated in federal court. But, because mass tort litigation, or consumer protection litigation such as the General Motors "sidesaddle" fuel tank litigation,<sup>66</sup> is simply an aggregation of hundreds or thousands of individual state law cases, one would think that the preferred place for resolving such litigation would be state courts.<sup>67</sup>

State courts, however, historically were thought to lack the means for resolving such cases on a national basis.<sup>68</sup> Instead, the federal courts increasingly were looked to as the preferred forum for the aggregated resolution of cases traditionally handled as individual products liability cases in state or federal court. Because mass torts are national—and

sometimes international—in scope, it made sense to try to use the federal court system to resolve such cases.<sup>69</sup> In several respects, the federal courts appeared to have the best tools for more efficiently resolving such cases.

First, the Multidistrict Litigation statute<sup>70</sup> allows the Multidistrict Litigation Panel to transfer related federal cases to one district court for pretrial purposes.<sup>71</sup> In addition, the bankruptcy laws provide several tools to assist a defendant corporation in consolidating the cases against it.<sup>72</sup> There are judicial tools as well. The Supreme Court, by way of Federal Rule of Civil Procedure 23, permits representative (i.e., class) litigation in appropriate cases.<sup>73</sup> Finally, in some cases nearing federal court settlement, the federal courts will issue injunctions against state court litigation that raises or may raise the same claims as those in federal court.<sup>74</sup> Thus, by the mid-1980s, the federal courts came to be seen by many litigators and commentators as the most appropriate place to resolve mass tort cases. However, later judicial developments, most particularly the Supreme Court's *Amchem Products, Inc. v. Windsor*<sup>75</sup> decision, questioned the propriety of federal court class resolution of mass tort litigation. These decisions resulted in a flight of mass tort and similar litigation to the state courts, many of which appear to be more hospitable to class resolution of such cases. This flight, in turn, led to the recent subject matter jurisdiction legislation designed to permit the return of the state class litigation to federal courts. Once returned to federal court, it appears that, based on restrictive readings of *Amchem*, Congress envisions that the federal courts generally will refuse to certify the proposed class actions. Not only does that greatly reduce their settlement value to plaintiffs and their attorneys,<sup>76</sup> but it also denies the state courts the opportunity to resolve the case.

## **B. Why Is Congress Hostile to Concurrent Jurisdiction?**

The crux of much of Congress's legislation is that state courts cannot be trusted to resolve fairly cases brought under state law.<sup>77</sup> For example, in the findings section of the Interstate Class Action Jurisdiction Act of 1999 (House version), Congress finds that "interstate class actions are the 'paradigm for Federal diversity jurisdiction because, in a constitutional sense, they implicate interstate commerce, invite discrimination by a local State, and tend to attract bias against business enterprises.'"<sup>78</sup> A more explicit statement that the state courts cannot be trusted would be difficult to envision. Is that not a serious insult to the dignity of the state courts, and therefore a violation of the principles enunciated by the Supreme Court in its federalism decisions? In legislation based on that premise there is a real potential for a Tenth or Eleventh Amendment violation.

Suppose the state court refuses to relinquish jurisdiction and continues to issue discovery orders and the like. The federal court to which the action was removed will undoubtedly enjoin the state court from proceeding.<sup>79</sup> Even if only the parties to the litigation are named in the federal court injunction order, the order effectively runs to the state court itself because it bars it from proceeding and thus violates federalism principles.<sup>80</sup> The state, in the person of the state court judge, is now the clear target of the federal order.

## **C. Why Balance Is Needed**

There is no question that the Supreme Court's recent federalism decisions are motivated in no small part by the desire to protect the dignity of the states as sovereigns. States, as Justice

Kennedy wrote in *Alden v. Maine*,<sup>81</sup> “are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not full authority, of sovereignty.”<sup>82</sup>

Recall that the Supreme Court in *Amchem* decried Congress’s lack of action in the mass tort arena. It found, nevertheless, that federal courts were without the power to use the procedural tool, Rule 23, to effect substantive results where Congress has failed to act. The Court clearly envisioned a reduced federal court role in the resolution of these big cases. Moreover, the Third Circuit’s analysis in the GM “sidesaddle” fuel tank litigation, denying All Writs Act relief, opened the door for the states to resume their role in adjudicating matters of state law in complex cases, even in the form of class actions. So, it is ironic, if not perverse, especially in light of the Supreme Court’s federalism cases, that Congress seeks to channel these cases out of state courts to federal court, knowing that class certification now will generally be denied in those courts. The effect may be to erode the force of state court claims and the power of the state judiciaries.

**States, as Justice Kennedy wrote in *Alden v. Maine*, “are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not full authority, of sovereignty.”**

Unless Congress is willing to preempt state substantive law, and pay the political price for that, it should not use federal procedural end-runs to eviscerate principles of state law. I maintain, as I always have, that the federal courts should remain an important part, and perhaps the ultimate part, of the global resolution of mass tort and other national scale civil litigation.<sup>83</sup>

There are many good things to say about many of the developments at the federal level. It is hard to ignore the inefficiencies and potential unfairness that arise when there are competing cases in state and federal courts. The dueling class action problem—where competing state and federal class actions are filed simultaneously—is a particular concern. Additionally, some state court attempts to assert jurisdiction over claims that have little contact with that state are also problematic from the federal perspective. But the hard question that needs to be addressed at both the state and federal levels is the question of which jurisdiction’s court ought to be primarily responsible for the resolution of state based causes of action.

Unquestionably, Congress’s attempt to essentially federalize cases involving purely state law claims raises significant federalism problems.<sup>84</sup> Certain trends in the federal judiciary’s approach to complex litigation raise similar concerns. To the extent that Congress and the federal courts are seeking to prevent certain types of state law cases from being litigated in the state courts in order to ensure a certain substantive outcome, Congress’s subject matter jurisdiction legislation is problematic.

Although the Supreme Court’s new federalism decisions do not readily suggest that such approaches are unconstitutional, one may wonder how far the new federalism decisions may reach to curb anti-federalist legislation. However, legislation and judicial action that has the effect of stripping state courts of their ability to hear class actions involving state law claims

undermines the spirit of federalism and may impair the fair resolution of such cases. At the very least, they compromise our traditional conceptions of the division of state and federal judicial business.<sup>85</sup> Beyond the niceties of political philosophy and jurisprudence, the traditional role that states play in regulating conduct and providing access to courts to injured parties by providing remedies through the common law process in state courts may be endangered—especially in mass tort cases, consumer protection litigation, and other complex litigation based on state law theories of recovery.

## ENDNOTES

- 1 *See, e.g., Alden v. Maine*, 527 U.S. 706, 760 (1999) (Souter, J., dissenting) (describing majority’s revolutionary conception of state sovereign immunity: “[T]he Court’s enhancement of the [Eleventh] Amendment was at odds with constitutional history and at war with the conception of divided sovereignty that is the essence of American federalism.”).
- 2 *See, e.g., Federal Marine Comm’n v. South Carolina State Ports Auth.*, 122 S. Ct. 1864 (2002) (holding that private plaintiffs may not sue states in federal agencies); *United States v. Morrison*, 529 U.S. 598 (2000) (holding that Congress lacks Commerce Clause and section 5, Fourteenth Amendment enforcement power to federalize domestic violence cases); *Alden v. Maine*, 527 U.S. 706 (1999) (holding that Congress may not abrogate state sovereign immunity in state courts); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999) (holding that Congress lacks section 5, Fourteenth Amendment enforcement power to abrogate state sovereign immunity in patent cases); *College Savings Bank v. Florida Prepaid Post secondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (holding that Congress could not abrogate sovereign immunity in Trademark Remedy Clarification Act under its section 5, Fourteenth Amendment enforcement powers); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (Congress lacks the power under its Article I Commerce clause powers to abrogate state sovereign immunity in federal courts); *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261 (1997) (same); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (Religious Freedom Restoration Act not an appropriate exercise of Congress’s Fourteenth amendment, section 5 enforcement power); *Printz v. United States*, 521 U.S. 898 (1997) (striking down Brady Handgun Violence Prevention Act gun control legislation as in excess of Congress’ Commerce Clause powers and in violation of 10<sup>th</sup> Amendment); *United States v. Lopez*, 514 U.S. 549 (1995) (striking down Gun-Free School Zones Act of 1990 as in excess of Congress’s Commerce Clause powers and in violation of the Tenth Amendment).
- 3 A quote by Justice Kennedy in *Alden v. Maine*, typifies the Supreme Court’s jurisprudence in this regard:

Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment, which, like the other provisions of the Bill of Rights, was enacted to allay lingering concerns about the extent of national power. The Amendment confirms the promise implicit in the original document: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

*Alden v. Maine*, 119 S. Ct. 2240, 2247 (1999).
- 4 Contrast Justice Kennedy’s language in note 3 above with the following statement by a member of Congress in reaction to these legislative developments:

These are the same people who say we need to return power to the local level, to the individual level, and here they are now arguing to bring this back to the federal government. This is absolutely contrary to the horse my colleagues rode to the Congress on, the states’ rights horse.

Rep. Melvin Watt, D-N.C., quoted in Stephen Labaton, House Approves Bill that Would Make Class-Action Suits Harder to Win, N.Y. TIMES, Sept. 24, 1999, (discussing his “states’ rights” colleagues’ attempts to enact legislation that would have the effect of ousting the state courts from hearing diversity based class actions).

- 5 Judicial Conference of the United States Long Range Plan 21-22, 135 (Dec. 1995), at <http://www.uscourts.gov/lrp> (visited June 18, 2002) (discussing the need to adopt a model of cooperative federalism that respected the states’ preeminent role in adjudicating state claims and recommending that Congress limit diversity-based jurisdiction).
- 6 See 28 U.S.C. 1332 (1996) (providing for federal subject matter jurisdiction in cases between citizens of different states when the amount in controversy exceeds \$75,000).
- 7 *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).
- 8 *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).
- 9 509 U.S. 579 (1993).
- 10 See, e.g., *Baker v. Dalkon Shield Claimants Trust*, 156 F.3d 248 (1st Cir. 1998) (using *Daubert* to exclude plaintiff’s gynecological expert’s testimony and test results).
- 11 15 U.S.C. § 77p and § 78bb (2000).
- 12 15 U.S.C. § 77p and § 78bb (as amended Nov. 3, 1998, Pub. L. No. 105-353, Title I, § 101(a)(1), 112 Stat. 3227).
- 13 Y2K Act, 15 U.S.C. § 6601, *et seq.* (1999) (an act “[t]o establish certain procedures for civil actions brought for damages relating to the failure of any device or system to process or otherwise deal with the transition from the year 1999 to the year 2000, and for other purposes.”).
- 14 See 15 U.S.C. § 6614(a)(2).
- 15 See 15 U.S.C. §§ 6614(c)(3)(A) & (B).
- 16 15 U.S.C. § 6614(c)(3)(A). For example, Y2K actions generally allege violations of state law. Section 6614(c) provides federal subject matter jurisdiction for class actions of this type notwithstanding a lack of complete diversity or failure to meet the jurisdictional amount rules. However, Congress did not intend to sweep into federal court all Y2K class actions. Rather, it excepted class actions that involve relatively localized claims, or relatively few class members, or state governments. Thus, the statute precludes original jurisdiction under Section 6614(c)(2) if: (1) a substantial majority of the members of the proposed plaintiff class are citizens of a single state, the primary defendants are citizens of that same state, and the asserted claims will be governed primarily by the laws of that state; (2) the primary defendants are states, state officials, or other governmental entities against whom the district courts may be foreclosed from ordering relief; (3) the plaintiff class does not seek an award of punitive damages, and the amount in controversy is less than the sum of \$10,000,000 (exclusive of interest and costs), computed on the basis of all claims to be determined in the action; or (4) the proposed plaintiff class has fewer than 100 members. If a class action is brought in federal court that fits within any of these exceptions, and if the sole basis for federal jurisdiction is the Y2K jurisdictional provision and the district court finds that the requirements for class certification under Rule 23 of the Federal Rules of Procedure are not met, the district court must dismiss the action, or, if removed, strike the class allegations and remand the Y2K action to state court.
- 17 The September 11<sup>th</sup> Victims Compensation Fund of 2001 was established as part of the Air

Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, §§ 401-409, 115 Stat. 230, 239 (2001).

- 18 H.R. 2926 § 408(b)(1) (“AVAILABILITY OF ACTION - There shall exist a federal cause of action for damages arising out of the hijacking and subsequent crashes of American Airlines flights 11 and 77, and United Airlines flights 93 and 175, on September 11, 2001. Notwithstanding section 40120(c) of Title 49, United States Code, this cause of action shall be the exclusive remedy for damages arising out of the hijacking and subsequent crashes of such flights.”); Section 408(b)(3) provides: “The United States District Court for the Southern District of New York shall have original and exclusive jurisdiction over all actions brought for any claim (including any claim for loss of property, personal injury, or death) resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001.”
- 19 *See* 11 U.S.C. § 524(g)(2)(B).
- 20 *See* H.R. 1875, 106th Cong. 2 (1999); S. 353, 106th Cong. 3 (1999).
- 21 *See House Approves Class Action Legislation; Bill Would Expand Federal Jurisdiction*, 2002 U.S.L.W. 2574 (Mar. 19, 2002).
- 22 *See* H.R. 1283, 106th Cong. (2000) (remarking that this bill had originally been introduced March 25, 1999).
- 23 *See, e.g.*, S. 1048, 107th Cong. (2001) and H.R. 1412, 107th Cong. (2001) (bills would provide tax relief for payments into asbestos-related settlement funds and for future claims).
- 24 *See, e.g.*, H.R. 4696, 107th Cong. (2002) (classifying status of “unimpaired” claims).
- 25 The Air Transportation Safety and System Stabilization Act was passed just eleven days after the attacks on the World Trade Center and the Pentagon. *See* Pub. L. No. 107-42, 115 Stat. 230 (2001).
- 26 *See, e.g.*, the “Terrorism Insurance Act,” S. 1744, 107th Cong. (2001) (bill would limit total liability for insurance companies and also limit total damages).
- 27 *See* Joseph B. Treaster, *Senate Passes Aid to Insurers on Terrorism*, N.Y. TIMES, June 19, 2002, at C1.
- 28 *Matsushita Electric Ind. Co. v. Epstein*, 516 U.S. 367 (1996).
- 29 *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133 (3d Cir. 1998) (involving claims that GM pickup trucks’ side-mounted fuel tanks were defective in design, creating high fire risk after side collisions).
- 30 *See* 22 U.S.C. 362 (1994).
- 31 *See* 28 U.S.C. 1334(b) (1994). Section 1334 provides for original and exclusive jurisdiction over all cases under Chapter 11 of the Bankruptcy Code and further provides in relevant part: “The district courts shall have original but not exclusive jurisdiction of all civil proceedings . . . arising in or related to cases under title 11.” *Id.*; *see also* 28 U.S.C. 157(b)(5) (1993) (allowing consolidation); *In re Dow Corning Corp.*, 86 F.3d 482, 486-87 (6th Cir. 1996) (finding “related to” jurisdiction).
- 32 Section 1334 “related to” jurisdiction has been used in a number of mass tort cases to effect consolidation. Perhaps the broadest use of such jurisdiction occurred in the silicone breast implant litigation. There, after Dow Corning sought Chapter 11 protection, other manufacturers and suppliers of silicone breast implants, as well as Dow Corning’s corporate parents, Dow Chemical Co. and Corning Inc., who were co-defendants in the lawsuits against Dow Corning, sought to have the state cases filed against them removed to federal court.

They consolidated with the Dow Corning Chapter 11 proceeding pursuant to 28 U.S.C. 1334 (providing federal jurisdiction) and 28 U.S.C. 157(b)(5) (allowing consolidation). *See In re Dow Corning Corp.*, 86 F.3d 486-87. The district court rejected the attempt, but the Sixth Circuit reversed and remanded. *See id.* at 485. Citing the “primary goal [of] establishing a mechanism for resolving the claims at issue in the most fair and equitable manner possible,” the Sixth Circuit adopted an expansive definition of “related to” jurisdiction. *Id.* at 487, 489. The Sixth Circuit found that the tort claims against the nondebtors were sufficiently related to the tort claims against Dow Corning, which were stayed pursuant to 11 U.S.C. 362(a)(1) (1994), because the former could give rise to contribution or indemnification claims among the nondebtors which could have an impact on the debtor’s estate. *See In re Dow Corning*, 86 F.3d at 493-94. Thus, according to the court, the “unusual circumstances” necessary to invoke 28 U.S.C. 1334 “related to” jurisdiction were present. *Id.* at 493, quoting *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 999 (4th Cir. 1986). The court also found that 28 U.S.C. 157(b)(5) granted the district court handling the Dow Corning bankruptcy the power to transfer all the cases to itself. *See id.* at 496-97. The Sixth Circuit relied heavily on the decision of the Fourth Circuit in the Dalkon Shield litigation. *See id.*

On remand, the district court, invoking 28 U.S.C. 1334(c)(2), held that the actions against the nondebtors were subject to mandatory abstention. *See In re Dow Corning Corp.*, No. 95-CV-72397-DT, 1996 U.S. Dist. LEXIS 16754, at 20-21 (E.D. Mich. July 30, 1996). Section 1334(c)(2) provides for mandatory abstention “if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.” 28 U.S.C. 1334(c)(2). The Sixth Circuit granted mandamus in favor of the nondebtors, holding that an individualized determination must be made in each case to determine the impact of the case on the debtor’s estate. *See In re Dow Corning Corp.*, 113 F.3d 565, 569, 572 (6th Cir. 1997). In addition, the Sixth Circuit found that discretionary abstention under 28 U.S.C. 1334(c)(1) was also “wholly inappropriate” given the court’s prior acknowledgment of the “significant impact that our resolution of these issues will have on the future course of [bankruptcy] litigation.” *Id.* at 571. Thus, the filing of bankruptcy, together with the broad reach of the “related to” jurisdictional provision and the transfer power, provides a very potent tool for aggregation and global resolution.

Similarly, the Fourth Circuit had held that there was “related to” jurisdiction over claims against doctors who had inserted Dalkon shield devices in connection with A.H. Robins’ Dalkon Shield Chapter 11 proceeding. *See A.H. Robins Co.*, 788 F.2d at 1011 (4th Cir. 1986).

- 33 *See In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir. 1989) (channeling all claims against doctors, Robins’s insurance carriers, and others to Dalkon Shield Claimants Trust; entering, under § 105 of the Bankruptcy Act, injunctive relief barring claimants from directly suing such third parties).
- 34 *In re Dow Corning*, 280 F.3d 648 (6th Cir. 2002), in which the Sixth Circuit affirmed the district court’s conclusion that, under unusual circumstances, a bankruptcy court may enjoin a non-consenting creditor’s claim against a non-debtor to facilitate a Chapter 11 plan of reorganization. However, it remanded because the factual findings of the bankruptcy court did not demonstrate that such an injunction was appropriate in this case.
- 35 28 U.S.C. § 2283.
- 36 The Act provides: “A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.”
- 37 Perhaps the granddaddy of the modern use of the All Writs Act to achieve a global resolution of a complex case is *In re Baldwin-United Corp.*, 770 F.2d 328 (2d Cir. 1985). There, the Second Circuit Court of Appeals upheld an injunction designed to prevent state attorneys general and others from pursuing state court remedies that would have the effect of frustrating an impending settlement in the federal securities multidistrict litigation.

- 38 In re Diet Drugs, 282 F.3d 220 (3d Cir. 2002) (concerning claims against manufacturer of Redux and Pondimin—products containing phentermine, fenfluramine, and/or dexfenfluramine (often called colloquially “Fen-Phen” and “Dexfen-Phen”), which can cause valvular heart disease).
- 39 *Id.* at 236.
- 40 Carlough v. Amchem Prods., Inc., 10 F.3d 189 (3d Cir. 1993).
- 41 For similar reasons, the Fifth Circuit affirmed the use of injunctions in an antitrust case in In re Corrugated Container Antitrust Litig., 659 F.2d 1332 (5th Cir. 1981), *cert. denied sub nom.*, Three J Farms v. Plaintiffs’ Steering Comm., 456 U.S. 936 (1982). Key to the court’s affirmance was the fact that state court actions were initiated for the purpose of challenging and derailing a federal class action settlement. *See also* White v. National Football League, 41 F.3d 402, 409 (8th Cir. 1994) *cert. denied*, 115 S. Ct. 2569 (1995) (approving settlement agreement in complex antitrust class action lawsuit, and enjoining related actions in state or federal court), (abrogated by Amchem Prods., Inc., 117 S. Ct. 2231 (1997)).
- 42 In re Hanlon v. Chrysler Corp., 150 F.3d 1011, 1025 (9th Cir. 1998).
- 43 In re Factor VIII or IX Concentrate Blood Prod. Litig., 159 F.3d 1016 (7th Cir. 1998) (concerning claims that hemophiliacs who were treated with blood solids manufactured by defendant drug companies contracted HIV infections from tainted blood).
- 44 In re Agent Orange Product Liab. Litig., 996 F.2d 1425 (2d Cir. 1993), *cert. denied sub nom.*, Ivy v. Diamond Shamrock Chem. Co., 510 U.S. 1140 (1994).
- 45 996 F.2d at 1431, quoting United States v. New York Tel. Co., 434 U.S. 159 (1977).
- 46 Pacheco de Perez v. AT&T Co., 139 F.3d 1368, 1379 (11th Cir. 1998).
- 47 118 S. Ct. 921 (1998).
- 48 Henson v. Ciba-Geigy Corp., 261 F.3d 1065 (11th Cir. 2001), *cert. granted sub nom.*, Syngenta Crop Protection, Inc., v. Henson, 122 S. Ct. 1062 (2002).
- 49 *See* Hillman v. Webley, 115 F.3d 1461 (10th Cir. 1997) (holding that All Writs Act does not provide an independent basis for a district court to acquire jurisdiction over a separate case pending in state court).
- 50 In re VMS Sec. Litig., 103 F.3d 1317, 1323-26 (7th Cir. 1996).
- 51 Henson v. Ciba-Geigy Corp., 261 F.3d 1065 (11th Cir. 2001), *cert. granted sub nom.*, Syngenta Crop Protection, Inc., v. Henson, 122 S. Ct. 1062 (2002).
- 52 In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 134 F.3d 133 (3d Cir. 1998).
- 53 526 U.S. 344 (1999).
- 54 28 U.S.C. § 1446(b).
- 55 28 U.S.C. § 1441(a).
- 56 *See* 16 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE §107.30[3][a][iv] (3rd Ed. 2002) (discussing timing issues for removal).

- 57 In re Ford Motor Co./Citibank (South Dakota), N.A., 264 F.3d 952 (9th Cir. 2001), *cert. granted*, 122 S. Ct. 1063 (2002).
- 58 See *Insolia v. Philip Morris Inc.*, 216 F.3d 596, 607-08 (7th Cir. 2000).
- 59 See *Desmond v. BankAmerica Corp.*, 120 F. Supp. 2d 1201 (N.D. Cal. 2000).
- 60 In re Bankamerica Corp. Sec. Litig., 95 F. Supp. 2d 1044, 1050 (E.D. Mo. 2000) (“Additionally, Milberg Weiss’s behavior in these cases are precisely the sort of lawyer-driven machinations the PSLRA was designed to prevent. Hindsight now reveals that the simultaneous filing of suits in state and federal court was a blatant attempt at forum shopping. When the federal forum proved unsavory because Milberg Weiss would not be able to control that case, the firm simply took its marbles and went to play in the state court.”). See Opatrny, *Federal Judge Rips Into Milberg Weiss*, NAT’L L.J., May 22, 2000 at B5, col. 3.
- 61 *Id.*
- 62 Hon. David F. Levi, U.S.D.J., Memorandum to the Civil Rules Advisory Committee, Perspectives on Rule 23 Including the Problem of Overlapping Classes (April 24, 2002) (recounting federal rulemaking related to class actions and advocating legislation to authorize “minimal diversity” federal court jurisdiction for certain cases. Compare to the stance of the Judicial Conference’s Long Range Plan for the Federal Courts, *infra* note 85).
- 63 See *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).
- 64 See *id.* at 78.
- 65 See Mark C. Weber, *Complex Litigation and the State Courts: Constitutional and Practical Advantages of the State Forum Over the Federal Forum in Mass Tort Cases*, 21 HASTINGS CONST. L.Q. 215 (1994).
- 66 See *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 819 (3d Cir. 1995).
- 67 See Robert L. Rabin, *Federalism and the Tort System*, 50 RUTGERS L. REV. 1, 6 (1997); Linda S. Mullenix, *The Federalization of State Law: Mass Tort Litigation and the Dilemma of Federalism*, 44 DEPAUL L. REV. 755, 757-60 (1995); William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENTARY 599 (1999).
- 68 Currently, there is no legislation authorizing transfer, consolidation, and coordination of related state and federal litigation. There have been various proposals for more effective handling of complex litigation pending in state and federal courts. For example, the American Law Institute has proposed a variety of procedural solutions for dealing with such litigation, including the following: expanded federal diversity subject matter jurisdiction to provide a federal forum alternative in a broader range of cases; reverse removal to permit federal cases to be handled in the state courts where appropriate; expanded powers for a new Complex Litigation Panel, which would take the place of the Multidistrict Litigation Panel; federalized choice of law rules; and new rules pertaining to personal jurisdiction and preclusion. See American Law Inst., *COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS* (1994). Although these proposals raise interesting federalism issues, at least they envision an important role for state courts. Moreover, in recent years, federal district and state court judges have worked closely and cooperatively on a voluntary basis in a number of complex cases to achieve a high degree of efficiency. See William W. Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689 (1992). In addition, Congress has considered various forms of “Multiparty-Multijurisdiction” legislation over the last decade. More importantly, most state courts have become expert in handling complex litigation.
- 69 See, e.g., Geoffrey P. Miller, *Overlapping Class Actions*, 71 N.Y.U. L. REV. 514 (1996).

- 70 See 28 U.S.C. 1407 (1994).
- 71 See *id.*; 17 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ch. 112 (3d ed. 1999).
- 72 See Barbara J. Houser, *Chapter 11 as a Mass Tort Solution*, 31 LOY. L.A. L. REV. 451 (1998).
- 73 See FED. R. CIV. P. 23.
- 74 See Georgene M. Vairo, *Problems in Federal Subject Matter Jurisdiction: Supplemental Jurisdiction; Removal; Preemption, Abstention and Diversity*, in ALI-ABA NEW DIRECTIONS IN FEDERAL CIVIL PRACTICE AND PROCEDURE 47-58 (1996).
- 75 521 U.S. 591 (1997).
- 76 See *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995) (directing district court judge to decertify class action in hemophiliac/HIV contamination litigation out of concern that certification provided plaintiff class with undue leverage in seeking settlement).
- 77 See Stephen Labaton, *House Approves Bill That Would Make Class-action Suits Harder to Win*, N.Y. TIMES, Sept. 24, 1999, at <http://www.nytimes.com/yr/mo/day/news/national/class-action-limit.html> (visited Sept. 24, 1999).
- 78 H.R. 1875, § 2(1).
- 79 MOORE'S FEDERAL PRACTICE § 107.31[1] & [2].
- 80 See *Younger v. Harris*, 401 U.S. 37 (1971) ("Our Federalism" represents "a system in which there is a sensitivity to the legitimate interests of both state and national governments, and in which the national government, anxious though it may be to vindicate and protect federal rights and interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the state.").
- 81 119 S. Ct. 2240, 2247 (1999).
- 82 *Id.*
- 83 I have been of the view for a long time that consolidation of complex litigation in the federal courts can be an efficient and fair means for resolving complex, multiparty, multijurisdiction litigation. See, e.g., Georgene M. Vairo, Georgene, *The Dalkon Shield Claimants Trust, and the Rhetoric of Mass Tort Claims Resolution*, 31 LOYOLA OF L.A. L. REV. 79 (1997); Georgene M. Vairo, *The Dalkon Shield Claimants Trust, Paradigm Lost (or Found)?*, 61 FORDHAM L. REV. 617 (1992); Georgene M. Vairo, *Multi-Tort Cases: Cause for More Darkness on the Subject, or a New Role for Federal Common Law?*, 54 FORDHAM L. REV. 167 (1985).
- 84 See Georgene Vairo, *Judicial v. Congressional Federalism: The Implications of the New Federalism Decisions on Mass Tort and Other Complex Litigation*, 33 LOYOLA OF L.A. L. REV. 1559 (2000).
- 85 Judicial Conference of the United States Long Range Plan 21-22, 135 (Dec. 1995), at <http://www.uscourts.gov/lrp> (visited June 18, 2002) (discussing the need to adopt a model of cooperative federalism that respected the states' preeminent role in adjudicating state claims and recommending that Congress limit diversity-based jurisdiction).

## ORAL REMARKS OF PROFESSOR VAIRO

When we talk about trends in federalism and what they mean for the state courts, we are talking about some very difficult, complex questions. I have to confess that I stand before you state court judges as a something of a knee-jerk federal court apologist. From my first look at them as a law professor until more recent years, I always assumed that the federal court was the place to be, and didn't even really look too hard at what the cause of action was—whether it was under state law or federal law.

Perhaps that was because I, like countless thousands of others who have been educated in American law schools over the last several decades, was taught that the Federal Rules of Civil Procedure form the basis for how you operate in court. Perhaps it was because the first time I went down to visit the courts in lower Manhattan, where I was going to school, I noticed that the state courthouse was rather dingy. Whereas, the federal court across the street was white and shining and seemed very, very elegant.

Somewhat metaphorically, during my visit to New York last year just before September 11, I returned to lower Manhattan and I noticed a couple of things. First, I noticed that it was the *federal* courthouse that was dingy now, while the state courthouse had been whitewashed and renovated. Substantively, over the last several years I have been watching the efforts of Chief Judge Kaye of the New York Court of Appeals, and of other state judiciaries throughout the country reform and improve civil litigation in the state court systems, particularly with respect to complex litigation. So, I certainly have come to rethink my views about the proper allocation of judicial business in state and federal courts, particularly as it pertains to state-based causes of action.

The efficiencies that I had assumed could be achieved in state-based causes of action when they are resolved at the federal level is certainly no substitute for careful thinking about what the proper role of the state courts and federal courts should be in resolving those claims. So, my job this morning is to set the table for you and give you an idea of some of the developments at the federal level that are having, and may have in the future, a very, very serious and significant impact on the state courts' ability to resolve state law claims.

We know that we live in a world of concurrent jurisdiction, in which litigants often have the choice of state or federal court or both. Over the last decade perhaps, and probably in reaction to many developments at the federal court level, we have seen situations where plaintiff lawyers, including those with class action practices, increasingly bring their actions in state court. In contrast, defense attorneys appear to be seeking refuge in the federal courts, which they perceive as less receptive to the claims filed against their clients. For example, after the U.S. Supreme Court decided the *Amchem* and *Ortiz* cases, in which the Court made it more difficult to get class certification at the federal level, we are seeing many, many plaintiff lawyers wanting to bring their class actions in state court rather than in federal court.

There have also been other developments. The U.S. Supreme Court's trilogy of summary judgment cases in 1986 (*Celotex v. Catrett*; *Anderson v. Liberty Lobby*; and *Zenith v. Matsushita*) led to increased granting of summary judgment against plaintiffs in various kinds

of cases—products liability and the like—that never had happened before. In reaction, many plaintiffs began bringing their lawsuits in state courts, where they were less likely to have to worry as much about summary judgment. The Supreme Court’s *Daubert* decision, in which it made the federal district courts the gatekeepers for scientific evidence, I think hastened this trend.

Additionally, as we all know, it is axiomatic that the plaintiff is the master of the complaint, and that the plaintiff’s choice of forum should rarely be disturbed. We all know the exceptions to that—forum non-conveniens, dismissals, and the like. However, as the stakes have risen, and the forum selection battle has intensified between plaintiff lawyers and defense lawyers, it appears that both Congress and some members of the federal judiciary have taken, or are taking, steps to shift the equation. The shift is somewhat dramatically in favor of federal court litigation, whether the plaintiff lawyers like that or not, especially when we are talking about complex state-based causes of action.

This is all very ironic indeed. At the same time that the U.S. Supreme Court is waving the flag of state’s rights and federalism in many of its decisions, and at the same time the federal judges are complaining about judicial vacancies and burgeoning case loads, we see Congress and some federal judges taking distinctly *anti*-federalist steps that effectively strip state courts of their ability to adjudicate important cases involving important issues of state law.

Let me first talk about some of the examples of existing federal legislation to give you a flavor for what Congress is doing. To begin with, there is the Securities Litigation Uniform Standards Act of 1998. You may know that in 1995 Congress enacted, over President Clinton’s veto, the Private Securities Litigation Reform Act. What Congress was intending to do was to cut down on the number of securities class actions in the federal courts. What Congress did in the 1995 bill is enact heightened pleading standards for bringing securities class actions in federal courts, establish rules about who could be class counsel, and heighten Rule 11 standards for these types of lawsuits.

What happened is that many plaintiff lawyers, instead of going to the federal courts where they would have to worry about some of these restricted standards, were bringing class actions in state court based on state law fraud theories. The people who brought you the 1995 Act saw that there was a huge loophole there. Allowing the plaintiff lawyers to go to state court and bring essentially the same actions under state law was viewed as a problem, and the 1998 Act was enacted to deal with that problem. What Congress did was to provide that state fraud causes of action—to the extent that they involve the sale of a security—were essentially preempted. If a lawyer brought a class action in state court based on such theories, Congress made those actions removable to federal court, notwithstanding complete diversity requirements, and gave federal judges the power to enjoin discovery in state court actions or for aspects of the cases that remained in state court.

There is no question that Congress was well within its power to cut back on federal remedies for securities law violations. There also is no question that Congress has preemptive power versus state law causes of action, but the thing about the 1998 Act that troubles me is the extent to which it gives private defendants the opportunity to essentially preempt state prerogatives. What we see here is Congress essentially achieving, through the removal procedure,

what it might not want to do substantively. So, this sort of preemption is something of a problem, where all of a sudden cases are being whisked out of state court and into federal court.

The “Y2K Act” is another example of Congress adopting substitute procedural standards for the resolution of these suits. Even though litigation involving Y2K problems was something of a bust, and the problems that were predicted didn’t materialize, what we saw was the information technology industry successfully persuading Congress that it might need help from all of this litigation. They got Congress to pass a bill that would regulate procedures and substantive provisions in state courts and federal courts, and make it very, very easy for defendants to remove cases from state courts if the defendants thought that the state courts were not adopting the principles of the Act appropriately—another example of Congress getting involved and procedurally handling or adopting standards that would impair state court judges’ ability to resolve the cases before them.

**What concerns me about the bill is that this is another example of Congress basically substituting its own version of tort law for matters that otherwise could have been handled at the state level.**

I’d also like to talk a bit about the Victims Compensation Fund. I think we can all agree that it was a wonderful idea for Congress to try to set up a Victims Compensation Fund for the victims of the September 11<sup>th</sup> attacks. Why have to go through the lengthy process of trials if you can set up a compensation scheme that will fairly, and relatively efficiently, compensate the victims of that horrible act? But, what concerns me about the bill is that this is another example of Congress basically substituting its own version of tort law for matters that otherwise could have been handled at the state level. Putting that aside, the part of the bill that concerns me the most is not the setting up of the Victims Compensation Fund, because those types of programs can have a very positive effect, but the other thing that Congress did—provide that if a victim decided not to file a claim with the fund and wanted to bring a lawsuit, Congress federalized the entire case. It provided for a federal cause of action, and also provided that the U.S. District Court for the Southern District of New York would have exclusive jurisdiction over all of the cases arising out of that disaster. Now, the case law is beginning to come down. It tests the reach of that, but that part of the statute is somewhat problematic. Victims do not have the opportunity to choose a state court. They wouldn’t even have the opportunity to choose a federal court elsewhere in the U.S. They would have to go to the Southern District of New York. Since most of the victims were in that area, perhaps that doesn’t seem too troubling from a venue perspective, but it has potential for other problems.

Another example is Section 524(g) of the Bankruptcy Code. The interesting thing about 524(g) is that it applies only to asbestos cases, but it allows a third party related to a debtor (an asbestos company) in a Chapter 11 bankruptcy proceeding to get final injunctive relief against all lawsuits that otherwise could be filed against the debtor in state court or in federal court if they contribute money to a settlement fund. Again, we see Congress taking steps that allow for federal statutory protection of debtors where parties would otherwise have the ability to go to court (in many cases state court) to get compensation.

In addition to these examples, we see Congress considering many other types of bills

and dramatic legislation that would, I think, seriously alter the balance of jurisdictional power. Perhaps the most far-reaching bill is the Class Action Fairness Act, which passed the House earlier in 2002. You have seen this over the course of the last several years: Dan Quayle's commission, the Contract with America, etc. Congress has been very, very anxious to protect United States industry by getting more cases—products liability cases, etc.—out of the state courts and into the federal courts. The Class Action Fairness Bill would eliminate the ability of plaintiff lawyers to structure their cases to keep them in state courts by naming in-state defendants. The Class Action Fairness Act basically provides for minimal diversity, which would make most routine consumer cases and products liability cases and class actions removable from state court to federal court. That's another example of how state-based causes of action could get sucked into federal court.

In addition to this, Congress has, over the years, looked at adopting various bills having to do with resolution of the asbestos litigation. No full-scale bill has been introduced in the current Congress, but again and again Congress has been looking at bills that would allow for a more consolidated resolution of asbestos cases in federal court rather than in the states. I think this is where we have to look at what is going on with the Victims Compensation Fund. It appears that Congress is far more willing to enact this kind of substitute court legislation where, in its view, there is a need to protect an industry from crashing. For example, don't forget that part of the September 11 legislation was designed to bail out the airline industry as well as to set up this compensation fund. It seems that Congress is willing to do those sorts of things.

The federal judiciary is also taking steps that would appear to aggrandize the federal court's role at the expense of the state courts. These are just some perceptions that I have covered for you in my paper that I will talk about now.

There are many developments at the federal level that are consistent with the federalism decisions of the United States Supreme Court, but at the same time we see the federal courts

**Federal courts...are far more willing to use the All Writs Act to enjoin parallel state court proceedings which they view as frustrating their ability to settle with federal court action.**

making very aggressive use of bankruptcy statutes and the various other provisions to try to achieve a global resolution of various litigations. For example, the chief judge of the Third Circuit Court of Appeals is on record as saying that he wants the bankruptcy and district court judges handling the many Chapter 11 asbestos bankruptcy cases to achieve a global resolution of the asbestos cases.

And, we see that PPG Corporation has recently announced that it seeks to settle all of its asbestos cases essentially piggybacking on the bankruptcy case of its subsidiary, Pittsburgh Corning. That is one development.

Another development is that, in many cases we see, where the federal courts are involved in multi-district litigation and the like, they are far more willing to use the All Writs Act to enjoin parallel state court proceedings which they view as frustrating their ability to settle with federal court action. It is not 100 percent, but we see many, many instances where the federal courts are using these injunctions to protect their ability to resolve the cases sometimes at the expense of the state courts. Even more controversial, is the use of the All Writs Act to actually remove cases from

state court to federal court where the federal courts believe that there is a frustration of an existing settlement or possibly a pending settlement.

There is a big debate over this question that should be resolved by the U.S. Supreme Court in its next term. The Court has granted certiorari in an Eleventh Circuit case. It will be very interesting to see how it decides it—whether it will be consistent with its federalism cases and, if so, how. There is other case law on removal that I discuss in my paper. The federal courts in many important respects seem to be making it easier to remove, for instance, by expanding the time limits for removal, which makes it easier for defendants to get out of state court when they would prefer to be in federal court.

Finally, the Judicial Conference of the United States seems to be more willing to support legislation along the lines that I have been discussing. There is a memo that has been circulated in the judicial conference that calls for Congress to enact a bill that will allow federal courts to enjoin state court litigation with greater regularity and would make it easier for more cases to be removed.

## COMMENTS BY PANELISTS

**Honorable John L. Carroll**

**Kenneth M. Suggs, Esq.**

**Honorable Gerald W. VandeWalle**

**Patrick A. Long, Esq.**

### **Honorable John L. Carroll:**

Good morning. Like Professor Vairo, I am very, very pleased to be here to have this opportunity to talk with you. As Mark said, I am John Carroll. I am the Dean at the Cumberland School of Law at Samford University in Birmingham, Alabama. I am a federal judge, a former law professor, a former plaintiff lawyer, and I am trying to figure out what I want to be when I grow up.

I am here today to talk to you about the federal view of these particular issues. I have just spent six years on the United States Judicial Conference's Advisory Committee on Civil Rules, and during my tenure on that committee we looked twice at issues involving class actions and once involving issues relating to discovery.

I think it is fair to say, without fear of contradiction, that the overwhelming federal view is that federal courts ought to control complex cases, regardless of whether they arise under federal or state law. There is no finer example of that than the amendments to the Federal Rules of Civil Procedures proposed in March 2001 relating to class actions.

The committee initially proposed a series of rules amendments that would have given preclusive effect to federal court rulings in class action matters—preclusive effect that would have bound the state courts as well as the federal courts.

Specifically, a federal court denying class certification could issue orders to both state and federal courts that they could not certify. A federal court that refused to accept a settlement in a class action would have the power to issue warrants against state courts saying that they also could not approve a settlement. Last but not least, if a class action was pending in state court, the rules would authorize the federal district court to order the litigants before the federal district court not to file other class-action related litigation.

Now, ultimately the Advisory Committee did not pursue those amendments, because, in all candor, they were extremely controversial. But I really do think that they embody the federal notion that it is the federal courts that ought to control complex litigation, even if the complex litigation is based on *state* law claims.

There is a very interesting quote from the March 2000 meeting minutes that I would like to share with you: “The reason for establishing control in a federal court stems from concerns that,

absent control in some tribunal, it may not be possible to manage class action litigation.” I think that is the prevailing view, if federal courts do not have control, then the possibility of serious mismanagement will occur.

The most often cited concern is the “reverse opt-out” question. That is, if you have a class action in federal court that the federal court is managing, and all of a sudden there is a parallel and overlapping class action in state court, then that state court class action may be used to “sell out” the plaintiff class by subjecting them to an unfair settlement. So the view of the federal judiciary is that the federal courts ought to control the litigation for several reasons—some basic policy reasons, some based on perception.

One policy argument is that the federal courts are the national courts, and therefore they ought to control “national” litigation. If you have a class action filed in an Alabama state court, for example, it may well have national ramifications. A nationwide class action affects not just the State of Alabama. The entire nation can be certified as a class. Federal courts have the tools to utilize and manage litigation—particularly the ability to transfer multi-district litigation. Therefore, the argument goes, the federal courts ought to be the ones to control such cases.

But then you also have several *perceptions* about state courts that are involved. The first perception—and I do not say that these are realities, these perceptions I gleaned by listening in the federal courtroom over the last six years—is that a state might lack the resources to handle these matters. The state courts are generally underfunded. They don’t have sufficient staff. They don’t have sufficient law clerks. They don’t have sufficient resources to handle these cases.

The second perception is that the state courts simply do not have the tools. In the state courts, there is no such thing, and *cannot* be such a thing as multi-district litigation. You can’t transfer cases between states. You can’t do anything to manage those sorts of class actions on a level broader than just one state.

The third perception, and probably the most damaging, I think, is simply that state court judges do not ride herd on these cases the way the federal courts think they ought to ride herd on them.

**The third perception, and probably the most damaging, I think, is simply that state court judges do not ride herd on these cases the way the federal courts think they ought to ride herd on them.**

When I was listening to the debate around the first class action of the rules changes, the State of Alabama was the litigant. Back in those days, the so-called “drive-by” class action days, when a state court judge could certify, without notice to the other side, a nationwide class action thereby binding everybody without a hearing and without any opportunity to be heard on the other side. That led to the perception that state courts simply let courts run amuck in these cases and that they won’t ride herd on them.

My five minutes is up. I have said exactly what I wanted to say. This is a problem that we really all have to solve. State courts, particularly, are overcoming the perception that is

driving a lot of what is going on in federal courts today. The answer is probably more cooperation and communication between the courts.

## **Kenneth M. Suggs**

Good morning. I am Ken Suggs. I am a plaintiff's lawyer from Columbia, South Carolina. We are here talking about attempts to federalize state causes of action

In 1984, the Manhattan Institute formulated a 10-year plan for aggressive tort reform. That plan included creating a body of literature, both popular and academic, supporting tort reform. If you were a judge back in the eighties, a copy of *Galileo's Revenge: Junk Science in the Courtroom* was mailed to you by the Manhattan Institute. There was a body of anecdotes about our civil justice system, such as the McDonald's coffee-spill case, where false information was put out to the public and the press. The ultimate goal was to create the perception that somehow the legal system is responsible for all of America's troubles.

Now, having created this fantasy world, these same folks started thinking about how to control the civil justice system and what they want from it. What they wanted was tort reform. You may remember in the 1980s they tried to get tort reform through federal channels. Then, they tried to move it nationally. They tried to pass national products liability legislation; they tried to pass national medical malpractice legislation, but that didn't work. Federal legislation didn't pass.

Then came state legislation, from one end of the country to the other, and to some extent that did work. Tort reform measures were passed in the late eighties in almost every state in the country, but that wasn't enough for those who wanted to get rid of the civil justice system. They finally employed the civil state judiciary by writing articles and through elections, but the fact is that the state judiciary—God bless you—is too diverse. Because there are no life terms, and turnover is too frequent—you have to run for six- or ten-year terms—and there are just too many of you, they turned to influencing the federal judiciary. A less daunting task I submit, with my

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apologies to anybody who used to be a federal judge, because *they* have life tenure. So, if you have a federal judge who is favorable to you, you have that judge for life.

There are far fewer federal judges than there are state judges, and the truth is that party politics influences the selection of federal judges far more than it does for state judges. We need to resist this from happening. Why? Because it is not good for the people, and it is not good for the development of the law.

As you well know, most of the law in our federal court system is supposed to come from an experimental laboratory—the state courts. Products liability, automobile crashes, contributory versus comparative negligence are all issues for which the states can be an experimental laboratory.

I want to comment on the idea of the Victims Compensation Fund. The Victims Compensation Fund is a much different kind of mass tort reform. It was created from a situation arising out of the September 11<sup>th</sup> attacks in New York and Washington. It was created by an outside agency, and those outside agencies are not generally subject to the jurisdiction of the civil courts.

Collectability (*the ability to collect victim compensation*) in terrorism cases is difficult, if not impossible. But the real difference between a terrorism case and the kind of a disaster case that happens when a corporation makes a product that injures or maims 350,000 people is not about compensation.

The primary purpose of tort law is about accident and injury prevention. In the Oklahoma City bombing, Timothy McVeigh killed 168 people and was put to death. In the Ford Pinto case, the Ford Motor Company knew that they were going to burn 180 people to death if they didn't change their car. They did not change it, and people died as a result—but nobody went to jail. The civil justice system is the only way that we have to deter that kind of violent behavior by Corporate America.

### **Honorable Gerald W. VandeWalle**

Good morning. I am Jerry VandeWalle. Let me confine my remarks primarily to class action lawsuits, a subject with which I am most familiar.

I think Professor Vairo has done a pretty good job of balancing out some of the issues. However, I take exception to Professor Vairo's remarks that the Supreme Court has been more favorable to states' rights, especially after the last decisions concerning state judicial elections. I am not so sure that her remarks hold true in that regard.

I think it is pretty clear that there are problems existing with regard to class actions. When I first started hearing about class action problems, I asked to have these stories verified. I was hearing all these anecdotal stories about class actions in Alabama, and all kinds of things that were going on around the country. I think for the most part, where those have occurred they have been pretty well fixed, either by court rules or state supreme court decisions, or, in some instances by legislation in those states.

I think the greater and perhaps the more philosophical issue that arises in class actions is in the case of a national class action lawsuit. What happens if a state applies the laws of that state to a class action lawsuit that is of nationwide concern? Those are some philosophical issues that I think are much more difficult to deal with than are the specific problem spots around the country, where perhaps some judges are not riding herd on class action lawsuits just the way they ought to.

The one thing that keeps coming up is the recent proposal out of the Civil Rules Advisory Committee of the federal judiciary. I serve on that committee, and I sit as one of four state chief justices on the Federal-State Jurisdiction Committee of the United States Judicial Conference. Perhaps because there are four state chief justices on there, we have not supported the class action concepts that are embodied in legislation presently pending in Congress.

As Dean Carroll pointed out, there was a proposal to amend the federal rules that would have provided some pretty stiff concerns for state courts. At that time, I participated in some of these debates. My thoughts at the time were that, if you want to look at any kind of relationship between federal and state court judges, you really ought not attempt to address class actions with federal court judges saying, “We are going to take cases away from state courts.” Instead, the federal judges might ask, “We have some problems. There are some philosophical issues concerning class actions. What law is going to be applied? Do you have the tools? What are you going to do about it?”

Well, one of the things that the Conference of Chief Justices and the National Center for State Courts have done is set up a curriculum for state court judges and federal court judges on how to handle mass torts and class actions. That program is just getting on its legs, and I expect that it will draw some of the experts around the country to come, lecture, teach, and consult with federal and state court judges on some of these issues.

Another interesting question arose in the debates over various proposals to amend the federal court rules. What would happen if we set up a multi-district panel that included state judges as well as federal judges, who had the authority to send cases not only to federal courts but also to state courts? It is an idea. It certainly hasn’t been developed, but there are some things that can be done short of saying that we are just going to take all the class action lawsuits out of state courts.

**What would happen if we set up a multi-district panel that included state judges as well as federal judges, who had the authority to send cases not only to federal courts but also to state courts?**

I think if you look at the legislation, it is pretty clear that if it were adopted, there would be few if any class action lawsuits left in the state courts. The jurisdictional amount, I think, is a million dollars. There are all kinds of provisions in that legislation that really would kill any class action in any state courts.

At the end of these debates, my remark (sort of tongue-in-cheek and in-your-face) was, “Well if diversity is that significant, let us just pass a law and we will have federal courts trying every case in which there is any diversity at all.” The federal judges on the panel didn’t like that. So we have gone back and pointed at some of these other issues. I think that there are remedies for these problems, and I am not denying that there are problems, many philosophical problems in these cases. I think that we can pursue these issues short of this really draconian legislation that is now pending in Congress.

### **Patrick A. Long**

I asked Mark for more time, I said that five minutes wouldn’t be enough. I am a hot number up here, and I need more time, and he said, “Pat, you ask me another question like that and you are down to *three* minutes.” So, I’ll move on.

We are talking money. This is not a question of truth, justice, and the American way. That is the clothing that is put on the question that we have here, but there are reasons why plaintiff attorneys want to be in the state courts—they are more comfortable there. They don't have the obligation to get a unanimous verdict. If I can hang up just one juror in a federal case, that makes it a hung jury. And, as you know, to a defendant a hung jury is a defense verdict. So, that is one of the reasons.

I can't speak to whether federal judges are more hospitable to defendants. I really don't know. I have been practicing for about 32 years and I like to be in the federal court. I have been there a fair amount of time, but not nearly so much as in the state courts, and I don't have a strong feeling about that one way or another.

I would like to speak to the *Daubert* decision. Professor Vairo brought this up in her paper and talked about this decision as providing a gatekeeper. Well, in my opinion, somebody needs to be a gatekeeper, and it doesn't make any difference whether it is a federal judge or a state court judge. [It is claimed that] the *Daubert* decision seeks to keep out the plaintiffs use of scientific evidence. It does not do this. What it does is keep out crap that masquerades as scientific evidence.

In the 32 years that I have been practicing, I have handled a fair number of class actions. They have involved *E. coli* epidemics, some products cases, some underground petroleum spills and things of that nature. But I will say that, although philosophically I think it is a very important topic that we are here to discuss today, in the general scheme of things, it probably impacts five percent of plaintiff lawyers and probably five percent of defense attorneys around the country.

Are there a lot of class actions filed? Yes, but in comparison to the other types of litigation, it is a very, very small percentage. It is of crucial importance to the people who happen to be a member of the class, but in the general scheme of things, I think we are talking about a very small percentage of litigation as a whole.

**We are talking money. This is not a question of truth, justice, and the American way.**

I believe it is a matter of philosophy. When I sought to remove cases to the federal court from the state court, I didn't sense an overwhelming desire on the part of the federal judge to take the case. I think that is true of the federal judiciary as a whole. It seems that it is a different question when you talk about who should have, if you will, the "power" to do that or the "ability" to do that. Quite frankly, I don't think the federal judiciary needs more class actions on their calendars.

In her paper, Professor Vairo referred to a rush to get these things into the federal court—maybe by Congress—but not so much by the judiciary. To the extent that they want to get class actions into federal court, I think, it has really been more for purposes of administration rather than because of some kind of interest in the outcome of the case. I disagree with Professor Vairo when she inferred, in her paper, that there is a feeling that Congress wants these cases in the federal court to gain a particular outcome.

There are lots of neighborhood class actions, but if we get a class action that involves interstate participation by hundreds of thousands of plaintiffs across the country, I am not sure that the state court is the appropriate or logical place for that case.

## **Response by Professor Vairo**

Let me begin by responding to Patrick. This may be challenging because I don't have to worry about making money like plaintiff lawyers and defense lawyers do. I have the privilege of taking an ivory tower point of view with respect to all of this, but I can't help looking at what is going on.

I speak at a lot of federal practice CLE programs around the country. I don't think there is any question that the result of these cases, especially with respect to some states, are going to be very, very different depending on if the case stays in state court or gets moved to federal court. There seems to be an "outcome determinative" aspect to all of this, and it is troubling from an academic perspective because, as we all know, case outcomes are supposed to be the same in federal court as in state court. I don't really think differing results happen all the time. Take for example one of the cases I discuss briefly in my paper. Here is the scenario: A plaintiff brings a

**The plaintiff lawyer in this kind of situation is in a real Catch-22.**

lawsuit to state court, alleges a very novel claim under state law, and wants to convince the state judiciary to push the law along a little bit. The case gets removed to federal court, and now the federal court judge says, "We have to follow the law of the state essentially as it is. We are not going to be the ones who will advance the law, so your case is dismissed."

The plaintiff lawyer in this kind of situation is in a real Catch-22. He brings the case to a state court, the laboratory so to speak, so that the state court can push, or try to push, the boundary. They may or may not be successful in getting the law to evolve. But, if federal court judges are taking the point of view that it is not their job to push the boundaries of state law, and more cases are removed to federal court, then there is a problem that will seriously impact the evolution of state law.

I think there is something here to consider. It is easy to be cynical and say it's all about money. That is why, I guess, you have to have law professors to remind people of the principles, and to use these principles as guideposts. This is one place where, I think, federalism matters. We have to pay attention to what would happen if the federal courts achieve more "power" to adjudicate cases, and they stop state court proceedings at the expense of the state courts.

The other thing that I would like to mention that both Dean Carroll alluded to and Patrick said, is that many of the cases going to state court aren't going to be impacted by much of what we are talking about, or at least it doesn't appear to be so right now. What we are talking about are the relatively complex state-based causes of action, what may happen to them, and what their resolution may be.

Over the last couple of decades we have seen an increase in cooperative federalism, where state court judges and federal court judges have been working together to resolve some of these intractable cases. For example, Judge Pointer who is handling the breast implant litigation in Alabama, worked with the state court judges in handling breast implant cases all over the country. They sat together with the state court judges to resolve the various issues arising out of the federal litigation as well as the state litigation involved in bankruptcy. And, in New York, Judge Weinstein in the federal court and Justice Helen Friedman in the state trial court working together in an attempt to handle various asbestos cases in New York.

In Professor Parmet's paper, she talks about what happened a number of years ago when the American Law Institute proposed legislation that facilitates cooperative federalism. Congress might even want to adopt this idea, and I think it's something we should think about, and whether to proceed on a formal or informal level.

In some respects, some of the ALI proposals are a bit heavy-handed from the federal perspective, but I like the idea that Judge VandeWalle talked about. Why not have a multi-district litigation panel, or some sort of vehicle, that has state judges and federal judges. Decisions could be made there about where the litigation ought to be handled, and who knows, perhaps the litigation ought not to be handled on a national level by state courts or federal courts. In conclusion, I think that it is time to think about how the state courts can be brought in as partners in determining how to handle much of this intractable litigation.

## **Panel Comments and Remarks from Floor**

**John Carroll:** There is a tendency in this debate to make the federal courts out to be the bad guys, as if they want to take business away from state courts and control everything. As if they don't like the state courts, and think less of them. I don't believe that is true at all.

I think the problem is that this complex litigation, which involves nationwide issues, has problems that require a solution. In all candor, when I heard the debates about the class action issue, I thought, it's not always the defendants who are the ones being ignored.

Many of the problems are due to plaintiff claims where, because of the lack of a control mechanism, a plaintiff lawyer can go into state court; get a much better settlement from the defendant; hurt the plaintiff class; but in the end get the case taken care of. I think that this is one of the problems that we overlook.

We talk all the time about a sure win if a case goes to federal court, but that is not necessarily true. We need a system to assure justice for everybody, including plaintiffs. A system to make sure that there's not an opportunity for lawyers to get out from under the federal umbrella and in front of a favorable state court judge, where they can work a sweetheart settlement and receive large amounts of attorney fees, while the plaintiff class gets coupons.

This is a problem we need to confront, and one solution may be cooperation with the state courts. The federal courts are looking for the state courts to help solve this particular problem, and in my opinion the answer is more cooperation, more consultation, and more ideas generated from the state court.

**Patrick Long:** I really don't have any major disagreement with what Dean Carroll just said, but I did want to comment. I think it was Ken that said it may be easier to influence federal judges than state court judges, and that politics has more to do with the appointment of a federal judge than a state judge.

First, I hope it is not easy to influence *any* judge, whether he or she be state or federal, and I don't think that it is easy to do at all. Secondly, I am not sure that politics has as much influence on a federal judge, perhaps at the time of the appointment, but since it is a lifetime appointment you can make any decision you want and not have to worry about reelection.

**Kenneth Suggs:** I would like to respond to that. I didn't mean to say that it is easier to influence a federal judge. But, I think it is easier to influence the federal judiciary. You only have to look at the struggle over federal appointments that has been going on in the United States Senate

**There is a struggle to ideologically control the federal judiciary, and it has been going on for over a decade.**

since 1992 to understand that it is a political process. It is really seen by ideologues, especially those on the right, as a struggle to control the future of America. We are not just talking about tort reform, we're talking about different views on issues like the right to life, reproductive issues. There is a struggle to ideologically control the federal judiciary, and it has been going on for over a decade.

**Gerald VandeWalle:** I would like to respond to what the Dean said. I agree that we ought not demonize federal judges. My experience has been that they are very concerned about the number of cases that are being dumped into their courts. I do applaud the cooperation concept that Professor Vairo described a few minutes ago that is going on in some states.

She referred to the use of the state courts as a laboratory, and I agree that is what we have described—state courts as a laboratory. One of the methods we use in North Dakota, because we have a very liberal certification rule with our federal courts, is that both the federal trial courts and the Eighth Circuit, do not hesitate to certify questions to our state courts that are pending before them. Some of these cases have been removed. Some were originally filed in federal court, and so we still are permitted to act as a laboratory.

**Mark Mandell (moderator):** Dean Carroll, I would like to ask you a question if I might. I thought it was impressive, the listing of perceptions you gave as to what the federal courts and state courts could handle. One of the perceptions plaintiff lawyers have is that the type of federal legislation we have been seeing over the last 10 years has been primarily tort reform. Professor Vairo listed a number of pieces of legislation passed by Congress to that effect. This is a perception that is so deeply ingrained in plaintiff lawyers that it has actually become a

reality. I just wanted you to comment on this, because I am respectful of the perceptions you have mentioned.

**John Carroll:** I think that perception is probably a reality. The attempt to get class actions into federal court by the sponsorship of legislation is tort reform, but I don't think that it really works. There is a general view in the federal court system that somebody has to be in control.

For example, if Chief Justice VandeWalle's solution would come true, if there were a mechanism whereby state courts can somehow cooperate with federal courts, that would be the answer. I don't think that the answer is to federalize everything, but there is an inclination to do that right now. There is no leadership in state courts, or at least a leadership saying that we can handle cases just as well as federal courts.

**Mark Mandell:** That makes intuitive sense as well. In fact, the only response I have to that comment you made twice is, that federal judges are appointed for life and state court judges are elected to terms. In Rhode Island, the state I am from, our state court judges are appointed for life. In Vermont and some other states, I think, judges are appointed to serve until the age of 70. I believe the majority of states elect their judges, but certainly not all states do.

**Patrick Long:** That is true. I would like to mention the term "tort reform." It is a term that I don't like. Most plaintiff attorneys probably don't like it either. Tort reform is a broad term—it's like saying, the United States of America. Well, what state are you talking about? What particular item of tort reform are you talking about? When you ask defense attorneys if they are in favor of tort reform, most will say, "I don't know. What specific item of tort reform are you talking about?" It is a really inclusive term. I think some of what is termed "tort reform" is good and necessary, and some of it is pretty awful.

**Professor Vairo:** I don't want to leave you with the impression that I am seeking to demonize federal judges. Some of my best friends are federal judges. I do think that a lot of the push comes from Congress and not the federal judiciary itself.

I think federal judges get frustrated too. For example, say you're a federal judge, and you are sitting on an MDL case in which you have invested a lot of time and effort in trying to achieve what you view as a just resolution. You certainly would be irritated when some of the plaintiff lawyers who are also representing members of the classes and don't like the resolution, turn around and go to state court to try to file a competing class action so that they can get a better deal, or a worse deal, for their clients as the case may be.

I think it is a very complicated problem, especially if you look at the language of the courts. Using injunctive relief as an example, although it is not like they are all rushing out to do that, but certainly as a matter of saving judicial resources it is an important thing for them to try to do. These are very important problems, and I think if state judges and federal judges can work together to solve these intractable problems, then that is the ideal world.

**Comment from Floor:** If the panel agrees that the solution is cooperation, as Chief Judge VandeWalle stated, and participation by the state judges on multi-district panels or some effort such as that, then where does the impetus for this come from, and what are some of the appropriate steps that the panel sees could be taken?

**Gerald VandeWalle:** I referred to the National Center for State Courts. They are promoting and establishing a mass tort class action program that will bring in both federal and state court judges. They are developing a curriculum for the judges on how to deal with it, and out of that meeting between federal and state judges, there will develop something along the lines of what I spoke about earlier. Perhaps it will require federal legislation to do that, but the idea has started. I think the cooperation between federal and state court judges will develop, not only in local areas such as Professor Vairo has already described, but on a national level, and may very well lead to that type of a program.

**Kenneth Suggs:** I would like to make a quick response. I would add caution because I have participated in multi-district litigation quite a bit, I think cooperation between state and federal courts is a good thing. Clearly there cannot be 50 tracks of depositions and 50 sets of document production, but it is not necessarily a good thing that there be only one. To the extent that state court judges are being asked more and more to defer to the multi-district litigation instead of conducting their own consolidated litigation, it can be a bad thing. I would not want to see a situation where we have only one track, because there is plenty of potential for abuse or mismanagement.

**John Carroll:** I think that is an excellent point. The point of changing the way cases are being handled ought to be to select the best place to handle the litigation. We need to develop a system that has the ability to decide which court, the federal court or state court, is the best place for that particular case.

**Patrick Long:** One of the goals of creating a procedure like the one that has been outlined today is that the perceptions be eliminated because they don't have any basis in reality. I mean that plaintiffs shouldn't feel that they are going to get a better deal in the state court, and defendants shouldn't feel that they are going to get a better shot in the federal court. We need to perceptually level the playing field so that whatever the jurisdiction, everybody gets a fair trial, a fair shot at achieving justice, because that really is what we are all after.

**Stanley Feldman (afternoon panelist):** I had the pleasure of sitting on the Board of Directors of the Conference of Chief Justices with Justice VandeWalle for years. He is the immediate past-president of that organization, and I wonder if he thinks there is any chance of getting the Conference of Chief Justices, which includes every state court chief justice in the United States, to help with this problem. Or, will we simply allow Congress to put these cases with the federal judiciary? I remember when the second round of tort reform came. We finally got the Conference of the Chiefs to send a delegate to the Commerce Committee in the United States Senate to argue against tort reform because it impacted upon the jurisdiction of state court judges. So, here we are, back to the same kind of problem. Do you think you could get them to do anything? If not, how can organizations like this get the Conference of Chiefs to move?

**Gerald VandeWalle:** Justice Feldman, as you know, the National Center for State Courts Board leadership is composed of the Conference of Chief Justices leadership. Again, we have set up this program for mass tort class action litigation between the federal and state judges. I think that the chief justices are fairly well committed to trying to resolve this problem, and that they recognize that there are some problems.

The issue, as I said, is not the spot problems that have occurred in some of the states. It is the philosophical issue of how to handle mass torts and class actions in the best way possible. They are committed to exactly that, they are waiting to see what happens with the development of this curriculum, and what happens when you bring federal and state court judges together in one group. I don't disagree with Ken, that it is not a one-size-fits-all proposal, that this panel would say, "All right, this case is only going to be tried in this federal court, or this case is only going to be tried in that state court."

There would be a variety, but at least there would be a management system in place. Some states are more concerned about class actions and mass torts than other states, and so it is a question of mobilizing the forces. I have some fairly optimistic hopes that the chiefs will put their shoulders to the wheel on this issue and attempt to resolve it.

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**Comment from Floor:** I am sure somebody is familiar with this situation. We have already had a conference in New Orleans concerning multi-district litigation, and it was initiated by U.S. District Judge Davis, from Minnesota. There is a large class action there in federal court. There is a large class action in Philadelphia too, and the primary focus of that is to try to get the states and the federal courts to cooperate in the discovery process. It was pointed out, if I remember correctly, that the main discovery is going to consume 18 months, and the states who do not coordinate will have to fall in line, and be years behind in doing that. So, there is already a process under way for some mechanism to speed up the discovery process.

## LUNCHEON ADDRESS BY CHIEF JUSTICE FRANK J. WILLIAMS

### **An Historical Perspective on Maintaining Judicial Independence**

Frank J. Williams, Chief Justice of Rhode Island

Good afternoon fellow members of our state judiciaries, and I extend the same greeting to any other jurists that may be present. I am honored to be with you today to discuss a matter near and dear to my heart, maintaining the judicial independence of the state courts.

Being a judge reminds me of this story:

While robbing a home, a burglar hears someone say, “Jesus is watching you.” To his relief, he realizes it is just a parrot mimicking something it had heard.

The burglar asks the parrot, “What is your name?” The parrot says, “Moses.”

The burglar goes on to ask, “What kind of person names their parrot Moses?” The parrot replies, “The same kind of person that names his Rottweiler Jesus.”

All of us gathered here today are on what I would like to characterize as continuing (in a military term) a long patrol. We have to pay close attention to federal legislation and federal case law to ascertain how it may impact upon the independence of the state courts. Maintaining state judicial independence in the face of encroaching federal law is more than a concept, it is the foundation upon which the independence of our state courts has been built. Chief Justice John Marshall said it best:

Advert, sir to the duties of a judge. He has to pass between the government and the man whom that government is prosecuting; between the most powerful individual in the community, and the poorest and most unpopular. It is of the last importance, that in the exercise of these duties he should observe the utmost fairness . . . the greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people was an ignorant, a corrupt, or a dependent judiciary.<sup>1</sup>

While Chief Justice Marshall may clearly state the mandate with which we have been entrusted, the means of achieving this balance can be somewhat less certain. Within the American system of government, federalism allows for a dual court system.<sup>2</sup> Although the system is well worth preserving, we often times face potential threats from a federal level that impact or limit the sovereignty of the state courts. Both the state and federal courts have an important role to play as the judicial branch of government seeks to implement wise decisions and policies.

As a former trial judge and now Chief Justice, I know the challenges that you face every day in your courtrooms. We all take tremendous pride in our duties to ensure that justice is always served. We should relish sharing our judicial mission with others. That is why this forum is ideal for all of us to discuss the challenges we face.

It is humbling to speak before a group at an institute named for one of the greatest minds of the twentieth century – Roscoe Pound. As many of you know, I often speak about Abraham Lincoln, one of the greatest legal and political minds of the nineteenth century. Similarly, both men are from the Mid-west. When asked to speak to you today, I had hoped to share with you Abraham Lincoln’s experiences with state judicial independence and to impart that historical perspective to all of you. I was dismayed to find that Lincoln did not often concern himself with the relationship between federal and state courts. Yet his legal talent in the Nineteenth Century, like Roscoe Pound’s pioneering efforts in the early Twentieth Century, would eventually center on adopting the changing national landscape to the requirements of American federalism. And Abraham Lincoln did have much to say about judicial independence.

When his Whig Party faced a vote on a bill seeking congressional reorganization of the judiciary, Abraham Lincoln said that “[R]espect for public opinion and regard for the rights and liberties of the people have hitherto restrained the spirit of party from attacks upon the independence and integrity of the Judiciary . . . Men, professing respect for public opinion . . . were unwilling to see the temples of justice and the seats of independent judges occupied by the tools of faction . . . [Now we believe] that the independence of the Judiciary has been destroyed—that hereafter our courts will be independent of the people, and entirely dependent upon the Legislature—that our rights of property and liberty of conscience can no longer be regarded as safe from the encroachments of unconstitutional legislation.”<sup>3</sup> Lincoln clearly saw that too much federal intrusion into judicial matters could undermine the delicate balance which federalism seeks to maintain.

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The Whigs did not consent to the passing of the bill reorganizing the judiciary because in Lincoln’s opinion it violated the great principle of free government by subjecting the federal judiciary to the national legislature while dealing a fatal blow to the independence of judges.<sup>4</sup>

I am reminded of a story that has been making the rounds involving a United States ship and its captain.

The radar announces to the captain, “Blip on the radar screen, dead ahead sir.”

The captain says, “Tell that ship to turn 15 degrees starboard at once.”

The radar officer sends the signal and the response comes back: “You move 15 degrees.”

The captain is irate, and says, “Tell him again. This is a United States Navy Ship—you move 15 degrees starboard!”

And the response comes back, “You move fifteen degrees.”

The captain grabs the radio himself and says, “THIS IS THE CAPTAIN OF THE GREATEST SHIP ON THE HIGH SEAS. I DEMAND THAT YOU CHANGE YOUR COURSE 15 DEGREES STARBOARD.”

And the answer comes back: “This is a lighthouse. You move 15 degrees.”

I tell this story to illustrate a simple point. Implicit in the nature of our federalist system is continuing tension between Congress/federal courts and our state judiciaries. Sometimes the tensions develop into conflict, signaling the time when jurists need to navigate the judicial ship out of harm’s way.

### **Federalism as a Way of Life**

We in state judiciaries must be flexible when navigating in a federalist system. As judges we are all called upon to be civil, independent, and tough—as well as compassionate. We must be all of these things as we attempt to settle contentious disputes within our culture especially if the legislative and executive branches of government are unable to resolve these problems. We are expected to understand and appreciate the distinction between the law and justice in a federalist system. To do so requires a high degree of courage, as we stand against political pressures from various sources while contending with the public’s perceptions as to what is popular, rather than what is right.

Most judges possess appropriate navigating skills. At times in our history, some judges have been called upon to demonstrate the highest level of courage in order to navigate a steady course to ensure that justice prevails. At the heart of the important judicial role that we play is the concept of independence, which is both important and misunderstood. The concept of judicial independence brings us here today, so that we can find creative ways to work together and share ideas toward its preservation in the face of federal authority and the threat of intervention in our state courts.

Protecting state sovereignty and judicial independence is of utmost importance, and we should strive to reach a proper balance, though some tip the scales of justice either too far toward Washington or too far the other way. Our nation emerges stronger when we fully appreciate our federal experiment in creating three co-equal branches of government in a dual system. The executive and legislative branches of our national government often encourage and at the same time discourage the judicial independence of state courts. This has led to state experimentation and innovation in how we conduct the democratic process. While we all promote the understanding that reasonable people and parties can disagree over the interpretation of law, so too can federal and state courts independently assert their own interpretation of the same law.

At the very least, it should be acknowledged and respected that Washington and the federal judiciary do not possess a monopoly on judicial wisdom and, parenthetically, it seems sometimes that the opposite is true. For example, some might not need to look further than the Federal Ninth Circuit panel’s recent opinion on the constitutionality of the phrase “under God” in our pledge of allegiance.<sup>5</sup>

### **Searching for the Golden Mean**

After the Founders believed that they had discovered the perfect balance and solution to the issue of power in government, maintaining judicial independence has been an ongoing challenge.

Almost immediately after the Constitution was ratified, issues of state sovereignty and the supremacy of federal authority surfaced.<sup>6</sup> At the time of the Civil War, state sovereignty was not an abstract concept but a very real and personal issue over which many were willing to sacrifice their lives, and did.

Prior to the Civil War, decisions of the United States Supreme Court, combined with several of Congress's laws, created an atmosphere of mistrust and tension.

### **The United States Supreme Court Overreaches in the mid-19<sup>th</sup> Century**

We see this in the United States Supreme Court's 1842 decision, *Prigg v. Pennsylvania*, where the Court labeled state personal liberty laws unconstitutional as these laws were enacted to protect free Blacks and fugitive slaves.<sup>7</sup> The Supreme Court concluded that the state laws conflicted with the Fugitive Slave Act of 1793, and the Court declared that Congress possessed exclusive power to regulate the return of slaves.<sup>8</sup> However, Justice Joseph Story, who authored the opinion, wrote that the federal government could not force state officials to enforce the 1793 Act or to comply with any other federal statute.<sup>9</sup> Seemingly, Justice Story was aiming for a creative solution to a situation that political forces were unable to handle. Yet, no one understood the message. Eight years later, Congress passed the Fugitive Slave Act as part of the 1850 compromise in order to strengthen its 1793 predecessor, as well as avoid civil war.<sup>10</sup> The new law permitted appointed federal commissioners to command local law enforcement officials to capture alleged slaves.<sup>11</sup> Anyone failing to comply would be subject to fines and a prison sentence.<sup>12</sup> Most offensive about the law was its failure to provide the alleged slaves with a jury trial or the right of habeas corpus.<sup>13</sup>

This was an act of congressional overkill. In Wisconsin, the 1850 Act was viewed as an "egregious infringement upon states rights and civil liberties."<sup>14</sup> When Joshua Glover was arrested in 1854 as an alleged runaway slave pursuant to the 1850 Act, a man named Sherman Booth began organizing support to protest the arrest.<sup>15</sup> After a rally, Booth helped Glover escape from jail and was arrested.<sup>16</sup> Booth was charged with aiding and abetting a fugitive slave in violation of the 1850 Act.<sup>17</sup>

The Wisconsin Supreme Court declared Congress's act unconstitutional.<sup>18</sup> Booth became an icon for states' rights. The United States Supreme Court overturned the Wisconsin court's decision, reasserting "the primacy of the federal judiciary over matters of federal law."<sup>19</sup> However, the Wisconsin legislature refused to be silenced and declared the Supreme Court decision null and void.<sup>20</sup> Not to be deterred, the Supreme Court declared the 1850 Fugitive Slave Act constitutional in *Dred Scott v. Sandford*.<sup>21</sup>

By 1860, the Civil War became a test for federalism. Slavery had accelerated tensions between the nation and state-centered concepts of the federal system. By the end of the war, the role of the national government was settled, with the federal government reclaiming control over many areas that had previously been delegated to the states.

Yet, despite the widespread federalization taking place, state courts continued to exercise their power. The number of state cases that were removed to federal courts under various civil rights acts was actually quite small. The exception was the Civil Rights Act of

1875, which made civil rights violations a federal offense with jurisdiction in the federal court. Many began to fear that Congress was taking over the state courts.

The Wisconsin *Booth* case suggests why state courts should have an equal opportunity in promoting justice. The reason that the federal courts during Reconstruction did not once and for all successfully trump the power of the state courts in enforcing the civil rights acts lies in the American faith that state courts have an important role to play in a federal system of justice that includes both the federal and state courts. Today's federal encroachment into state judiciaries too often overlooks the creative state solutions to problems. The Founders never expected justice to flow only in one direction in their idea of federalism—an idea that a bare majority of our present U.S. Supreme Court seems to be recognizing.

We, as members of state judiciaries, are in the best position to preserve the balance associated with federalism. Although federal constitutional law often intrudes into state court adjudication, it is up to state court jurists to resist usurpation. State jurists need to point out when Congress and federal courts are acting in contravention of an individual state and its exercise of sovereignty.

For example, my court recently addressed a prisoner complaint in which he sought to enforce prison disciplinary rules set forth in a federal court consent decree.<sup>22</sup> The federal court across the Providence River stated in an earlier opinion that the decree mandated that our state court address these disciplinary and classification appeals.<sup>23</sup> In denying the prisoner's appeal, we rejected the federal court's attempt to force a consent decree upon our courts.<sup>24</sup> Even more troubling is a recent local bankruptcy court decision finding a Rhode Island tax sale statute unconstitutional, notwithstanding the state supreme court's opinions to the contrary.<sup>25</sup>

Despite federal infringements in the state courts, we still must strive for cooperation between the federal and state courts as we pointed out this morning. For example, we welcome the opportunity to respond to certified questions from our federal court concerning state law.<sup>26</sup> States in our federal system of government should be "laboratories of experiment" regarding what works best at the state and local level. I should point out that Rhode Island has the first lead paint case in the country. No class action has been certified, and there has been no removal to federal court, at least not yet.

In a recent law review article, the author cites the Connecticut Supreme Court for supporting a "new federalism."<sup>27</sup> The author gave examples in which former Chief Justice Ellen Ash Peters advocated a more expansive interpretation of state constitutional provisions than those given in the United States Constitution.<sup>28</sup> In another example, the justices of the Massachusetts Supreme Judicial Court rejected two landmark United States Supreme Court cases in interpreting its own constitution.<sup>29</sup> The Massachusetts Court held that police officers may only order a driver out of its vehicle during a routine stop where the officer has a reasonable belief that his or her safety, or the safety of others, is in danger.<sup>30</sup> Of course, there are many examples that each of you could personally relate. This is now being called the "new federalism" since they reflect the individual nature of our state cultures and the importance of preserving them.

One way of promoting the individual nature of the state courts is to explain to the public and media what we do in our respective judicial systems. This includes conferences with our

congressional delegations. We must also meet with our U.S. District Court judges. In Rhode Island we meet with our federal counterparts twice a year. When next we meet I fully expect that we will resolve the prisoner discipline and tax statute issues.

My approach has been to humanize our courts by demystifying our branch of government and engaging and informing the public and public officials regarding the vital role our judges play in the government of people.

Indeed, in my talks around the state I often remind audiences that our branch of government affects people's lives like no other. We resolve issues of human rights and social policy as well as matters of equity and law. We are required to make judgments related to who will care for children and matters of domestic dispute. We determine the rights of private citizens in civil disputes, affecting individual's financial resources as well as their lives. And in criminal matters, we are called upon to decide matters of guilt and innocence, punishment and freedom. Because of these great responsibilities, we are in the best position to make changes to improve our state judicial systems in order to maintain a level playing field.

**Federal law does not necessarily mean good law.**

These examples should inspire each one of us to recognize similar situations. Federal law does not necessarily mean good law. Creative solutions from our courts that incorporate the principles of federalism were what the Founders had expected from "the least dangerous" branch of government, as Alexander Hamilton wrote in Federalist Paper No. 78.<sup>31</sup>

## **Conclusion**

So where does this discussion lead each one of us today? We know that there is no simple answer. On the one hand, it may just be that the frictions between the federal and state courts demonstrate that our democracy is truly working as intended by the Founders and that even contentious clashes serve as benchmarks for improving the judicial system overall. Although the future relationship between the federal and state courts will never be one of smooth sailing, we must persevere as we have always done in the past even when the judicial system, or we as judges, are personally attacked as a result of these conflicts. Abraham Lincoln knew this. When he was being unfairly maligned by the Committee on the Conduct of War, an officer, who knew the truth, offered to testify to set the record straight. Lincoln, following his own advice, declined:

Oh, no, at least not now. If I were to try to read, much less answer, all the attacks made on me, this shop might as well be closed for any other business. I do the very best I know how—the very best I can; and I mean to keep doing so until the end. If the end brings me out all right, what is said against me won't amount to anything. If the end brings me out wrong, ten angels swearing I was right would make no difference."<sup>32</sup>

I am sure that all of us here today have endured such attacks. During my tenure, I have been called “maximum Frank,” “Judge Roy Bean,” “marrying Sam,” and “the great enforcer.” One Associated Press article, written after I presided over a high-profile rape case, referred to me as “colorfully expressive,” “verbose,” and “quirky.”

Lincoln had the best reply to such irksome characterizations when he wrote in response to newspaper criticism: “Those comments constitute a fair specimen of what has occurred to me through life. I have endured a great deal of ridicule without much malice; and have received a great deal of kindness, not quite free from ridicule. I am used to it.”<sup>33</sup>

I am reminded of one story about a defendant, who just after being sentenced to 90 days in jail, asked if he could address the court and the judge replied, “Of course.” The defendant asked, “If I called you a S.O.B., what would you do?” The judge responded, “I would hold you in contempt and assess an additional five days in jail.” The defendant then asked, “What if I thought you were S.O.B.?” The judge said, “I cannot do anything about that. There is no law against thinking.” The defendant then said, “In that case, I think you are a S.O.B.”

In closing, let me continue to use a military metaphor that each of us are on a long patrol to protect the judicial independence of our state courts. State courts will continue to

**State courts will continue to play a vital role in examining issues, ideas, and implications of laws within our federal system of government.**

play a vital role in examining issues, ideas, and implications of laws within our federal system of government. Those advocating for too little or too great an assertion of federal or state jurisdiction fail to perform their constitutional function in a federal framework, which requires a balanced involvement at all levels of government.

In short, judicial teamwork is the key in maintaining a healthy federalism. I know that everyone here feels about their judiciary, as I do about my judges in Rhode Island, we each have one of the greatest teams in the country.

In the face of the many challenges before us, let me leave you with this final thought that has provided me with guidance and inspiration. In 1944 during World War II, *House & Garden* magazine published a remarkable cover with this Abraham Lincoln quotation, “I like to see a man proud of the place in which he lives. I like to see a man live so that his place will be proud of him.”<sup>34</sup> I believe that what we do as state judges is an approach, if not a perfect realization, of this vision.

Thank you.

## ENDNOTES

- 1        *See* *Evans v. Gore*, 253 U.S. 245, 250-51, 40 S.Ct. 550, 552, 64 L.Ed. 887, 891.
- 2        Thomas E. Baker, “Federalism: Allocating Responsibility Between the Federal and State Courts: The Ambiguous Independent and Adequate State Ground in Criminal Cases: Federalism Along a Mobius Strip,” 19 *GEORGIA L. REV.* 823 (1985):.
- 3        *THE COLLECTED WORKS OF ABRAHAM LINCOLN*, Roy P. Basler, 235-37 ( Rutgers University Press 1953) 235-37 [hereinafter “C.W.”].
- 4        *Id.* at 244.
- 5        *See* *Newdow v. United States Cong.*, 292 F.3d 597 (9th Cir. 2002).
- 6        *History of U.S. Federalism*, at <http://www.min.net/~kala/fed/history.htm> (last modified July 23, 2002).
- 7        *See* *Prigg v. Pennsylvania*, 41 U.S. 539 (1842).
- 8        *See Id.* at 622.
- 9        *See Id.* at 625-26.
- 10       Jacob Berman, *The Slave Power, States’ Rights, and the Transformation of Politics in Antebellum Wisconsin*, 37 (2002) (Senior thesis, Brown Univ.).
- 11       *Id.*
- 12       *Id.*
- 13       *Id.* at 38.
- 14       *Id.* at 39.
- 15       *Id.* at 44-5.
- 16       *Id.* at 45.
- 17       *Id.* at 46.
- 18       *Id.* at 52-3.
- 19       *Id.* at 80.
- 20       *Id.* at 82-3.
- 21       *Id.* 75-6; *Dred Scott v. Sanford*, 60 U.S. 393 (1856).
- 22       *See* *DiCiantis v. Wall*, 795 A.2d 1121 (R.I. 2002).
- 23       *See* *Doctor v. Wall*, 143 F. Supp. 2d 203 (D.R.I. 2001).
- 24       *See* *DiCiantis*, 795 A.2d at 1125.
- 25       *In re Pontes*, 280 B.R. 20 (D.R.I. 2002).
- 26       *See* *Wigginton v. Centracchio*, 787 A.2d 1151 (R.I. 2001).
- 27       Michael F. J. Piecuch, *High Court Study: State Constitutional Law in the Land of Steady Habits: Chief Justice Ellen A. Peters and the Connecticut Supreme Court*, 60 *ALBANY L. REV.* 1757 (1997).
- 28       *Id.* at 1767-70.
- 29       *Commonwealth v. Gonsalves*, 711 N.E.2d 108 (Mass. 1999).

- 30 *Id.* at 112.
- 31 Alexander Hamilton, THE FEDERALIST NO. 78, 114 (Henry S. Commager ed., 1949).
- 32 Francis B. Carpenter, THE INNER LIFE OF ABRAHAM LINCOLN: SIX MONTHS AT THE WHITE HOUSE 258-59 (University of Nebraska Press 1995) 258-59.
- 33 C.W. vol. 6 at 559.
- 34 HOUSE & GARDEN February 1944 at 1.

## ISSUES STATE COURTS FACE WHEN CONSIDERING FEDERAL PREEMPTION OF STATE COURT PROCEDURES: AN ANALYSIS FOR STATE JUDGES

*Wendy E. Parmet*

**I**n her introduction, Professor Parmet notes that the current controversy over federal regulation of the state courts implicates two of the mainstays of the U.S. legal system: the supremacy of federal law and the independence of state courts.

*In Part II, she expands on her introduction to explain that the “Madisonian Compromise” demonstrates that the drafters of the United State Constitution assumed the continuation of state courts’ authority. Their authority, however, was qualified by the Constitution’s assertion that federal law would be supreme (the Supremacy Clause) and that it must be enforced by state judges. congressional efforts to regulate the procedures applied in state courts, especially for the adjudication of questions of state law, raise the question of how to reconcile the continued independence of state courts with their obligations under the Supremacy Clause.*

*In Part III, Professor Parmet reminds the reader that state courts cannot enforce a federal statute that is itself unconstitutional. Yet, as Justice Brandeis observed in his concurrence in *Ashwander v. Tennessee Valley Authority*, courts that have available to them more than one ground of decision, including one that does not involve a constitutional question, may not have to, and, if possible, should not, reach the constitutional question. One particularly relevant non-constitutional response is the use of a “plain statement” rule, under which a state court will not interpret a federal statute as regulating state court procedures unless Congress, in the statutory language itself, has made a clear statement of its intent to do so. Another is an interpretation that the federal statute, for the most part, incorporates state law and so creates little conflict between federal and state law.*

*In Part IV, she discusses avenues open to state courts that must decide the constitutional issues raised by federal efforts to regulate state court procedures. The first is to determine whether Congress had authority to make the law in question. That authority must come from somewhere in the Constitution; the Supremacy and Judges clauses are not, by themselves, sources of authority. There may be relevant limitations upon congressional authority derived from the Tenth Amendment, which has been read as a limit on Congress’s power to commandeer either the legislative or executive branches of state government—the “No-Commandeering Principle.” However, whether that principle limits the power of Congress to require state courts to apply federal procedural requirements in adjudicating state law claims remains uncertain.*

*In her conclusion, Professor Parmet asserts that, although recent federal legislation affecting state court procedure raises complex and troubling federalism issues, it may be unlikely that the United States Supreme Court will be able to cut through the complexity with a single, definitive decision agreed to by a clear majority of the Court. Given the complexities of the problem, it may actually be impossible for the Court to do so. Thus, state judges may have to expect to be called upon for the foreseeable future to decide on their own the limits of the application of federal law in their courtrooms.*

## I. Introduction

The growing practice of congressional regulation of state courts lies at the juncture of two central tenets of American constitutionalism: the supremacy of federal law and the independence of state courts. With only cryptic messages from the Supreme Court to guide them, state judges are increasingly forced to decide whether they must adhere to federal laws that would alter their courtroom practices. Although no definitive answers can be given, this paper suggests a path through the maze.

## II. Background Propositions

### A. The Madisonian Compromise

To determine whether and under what circumstances Congress can preempt or regulate state court procedures, several fundamental propositions should be kept in mind. The most important is that the Constitution assumes the independent creation and continuing existence of state courts. The so-called “Madisonian Compromise” ensured that state courts would continue to exist and that they would be available to exercise jurisdiction over state claims as well as matters falling within the “judicial power” of the United States. As a result, Article III defines the federal judicial power without insisting upon the creation of lower federal courts. As Alexander Hamilton stated in Federalist 82:

[T]he State courts will be divested of no part of their primitive jurisdiction further than may relate to an appeal and I am even of the opinion that in every case in which they were not expressly excluded by future acts of the national legislature, they will of course take cognizance of the causes to which those acts may give birth.

### B. The Supremacy Clause

As Hamilton’s statement makes clear, the Constitution also supposes the supremacy of federal law and its application in state courts. The State Judges Clause, a part of the Supremacy Clause, states that the “Judges in every State” shall be “bound” by the “Constitution and laws of the United States.”<sup>1</sup> As a result, constitutionally valid federal statutes have to be given effect in state court, as they are every hour of every day.

The Supremacy Clause also ensures that Congress may, at times, divest state courts of some of their jurisdiction. This occurs most often when Congress regulates in an area, vests the federal courts with jurisdiction over disputes pertaining to those regulations, and preempts state courts from resolving claims in the field. Federal preemption under ERISA of disputes “relating to” employee benefits is such an example of federal divestment of state court jurisdiction.<sup>2</sup>

Federal power over state courts, however, goes further. In *Testa v. Katt*,<sup>3</sup> the Supreme Court held that Congress may require state courts of general jurisdiction to hear federal claims, at least when doing so would not be overly burdensome.<sup>4</sup> And, in the rather mysterious case of

*Dice v. Akron, Canton & Youngstown Railroad*,<sup>5</sup> the Court suggested that state courts might be required to apply certain federal procedures when they are adjudicating federal causes of action.<sup>6</sup>

Federal regulation of state court procedures, even for state causes of action and defenses, also occurs regularly as a result of the Due Process Clause of the Fourteenth Amendment and the incorporation of most provisions of the federal Bill of Rights into that Clause.<sup>7</sup> Thus it is commonplace, and no longer questionable, that the federal Constitution imposes commands and limits upon the way that state trials, especially criminal trials, are conducted.

### C. State Sovereignty

Despite Congress's ability to limit the jurisdiction of state courts and to require those courts to hear federal claims, and even to apply federal procedures when they are not overly burdensome, it is far from clear whether Congress can go further and regulate the procedures state courts must use to adjudicate questions of state law, in instances when that law is not preempted. Although the Constitution assumes and demands the supremacy of federal law, it also requires the continued existence and sovereignty of the states. As the Supreme Court has repeatedly made clear in recent years, "Dual sovereignty is a defining feature of our nation's constitutional blueprint."<sup>8</sup> Arguably, the ability of states to control the procedures applicable to the adjudication of state law issues in their own courts is an aspect of that sovereignty.<sup>9</sup> Whether this is so is an issue that state judges will find themselves increasingly confronting in the years to come.

## III. Norms of Construction

### A. The *Ashwander* Principle

The State Judges Clause obliges state court judges to apply federal law. That does not mean, however, that state courts must give effect to all federal statutes. As *Marbury v. Madison*<sup>10</sup> taught us, in applying federal law, courts must consider the totality of federal law, including the Constitution, and cannot give force to a federal statute that is in violation of the Constitution. Hence the State Judges Clause requires state (and federal) courts to give effect to preemptive federal legislation only when doing so is not in itself in violation of the Constitution.<sup>11</sup>

That does not mean, however, that state courts must always determine the constitutionality of a federal statute that purports to preempt state court procedures. As Justice Brandeis famously stated in *Ashwander v. Tennessee Valley Authority*, "[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter."<sup>12</sup> Hence the fact that a party claims that a federal statute preempts a state court procedure does not necessarily mean that the state court must either abide by the federal statute or hold it unconstitutional. The state court can, and should, first consider whether there are other bases for resolving the matter.

Depending upon the situation, there are many different ways in which a state court might apply the *Ashwander* principle to a federal statute that is claimed to regulate state court procedures for state law issues. Perhaps most obviously, the court might determine that the statute simply does not apply in the particular factual context. This approach to the problem was utilized by a federal magistrate judge in *In re Transcript International Securities Litigation*.<sup>13</sup> The court in that case was asked to stay state court discovery proceedings pursuant to the Securities Litigation Uniform Standards Act of 1998 (“SLUSA”),<sup>14</sup> which authorizes federal courts to stay state court discovery in “related actions.” While noting that “it may be questioned whether Congress actually does have the power to regulate state procedural law and the state courts’ power to govern the progression of cases on their own dockets, particularly in areas in which Congress has not ‘preempted the field . . .’” the magistrate concluded that “I need not explore this intriguing but

**The Supreme Court has long stated that it will not infer preemption of a state’s historic police powers absent a clear statement of intent by Congress.**

perplexing question,” because the state proceeding that the petitioner sought to stay was not, in fact, a “related action.”<sup>15</sup> In effect, mindful of the potential constitutional problem that would arise if he stayed the state proceeding, the magistrate looked carefully at the legislative history and determined that Congress did not intend that private,

individual actions in state court be considered “related actions” subject to the statute’s stay provisions. The court followed Justice Brandeis by reading the federal statute narrowly so as to avoid the “perplexing” constitutional question.

## B. The Plain Statement Rule

Another possible approach would be the use of a “plain statement” or “clear statement” rule, holding that a federal statute will not be read to regulate state court proceedings for state causes of action unless the statute says so with absolute clarity. Although the Supreme Court has not used this approach to the scenario now under discussion, this technique of statutory construction has been applied with regularity by the Court when a broad reading of a federal statute would raise difficult and sensitive issues of federalism. For example, the Supreme Court has long stated that it will not infer preemption of a state’s historic police powers absent a clear statement of intent by Congress.<sup>16</sup> Because state judicial procedures help states to implement and effectuate state substantive law,<sup>17</sup> the caution against a rush to find preemption is arguably relevant to federal preemption of state court procedures, especially when those procedures are tied to substantive areas, such as safety, that have traditionally been regarded as part and parcel of the states’ police power.<sup>18</sup>

More particularly, the Supreme Court has frequently demanded that Congress provide a clear or plain statement of its intent to enact measures that would arguably interfere with the ability of a state to control its own courts. Perhaps most relevant is *Gregory v. Ashcroft*,<sup>19</sup> which concerned the application of the Age Discrimination in Employment Act to state court judges. Noting that the application of the act to state court judges would “upset the usual constitutional balance,” Justice O’Connor held that it was “incumbent upon the federal courts to be certain of Congress’s intent before finding that federal law overrides this balance.”<sup>20</sup> In recognition of the importance of preserving the delicate balance between the states and Congress, the Court imposed a “plain

statement” rule, under which it refused to construe federal legislation as properly overriding the balance unless and until it is absolutely clear that Congress intends to do just that.<sup>21</sup>

*Ashcroft’s* plain statement rule has been applied in numerous other situations involving “judicial federalism.” For example, the Court requires that Congress state clearly and unequivocally its intent to abrogate a state’s sovereign immunity.<sup>22</sup> Likewise, the Court requires a clear statement from Congress in order to find that a state’s participation in a federal spending program creates enforceable rights against the state.<sup>23</sup>

To be sure, the situations in which the clear statement rule has been applied to date are each distinguishable in different ways from the situation in which a federal statute putatively preempts state court procedures. Most obviously, in many of the cases in which the clear statement rule has been used, the Court has worried about the financial obligations imposed upon the states by making them amenable to federal causes of action—a problem that will not be readily evident if Congress federalizes state court procedures. Nevertheless, the primary rationales for the *Ashcroft* rule, respect for state sovereignty and avoidance of difficult constitutional questions, seem relevant in cases in which a federal statute preempts state court procedures without explicitly stating whether the preemption applies to the adjudication of state law issues. In that circumstance, the use of the clear statement rule to hold that federal law does not apply to state law issues unless Congress says so explicitly would seem well within the tradition of *Ashcroft* and constitutional federalism.

### C. Federal Incorporation of State Law

In some situations, a state court may be able to avoid federal regulation of state court procedures by reading the federal statute at issue as one that reduces federal/state conflict by relying, for the most part, on state law. Although very different in some respects, the Court’s decision in *Semtek Int’l., Inc. v. Lockheed Martin Corp.*<sup>24</sup> provides some support for this approach. *Semtek* concerned a state court’s determination of the claim preclusive effect to be given to a diversity action brought in a federal district court in another state. The respondent contended that Federal Rule of Civil Procedure 41(b) governed the case and should have been followed by the state court below. The Supreme Court disagreed, noting that the application of the federal rule to state law actions would “in many cases violate the federalism principle of *Erie Railroad Co. v. Tompkins*.”<sup>25</sup> Nevertheless, because the issue involved the preclusive effect of a federal court judgment (albeit in a diversity case), the Court concluded that federal common law should apply. However, the content of that common law was to be determined by state law, thereby minimizing any apparent federalism conflict. According to Justice Scalia, this appeared to be “a classic case for adopting, as the federally prescribed rule of decision, the law that would be applied by state courts . . . .”<sup>26</sup>

Likewise, faced with a federal statute that arguably regulates state court proceedings, a state court may, in appropriate cases, find that the federal statute, even if does apply, should be read as relying upon state law to supply the content of key terms. Thus if a federal statute required a state court to apply a “clear and compelling” standard of proof for a particular claim, the state court might determine that the meaning of “clear and compelling” is to be determined by its own state’s law and in such a way that the standard of proof would not be altered from the way it would be even in the absence of the federal statute.

## IV. Facing the Dilemma: Analyzing the Constitutional Issues

### A. Source of Authority

Despite *Ashwander's* admonition, constitutional issues, even delicate ones, cannot always be avoided. In many instances, such as the Y2K Act,<sup>27</sup> Congress has made its intent to alter the procedures applicable in state courts absolutely clear. When that occurs, courts may have little choice but to face and analyze the constitutional issues raised by federal regulation of state court procedures.

In analyzing the issue, the first obvious point is that Congress lacks a general police power and must rely upon some provision in the Constitution to authorize its actions. In this regard, it is important to recall that although the State Judges Clause requires state court judges to apply federal law, by itself it is not a source of authority for congressional actions meant to apply in state court.<sup>28</sup> To

**It may appear obvious that Congress has authority under the Commerce Clause, either alone or in conjunction with the Necessary and Proper Clause, to regulate state procedures in such actions. However, that assumption should not go unquestioned.**

the contrary, the Clause makes clear that state judges must apply “constitutional” federal law; thus state judges must ensure that the federal statutes they follow are themselves properly authorized by another provision of the Constitution.

In determining whether a federal regulation of state court procedures has the requisite constitutional anchoring, it is also important to recall that the Necessary and Proper Clause of Article I, § 8, does not, on its own, provide the

authority. As the Supreme Court of South Carolina recently reiterated in a case determining that a federal statute tolling the statute of limitations for state court actions was unconstitutional, the Necessary and Proper Clause “is not a self-contained grant of power. It authorizes Congress only to pass laws that ‘carry[] into Execution’ powers the Constitution elsewhere vests in one or more institutions of the federal government.”<sup>29</sup> Thus another, more specific, enumeration of congressional authority must also be found.

*The Commerce Clause.* The most obvious, and important, source of congressional authority for this inquiry is the Commerce Clause of Article I, § 8. Because many of the proposals to regulate state court procedures occur with respect to business or consumer class actions, it may appear obvious that Congress has authority under the Commerce Clause, either alone or in conjunction with the Necessary and Proper Clause, to regulate state procedures in such actions. However, that assumption should not go unquestioned. In recent years the Supreme Court has made clear that it will provide meaningful, if not stringent, review of regulations that are authorized on the theory that they “substantially relate” to commerce.<sup>30</sup> In doing so, the Court has recalled the importance of federalism and the need to impose limits upon federal actions that intrude upon the states’ police power.

In the case of federal actions that regulate state court procedures, the interesting question arises as to whether Congress’s power to regulate a subject matter (such as the securities markets) extends to the regulation of state court proceedings involving that subject. Does the fact that

Congress can regulate the securities market mean that Congress can regulate state actions that pertain to that market? Do we conceptualize the regulation of state court procedures in such actions as simply a step that is “necessary and proper” to fulfill Congress’s power to regulate the securities markets, or must we ask, with specificity, whether the regulation of state court procedures in such cases by itself “substantially affects” commerce? In the past, the Supreme Court has not demanded great specificity. Therefore it is possible to argue that if Congress has the power under the Commerce Clause to regulate an area of the economy, that power, abetted by the Necessary and Proper Clause, extends to the determination of procedures used to adjudicate claims about the matter regulated. However, as Professor Bellia has written,

The Supreme Court has never addressed the level of specificity that Congress must use under the Commerce Clause when aggregating activities affecting interstate commerce. The Court has, however, used the specter of federal regulation of a large class of aggregated activities as an argument against the constitutionality of regulation of a subset activity.<sup>31</sup>

Given the Court’s recent demands that actions under the Commerce Clause be reviewed with some care,<sup>32</sup> it is possible that Congress’s power to regulate a field or activity as one that “substantially affects” interstate commerce does not itself provide the power to regulate state court proceedings that govern that activity.

This view was recently adopted by the Supreme Court of Washington in *Guillen v. Pierce County*.<sup>33</sup> That case concerned 23 U.S.C. § 409, which provides immunity from discovery in state courts for accident data and surveys collected by state agencies. In an opinion very much influenced by concerns for federalism, the Washington Supreme Court held that Congress’s power to regulate interstate commerce and, therefore, the interstate highway system does not extend to the power to regulate the admissibility of evidence, not created pursuant to federal law, in state tort actions. In effect, the court demanded that § 409’s discovery-immunity rule itself be subject to a Commerce Clause analysis, a test that § 409, untethered from the rest of federal highway regulations, could not survive. Whether this requirement that federal procedural rules be judged on their own for their relationship to interstate commerce may be determined next term, as the Supreme Court has recently granted the petition for certiorari in *Guillen*.

*The Spending Clause.* A second source of congressional power worth considering is the Spending Clause.<sup>34</sup> Congress has broad power to spend for the public welfare.<sup>35</sup> When it does so, it may impose obligations upon the states in return for their receipt of federal money as long as Congress had spoken with clarity, has given the states the ability to exercise a knowing choice, and the conditions on federal grants are related to the particular federal program or project that is the subject of the grant.<sup>36</sup> In the past, these requirements have been construed gently, granting Congress broad latitude to make demands upon the states by attaching conditions to federal spending bills. Recently, however, some judges and commentators have begun to question the deferential review applied to Spending Clause litigation.<sup>37</sup>

In its review of *Guillen*, the Supreme Court will likely consider whether Congress can use its spending power to modify the procedures or rules of evidence applicable in state courts,

by attaching conditions to federal grants.<sup>38</sup> In considering whether § 409 was authorized by the Spending Clause, the Washington Supreme Court found that by trying to immunize states against production of documents that were not prepared with federal funds, and that would have been prepared even in the absence of federal funds, Congress had exceeded its power. In reaching that decision, the court found that Congress had no legitimate interest in the evidence presented in state court proceedings and that as a result, Congress could not use the money it gave for highway improvements as a “string” to coerce states to alter their rules of evidence, at least with respect to documents not created with the help of the federal money. The Supreme Court’s review of *Guillen* should help shed some light on the extent to which the spending power can be used to authorize federalization of state court procedures.

*Fourteenth Amendment.* A less obvious source of congressional authority is § 5 of the Fourteenth Amendment. That section provides Congress with the power to enforce the rights granted by § 1 of the Fourteenth Amendment. Because many of the rights protected by § 1 pertain to courtroom procedures (consider both the exclusionary rule<sup>39</sup> and constitutional limitations on jurisdiction<sup>40</sup>), it is plausible to imagine that Congress could, under some circumstances, regulate state judicial procedures pursuant to its § 5 enforcement powers. However, the Supreme Court has made clear that congressional power under § 5 is only remedial; it does not extend to creating or altering the substance of rights.<sup>41</sup> In addition, when Congress acts under § 5, the court must determine whether there is “a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”<sup>42</sup> Thus, there must be some strong evidence that the problem Congress is addressing really existed and that the statute sought to be authorized is well attuned to resolving that specific problem.<sup>43</sup> This suggests that if and only if Congress can establish that a particular class of state court procedures is *unconstitutional* could Congress use § 5 to override those procedures and replace them with a federal procedure that implements and enforces the constitutional rule.<sup>44</sup> While this scenario is possible, few if any proposals to federalize state court civil procedures aim to remedy practices in state courts that are themselves unconstitutional, thereby justifying congressional intervention under § 5.

## **B. The Tenth Amendment and the “No-Commandeering” Principle**

Even if Congress has a source of authority, that does not end the analysis. Even if a federal statute is otherwise authorized, it is still unconstitutional if it violates some other provision or norm of the constitution. Thus, any federal statute altering state court procedures must itself satisfy the Due Process Clause of the Fifth Amendment as well as other constitutional limitations on federal authority (such as the First Amendment).

Perhaps the most relevant constitutional limitation on federal authority comes from the Tenth Amendment. In a series of cases over the last decade, the Supreme Court has made it clear that the Tenth Amendment is a critical reminder of the dual sovereignty at the heart of our Constitution. In order to respect state sovereignty, the Court has read the Tenth Amendment as limiting the ability of Congress to commandeer either the legislative<sup>45</sup> or executive branches<sup>46</sup> of state government to carry out and implement federal law.

As it has developed, the no-commandeering rule is principally a limitation upon Congress’s power under the Commerce Clause. In *New York v. United States*, where the Court first enunciated

the doctrine, the Court held that Congress can entice states to carry out federal commands by offering the states money.<sup>47</sup> In other words, Congress can effectively commandeer the states when it acts under the Spending Clause. Of course, as was noted above, Congress can only do so when it is legitimately using its power to tax and spend. Whether that power extends so far as to enable Congress to require states to alter their state court procedures for matters not directly related to Congress's spending to states remains, as was discussed above, problematic.

The no-commandeering doctrine also probably does not apply to congressional acts based on the Fourteenth Amendment. When Congress is enforcing that amendment, it is directly remedying constitutional failures by the states. Obviously, to remedy these violations, Congress can pass laws that speak directly to and indeed commandeer the states.<sup>48</sup> In fact, Congress can regulate only the states when it acts under § 5.<sup>49</sup>

Although the no-commandeering doctrine itself is probably limited to the Commerce Clause, it is still of critical importance. The Commerce Clause, after all, is the great font of congressional power and many of the proposals to federalize state court procedures appear to be predicated on Congress's ability to regulate interstate commerce.<sup>50</sup> Therefore, the question must be asked: Does a federal statute that requires a state court to apply federal procedural requirements for state law claims violate the no-commandeering principle?

**Moreover, in the early years of the Republic, it was not unusual for Congress to expect state courts to carry out certain federal functions, such as naturalization.**

The answer to that question is uncertain.<sup>51</sup> The strongest reason to believe that the no-commandeering principle does not apply to laws that regulate state courts comes from the fact that in its two no-commandeering cases, *New York v. United States*<sup>52</sup> and *Printz v. United States*,<sup>53</sup> the Supreme Court took pains to distinguish the commandeering of state judges from the commandeering of state legislative and executive branch officials.<sup>54</sup> Pointing to the State Judges Clause, the Court noted that the Constitution requires state judges to apply federal law and that in cases such as *Testa* this has meant that states courts must provide a forum for federal causes of action.<sup>55</sup> Moreover, in the early years of the Republic, the Court noted, it was not unusual for Congress to expect state courts to carry out certain federal functions, such as naturalization.<sup>56</sup> Hence, one might conclude that the no-commandeering principle is simply inapplicable to the issue of federal regulation of state courts.<sup>57</sup>

On the other hand, there are significant reasons to conclude that the discussions of judicial commandeering in *New York* and *Printz* should not be read so broadly. First, in neither case was the Court deciding the constitutionality of judicial commandeering. It was only explaining why precedent, such as *Testa*, and the past practices discussed above should not be read as inconsistent with the imposition of the commandeering doctrine to state legislatures and executives.<sup>58</sup> In other words, the discussions of judicial commandeering were dicta designed to bolster the argument that Congress cannot commandeer the other two branches of state government. It was not a holding on the issue of judicial commandeering.

Second, and more importantly, the examples relied upon, and past precedent more broadly, derived from cases when state courts were obligated to adjudicate or carry out federal law for the enforcement of federal claims or interests. In effect, these cases, like *Testa* and *Dice*, stand only for the proposition that, as a result of the Madisonian Compromise and the State Judges Clause, state courts cannot discriminate against federal claims and must apply federal law when doing so is “necessary and proper” for the effectuation of those claims. They say absolutely nothing about whether Congress can commandeer state courts with respect to *state* law claims or issues—a far greater intrusion into a state’s sovereignty, and a practice that does not seem to follow *a fortiori* from the State Judges Clause.

This reading of *Printz* gained significant support from the Supreme Court’s decision in *Alden v. Maine*.<sup>59</sup> The question before the Court in *Alden* was whether Congress can abrogate state sovereign immunity for federal claims in state court. In finding that Congress lacks that power, even though the Eleventh Amendment itself is silent on the point, the Court considered the argument that the *Printz* discussion of the State Judges Clause implied that Congress may commandeer state courts. According to the Court, that argument “would imply that Congress may in some cases act only through instrumentalities of the States.”<sup>60</sup> But, the Court insisted, the Supremacy Clause does not give Congress any such power. Congress may require state courts to follow federal law, as they were required to do in *Testa*, and as the federal courts must also do, but Congress may not impose unique obligations upon the state courts—which is precisely what it attempted when it tried to abrogate sovereign immunity for state court actions and what it does when it creates federal procedures for state court actions. Indeed, if Congress could impose unique obligations upon state courts, the Court stated in *Alden*, it would “blur not only the distinct responsibilities of the State and National Governments but also the separate duties of the judicial and political branches of the state governments, displacing state decisions that ‘go to the heart of representative government.’”<sup>61</sup>

### C. Federal Deference to State Law and State Court Procedures

The Court’s opinion in *Alden* not only casts doubt upon the argument that the State Judges Clause creates an exception to the no-commandeering rule, it also follows *Ashcroft* and even *Semtek*, in suggesting the importance of the ability of states to regulate their own courts. Numerous other cases, going as far back as *Tarble’s Case*,<sup>62</sup> make the same point. A relatively recent case to do so was *Johnson v. Fankell*,<sup>63</sup> in which the petitioner argued that a state court must follow the federal rule and permit interlocutory appeals of denials of qualified immunity in § 1983 civil rights cases. The Supreme Court disagreed, noting that “No one disputes the general and unassailable proposition . . . that States may establish the rule of procedure governing litigation in their own courts.”<sup>64</sup> Thus, even when *federal claims* are being adjudicated in state court, the normal rule is to defer to state procedures. The idea that such comity is owed to state courts is expressed pervasively throughout our jurisprudence.<sup>65</sup> It seems logical, therefore, that even more weight would be given to state procedures when the claim adjudicated is one based on state law. On the other hand, the typical case does not test Congress’s power to override state procedures.

In addition, it is important to recall that even when the Court has required state courts to adjudicate federal claims, it has insisted that state courts need not abide by Congress’s requirement if they have a valid excuse.<sup>66</sup> While the contours of the valid excuse doctrine are hazy,<sup>67</sup> in light of

the Tenth Amendment it seems possible that a state may well be able to claim that it has a significant enough interest in the way it adjudicates its own claims so as to constitute a “valid excuse” for ignoring the demands of the federal statute. This might be especially so either when the federal statute places a significant burden on the state’s judicial system or when the federal statute substantially impedes the state’s ability to carry out its own legal policies.

The possible impact of federal procedures on the development or interpretation of state law highlights a particularly troubling implication of the federalization of state court procedures. It goes without saying that state courts are the final arbiter of the meaning of state law.<sup>68</sup> While Congress, when it acts pursuant to a lawful grant of authority, can preempt state law, neither it nor the federal courts can definitively interpret or shape state law. That is the job of the states.

Yet, there can be little doubt that procedure affects substance and that alterations of the rules of procedure can change the course and content of state substantive law.<sup>69</sup> For example, a federal rule altering the

pleading requirements for a state tort action might well have the indirect (or maybe intended) effect of barring a class of claims that are otherwise permissible under state law. As a result, the substance of the state’s law would be effectively changed without any action on the part of the state legislature or state courts.

The impact would be the same as if the federal government had demanded that the state legislature redefine the standard of liability, or if the federal courts had redefined the standard, under state law. But that is precisely what *New York v. United States* and *Erie Railroad Co. v. Tompkins* each prevent in their respective spheres.

Paradoxically, the intimate relationship between state procedure and state substantive law may point not only to why federalization of state procedures may violate state sovereignty, but also to why it may fall within Congress’s constitutional powers. Even with the Supreme Court’s renewed attention to federalism and the limits of federal authority, there is little doubt that Congress has broad preemptive power. The *substantive impact* of many of the efforts to federalize state court procedures undoubtedly falls within that scope. For example, Congress can remove the regulation and adjudication of securities claims from the states altogether. And, Congress could probably change the liability rules for all securities claims. Logically one might think that this broader power would necessarily include the lesser power to simply impose federal procedures on state claims related to those subject matters. However, in matters of federalism that is not necessarily true.<sup>70</sup> Form often matters, and in this case it may matter precisely because the federalization of state court procedures permits one sovereign (the federal government) to alter the course of another sovereign’s law, blurring the lines of political responsibility and accountability that lie so close to the heart of federalism. As Justice O’Connor stated in *New York*,

Where the Federal Government compels states to regulate, the accountability of both state and federal officials is diminished.

**It goes without saying that state courts are the final arbiter of the meaning of state law.**

[If the states enact a policy contrary to the federal one it can] always be pre-empted under the Supremacy Clause if it is contrary to the national view, but in such a case it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular.<sup>71</sup>

That accountability does not exist if federal officials change state court procedures, altering the impact of state law without taking responsibility for imposing federal substantive standards.<sup>72</sup>

On the other hand, the very fact that the federalization of state court procedures may have a substantive impact means that it is almost impossible to distinguish federal statutes that

**It is precisely because it is often difficult to untangle substance from procedure that federal laws that regulate state courts are both especially troubling as a matter of federalism and especially hard to distinguish from common, “garden variety” preemption.**

commandeer state procedures from federal laws that simply alter the substantive rules. To take again the example given above, if a federal statute altering the standard of proof in a securities case has a substantive impact, how is it all that different from a federal statute that preempts state substantive laws in securities cases? It is precisely because it is often difficult to untangle substance from procedure that federal laws that regulate state courts are both especially troubling as a matter of federalism and especially hard to distinguish from common, “garden

variety” preemption. In effect, because procedure affects substance, Congress may claim that federalization of state procedures must be sustained as indistinguishable from substantive federal regulations within the scope of Article III.

## V. Conclusion

The recent proclivity of Congress to consider and enact laws affecting the procedures to be applied in state courts on state law issues raises complex and troubling issues of federalism. With the grant of certiorari in *Guillen* we can be hopeful that the Supreme Court will give us some guidance on this issue next term. But a definitive resolution of all of the issues raised is unlikely. Indeed, it is possible that *Guillen* itself will end up being decided, per *Ashwander*, on other non-constitutional grounds.<sup>73</sup> But even if it is decided on constitutional grounds, we may not get a clear majority decision and even if we do, it is unlikely that a single case can or will answer all of the issues that arise in this complex and sensitive area of the law. Indeed, it is unlikely that any single ruling or principle can apply to the myriad forms that federal regulation of state procedures may take. Thus it is likely that state courts will continue to have to do their duty under the Supremacy Clause and decide for themselves the extent to which federal laws apply to state procedures and the extent to which they may do so constitutionally.

## ENDNOTES

- 1 U.S. CONST., art. VI, § 2.
- 2 *E.g.*, *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985).
- 3 330 U.S. 386 (1947).
- 4 *Douglas v. New York, N.H. & H.R. Co.*, 279 U.S. 377 (1929).
- 5 342 U.S. 359 (1952).
- 6 For a discussion on the uncertainties surrounding *Dice*, see Wendy E. Parmet, *Stealth Preemption: The Proposed Federalization of State Court Procedures*, 44 VILLANOVA L. REV. 1, 17-20 (1999).
- 7 *E.g.*, *Mapp v. Ohio*, 367 U.S. 643 (1961).
- 8 *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743 (2002), *citing* *Gregory v. Ashcroft*, 501 U.S. 452 (1991).
- 9 *See* section IV. C. *infra* at 61.
- 10 5 U.S. (1 Cranch) 137 (1803).
- 11 Martin H. Redish & Steven G. Sklaver, *Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism*, 32 INDIANA L. REV. 71-2 (1998).
- 12 297 U.S. 288, 347 (1936)(Brandeis, J., concurring).
- 13 57 F. Supp. 2d 836 (D. Neb. 1999).
- 14 15 U.S.C. §§ 77z-1(b)(4); 78u-4(b)(3)(D).
- 15 57 F. Supp. 2d at 841 note 2.
- 16 *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).
- 17 Parmet, *supra* note 6, at 52-3.
- 18 *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996).
- 19 501 U.S. 452 (1991).
- 20 *Id.* at 460 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985)).
- 21 *Id.* at 462.
- 22 *See* 473 U.S. at 242.
- 23 *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984).

24 531 U.S. 497 (2001).

25 *Id.* at 504 (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78-80 (1938)).

26 *Id.* at 508.

27 15 U.S.C. § 6602 (2002).

28 Redish & Sklaver, *supra* note 11, at 75.

29 *Jinks v. Richland County*, 563 S.E. 2d 104 (S.C. 2002), (quoting Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 274 (1993)).

30 *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

31 Anthony J. Bellia Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947, 965 (2001).

32 *See supra* note 30.

33 34 P. 3d 1218 (Wash. 2001), *cert. granted*, 535 U.S. 1033 (2002).

34 U.S. CONST. ART. I, § 8.

35 *South Dakota v. Dole*, 483 U.S. 203 (1987).

36 *Id.* at 207; *New York v. United States*, 505 U.S. 144 (1992).

37 *E.g.*, *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 654, 655-657 (1999) (Kennedy, J., dissenting); Lynn Baker, *Conditional Spending and States’ Rights*, 574 ANNUALS OF THE AM. ACADEMY OF POLITICAL & SOCIAL SCIENCE 104 (2001); Celestine Richards McConville, *Spending Clause Symposium: Federal Funding Conditions: Bursting Through the Dole Loopholes*, 4 CHAP. L. REV. 163 (2001).

38 34 P. 3d 1218 (Wash. 2001), *cert. granted*, 535 U.S. 1033 (2002).

39 *Mapp v. Ohio*, 367 U.S. 643 (1961).

40 *Pennoyer v. Neff*, 95 U.S. 714 (1877).

41 *City of Boerne v. Flores*, 521 U.S. 507 (1997).

42 *Id.* at 520.

43 *Id.* at 520-22.

44 For a further discussion of the use of § 5 to support federalization of state court procedures, see Parmet, *supra* note 6, at 28-30.

45 *New York v. United States*, 505 U.S. 144 (1992).

46 *Printz v. United States*, 521 U.S. 898 (1997).

47 505 U.S. at 167-68.

48 South Carolina v. Katzenbach, 383 U.S. 301 (1966).

49 *Morrison*, 529 U.S. at 620-26.

50 *E.g.*, 15 U.S.C. § 6601(b)(predicating the Y2K Act upon the commerce power).

51 For the most part, commentators have questioned whether Congress has such power. *See Bellia*, *supra* note 31, at 949, nn. 13, 14 (citing scholarly analysis of the subject).

52 505 U.S. 144 (1992).

53 521 U.S. 898 (1997).

54 521 U.S. at 907; 505 U.S. at 177.

55 521 U.S. 898, 928 (citing *Testa v. Katt*, 330 U.S. 386 (1947)).

56 521 U.S. at 906.

57 This would not mean, however, that federalism considerations should not guide the prior determination of whether Congress actually is acting pursuant to an enumerated source of authority.

58 *See Redish & Skiaver*, *supra* note 11, at 77.

59 527 U.S. 706, 753 (1999). *See also* A.C. Pritchard, *Constitutional Federalism, Individual Liberty, and the Securities Litigation Uniform Standards Act of 1998*, 78 WASH. U. L.Q. 435, 475 (2000).

60 527 U.S. at 753.

61 *Id.* (citing *Gregory*, 501 U.S. at 461).

62 80 U.S. 397 (1871).

63 520 U.S. 911 (1997).

64 *Id.* at 922.

65 *See, e.g.*, *Coleman v. Thompson*, 501 U.S. 722, 724 (1991)(holding that claims defaulted in state court cannot be raised on federal petition for habeas corpus unless the prisoner can demonstrate cause and prejudice, because of “the important interest in finality served by state procedural rules and the significant harm to the States that results from the failure of federal courts to respect them.”).

66 *Douglas v. New York, N.H. & H.R. Co.*, 279 U.S. 377, 388 (1929).

67 Louise Weinberg, *Symposium—Federal State Conflicts Law—The Federal-State Conflict of Laws: “Actual” Conflicts*, 70 TEX. L. REV. 1743, 1773-77 (1992).

68 *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997); *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938); *Murdoch v. City of Memphis*, 87 U.S. 590 (1874).

69 *Parmet*, *supra* note 6, at 52-53. *See also* Mark Spiegel, *The Rule 11 Studies and Civil Rights Cases: An Inquiry Into the Neutrality of Procedural Rules*, 32 CONN. L. REV. 155, 184 (1999).

70 New York v. United States, 505 U.S. at 168-69, 188.

71 505 U.S. at 168.

72 For this reason, I have elsewhere referred to this practice as “stealth preemption.” See Parmet, *supra* note 6.

73 One question is whether the state court correctly read the state statute. The respondent below argued that the statute was not as broad as the state court found it to be. Second, there is a major question of standing in the case. Its resolution may determine whether the Supreme Court ever gets to the merits of the case.

## ORAL REMARKS OF PROFESSOR PARMET

I am very honored and pleased to have been invited by the Institute to have the opportunity of speaking with you today. I really appreciate this opportunity.

In some sense, the topic that I was asked to write about and talk to you about today is a very small, maybe arcane, part of the much larger topic that we were discussing this morning. This is the relationship between federal and state courts, and the impact that it has on state judicial independence. I am focusing on one particular part of this relationship, federal control over the procedures used in state courts, which is still relatively rare.

In recent years, Congress has introduced numerous bills telling state courts the way and manner in which they should conduct their business. One clear example of such legislation is Section 409 of the Highway Safety Act, which shields certain documents from discovery. Another example is the Y2K bill, which was discussed this morning. It not only expands federal court jurisdiction but also sets the terms for class action certification in state court.

In one sense these statutes appear to be clearly within Congress's power. They are less troublesome as a matter of federalism and comity, than many other garden variety federal laws that preempt state regulation, create federal causes of action, create removal, and take the cases away from the state courts. Such laws leave little room for state action. Statutes like 409 and Y2K, on the other hand, permit state courts to continue to hear state claims. What then, we may ask, is the problem with Congress simply tinkering with some of the rules that are applied in state courts?

It turns out, I think, that if we think about the issue in terms of federalism, and in light of the values the Supreme Court has identified in numerous cases, as well as in light of democratic theory, there are several reasons to believe that Congress' exercise of this lesser power is more worrisome than its exercise of the greater power of preemption.

We could discuss some of these issues more fully later, but let me note here a couple of reasons for concern. First, by federalizing state court procedures for state claims, Congress is in effect commandeering an agent of state government, commandeering you, telling you how to do your job, which is your constitutional duty to adjudicate. This seems contrary to the concept of dual sovereignty, which is at the heart of the Constitution. In addition, in many instances by affecting the procedures states may use to adjudicate their own claims, Congress may be, ever so subtly, affecting the substance of state law. This seems to contradict the long-held view that state courts are the final arbiters of state law, which is the view most associated with *Erie Railroad v. Tompkins*. And finally, there is the problem of transparency and accountability.

It is one thing for Congress to make federal laws affecting highway safety, securities, or computer virus claims. If citizens don't like those laws, they know where to go to change them. By leaving those claims to the state courts but specifically making it hard for plaintiffs or defendants to adjudicate those claims, it is hard to know who will be responsible. It is a state claim, but if we change the state law the outcome won't be effective. Yet, there is no federal substantive law. In fact, Congress came out against tort reform in all the ways that are on the public radar screen but still affects the outcome.

These federalism problems suggest that such laws are ripe for constitutional analysis and challenge. In the next term, the U.S. Supreme Court will review a decision of the Supreme Court of Washington in *Guillen v. Pierce County*, holding that Section 409 of the Highway Safety Act is unconstitutional. Thus far, however, there has been no clear answer from the Supreme Court, or a consensus among the commentators, of the constitutionality of such a statute. Instead, they have been widely recognized as raising particularly delicate and knotty questions of federalism. This suggests that in many instances, state courts may well decide, as they often have in the past, to avoid the constitutional question.

In some cases, jurisdictional determination may preclude the discussion actually reaching constitutional issues. For example, in *Guillen v. Pierce County* there is a rather complex and intriguing question of whether the private party has standing to raise the state's federal claim when the state is not interested in doing that. It may well be that the court decides that the private party does not have such standing. That would certainly leave the constitutionality question for another day.

Narrow readings of the statutes could also preclude a constitutional determination. Indeed, in a concurring opinion in *Guillen*, Justice Madsen of the Washington Supreme Court suggested that Section 409 could be read more narrowly than the way the majority did, therefore avoiding the constitutional problems. I think these techniques of avoiding constitutional issues are fairly well known and associated with the *Ashwander* principle.

In my paper, I go further to suggest that the application of a clear statement doctrine would be appropriate in some of these cases. Although the Supreme Court has never used the clear statement doctrine in a case directly on point, it is often noted that congressional statutes should not be read as infringing upon the rights of the states unless Congress's intent to do so is made absolutely clear. This means that Congress should not be read as deciding to federalize state court procedures for state claims, unless the statute says so plainly and explicitly.

Reading a statute as applying only to federal claims avoids many constitutional problems and follows the principle that Congress should not ordinarily be assumed to undermine the sovereignty of the states. Of course, sometimes the constitutional question must be faced. Then what?

While there is no answer to the constitutional question, we can discuss the way state judges must go through the analysis. A question that obviously needs to be asked is whether the federal statute itself constitutional. Does Congress have the authority to provide such a statute? There are two sources of congressional authority that are particularly pertinent to these statutes. Although I discuss it in my paper, I am happy to talk about it during the discussion. The two most relevant sources are the Commerce Clause and the Tax and Spending Clause, both in Article I.

Traditional understanding of either clause gives Congress great leeway and would suggest that in most circumstances it would not be difficult to sustain congressional authority through the federalization of state law procedures in acts like Y2K, Section 409, or indeed almost any act of tort reform. However, there are reasons to be less certain.

First, starting with the *Lopez v. United States* case, the Supreme Court has signaled a renewed attention to reviewing congressional actions under the Commerce Clause. Especially

because the matter at hand is not commercial in nature, and touches upon matters traditionally reserved for the states. Even so, the problem we face is really a rather unique one. What level of specificity do we apply to more stringent review? If we look at the Highway Safety Act in general, or Y2K in general, there would seem to be little doubt that it is within Congress' power to regulate computers, to regulate interstate highways, and to regulate security. But if we focus only on Section 409 and the discoverability of state documents in state court proceedings, the matter may look quite different, indeed, as it did, to the Supreme Court of Washington. If the correct focus is on a procedural rule in isolation, removed from a larger federal regulatory scheme, then Congress's authority under the Commerce Clause appears less secure. Given the court's insistence in *Lopez* about Commerce Clause review being attuned to the interests of the states, it is possible that the court rule will be in that direction, although it has not yet done so.

Congress can, and often has, relied upon its ability to use the Spending Clause to orient the state on their adoption of certain procedural rules. This is in fact one of the county's strongest arguments in *Guillen*. Washington has taken federal money for highway improvements, and in order to do this, it has agreed

**When Congress acts under the Spending Clause, it can commandeer. It can bribe the states. It can say to states, "You want our money; you have got to play our way."**

not to immunize certain documents from discovery. Thus far the Supreme Court has been especially lenient in reviewing the constitutionality of legislation under the spending power. However, the Court has said that its power is not unlimited. There must be a nexus between the grant the state has received and the obligation the state has undertaken.

Recently, several commentators and some lower courts have picked up on Justice O'Connor's opinion in *South Dakota v. Dole*, which calls for a more searching review of federal power under the spending clause. They are worried that a very loose and deferential review really lets Congress do almost anything. If a more stringent review were adopted, it would make it difficult for Congress to rely casually on the fact that it gives some money to the states to actually federalize procedures in state court. Again, this is an issue that we don't have an answer for yet. Perhaps the most interesting constitutional question, however, is not whether Congress has the source of authority, but whether that authority is otherwise limited by the Tenth Amendment or general federalism structure.

Most on point here are the Court's decisions in *New York v. United States*, and *Printz v. United States*, which forbid Congress from commandeering state legislatures and executive officials. Whether the so-called "no-commandeering doctrine" applies to state law procedures is a very complex question.

First, the no-commandeering doctrine as it exists probably only applies if Congress is acting under the Commerce Clause. When Congress acts under the Spending Clause, it can commandeer. It can bribe the states. It can say to states, "You want our money; you have got to play our way."

Second, it is clear that the no-commandeering rule does not generally apply to state judges. They have to follow federal law under the State Judges Clause, part of the Supremacy

Clause. That means accepting federal causes of action and sometimes even applying federal procedures for those actions is permissible, and in that sense, Congress has commandeered the states. This was a point explicitly stated by the Supreme Court in *Printz* and *New York v. United States*.

On the other hand, these cases did not consider whether the no-commandeering rule applied when Congress told state judges how to adjudicate state claims. And the Court's opinion of *Alden v. Maine*, although not exactly on point—this was a sovereign immunity case—reads the Tenth Amendment as protecting state courts by prohibiting Congress from placing special obligations on them. And *Alden* reads the State Judges Clause as saying that Congress can ask the state judges to do what federal judges can do but nothing special; you can't include special obligations. One might argue that telling state judges how to adjudicate their own claims is really imposing a special obligation on the state courts and, therefore, under *Alden* is not protected by the State Judges Clause.

Of course, the problem is that it is difficult, in fact probably impossible, to develop clear lines distinguishing federal substantive laws—garden-variety preemption—that state judges must apply under the Supremacy Clause from federal procedures that may be seen as commandeering or corrupting the adjudication of state laws. Procedure affects substance, which is why these laws are so troubling. It is also why there may be no way of absolutely distinguishing federalization of state law procedures from garden-variety preemption. Indeed, this may well be one of those issues at the vortex of federalism for which there is no clear answer, and perhaps, for which no all encompassing answer should be given. Instead, it may be one of those issues like Congress's ability to strip the federal courts of jurisdiction, which are best dealt with by seeing the problem from all sides and recognizing that unconstitutionality lurks behind it. In the past, that fear has often served to temper the legislature's enthusiasm for such laws. It has also cautioned courts from issuing grandiose statements, and it has driven them to decide cases narrowly.

We will see in the *Guillen* case next term if the Supreme Court continues in that vein and decides narrowly, or if it rules broadly and decisively on the power of Congress and the sovereignty of the state courts.

## COMMENTS BY PANELISTS

**Honorable James D. Moyer**

**Honorable Stanley G. Feldman**

**John H. Beisner, Esq.**

**Robert S. Peck, Esq.**

### **Honorable James Moyer**

I think I am here as a token representative of the dark side of the force. I want to give just a few comments on the topics raised by Professor Parmet.

She raised a question at the very beginning of her talk that I want to try to answer. The question is: What is the problem with congressional tinkering with state court procedures?

Here is the answer I wrote down. It irritates the dickens out of state court judges and raises fundamental questions about who is in charge. Let me put this in context by relating it to you in an area from which I've learned most of life's lessons—around the kitchen table. My wife, who is also a lawyer, and I have two teenage daughters, and one of them said to me the other day, “What makes you so smart?” which was rather impertinent, but kind of on point. I suspect that state court judges, when faced with congressional legislation or other directives from federal courts about how state courts should operate, say to themselves quietly or maybe not so quietly, “What makes you so smart?” It is an extremely valid question, and right on point.

Chief Justice Williams said at lunch today, “Washington and the federal judiciary do not possess a monopoly on judicial wisdom.” That is exactly right, and is at the heart of what all this is about. What we have here is a specific debate on whether it is about a relatively narrow issue involving the discovery of state highway records, or a very broad politically sensitive issue dealing with class actions. These all get back to a tension, which I think is a creative tension and a helpful tension, but a necessary tension nonetheless, between state courts and federal courts. It has been with us for 200-plus years, and if we are around for another 200-plus years (and I hope we will be), it will still be there.

I want to go slightly off topic and talk about something that I think is as important. It may be less academically advanced, and not on the Supreme Court's docket, but it relates to this topic and is what I call “practical preemption”—the practical preemption effects of federal procedures on state procedures.

I am from Kentucky. I know there are a couple of other judges and justices here from Kentucky. In Kentucky, as is true in many other states, our state rules of civil procedure are substantially modeled on the Federal Rules of Civil Procedure. The Kentucky Rules of Evidence are very significantly modeled on the Federal Rules of Evidence. We can go on and find other kinds of parallels. The Kentucky Civil Rights Act essentially borrows its substantive

content from Title VII of the U.S. Civil Rights Act of 1964. This is not because Kentucky legislatures or Kentucky practitioners are dumber or less experienced or less capable than federal practitioners. It is simply what I would call the “Microsoft Windows” phenomenon.

Microsoft Windows has a practical monopoly on operating systems—not because it is the best or the smallest or even the most stable. It just is what it is and therefore we all mostly work in a Windows world. I think the same thing happens with the Federal Rules on civil procedure and evidence. They are not imposed in any way on the state judiciary, but the state courts as a practical matter choose to adopt them because they are well-known. They are stable. There has been a lot of work done on them, and if you have a problem you can go to a ready reference and find a wealth of information about how they are interpreted. It’s not because they are the best.

So, we can talk about issues like “direct commandeering,” but I think we also have to keep in mind this “practical preemptive” effect.

If you want to get the full range of congressional and federal judicial impact on state justice, you can’t look at just the civil side of things. You have got to look at *habeas* practice. You have got to look at the Anti-Terrorism Act and the Federal Death Penalty Acts. If you want to look at some potentially very significant legislation in Congress you have to look at the Innocence Protection Act, which, if adopted to provide for DNA testing, will have a dramatic impact on state court procedures.

## **Honorable Stanley Feldman**

I would like to revert, if we could for a moment, to some first principles.

Why should we worry over the problem of state court/federal court, who is smart or who is not smart, who has or doesn’t have a monopoly? In my view, although I agree with everything that has been said, it might all be irrelevant. We have a lot of loose talk these days about activism, or regionalism, or original intent. You have heard all of those words.

One thing we know that is inarguable as to the original intent of the founders and the drafters of the Constitution was to leave to the states and to the state judicial systems the questions of state law, the resolution of questions of state law, and the procedures by which they were to be resolved and the methods that were to be used. They did not intend for these issues to be addressed in the lower federal courts.

In fact, if you go back to the Judicial Article of the Constitution, it doesn’t require any lower federal courts, only the Supreme Court. It states that there shall be one Supreme Court and only such lower courts as Congress may establish. If it wanted to tomorrow, Congress could abolish the United States District Courts and the Courts of Appeals. It was the intent of the founders that the states courts resolve these problems pertaining to state law.

Now, the U. S. Supreme Court interprets the federal Constitution and the Bill of Rights. That was the intent of the founders, but when Congress passes laws that require the states to follow federal procedures in deciding state law, then we get into an area that is completely contrary to what the founders of this country intended.

We talk a lot about independence of the state judiciary, but the independence of the state judiciary is largely a function of the willingness of the state judiciary to be independent. Nobody is going to do it for us. We have got to do it for ourselves. We have got to be heard in deciding issues such as this before legislatures, before our congressional representatives. We have got to be heard with regard to the necessity, the need, and the Constitutional basis for the independence of state courts.

I am well aware of the Supremacy Clause and the obligation of the judges to enforce federal law, but the answer to that comes up in the *Printz* case that the Professor mentioned. *Printz* is a very interesting case. A sheriff from Arizona, where carrying a gun is still a way of life, refused to enforce the background check for immigration law. He said the federal government could not, by statute, make him do that. The United States Supreme Court agreed, and that gives you a pretty good idea of the view of at least a majority of the United States Supreme Court when talking about the Supremacy Clause. The majority opinion by Justice Scalia states that, “The Supremacy Clause does not help the defendant since it makes ‘law of the land,’” which is to be enforced by the state judges, and it makes only “‘the laws of the United States’ which shall be made in pursuance of the Constitution.” So, there is no obligation of state court judges to enforce laws or procedures when those laws or procedures violate the very terms, ideas, and concepts of the United States Constitution.

**We talk a lot about independence of the state judiciary, but the independence of the state judiciary is largely a function of the willingness of the state judiciary to be independent. Nobody is going to do it for us.**

The most important thing to remember about the independence of the state judiciary is the need of the state judiciaries to assert and maintain their own identities.

## **John Beisner**

I am John Beisner, and I want to thank the Institute for including me in today’s program. For me, it has been a very, very instructive and productive discussion. I have a confession to make. Having gone through law school, where it was hammered into me to have great deference for judges and for the bench, and since I am accustomed to appearing before one judge at a time, or occasionally in appellate circumstances before a panel of judges, it is truly daunting to me to be standing here today before a whole room of judges. I apologize for being a little bit discombobulated.

I have a concern that in our discussion today we are inappropriately blending two very distinct issues. This morning, the discussion focused in large part on one issue—which courts, federal courts or state courts, should hear certain types of disputes?

This afternoon, I think, we are dealing with a quite distinct question—once you have determined that a matter is to be heard in state court, to what extent, if any, may the federal

government intrude on the procedures the state court establishes in adjudication of that dispute? I say that they are very distinct questions. I think the first question is that of the existence of the judicial system. The Constitution establishes, by omission, a category of cases that can be heard only in state court. There is a large body of cases that could never be heard in federal court, but there are also two categories of cases that the Constitution says Congress, if it so chooses, may place within the concurrent jurisdictions of the federal courts. The first, of course, as everyone knows is the category of federal budget cases. The second is the cases that would be subject to diversity jurisdiction, and the constitutional authority for diversity jurisdiction is *much* broader than Congress has presently defined it.

Article III of the Constitution says that any time we have a dispute where there is a plaintiff whose state citizenship is in a state that is different from the defendant's state, that case is a candidate to be in federal court, if Congress so decides. So we have out there a substantial body of cases that, with the decision of Congress, could be in federal court. My concern is there has been a lot of discussion about cases being "taken away" from state courts, and cases being "taken away" from federal courts, and I am not sure that is the proper way to approach this discussion. I think that Dean Carroll got it right this morning when he said that what we should be discussing is where the best place is to handle those sorts of disputes. I don't view that as being an issue of federal intrusion. I think the question is when you have that area of potential concurrent jurisdiction, what sort of cases should be eligible to be in federal court?

Let me address the second issue very quickly. If you determine that a case should be heard in federal court, I think that there is a real risk of intrusion if the federal government does dictate procedures. I just note, in passing, that if you are significantly interested in this issue I would recommend not only reading Professor Parmet's paper that was presented here today, but her longer article in the *Vanderbilt Law Review*. I think it lays out very accurately the balance of this view. It makes the point that the states have a right (and I fully agree), to establish the rules of procedure governing litigation in their home courts.

There is a caveat, though, that I think is very succinctly stated in Professor Parmet's article, and I will quote her. "When Congress relies upon state courts for the enforcement of federal law, however, it can require the state courts to follow such procedures that are 'necessary and proper' to prevent the undermining of the federal goal."

So, there is an opening here. There are circumstances when Congress may dictate some procedures, but it is admittedly a narrow band of circumstances where that can occur. I think that on many occasions a mountain is made out of this mole hill.

I think there is great sensitivity among federal legislators who are very concerned about these issues. I think that is the reason why many of the proposed pieces of legislation, some that Professor Parmet indicated that threaten the state judiciary, have not become law.

## **Robert Peck**

My name is Bob Peck, and I practice constitutional litigation, and I am going to give what I think is the nugget of the issue.

James Madison originally resisted adding a Bill of Rights to the Constitution. He thought that the proposed “rights” were mere parchment barriers, incapable of really performing a major function. But the adoption of the Bill of Rights was one of the critical steps in getting the Constitution ratified. To achieve ratification, Madison promised that the First Congress would propose a bill of rights, and he undertook responsibility for that task. He had come around to the view that a dual jurisdiction over rights was a double protection. It’s something that Justice Brennan echoed in a seminal article on judicial federalism: that *dual* protection is very important because if one judiciary were not protective of legal rights, then the other one perhaps would be.

One of the reasons for that is that the judiciary is not buffeted by political winds that may cause the legislative and executive branches to move in different directions that may not be wise. Decisionmakers in those branches may not have the kind of introspection that is necessary to come up with the right policy. The judiciary, however, might be able to tie together these principles that were set out in the Constitution in a manner that does not give rise to expedient solutions that violate the Constitution.

So, there is the same expectation that the state courts as well as federal courts will guard people’s rights. But the courts themselves cannot reach out and create the cases that determine this. Instead they must wait until appropriate cases come to them. That is the reason why Hamilton referred to the judiciary as “the least dangerous branch.”

Now, it is in that context that we look at this issue. Certainly, we do not decide a constitutional issue if it is unnecessary to do so. What I would like to do is assume that the constitutional issue is unavoidable, and that the issue is squarely before you. Then, how do you approach it?

Professor Parmet mentioned two cases that I think raise an issue for you. One is *Pierce County v. Guillen*, which the U.S. Supreme Court will be resolving during the upcoming term. In that case, § 409 of the Highway Safety Act was declared unconstitutional by the Washington State Supreme Court. It prohibited making available in discovery, in personal injury cases, materials gathered by government agencies for purposes of applying for a Department of Transportation grant.

**The courts themselves cannot reach out and create the cases that determine this. Instead they must wait until appropriate cases come to them. That is the reason why Hamilton referred to the judiciary as “the least dangerous branch.”**

This is not a power of Congress that could be considered plenary in nature. When Congress in recent times has attempted to legislate in an area of traditional state concern, the Supreme Court has required extensive legislative findings that tie the statute to an enumerated power found in the Constitution. It must also clearly indicate its intent to override existing state law. Here, the statute fails to satisfy these federalism concerns.

So, is this a Spending Clause case? Well, the interesting thing is that the federal statute actually doesn't make it a Spending Clause case. And I think this is the issue.

In fact, in this instance, Pierce County applied for the funds, did not receive the grant, and then reapplied one more time. How this somehow fits within the Spending Clause is something that I think indicates how far afield § 409 might go. Moreover, it cannot be regarded as fitting within another congressional power. When Congress, pursuant to its commerce power, has enacted legislation in the past that has preempted state authority, the Supreme Court has required extensive legislative findings that support the use of that power, that there is a strong connection to commercial activity subject to regulation. It must also clearly indicate its intent to override existing state law. Here, those necessary elements are missing.

So, therefore, I think that this was a case where it was appropriate to apply those Tenth Amendment principles—that this was an internal process of the state court, and, therefore, federal interference is unconstitutional. It would be very odd indeed in an enforced Spending Clause situation, where the state or Pierce County could essentially abate mandatory process in these courts by applying for a grant to avoid compliance with discovery. So, this is an appropriate application of those Constitutional principles.

The other case that Professor Parmet mentioned was *Jinks v. Richland County, South Carolina*. On July 18, 2002, I filed a cert. petition in that case. There, the South Carolina Supreme Court held unconstitutional a federal statute that tolls the statute of limitations for actions that could be tried in state court but are filed in federal court because of an allied federal claim. The federal law tolls the limitations period during the period when the matter is pending in federal court. This is part of the supplemental jurisdiction statute. Someone brings an action in federal court for both federal and state claims, and the federal cause of action is later dismissed without prejudice. The remaining state law claim might be heard in the federal court, or in the state court in accommodation of comity, under the principle that state issues ought to be heard in the state court. If the state statute of limitations expires while the case is pending in federal court, then you have this 30-day period from dismissal from the federal district court in which you can refile in state court. South Carolina found that tolling provision to be unconstitutional, in violation of the Tenth Amendment. Here is an instance where, again, the question is, What federalism principle is being served? If the principle is to see that state courts use state procedures for state claims, then Congress is actually accommodating that by creating the narrowly tailored little window, one that exists in bankruptcy law and other laws and that I think is an appropriate exercise of congressional power.

Let me leave with this one idea: If a congressional action is intended basically to support federalism, and if a state declaring that federal action unconstitutional discriminates against a solid federal right (which I also contend is the case here), then there is no violation of the Tenth Amendment. On the other hand, where there is a mere interference with state court procedures that are internal to the hearing of the case, then indeed the Constitution has been violated.

## Response by Professor Parmet

When I sat down after presenting my paper, I prepared myself for my esteemed panelists to knock me down. I actually think there is a significant consensus, although different ways of emphasizing different points. We all seemed to recognize that there are some very significant problems with federalization of state court procedures. That this violates original intent, because it is threatening judicial independence, which is troubling, although perhaps not very frequent.

Just two quick comments. There was a lot of consensus. I am anxious to hear what all of you have to say. First, I think Bob's point about *Jinks vs. South Carolina*, without getting into all the details, shows something else that I think should be said because sometimes this federalization of state court procedures can hurt plaintiffs, and sometimes it can hurt defendants. It does not necessarily, a priori, go one way or the other, so it can go both ways. What is constant is the potential federal intrusion on state procedures.

Secondly, John mentioned that there are times where the court has upheld federalization of procedures in state courts. That is undoubtedly true, and as I mentioned in my paper, one obvious example is the procedural rules commanded by the federal rights that govern the conduct of state trials—particularly state criminal trials. But even more clearly, Congress can include procedures when the state courts are adjudicating federal claims. It can do that to further federal interests, it can override or preempt state procedures where those block the federal entrance.

The difficult question is, “What about the state claims?” What about those instances where Congress hasn't made a substantive claim? Maybe because they can't agree on it, or because they don't want to do it publicly.

## Panel Comments and Remarks from Floor

**James Moyer:** Let me ask a real dumb question. How often does this happen? Give us examples of when Congress is actively federalizing state procedures on state claims? I think the Y2K legislation is one example, but my brain is having trouble thinking of a lot of examples of this happening on a daily basis.

**Professor Parmet:** I think you are right. It is not very frequent. In my article I focused on the legislation for the proposed global settlement, legislation that was not enacted. There have been many other cases where it has been proposed. The Securities Act, for example, comes close. Part of the problem is whether or not there really is a continuum, and if there is not, where do you exactly cut off? How divorced from substance is this procedure? It is hard to know, and I think that is one of the difficulties. Pure examples of naked federalization of state procedures are not too common. I think Y2K, and as it has been proposed, some forms of tort reform, but these laws have not been enacted.

**Stanley Feldman:** I think you are overlooking federalization of state court procedures that, while not mandatory, we seem to accept without much controversy, at least in some places. The *Daubert* case for instance, which federalizes the use of expert testimony in the

courts, has been adopted in many states. When it came before our court, the arguments were sort of, “the federal rules had been changed.” So, we now had to change the Arizona rules of evidence in order to match the Federal Rules of Evidence. I said, “What if we think the United States Supreme Court is wrong?” It was like I had questioned the Bible or something. We thought it was a bad law, a bad interpretation of the Federal Rules, a bad policy. When we did reject *Daubert* and decided that Arizona was not going to follow it, why a storm of protest broke out. The answer of course is,

**The normal rules, and the normal understanding is when a litigant goes to state court even to litigate a federal claim, the state procedure rules apply.**

if you think *Daubert* is good law then you ought to adopt it, but if you think it is a bad law you ought to reject it. I do know that many of our state court judges were horrified that we would even think of doing this. So, again, it comes down to, there is no independence of state courts, unless state courts are willing to assert it.

**Comment from Floor:** I would like to make a short statement and then ask Professor Parmet and Mr. Peck to comment on it. I believe we need to distinguish between those state court claims that are, as Professor Vairo called it, state based and other claims in state courts that are federal-law based. I think the U.S. Supreme Court has spoken on this issue several years ago. When it changed, it was *Wisconsin’s* statute of limitations on the § 1983 actions. By that decision, the US Supreme Court said that it will control the limitations on federal law claims.

As for state law claims, would the Supreme Court conceivably say that certain procedure should be changed because it adversely affects the rights of litigants under federal law?

**Professor Parmet:** I think you are absolutely right that we need to be careful and distinguish between those instances where Congress clearly has the authority to impose procedures or preempt procedures used in state court and when it does not. Although it should be stated that the Supreme Court has repeatedly said it should not be implied. The normal rules, and the normal understanding is when a litigant goes to state court even to litigate a federal claim, the state procedure rules apply.

Even in that instance, which is the strongest case, the norm when Congress has not spoken is that state procedures apply. Put it that way, you are right. The issue is different when we are adjudicating state law complaints. Although, I guess what I want to say here is, we probably should be using more nuance. It really is not about state law complaints. The issue is state law issues, because federal authority presumably applies to federal defenses as well as to state law claims.

The real question then is, and this is why it gets so complex and technical, what is Congress’s authority to regulate procedures for state law issues? The difficulty is, for example, suppose there is a state law claim and Congress hasn’t created a defense for it, however, it can regulate procedures for the defense. After all, Congress might be able to regulate a defense. We know there are federal defenses to state law claims. As we look at this carefully, we see that the lines become knotted, and it is important to be pretty precise.

**Robert Peck:** Let me start with the easy question. The easy question of course is, if it is clearly a state-based claim, then it ought to be determined completely by state procedure. The

only appropriate interference by a United States Supreme Court ruling might be if those procedures are denied by due process, a violation of the Fourteenth Amendment. That seems fairly clear and easy.

I think the difficulty comes when you have a matter that is not clearly either entirely state or entirely federal. For example, in § 1983, where there is a dual jurisdiction created out of a federal right, and the court has been somewhat ambivalent about whether a statute of limitations is substantive or procedural—it is procedural for some things and substantive for other things—sometimes, you might as well flip a coin to determine which way it is going to go on a particular matter. It is in those instances that I think we have the hard case.

And, the hard case is, of course, that it is difficult to come up with some doctrinal or jurisprudential rationale to say that this is the way it normally ought to be handled. I think that is when a balancing-of-interests test probably makes the most sense. The problem has been that in the past, the springboard has almost uniformly balanced in favor of the federal interests. A more clear and honest look at that probably would not result in as many federal determinations as there have been.

**James Moyer:** This is a question for Professor Parmet. It seems to me that ERISA is a classic example of a situation where Congress has decided to take the whole ball and put it in all these federal courts all at the same time. Presumably, Congress can choose to do that with a variety of things under the commerce clause.

Suppose that Congress, which hasn't been able to pass a federal products liability law, says, "We don't want to have a federal products liability law, but because of the national concerns we have, we want to make sure that any products liability case that is litigated in state court follows *Daubert*." And so, if a state court is going to adjudicate a products liability case, it has to follow *Daubert* regardless of what it does in other cases.

Could Congress, and this might be very unwise, but could Congress constitutionally do that?

**Professor Parmet:** I think that is the perfect example of naked procedural rule. It is certainly the opposite of protective jurisdiction.

We have all thought about cases where Congress makes no substantive law but gets jurisdiction in Article III. Well, here is sort of the opposite. You keep it in state court, no substance, but we are just going to regulate and put *Daubert* in for all state products liability cases.

I think my answer is No, that they can't do it, but again, I have to say I think the arguments are complex on both sides. You know, I think if you got 100 law professors and judges in a room, I think you would have a split vote. I think the answer is No, they can't do it, and I am pretty confident that I don't think they should be able to do it. There are cases with clear examples of that.

# The Judges' Comments

In the discussion groups, judges were invited to consider a number of issues raised by the group moderators related to the papers and oral remarks. The judges devoted more time to some issues than to others, and they raised other interesting points as well.

Remarks made by judges during the discussions are excerpted below, arranged by topic and summarized in the italicized sections at the beginning of each new topic. These remarks are edited for clarity only, and the editors did not alter the substance or intent of any comments. The comments of different participants are separated into offset paragraphs. Although some comments may appear to be responses to those immediately above them, they usually are not. (In some cases, a response by one judge to another is distinguished by two slashes (//) separating the comments in the same paragraph, and the response is italicized).

The excerpts are individual remarks, not statements of consensus. No attempt has been made to replicate precisely the proportion of participants holding particular points of view, but all of the viewpoints expressed in the discussion groups are represented in the following discussion excerpts.

## Handling Complex Litigation

*Judges were asked if they had seen any hard evidence of the inability of their state courts to hear and decide fairly complex or class actions, an argument sometimes made by those who advocate moving cases out of the state courts and in to the federal system.*

No. If that deserves explanation, the answer is no. I think we handle them very well.

I guess, if I had to say whether there is a problem in our mid-Atlantic state, that we tend to do fairly well so far.

Sure, there is going to be a problem, but there is a solution with good management. I don't think that this is a problem for us, from my narrow perspective, such that it is not being worked and not being handled fairly well.

I have never heard of all the problems until I read these two papers, quite frankly.

I haven't seen any problems, particularly with respect to the class actions. We get them in our state courts. We have them in a number of products liability areas, and we've dealt with them. So, I would have to answer your question by saying, at least in our state, we haven't seen a problem yet.

We haven't seen the problem. What I got from the presentation this morning is that there are these cases that do present problems when they arise. And the question is, when you get one of them, which could be in any state I suppose, what do you do if the state really isn't able to

handle it in the view of a federal judge who gets a removal? How is that to be dealt with? I guess the point is that these problems do exist somewhere.

I was an asbestos judge for about four years in one of my counties. I had thousands and thousands of asbestos cases that did not originate in our state, a lot of them from all over the United States. We have kept every one of them, and we continuously disposed of them. It is excessive, and it does take a lot of time, but we've just slowly been doing it, without any administrative help.

I hear so often someone term a case a "complex case," when what it is is just a simple products liability case that has got a lot of plaintiffs. Is that a complex case?

I think the former thing you just said, some people believe that where there may have been problems some years ago, a lot of that has been corrected. Many of the states have the tools to deal with class action work today.

*Judges addressed the ability of themselves and their colleagues to handle complex litigation, especially compared to that of federal judges.*

I feel that our trial judges are very able to handle complex litigation in our southern state.

We don't have separate sections of the complex litigation judges. We get a lot of judges that are 37, 38, 42, who never even tried a simple case at all, or never really tried a criminal case at all. We get some people coming on with the city attorney's office, we get people coming from commerce and legislative committee, never been involved in litigation of any kind or any consequence. You get in some districts four or five applicants for the job. It is not good.

**I think most state judges in our state, and I would imagine most state judges around the table, feel capable of handling any class action or mass tort.**

Unless you have done a heck of a lot of class action work, you have got as a judge more education to do on that case than the lawyers do. I could foresee that as a legitimate concern to the lawyers, not that there are inherent problems with the judiciary, but just that there is a fairly low level of knowledge and understanding of the technicalities and procedures of the law with respect to this. There is a huge body of class action law.

I think most state judges in our state, and I would imagine most state judges around the table, feel capable of handling any class action or mass tort. That's probably natural. It's easy, I'm a judge and I'm experienced and I can do it. I think the aspects that we've talked about in terms of budget and personnel and caseloads and everything might make the federal courts a place where you might better handle these things. Suppose if someone looking on high said well, where would be the most efficient place to handle these things, they might say the federal court.

As far as the judges are concerned, I think there are judges on the state courts, certainly where I come from and most other areas, that are absolutely as well qualified as our federal judiciary. We talk about our federal judiciary, and we say that they sometimes think they are anointed rather than appointed.

***How state court systems, as well as individual courts, are set up and managed will greatly affect their ability to handle complex litigation and/or class actions.***

One of the factors that the supreme court has engrafted in the rules is manageability. And if it's unmanageable, we are told not to take it, not to certify it.

Some states are still uncoordinated; they don't have a jurisdictional department, with some institutions having statewide power to operate the courts. Our Mid-western state is very unique in that the supreme court can operate the entire system. I think in those states that have no statewide managerial power in an institution, the complex litigation management cannot be coordinated statewide.

In my observation, the experience is that if you get on the case early enough and you get all the lawyers involved in the case early enough, you get pretty much an agreed-upon case management order. You anticipate what the problems may be, and lawyers have done this often than you have oftentimes. By consensus you can work through a protocol that is really tremendous and make a stipulated binding order that is in effect. Thereafter, the case runs itself really, only as problems arise.

I think so much of the complex litigation problems can be resolved and the problem of whether states can handle it versus federal government depends on the people who are administering the court system. For instance, in our county, we have 400 judges and through the years we've been blessed with some really good administrators. They have managed to set up an asbestos call and various other items that can go in there, and I think they have been able to consolidate groups of cases, assign it to one judge. So I think part of it is to take care of this criticism that you have about state judges or state courts not handling things. I think so much of it depends on the competency of the administrators that you have in your state system.

***Several judges noted that how cases are assigned to judges in their states will impact who gets which cases. In some situations, cases may not be heard by judges with any special expertise in the case's area. In others, judges are purposely assigned related cases.***

I think that is a very important point that really hasn't come out and doesn't seem to be on anyone's agenda at this conference. But it is absolutely true, that part of the circumstance is that cases ordinarily get randomly assigned. We don't normally have complex or class action courts that get randomly assigned. The lawyers may specialize within their specialty with complex tort or class action litigation, but most judges don't. I am probably the most specialized judge here, and my specialty is civil actions.

It ended up, I think 1,600 cases were filed as a result of some legal litigation play that the lawyers went through. But the bottom line is, they were all filed in our court, and we ended up

assigning them all to one judge, in addition to that judge's regular full-time docket. We have had to make some modest adjustments, but nothing of great consequence. That judge is handling the 1,600 cases, and is working his way through. I think he started with 1,600 and he is down to 1,000 now.

Our court has a rule that requires related cases be assigned to the same judge in all sorts of fields, whether it is family law or civil or commercial or tort litigation. We are a small enough court that we can track that and follow it. I don't know how it would be in other, larger courts, whether they can track and accomplish that.

In our court, not only does no one know who's assigned the case, but no one knows who's even sitting on the case until they appear at oral argument. We don't release that information.

*In several jurisdictions, specialty courts had been set up to deal with complex litigation.*

We did have such problems. But at least where most of this type of litigation was initiated, we established a commercial part. And they are specifically set up to deal with, not only class actions, but the other complex commercial litigation. It's had its effects, but before that, obviously, there was a problem.

In one major city, they have a separate building devoted to the complex litigation judges. And they have their own separate courthouse, which could be used for other things. And that's a problem. I don't know how we deal with that problem, but it's a very serious problem.

**In our court, not only does no one know who's assigned the case, but no one knows who's even sitting on the case until they appear at oral argument. We don't release that information.**

The judges who are assigned to the complex litigation department are judges of vast experience and really have a real handle, as much as the federal judges do, on how to handle these things. All they deal with is very complex litigation, so I think it's a good idea and a good step in the right direction.

If it is complex, if the trial judge deems it complex, we have seven judges, and this is specifically funded by the state, and goes to one of the seven judges to handle the complex matters. They handle it in tiers. Again, it is based probably on a federal procedural pattern.

In certain states, you have a whole group of judges set aside for handling nothing but complex litigation. They have their own separate courthouse. That is all they do in that courthouse. They hit the ground running. Every case they have is complex class action type litigation. That is a tremendous advantage for litigants on both sides.

What the trial court has done in our northeastern state is have a so-called "business calendar," where one judge is in charge, and any plaintiff or defendant wanting a more expeditious

handling of a case can get it handled in a more expedited fashion by having a particular calendar just called a business calendar. That has helped tremendously, but by coordinating those types of cases and having a judge assigned to do that only.

In our western state, there are four or five complex litigation courts. We can ship a case there if we want to, or we can keep them. I think the better judges will keep those cases, because they are more interesting, and we can come up to speed on these things and know what the law is.

The state courts are so well managed, they have judges who are designated to be judges for complex litigation, and so the assignments of the complex cases go to the judges who are perceived as better able to manage them.

## **State and Federal Court Coordination of Complex Litigation**

*Judges discussed the coordination that often happens between state courts and federal courts when it comes to complex litigation.*

It has worked fine. One of the largest cases I handled we coordinated with the federal court. Anyway, we talked with the federal judge, and the parties were on conference call along with the judges who were handling these cases. The issues were discussed, agreements were made as to how discovery and things of that nature would proceed. There was no problem whatsoever. There was shared discovery and coordinated discovery. There was very little problem for us. As a matter of fact, that was one of the cases that I probably had less problems—I hate to say problems, because any case you have in court has problems. That case probably received less time and less work than most of the cases that I handle.

We have been doing that for several years, and that works very fine and very efficiently. You can usually, even in the most complex cases, have a telephone consultation with the judge in some other jurisdiction and discuss all of the issues, and result in one or two rulings and go on your way and handle the case.

We had Fen-Phen litigation, which all of it in the state went to one judge. It was handled efficiently. No one got into a national litigation on it, but it was handled and settled and coordinated with a federal judge in another state who was handling it on a national basis. They were talking about working in conjunction with the two courts.

I assume also, if you are going to have that kind of state cooperation, you need some sort of uniform act or some sort of enabling legislation from the federal government authorizing the states to join, because otherwise we wouldn't have the jurisdiction, I would guess, to be able to cooperate in that kind of way. But I don't know why you shouldn't be able to do it, because it is certainly desirable.

The best suggestion I've heard, and I've been doing class actions for 30 years, is this idea of putting state court judges on a multi-district panel. And let that panel decide, as between the federal and the state courts, where is the best place for this case to be developed. It could be that more than one should develop. The multi-district panel might be able to rearrange the classes somehow so that the state court is one phase of it, the federal court another. There has to be

some way to settle this better than two judges just getting out and fighting about it.

A multi-district panel sounds like the best solution I've heard.

It was interesting to me to hear about this kind of state-federal cooperation. I know I'm interested in finding out exactly how that would work because I know we've got some judicial canons and ethical canons that kind of worry me a little bit. If I were a trial judge, for example, I'd pick up the telephone and call my federal counterpart and talking with him *ex parte* over the telephone about how are we going to manage these cases. I'm just not sure, absent some kind of protection, that you don't wind up in front of the judicial conduct commission for that kind of action. But it's an interesting concept, and I think both the state and federal judges would be amenable to exploring that. It's just that they have got to have some kind of vehicle and some kind of protection to be able to do it.

**Our Mid-western state trial base has no law clerks, not at all. Not even in the two metropolitan districts.**

We have not heard any complaints of the kind voiced here, suggesting that somehow our western state's procedures or the personal involvement of these judges is getting in the way of fair litigation in a class action context.

## Resources, or the Lack Thereof

*Judges discussed the issue of resources (law clerks, research attorneys, funding, etc.) at length and often cited the lack of such resources as impacting their ability to handle complex cases.*

Our Mid-western state trial base has no law clerks, not at all. Not even in the two metropolitan districts.

We have a fair amount of research assistance and research clerks and research attorneys who assist our judges. In states that don't have that, boy, I don't know how they really get through the calendar.

I think the obvious answer to that question is no, it is not that the judges aren't capable of handling, it is a question of the issue that just was alluded to. If you don't have a research clerk or a research attorney to assist you and the resources to do that, it is very difficult sometimes for some state court judges to devote the time and effort to appreciate the exquisite issues of law that are involved.

I have been on the appellate court for almost 30 years. As far as the resources are concerned, I think at the appellate level, we have just as or nearly as good resources to handle class action suits as the federal courts. Now, at the trial level, though, we would have to admit the state trial courts, as I'm sure is true of trial courts everywhere, really don't have

resources to equal those of the federal courts.

I can speak from a trial judge standpoint. We have no administrative help whatsoever. I'm one of six judges in the whole state. I asked to get a coordinator for a short period of time. I have no secretary. Basically I have no libraries for the three counties. Our whole state spends 1% of the state budget on our judicial system, for the whole state. Now, how can we handle class actions or mass tort litigation? We've got to have financial help and administrative help to be able to even think about it. We do it anyway, and we do it at great cost to ourselves.

I think our last statistics indicated that our state funds are [benchmarked] to the tune of about 1/6th of 1% of the state budget. Everything else must come from the local sources. So that means the second judges, the chancellors, have to go to the board of supervisors in every county in their district to seek additional funding, for whatever they need.

Resources are an important issue for this issue, but they're an important issue for everything state courts do. So the underlying issue is the general resources for state courts, period. Not only in this area, but all the way through what the state courts are doing. And you'll find a variance from state-to-state. Some courts certainly have a higher level of resources and a higher level of commitment from the other branches of the government than they do in some other states.

I think that the problem is somewhat true in our northeastern state, but probably not to that extent. But the superior court, our trial court, has not a whole lot of law clerks. We don't have a lot of class actions, but when you have a complicated tort case, I think the lawyers would rather deal with the federal court—two clerks per judge, and sometimes more. I think they tend to try to find some basis to get the case into the federal court.

At least in our northeastern state, and I suspect in all these other states, the budget is so bad, and it's going to be so bad for the next three to four years, that the court budget has been cut so substantially that a lot of the things that play into one of these class actions are going to be seriously affected. For example, to get through this budget cycle our trial courts are going to have to close down a whole bunch of civil sessions for a couple months.

We have some law clerks, certainly not a one-to-one ratio, but there may be one available for every five or six judges. Our law school had a central research component, which was funded by the state. And judges and prosecutors and indigent defense lawyers could request research help from that. It was directed by one of the faculty of the law school and staffed by students of the law school. That was a very effective method of getting some research help for judges. I know we supported it as well as the prosecutors. It wasn't as good as one-on-one law firms by any means, but it was pretty good.

***Several state judges noted how they have access to far less resources than their federal counterparts.***

I have a different perception. In the central district of our state we have maybe 25, 35 federal district judges and magistrate judges, something like that. Each have something like three or four research attorneys. In my court, we each have one-half, at least in my case—I have one-half of a research attorney that I share with another judge. The folks in the central district have

the accessibility of all of those folks. They have a heavier caseload, that is very true, but they have the resources with which to manage it.

The comment was made this morning that, “let’s have greater resources in the states,” and that is the reason for justifying having cases such as these class action cases handled by the federal courts. That is great, if the federal courts did have the full complement of judges, if the federal courts did have the full complement of support staff and law clerks, but I am finding that not to be the case as often as it used to be.

As far as resources are concerned, I don’t guess there’s a jurisdiction in this land where the state courts have the resources that the federal courts have. I mean, they definitely have more resources than the state courts.

The federal judges in our southwestern state, and I think in almost all of the border states, are just as overloaded as the state trial judges. Our district courts are really courts of immigration and narcotics prosecution more than anything else. And they don’t have time for class actions. They have less time than our state court judges have.

**As far as resources are concerned, I don’t guess there’s a jurisdiction in this land where the state courts have the resources that the federal courts have.**

The class action is almost disappearing in our southern state now. But I think the resource issue is not that big a deal, although I will acknowledge that federal courts have twice the staff, twice the resources, and half the case level or less.

They have probably been to federal court, and the federal court has probably rejected it, and that is probably why some of the cases are back again. Plus, everything goes to federal court in this question of removal. The federal judges are happy to give litigation to state courts. They are swamped.

About ten years or so ago, when the federal government was going through a crisis about budgets, one federal judge in our area was complaining that he didn’t have the budget flexibility that the state courts had. To the extent that these actions are in urban jurisdictions in states, I think that probably those courts are going to have resources, or at least the availability of resources, to hear these cases and deal with them as effectively as the federal courts are.

***Some judges spoke of the benefit, when faced with limited resources, of using the expertise and resources of lawyers to assist them in answering questions or moving the case along.***

I listened to the comments about the resources, I just want to mention something again. I’m just wondering whether we’re taking full advantage of the resources that the lawyers who appear before us. I remember the days when I was in the trial court and I had a difficult

question, I asked the lawyers to be of some assistance and put their offices to work with their law clerks and their research—on both sides, or three sides, or four sides, as many as there were. Let's ask the lawyers, let's get some assistance here. I'm wondering why that might not alleviate the problem.

You're absolutely right, judge, that's what the lawyers are there to do—to help you out. And they're probably more attuned to what they're doing than anybody, including your clerks.

My experience has been that the state trial judges will push a lot of things off on plaintiff's counsel, for example.

I do call upon the lawyers to brief everything. I conduct pretrial proceedings very similar to federal court. I have very strict controls over what happens in my court. That's not the problem. And I've never had a lawyer refuse to give me a brief. The problem is I have nobody. Now,

**You're absolutely right, judge, that's what the lawyers are there to do—to help you out. And they're probably more attuned to what they're doing than anybody, including your clerks.**

how would you like, on your court, to have no briefing clerk, to have no lawyer? To, by yourself, go read every word of everything and sort it all? That's what I'm saying.

Handling cases, when we first started handling asbestos and Fen-Phen, we didn't have the resources to do; so what we did, we got the lawyers on each side

to kick in a fund and we had all the resources that we needed. Every month they paid their part, and we didn't have any problems with that. Actually it worked real well because that way it keeps the court off your back and the county off your back because they are not worried about it.

## Class Actions

*Judges discussed their states' experiences with class actions, ranging from extensive to none at all..*

Anecdotally, we just had our judicial conclave, and had a session on class actions. Going around the table, mainly trial judges who oversee these things, and uniformly they reacted by throwing their hands up in the air. They didn't want to embrace these causes of action. They were troublesome, they were time-consuming, and they weren't welcome in the state court system. Although what you get through that emotion, then you go ahead and rule and they either certify the class or not. So I don't think that, at least anecdotally, there is a reaching out for these kinds of cases in my state court, no matter what the perception might be.

I guess part of the difficulty is that we don't have a state class action. That does not exist procedurally in our state. So, at this point, we are trying to grapple with the increased number of cases that are complex and that in other jurisdictions would be handled through a class action mechanism. I think our supreme court has been giving some guidance, but it does

appear to be more limited than what we'll need if we continue to have all the cases that are being filed there.

Our southern state is no longer that way. I think through rulemaking and appellate cases by the supreme court, changing all the supreme court justices from Democrats to Republicans, except one. We don't have any class actions now. It's so difficult for you to even talk about doing that. In fact, I think there's an appellate case that the supreme court says now, before you certify, you need to go through all of these steps. So, we don't have any problems with the class action in our state now.

You may get different experiences in different states, depending on the personalities of the judges who have been familiar with these cases. In our state, we have something like about 15,000 or more asbestos cases filed in one court. They were not filed as class actions, they were filed separately, but they were consolidated. And I think those cases started out with about 15,000 or 20,000 plaintiffs, and over 100 defendants, each of whom filed cross-claims or counter-claims. It was a mess.

*Judges were asked if they had seen any excessive use of particular state courts for filing complex or class action litigation.*

In our midwestern state, the climate is probably not too favorable.

In our southern state, we do allow a lot of complex litigation to be filed in state courts. We have a lot of drug litigation going on there now.

We don't abuse the class action, neither at the trial level nor at the appellate level.

I don't sense that we have this rush to file class actions in our southern state. I may be wrong but we really don't have a system of tracking. The one thing I have seen that has been a little bit of a problem is where they are repeating requests for trial certification in different judicial districts. We have no mechanism to determine which judge should handle those.

We have in our midwestern state relatively few class actions, so as far as I know it has not been a major problem. But such actions are more likely to be filed by lawyers in the major metropolitan areas, when they are out of state. Part of it I think is, most lawyers have no experience with class actions and they are uncomfortable filing them, so they are apt to refer them to the larger firms in the metropolitan areas, so we don't see much.

It finally started slowing down in our southern state when one of our more courageous trial judges had one of these sets of documents presented to him, and he immediately ordered a series of hearings on the fairness of the settlement to the clients and the appropriate attorney fees. It had a ripple effect to the bar. And I think there's some of the things like that that the state court judges can do that would, perhaps, slow some of this down.

Well, I'm not sure I understand what excessive use of state courts is, but that question, from the way it's expressed seems to imply that it's inappropriate to bring class actions in state

courts. If you have got the jurisdiction, if you have got the venue, and you have got the choice, then what's inappropriate or excessive about choosing to bring it into the state court? I mean, that's what we're there for, to handle your cases if you choose to bring them to us and if the law permits us to hear them.

We have so many. There are a couple hundred class actions, and they broke it down as to complicated and non-complicated. The complicated were going to stay with the complex litigation judges, the non-complicated were going to be sent around to judges like myself on the fast-track to resolve. So that is how we have broken it down.

Obviously we need to do something with class actions in our southern state. But in five or six years, now you go into a situation where you probably have very few, if any. One extreme to the other. We went from there with all the arbitration cases, the class actions through the rule-making decisions, appellate decisions, and, of course, the electoral process, where we switched all our judges.

Most of the class actions are in federal court I think.

Isn't something afoot with the class action vehicle, where we actually seriously entertain the idea

**Obviously we need to do something with class actions in our southern state. But in five or six years, now you go into a situation where you probably have very few, if any. One extreme to the other.**

that the circuit court of a small county with a population of 5,400 people is going to entertain a national class action on PCB. Perhaps, there's some more pragmatic constraints that can be discussed, like limiting class action in state courts to residents of the state in which they actually file.

As far as class actions are concerned, we got some fairly serious tort reform from

the our legislature in 1987 and 1989 and again in 1995. And it seems that ever since the session in 1995, a big push from the business community is restrictions or elimination of class actions. That's been kind of at the top of their list.

I have had the sense that, I mean, as a percentage basis, we may not have the volume of class actions that some other states do.

*Several judges noted that they themselves had no experience with class actions.*

I have been a trial judge and an appellate judge now for 21 years, and I have never personally been involved in a class action case as a lawyer or as a judge.

I have been on the state supreme court of our southwestern state for the last seven years, and we haven't had a single issue regarding class actions.

We don't have class action. We don't have Rule 35. We do allow joinder of cases. That is in response to a lack of class action.

It is interesting, like we said before, that our southern state doesn't allow class action litigation. It was opposed originally by the Feds. Primarily they didn't want these complex cases to be brought in our state. In order to cope, the trial courts have had to allow joinder of cases with similar issues. Joinder has probably been more lucrative than class action, I imagine. So that is why I think we are seeing a lot of the complex litigation being tried in state courts.

***Judges discussed the impact of multiple class actions in different jurisdictions and the problems inherent in deciding what law to apply to competing class actions.***

At the end of the day, the state court, if it's the choice of law, would end up being asked to push the envelope with respect to the laws of other jurisdictions. I guess I'm just wondering if where you have the multi-state class action with that argument that the state court is in a better position to do it, that still holds true.

A perfect example is two class actions, one in my state maybe and one in, say, for example, Kentucky, some antitrust litigation where the damages in my state by statute are X and the damages in Kentucky by statute are Y, and we have got two class actions, one in our state and one in Kentucky. We could care less about Kentucky, and they could care less about us. But if you have got one class action that includes citizens of both states, then are you going to say that the citizens in my state get X damages and in the same litigation the citizens in Kentucky get Y? Well, maybe you are.

If the class action arises in Michigan and you want to use California's law, it is a mess. There is a potential to make mischief there.

If the class action involves the citizens of many, many states, then I think there should be federal law. If it is a local class action, a structural defect case involving 500 homeowners or 1,000 homeowners in a city in California or something like that, then that doesn't involve other states.

How are you going to get the citizens in Kansas treated equally with the citizens in California?

## **Certifying Class Actions**

***Judges described the certification process in their jurisdiction and whether they or the federal courts were more likely to certify cases as class actions.***

I think that in our Mid-western state, federal judges are more likely to certify in class actions

than state judges. And I think that's true throughout the state. They have three federal jurisdictional districts; it's true of all three.

In my experience on an intermediate appellate court, we've seen a lot of class actions where the trial court has certified and it comes to us an abuse of discretion question and generally we have upheld the trial court's certification. Very few of those have been national in scope however.

We don't have class actions, so we don't certify class actions.

We have a similar situation in terms of the certification process. And we do have our federal courts make fairly good use of it. We've had some, out-of-the-circuit questions certified to us as well. We don't meet as often, however, so that I'm not quite sure of the value of it. But we are in the process in our Mid-Atlantic state of trying to develop a specialized program to handle complex litigation which has, as its focus, the technology business focus. We are trying to educate our judges in that regard.

In our southern state, we've been reformed it seems. And the supreme court has tightened up substantially on class certifications. Formerly we had a real problem because one lawyer could file a class action and it would be set for a hearing. Another lawyer would get the exact same pleading rushed out to what he perceived to be a friendly forum, file it, and the judge would certify it on the spot without a hearing. That can't take place now because we've been reformed and that abuse is gone.

As far as class actions are concerned, I think in our state the federal courts don't want them, and the state courts don't want them, but the state courts are willing to handle them, and they are able to handle them.

I think the emphasis has to be justice, the certification of the class. That's where it starts. Because if you can't get the class certified, the thing ends.

I think the professor's views about the danger of not moving the law ahead are well-founded if the circuits and the federal district courts are not going to ask for certification in a clear law situation.

I think the class action deserves the federal courts.

If they meet the guidelines, we certify them.

As in our western state, we have a pretty wide open certification rule, too. I mean, in the time I have been on the court, there have been a good number of questions certified to us, and where there is a novel question or a question of first impression, the federal judges are pretty deferential. I mean, they are disinclined to guess as to what we would do. Removal has not been a particular problem with us.

I don't think we certify that many, I do know that.

Do you have an active certification program where the federal court can certify state law to your state supreme court? If you encourage that, that helps a lot.

We see extraordinary writs where they are trying to decertify the class or challenge the ruling of the judge. Of course, it is an abuse of discretion. You look at the factors in our statute and you certify the class, and pretty much there is broad discretion of the trial judge.

I think the courts of last resort do have the power to decertify, as one judge has stated. But they also have the power to keep the lawyer's fee to a reasonable level, and I believe they do for the most part and exercise that power. Though the last exercise of power, that of keeping lawyers' fee recovery to a reasonable level, is not always involved because it is not a popular method for elected judges to resort to. Some of us have to have the courage, as well as the power, and that's best exercised at the final last report level.

**Because the states do have an obligation. Even we, as public servants, have an obligation to the people we serve.**

When you asked us whether we should have these complex litigation and class action suits what our preference would be, whether it should go to a federal court or we have no preference. They have to go someplace. And so I think the question is, if they go some place, are there some places where they really should stay with the states? Because the states do have an obligation. Even we, as public servants, have an obligation to the people we serve.

*Judges were asked if they had experienced attempts to enjoin one or more state courts from proceeding with class actions.*

The one experience I had, and it was with removal, was during the silicone breast implant cases when Dow Corning filed for bankruptcy and you saw this mass exodus of your cases and here you were managing just fine and suddenly they left. That, I think, can create tension when you have got that kind of thing going on.

I think the pressure comes from Congress. They are the ones that are trying to move everything to the federal judiciary.

No, but I'll tell you what we have done, and it's a real interesting issue in our court. We had our court jump in, early on, at the certification stage and issue a writ of prohibition to one of our trial judges.

I think perhaps because we have about 50 appellate court judges in our state, and the cases are assigned at random. I cannot remember a removal case that's ever come to me—maybe one in almost 30 years. It is not a problem, a burning issue, that I can tell.

I guess the only way we would know is if somebody sent us an order that said, "Hey, your action has been stayed, judge," in which case we might have different responses for them.

I have not found that the federal courts are any more anxious to handle these cases.

## Forum Shopping

*Judges discussed their experiences, as well as their views, on the issue of “forum shopping” when it comes to class actions.*

What we need to remember is that the decision about where to go is made by lawyers on a very pragmatic basis. The lawyer will go to Timbuktu if he or she thinks they’re going to win the case there or have a better shot at winning the case there. The pressure on Congress to enact legislation that makes it easier to go from state court to federal court is based on litigants—habitual litigants, so to speak—who perceive that federal court is a better place to be.

I’ll tell you what I did do. I’ve been in the east part of my state, and there was a judge from the west part and we were involved in an identical case. It should have been my court. It was filed in

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his court. He went ahead, real fast, and went on an appeal. So, I abated the action in my court, only saying that while I thought it was wrong, I was going to stand aside until the appellate court had a chance to hear it. And if they think it’s wrong, they’ll send it back to me. It’s still pending.

Of course, the defendants can complain because they want it all in one place. The plaintiffs can complain because they

may live in Iowa and they don’t want to have to go to New York and try their case.

The difficulty that I foresee, if I were trying to project myself as a mouse in the room, the difficulty that I foresee is that the conversation among multiple competing plaintiff law firms, in an effort to keep it in Oklahoma or Texas or New Jersey, and don’t let it be transferred elsewhere, sounds very, very different than the voices of a firm representing the asbestos producer. They basically want that lawsuit tried in the most convenient, most hospitable forum for their client, and they won’t have any difficulty identifying where that is. So, the multiplicity of plaintiff’s participation hurts the plaintiff’s interest, I think.

If you are asking the state courts to press the envelope and come up with a new theory of liability, is that something that the state court in one jurisdiction should be doing with respect to laws in other jurisdictions?

If you have two single plaintiff lawsuits being filed in two different state courts at the trial court level, you assume they’ll both be tried. And you may very well come up with two different results. It may be based on the facts, or it may be based on the fact that somebody has a better lawyer than the other person does. // *And maybe based on law in two different jurisdictions.*

I had a weird situation once where, and I think it had to do with a mass tort where it was very obvious to me that the attorneys for both sides were forum shopping. They were trying to get it in my division and then the judge in charge, a senior judge, ended up going along with it and appointing me to handle the case. So it was very strange but it was a very uncomfortable situation. But that is the kind of thing that goes on either under the table or out in the open.

In our southern state, I'm sure we are not different from anyone else. Because if I was a lawyer, I would be looking for a friendly venue and from what I hear, there's no reason why you shouldn't put in this equation that some of these people are going to be looking for a friendly venue. If they find the state courts, that's where they are going to go. If they find it in federal court, that's where they are going to go. That's what they do in our state. They shop around for the district or the venue that they think will be more favorable to their cause.

The fact that we are realists and know that everybody forum shops because it's a natural thing to do is different from the parallel concept that as judges we have to be vigilant to discourage it.

***Judges discussed why parties would want to move or not move their cases to the federal courts.***

I don't think it matters a whole lot to most plaintiffs at a practical level whether the case is in federal court or whether the case is in state court.

My impression is most plaintiffs like state courts better than federal. And defendants like federal courts.

The biggest argument there is with the defendant is the cost of defending 50 separate actions.

If the lawyers feel that this group of judges is going to be able to handle the complex litigation, they'll come in there. If they have doubts, they'll go across the street.

Just like all politics is local, social interaction is local, particularly in small jurisdictions, I think the legal community makes judgments as to what they think of the federal judges that they are going to appear before, what they think of the state trial judges as individuals before whom they are going to appear. And when there is liberal use of federal magistrate judges to hear civil cases and the magistrate judge is regarded as very good, then people will tend to want to go to trial before that person.

It may be that going to federal court means you have to drive an hour and a half to get there and an hour and a half to get back, and you feel comfortable with your local judges and you feel comfortable with your local procedural rules. You don't get into federal court that often and you don't know how to cope with the federal judges and you have a little anxiety about the federal rules. You may choose to bring your class action across the street rather than across the state for that reason, and I think the convenience reason shouldn't be overlooked among all the other important reasons that have been discussed here.

The thing that strikes me is that why would most plaintiff attorneys want to be in state court in the first place. Because what I see is state trial court judges being more hostile to the plaintiffs and less liberal with making defendants make discovery than the federal courts. I think in a lot of cases, at least in our southern state, the plaintiffs are better off in federal court.

I think ultimately there probably is a distinction, a perception that the federal courts have what I'll characterize as the greater availability of summary judgment in federal court. Theoretically there shouldn't be a distinction, but in fact there is. I think there's a greater reluctance in the state system to grant summary judgment than there is in federal court and we see that particularly in employment cases

What is the fair distribution of the caseload between state and federal or among the states? If the system happens to make a particular state a good place to litigate because of a variety of considerations, then that's legitimate in a sense. That's where the people end up being able to litigate, so they choose to litigate there, and is that some how unfair?

**If the system happens to make a particular state a good place to litigate because of a variety of considerations, then that's legitimate in a sense. That's where the people end up being able to litigate, so they choose to litigate there, and is that some how unfair?**

When, you know, where does strategy end and forum shopping begin? I mean, all of these are strategic decisions.

It's been 21 years since I practiced law, so I haven't been in federal court lately. But the law used to be, and I assume it still is, that federal judges can only grant remittiturs, not additurs. Is that correct? In our southern state, state judges can grant additurs and remittiturs, and I suspect that may be one reason defendants would prefer federal court.

I think what I was hearing this morning was the idea that it's preferable to have class actions in state courts because of a greater receptivity to cutting edge theories of law. It's better to have state courts doing that because the federal courts may not be as prone to accept new theories of liability or things of that sort.

You have all of these differing venues with differing rules and differing advantages to differing parties and because of that, the perception is the state courts aren't the right place to do it.

*Several judges discussed the impact of federal courts' insistence on unanimous juries as having an impact on where lawyers may want their cases tried.*

I see a lot of that. I think you would see more unanimous verdicts if it were required. Even though jurors are not supposed to compromise, everybody knows they all do. So I think that is what would happen, that it would compromise some, and the verdict would be unanimous but probably for a lesser amount.

I can tell you about my own court, because I conduct a little exit poll for everybody. In 10 years of doing this, I think I'm trying probably an average of eight to ten cases a year, so that is a fairly limited sample. But I don't believe more than two or three verdicts at the most a year were unanimous. In large part they are 10-two or 11-one.

I think one's feeling about juries could have some influence, too. It did with me. I had a great distrust of juries which has largely dissipated since I went on the bench and dealt with them daily and discovered how wise they really were.

In the majority of states you do not need a unanimous jury. In federal court, you do. It's much easier to hang up a jury or have compromise in federal court than it is in state court, so there's a preference to having a non-unanimous jury in terms of justice. There's nothing gained from the plaintiff's perspective of not having a decision.

Why would you file in both courts? What would be the motivation when you have got concurrent jurisdiction, the same substantive law? The only difference I can see is in one you are going to get a six-person jury that's going to be unanimous or you are going to get perhaps in some states a 12-person jury that will be less than unanimous.

***Several judges discussed the pros and cons of class action, especially regarding the large fees paid to plaintiff lawyers and the relatively small payouts to claimants.***

I've had no problems, per se, with the lawyers. However, in our southern state, it seems like we have class actions everyday. We have a lot of class action cases filed, and a lot of them have merits. And I wonder if any of you have the same problem and what you do with it. The problem I have is the ultimate result is that the defendants have overcharged or whatever they have done, to the tune of \$10 or \$20 per individual—minuscule amounts—for which the attorneys are filing a class action. The most they could get back, if they got 100 cents on the dollar, was \$10 or \$20 for their client and millions of dollars for them, which I frankly find offensive.

That's one of our biggest problems, is that in the class actions we see on the appellate level, the individual members of the class receive very, very little, usually \$100 or less. And the lawyers are making millions.

But if you didn't have the class action vehicle, how many lawyers are going to take a \$100 case? Corporate America realizes that now. They know if you cheat just a little bit a whole bunch of people, you make a whole bunch of money. And that's the only redress you've got. You've got to have somebody to pick up the ball of these folks and vindicate what clearly is wrong.

I just wanted to say that I really don't have a problem with huge attorney fees, because it was mentioned today that part of the whole tort system is accident deterrence. And for huge attorney fees, which are reasonable and unreasonable? What is reasonable when you handle a class action? I never handled one. I never wanted to as a plaintiff's lawyer. It is an administrative nightmare. It costs a fortune. How can you talk about a windfall when

they're representing hundreds, sometimes thousands of clients? They have to talk to nuts, they have to talk to flakes. They have to have a huge staff. They have to get into corporate law. They have to become a business. They have to have the resources necessary to handle this. And then there's the thought that they get a relatively limited recovery because there's a limited fund.

There must be judicial relief against corporate petty fraud as well as corporate antifraud. And if we are to afford that relief against petty fraud, we have to confront problems of excessive attorneys fees and have the courage to curb those excesses that are likely to kill the goose that laid the golden egg.

Well, don't get me wrong, I don't want to appear to be speaking badly about settlements. After all, when parties can reach agreements even through the help or the coercion of an outside agency, like a judge, that's all for the good. I just get concerned that sometimes, with the large number of parties involved, people who authentically don't wish to settle their claims are being pushed over the cliff.

## **The Competence of Lawyers**

### *Judges spoke about the competence of the lawyers in complex cases from a variety of perspectives.*

It is hard to generalize, but as a general rule, I don't see any difference in the conduct of the lawyers handling these types of cases than any other cases. I have seen some conduct that I felt like was very unprofessional, unbecoming of the profession and unbecoming of the lawyers themselves, but I think that is an exception rather than the rule.

That is an important segue to what we are doing here today, in terms of complex litigation and simple litigation. I have a civility sign on my bench right next to my name. It works out well. I talk about it as the occasion arises, and when lawyers are beginning to act uncivil in their papers or in their appearance before me, or in the vibes I get, I get them into chambers and talk about civility: "Hey, folks, we are going to be living together for the next year and a half or so on this case, or two-and-a-half years or whatever it may be, and I have certain expectations of you and you of me. So we are going to be respectful of each other, not only in court, but in your papers. I want your papers well written and no attacks, et cetera." So you can set a tone as a judge early on, and I really urge you to do that. I tell my colleagues, it is a healthy way to go, and these cases run very, very smoothly, whether simple or complex, by setting the tone early on.

It is more of a training process for the judge. You should listen to the lawyers and hear what they have to say. Normally the attorney who is there advocating a complex case wants to walk you through it and make it simple and be courteous. They certainly don't want to get in the face of the judge and make themselves irritating to the court.

At the appellate level, we really don't see misconduct. There are allegations that you are trying to shoehorn a class action into something—or trying to create a class action out of whole cloth and those kinds of allegations. But I'm not sure that is exactly misconduct by the lawyers; it is just creative lawyers.

Now, another abuse, as you all well know, if you are talking about both sides—the defense often is very abusive about removing a case to federal court where they know it is not going to stick. It just causes a delay in what you are having, it causes a delay for the federal judge and it causes more use of resources. It's going to come right back to state court. When I see my federal judge friends, I say, "Keep 'em. I don't want them." And they say, "We don't want them either."

I'm not sure if it's sanctionable, but there are certainly a small number of lawyers who presented cases to our judiciary that had this knack of being able to pop up with complaints that read strikingly similar to complaints that have been filed elsewhere. And when you ask them if they're ready to go, then they start filing motions for a continuance — a foot-dragging tactic.

We were talking about the younger lawyers. They just don't represent what the younger lawyers were, generally speaking, 30 or 40 years ago. There is more antagonism, less civility. But good lawyers who are from excellent firms, things go smoothly as a general rule. As for the younger people, I have great hopes that they are going to get there eventually and we aren't going to have those problems.

Our experience has been very positive with that. I can think of one of the cases that I was involved with, where there were multiple class actions in other jurisdictions, and some of the lawyers in those class actions were also counsel in the case before me, and the thing that was impressive was that these lawyers were all very professional, very knowledgeable about what class actions were about, and what the law was.

I had the occasion recently to kick out a plaintiff's lawyer who just wasn't able to competently represent the class, in my judgment. So I said, "You have got to find someone else." So that is where we are right now; they are looking for someone else. I stayed all the discovery until they could get someone in place. My view in a class action suit environment is that the judge applies almost a fiduciary ruling to the parties in the case, to make sure that there are competent lawyers representing the plaintiff in particular.

**There are allegations that you are trying to shoehorn a class action into something—or trying to create a class action out of whole cloth and those kinds of allegations. But I'm not sure that is exactly misconduct by the lawyers; it is just creative lawyers.**

## Preemption

*Judges were asked about attempts by parties to invoke a federal statutory preemption and what areas this may have occurred in.*

Every safety regulation of the federal government has been argued to be preempt. Inflammable fabrics, for example, are brought into state court with the argument that this preempts state standards and, therefore, you must accept these as the standard. We refused that. The state courts, so do the appellate courts, we see this all the time. But now in recent years, we've seen some of these arguments prevail, which on the surface, appear to be exactly the same as the old argument.

Mortgage financing, in the case of amount of insurance on homeowners' policies under some federal statute, is a preemption case.

**As state judges, I don't see how the hell we could work our way around that.**

We've had several preemption cases in my court, but I believe they have either been on ERISA or air bags or seat belts or other automobile safety standards. Any time you have a crash-worthy type case, it seems like we get a preemption argument.

Another area that most people don't encounter is in mobile homes. The Feds have enacted manufacturing standards for mobile homes. Generally speaking, local governments can have a building code or ordinances that would determine what is needed in building a home, and it is argued that the Feds have preempted that.

Whenever the federal motor vehicle standards come up, there's always a claim or you are running into claims that it's preempted by federal law.

We have had it specifically in the seat belt and air bag cases.

In our western state, in medical device cases, we've seen preemption as an issue in at least two cases that I know that have come through our appellate system.

If there is a federal regulation squarely on point, the United States Supreme Court has said a state tort claim, negligence claim, product claim, is preemptive. As state judges, I don't see how the hell we could work our way around that.

For cases filed in state court, the argument is made that the standard to be applied has been preempted by federal law, therefore, we cannot use the common law standard that has been applicable in the states in the past.

It depends on the wording in the preemption clause in the federal statute and whether or not the

federal statute has a savings clause. The national highway transportation act has a preemption clause preempting any state law or regulation that is contrary to federal regulation.

How does one determine what the limit is then? I mean, essentially, are we saying that Congress can pass any law they want basically in any area that deals with interstate commerce and they can preempt anything they want.

Can I take it one step further? If, in fact, the Congress decided and the numbers changed that they are going to pass a national medical malpractice act or a national product liability act, couldn't they, in this act, say essentially this preempts the state law of any state that conflicts with this?

***ERISA cases were cited by most judges as those leading to preemption.***

There's not much way you can get around preemption in ERISA.

I think ERISA is the big one. We had that, too, and we said it was a preemption.

I was going to say, ERISA would be one, for sure.

ERISA.

I think you see that issue in just about every ERISA case.

The only substantive preemption cases that we really had, and they weren't in our court but were in our state supreme court, involved ERISA. It was a fairly clear-cut case where a man had been terminated from his employment when he was less than a year from vested retirement, and it was very obviously that he had been terminated so that his retirement would not vest. Our supreme court, God bless them, held that there was no ERISA preemption and held in his favor, but it got reversed, so ERISA stands free in our state.

I was going to point out that in the area of ERISA, certain areas of state law are not preempted by that, such as miners' rights. In our southern state, we do not apply ERISA to a miner where a health plan is seeking reimbursement for medicals paid out of a miner subsidy.

You were talking about HMOs or ERISA cases. And that, I think, is going to be the next battlefield. We had this come up in our southwestern state now three times. Plaintiffs who have an injury because of an HMO's failure to permit some procedures that were needed sued the medical director of an HMO for malpractice. Of course, the defense has said that's not permitted and it's preempted under ERISA. Our court of appeals has ruled now that it's just a plain old simple malpractice action. They are practicing medicine when they decide what kind of treatment to authorize and what kind of treatment not to authorize.

*Judges discussed areas of law where they were required to adjudicate matters using federal law.*

There are many federal, statutory and constitutional issues that come up fairly regularly.

We have to apply the strictures of federal due process in every state law case.

Constitutional issues arise in damn near every criminal case.

[Section] 1983, of course, is the obvious one

Rates and hour controversies, [Section] 1983.

In that civil rights example, where they authorized state legislation on the same subject matter, the federal legislation will establish a threshold that is a minimum level of protection. And the states can put in a higher level of protection but may not put in a lower level.

Antitrust is another one.

I'm not so clear how antitrust gets involved in state court.

You have class action to pursue antitrust actions in state courts.

We have antitrust actions, and the preemption is sometimes raised as a defense.

## **Federalism**

*Several judges discussed the issue of federalism and worried about the dominance of federal analysis being taught in the law schools, and the fear that this analysis will override the states.*

I know an argument has been made by a judge for whom I clerked that part of the fault lies with the way the law schools have been federalized. Everyone is taught essentially that there is a federal body of law, it's the easiest body of law to keep track of, there's a lot more material to work with, and so the law student come away with this idea that if you want to know what the law is, go read the commentators.

I think part of the problem is that there is such a dominance of federal analysis or federal methodology.

Are we taking steps to ensure that the opinion of a state judiciary is going to control how that state claim is processed, even when it's a pendant state claim in federal claim? That, to me, is an important element of federalism, so that we never lose the state judiciary weighing in on questions.

I think it's a matter of federal power and federalism, that's clear. That's the civil war. The authority of a federal government, in terms of due process, is clear. Now, that doesn't answer to the question about the wisdom and the interpretation and how far should you read that Due Process Clause to actually affect the goings on in state court. And there may be mixed signals from the Supreme Court going both ways.

What's wrong with conflicting decisions? If the states are sovereigns onto themselves and the states are supposed to be laboratories for development of the law, then you would expect there would be conflicting decisions. I'm sure from a federal court point of view, why would there be unless you were assigned a lot of cases? Why would you feel you would have to interfere with the state's determination of a similar issue?

I think that when we are talking about substantive law, it's different for a reason in every state. Whose need is it for there to be uniformity? That basically goes against the fabric of the individuality of each state in setting its own laws and setting its own basic law on how somebody gets redressed within that state.

**I would hate to see cases involving citizens of our state just automatically taken to a federal forum.**

I'm sure there would be differences of opinion, but I would hate to see cases involving citizens of our state just automatically taken to a federal forum. And I do know the federal forum is part of the state as well, but I would like to see us develop in a way where we can handle our share of these cases as well.

Our states vary widely on all kinds of issues. The people in our southern state get put to death for crimes and in another state they may serve a relatively short time of years.

I think it's a good thing to have that kind of diversity, but it's going to be harder to attain because, you're right, people want to solve the money problems.

***While talking about the Washington state case, Guillen v. Pierce County, discussed by Professor Parmet, several judges noted the impact federal funding has on cases they may be asked to adjudicate, and how Congress has preempted cases by using federal funds.***

They've done that under the Spending Clause. They just said, you either adopt these guidelines, in one form or another, or you lose billions of dollars of federal money. And the states have adopted them. So, that's not any longer federal law, that's state law.

Our Mid-western state has seen it in every railroad accident in which federal funds were used to erect signals. Almost to the point where we had to depart from the Tenth Circuit's interpretation. The Tenth Circuit said that preemption applies the moment funds were sought. And we said, "Preemption didn't apply until the devices were erected." And the railroads won the case or didn't take it on. But in a more recent decision by the U.S.

Supreme Court, our rule became the adopted federal rule, that preemption applies only after the funds were put to use. That's our only triumph over the thing.

I'm not sure what the correct answer is at this point. I had a case in a railroad crossing where some funds had been used there, but I didn't get to that question. I let the plaintiff try the case under the state tort law. It's on appeal right now, so I don't know what the supreme court in my southern state will say about it yet.

There is a constitutional basis for it—they're going to spend federal money. If you're going to take federal money, then you are going to agree with the conditions upon which it's given to you. // *It's different from preemption because it's sort of—// Blackmail.*

The Feds fund the highway in large part. The Feds have highway standards that are adopted by the Federal Highway Administration, so there is a federal interest that the Feds are trying to protect, even though the state court may be allowing discovery of state highway documents in this case. There may be a legitimate federal interest.

There is an effective way for Congress to tax us and use our own money to subjugate our future.

What the U.S. Supreme Court has said is that you cannot force the states to give up essential elements of state sovereignty. But in the situation where the state is willingly giving it up in order to get the money, the state has basically written itself out of the game.

**There is an effective way for Congress to tax us and use our own money to subjugate our future.**

The problem we have, the congressional legislation—usually it is the form of the carrot and the stick—and if the state stops doing something, money stops. But sometimes you simply have to draw the line in the sand to get a decision. And as long as we're quiet, we can assume that Congress is going to gradually get more territory. So, at some point, you just have to say that's it.

## Procedural versus Substantive Law

*Judges noted that it is not always substantive laws passed by Congress that impact their courts, but often it is changes to procedural rules that they have to take into account.*

By and large, it's not substantive law that is a concern in federal courts. It's procedural law and evidence law because the evidence law in federal courts related to expert witnesses is far more restrictive than most states.

But it also could be such things as discovery rules, other kinds of procedural rights that will attach to litigation of state claims that happen to be appended under pendent jurisdiction from federal court. I don't want to occupy a lot of our time, but this is a matter of curiosity to me because, again, it returns to the subject of state court judges making decisions about the extent

to which litigation in federal court is or is not shadowed or controlled by state rules, and having their opinion be the dominant opinion and control of judges' opinions in the federal court.

Let's face it. It appears that the federal procedures that we talked about have come over to the state courts, because it is a way of speedier handling of cases. I don't know about the other states, but I know our western state has consistently gone to federal procedures.

***One federal rule that has gained a lot of attention but has not been adopted by every state, is the so-called "Daubert rule" setting standards for the admission of scientific evidence. The judges discussed how their states treated Daubert issues, especially regarding whether cases end up in federal or state court.***

The states are utterly free to either adopt, as part of their civil procedure, or reject *Daubert*. We chose not to adopt it.

Our *Daubert* body of law in the state system is different from the federal system and less subject to restricting the ability to get to a jury on evidence, less prone to intrude into scientific issues. I think it is fair to second guess the judgments of what constitutes adequate scientific evidence.

Our *Daubert* rule is virtually the same as the federal rule so they know they are going to get a fair shake on those critical issues on how the experts are going to be handling them, whether it's good science or quack science, they know that the appellate courts will not hesitate on a state level to reverse an improper judgment.

I think one reason why many states do follow *Daubert* is because many states have adopted essentially the federal rules. It's much easier if you have a body of one in the federal courts. We have adopted the federal rules, but we have expressly said we don't adopt *Daubert*, so you can go that way.

Our supreme court has adopted *Daubert* with certain modifications.

We are getting most of our *Daubert* issues in the criminal settings where witnesses want to bring in crime scene experts, want to bring in eyewitness experts and I'm concerned we may be somehow unknowingly developing different rules for criminal and civil under the same rubric.

There was a case in the criminal courts in the Third Circuit that said look, if we were looking at this under *Frye* in any civil case, this person could not testify and why should it be different in criminal prosecutions?

Ten years earlier they had a case where this expert predicted future dangers in every capital case. His testimony was admitted, a guy was been sentenced to death, and the contention was that this evidence was improperly admitted. The case goes up to the U.S. Supreme Court and the American Psychiatric Association files an amicus brief that says this is junk science, junk

medicine. Nobody can predict future dangers with any accuracy. The U.S. Supreme Court says oh, well, yes, that may be true but it's up to the jury and the jury will decide. Then they decide *Daubert* and they don't tell us what we should do with all the guys on death row who have been convicted by junk science. If you think the state doesn't use junk science, you ought to see what goes in some of these cases. I don't like the idea of killing people who've been put on death row by evidence which is not good enough to use against a railroad. Nobody wants to talk about that.

## **The Relationship Between the Federal and State Judiciaries**

### *Judges discussed the relationship that they had with their federal counterparts.*

I don't think there's been any particular problems with regard to conflicts with federal courts. I think that generally speaking our relationship with federal courts is very good, and as far as transferring or taking cases, I haven't had any problem with it.

We have a very close relationship with our federal court. The courthouses are nearby and a goodly number of their judges are former state trial judges that moved into federal positions. For example, on the asbestos litigation, when there was national studies on consolidation and how to handle all the litigation through the states, one of our state trial judges was put on a federal committee and panel to work with other state and federal judges. We also have a very active class action practice under our Rule 23, and, surprisingly, some defendants who are major defendants do not seek to remove these cases.

Generally speaking, the relations between the federal judiciary and the state judiciary are very good in our state. We don't have a lot of federal judges, and they are not particularly looking for business and are not bashful about certifying questions to us.

I think we're changing a little bit. I recall our early experiences of conversations between judges were not always successful. They would just tell each other over the long distance phone line, "I'm keeping it." "No, I'm keeping it."

A lot of states have the state-federal council of federal and state judges and it starts some kind of relationship between the judges on the federal bench and the state court bench. I don't know if that's possible in your state but it certainly sounds like it would go a long way towards equalizing the relationship. I think once you sit down and start having dinner with people and talking back and forth about your mutual problems, it does away with some of the distance that occurs between them. I don't know if the other states have them.

We have dinners together. We go through that whole ball of wax. But quite frankly, in my opinion, if you are the big dog, which I think they quite frankly take as their position, they don't necessarily need to talk to the little dog.

I think it is impossible to generalize. But I think all in all, there is some trust with some judges on some issues in state courts, and there are some issues where there is none, with other state court judges and with other issues in state courts.

We also see the perception—it's not a perception, it's a reality—that people give more deference to the federal judge who makes the same decision on a day-to-day basis as you and I make.

Since I've been on the supreme court, particularly within the last three years, we've felt that the federal district judge is using us as law firms.

They are very pleasant. A federal judge and I live on the same street together. We are very pleasant but there's not a necessity, from my perspective, for federal judges in our area to have to cooperate or consider any state court's problems.

In terms of the question about whether there is tension between the federal judges and the state judges, I suppose the tension in a generic sense is natural. It's inherent in the fact that we, in some ways, compete for jurisdiction over the same types of issues, just as a tension between the executive, legislative, and judicial branch of government is inherent and natural and, in fact, on purpose. But whether that natural tension has to break down communication between the federal judges and state trial judges, I guess depends on social factors and a lot of other stuff we can't control here, but I like the idea to play golf with them, have a drink with them, or whatever. I think that most state judges, at least state trial judges, feel that we are courts of equal jurisdiction with federal trial judges. I think our perception of the federal judges is that mainly because of the supremacy clause they have this idea that we are supreme to the state judges and I'm sure that's true on the intermediate appeals state level or the circuit federal level, and so forth. But I think it boils down to your ability to pick up the phone and talk to the federal judge and say hey, look, we've got a problem. You and I both want attorney A here, can we talk. That usually works, but if you get a prima donna, it won't work.

**Since I've been on the supreme court, we've felt that the federal district judge is using us as law firms.**

*Several judges discussed whether or not having federal judges who had previously been state court judges affected the relationship between the two courts.*

The second observation I would make is also a perception. There is a big difference in attitude between the federal judges who've been state judges and those who've not. For instance, I have had conflicts and the federal judge who has been a state judge will call me and say would you mind this or how can we work this out. The other will not call you. They just make their decision, and you are just left behind.

None of our federal judges have ever been on the state courts before, so there's no relationship there.

I was surprised this morning whenever I heard so many judges say in their states they had federal judges up from the trial bench in the state courts. In our southern state, that would be an exception. We don't ever have that. Whoever makes the biggest contributions, the biggest man in the party, that's who gets the appointment.

In our western state, it's probably 50-50. Fifty percent will be state judges, 50 percent will be straight out of what I would call silk stocking law firms where they have never been judges at all.

In our southeastern state, I think it's just opposite. I think the majority of federal district judges were state judges before they became federal district judges. We all know each other and we get along well, and I think the tendency is for the federal judges to establish that the state judges would keep these cases and for the state judges to say you are welcome to them. Take them, we don't want them. So I don't see any kind of tension of that sort at all in our state.

***A couple of judges noted that while they respect the United States Supreme Court, they do not necessarily view it as an infallible.***

Well, I think a lot of state court judges, I think all of us, we have this ingrained respect for the United States Supreme Court. The idea that gee, if they say it's so, it must be so. I think it's sort of a radical idea to say no, they say it is so but we think they are wrong, and one of the main things we relied on is that ten years before they said it wasn't so.

I begin with the assumption that the Supreme Court is wrong and you speak in deference to the Supreme Court. It's obviously an institution that deserves respect as an institution, but I generally begin with the assumption that they have got it wrong and the job is to figure out what the right answer is.

***Judges discussed the difference between state and federal courts in general.***

Ninety-seven percent of all court suits are in the state courts. It's easy to forget that.

I think the whole basis of the tension is that it's perceived, whether it's true or not, that the state court is for people. It's for individual people. And the federal system is for cases. And I think that's one of the underlying basis of distinction there is that the average person perceives feeling much more at home in the state court than you do in the federal court.

State courts vary differently, not only from the standpoint of resources, but in how their courts operate. I come from a state where we have a unified system. I have the authority under the constitution to assign judges, so I can control complex litigation. It varies from state to state.

I think that the federal government has a responsibility to be there when the state courts need help.

I hope that the plaintiffs bar never forgets that those theories that they want to press in terms of state law continue to be available in federal court. It's just that the questions themselves have to be answered by state courts. My personal role has been to encourage our court to be as accepting, open as it can be, in taking cases where the federal courts express a good-faith doubt as to the content of state law, whether statutory or constitutional. Our court has been helpful in that regard. So, that when they do exercise their power to declare the supreme law

of the land and take over litigation of this kind, the state questions can continue to be answered with a state tone of voice.

The more you think about it, there is a lot of deference to us in court, and I suppose there ought to be a lot of deference in terms of scholarship, in terms of patriotism, if nothing else. I think that we ought to emphasize over the years the functions of the state courts and the state court judges.

## The Relationship Between State Judges and Legislative Bodies

*Some judges commented on interference, not from federal courts, but from their own state legislatures and the Congress.*

My experience has been that the federal judiciary has always treated us with equality. From my experience with the legislative branch—nationally and even at the state level, and particularly at the state level—we’re every bit second-class citizens to them. In fact, I’m not sure the legislature in our southern state recognizes that there is a third branch of government.

I’m not sure that the tension is between the state and federal courts. The tension is between state and the federal government, due to Congress. And we’ve seen state executives draw the line—*Lopez vs United States*.

The sheriff will say, you simply can’t tell us that we’re going to have to enforce the handgun laws on an interim basis because you, Congress, don’t have the authority to commandeer the state executive machinery to

enforce your law. There’s actual federal precedent in this particular area, back from the early 1800s. And there may be an appropriate situation where we could say the same thing—you cannot commandeer the state judiciary, or you cannot tell the state judiciary how to decide its cases.

**In fact, I’m not sure the legislature in our southern state recognizes that there is a third branch of government.**

In fairness, I think that Congress is driven by the need for uniformity and unfortunately, you get back to kind of the insurance company mantra of predictability. So there’s always been a fear that state courts and state juries would arrive at conflicting results in a mass tort or a mass situation. There’s always been this drive of if we can get this case in federal court, they are the only true national courts in this country where you can get a very uniform and a very predictable result. But it doesn’t always work that way.

Are we really looking at a situation where we have a conflict between the common law and development of legal principles and the federal complication of law? And where the complication of common law is going to be the means in which we flesh out what legal rights and obligations are. For political reasons, or whatever other reasons, it seems as if,

not necessarily federal courts, but Congress, seems to be more receptive to codifying more chunks of law than we've seen over the last several decades.

There's been a lot of activity in our legislature recently to encumber state law claims so that they can't be pursued, but with just matters of procedure. But then, when those claims are appended to federal claims, the federal court in our state, at least, is interested in knowing the extent to which they are free from those. Why? Because the intention of the state legislature is that those procedural encumbrances will apply to state courts. And the question is whether or not the state legislature can even have an intent to have its procedural encumbrances apply to those subsequent claims when pursued as pending claims at the federal court?

*Several judges discussed the actions, from setting uniform national standards to codifying procedural rules, of Congress and how they affected the state courts.*

Congress exists to pass laws. Congressmen are political. They pass laws often in order—I'm speaking of the obvious—to remain in office. I think that is the genesis for a lot of law that is unnecessary and cumbersome and duplicative of what we already have and can handle in our own states.

**Congress exists to pass laws. Congressmen are political. They pass laws often in order—I'm speaking of the obvious—to remain in office.**

We haven't thought about it because that hasn't been the paradigm we're in, but the U.S. Constitution clearly gives us the allocation to enforce the federal constitution and federal law. It seems

to be that we do have the portfolio to say, you have exceeded your authority, Congress, under the Enforcement Clause of the Fourteenth Amendment. And we're simply not going to do that.

We tried dealing with this to some extent in passing the Uniform Commercial Code, but all the different uniform laws make it much easier to deal from state to state. But in the areas where the states haven't enacted uniform laws, then it is much easier to get something through the Congress than it is to get it through 50 separate state legislatures.

Professor Vairo alluded at the end of her paper to the traditional role that states play in regulating conduct and providing access to courts to injured parties by providing remedies through the common law process. I think there's as much of a potential threat to that in the separation of powers problem between legislatures and judiciaries at the state level, the codification of common law increasingly, and the implications underlying that. I mean, workers' compensation, although generally viewed as a progressive reform, eliminated claims for relief that had existed forever. The abolition of tort liability in motor vehicle accident cases, subject to assessment of no fault, has done the same. But that's really what I think we are dealing with here whether it's Congress or the state legislature.

Maybe I just grapple with the language being used. It seems to me what we're really talking about is relying on the development of common law theories versus a federal codification of that

particular issue. It seems to me fairly clear that, as long as Congress isn't exceeding its constitutional mandate, that it can codify bodies of law that affect the national interest.

Is it distrust of the courts, of the state judge, or is it a perception of the need to have something on a more solid basis? The Americans with Disabilities Act, the federal law, came into play six, seven years ago now. Each state had its own version of the ADA or no version at all, and the Congress felt that there was a need for something, and that was passed, and it is now being applied nationally, not because of any distrust of the inability of a court to administer the law properly, but the need for a law. That is my perception, anyway.

***Judges were asked if they believed that state tort law constitutes, "regulation" such that it should be preempted when a claim is made that it conflicts with relevant federal regulations?***

No.

No.

No. If you are asking for an opinion, no, no, no.

No.

I think that's what they are basically saying. You have tort law in this state. A federal regulation is passed. This regulation essentially trumps the state law.

***Further, judges discussed the various ways in which the tort system is affected by federal preemption, rules changes, and legislative incursions into judicial procedures.***

I think the real danger is that state legislature after legislature is enacting what I think you guys call tort reform, by putting caps on damages, creating statutes, all kinds of other things, declaring that there will be non-jury trials and this and that, so forth and state appellate courts are upholding, saying these are within constitutional limits, not for statutes. Causes of action in these various states are disappearing.

I think the more appropriate question for this Forum is, do we feel that under the Constitution as we understand it, it would be appropriate for Congress, and ultimately the Supreme Court to nationalize products liability and all automobile torts legislation, etc.? My personal view is no.

I think the attack is not on the independence of the state judiciary. I don't think that's what it is at all. These attacks are on specific areas of tort law because of publicity. You've seen recently attacks on punitive damages. The Supreme Court has just come down. Now, a few state court judges are going to have to look de novo as a matter of constitutional law on every punitive damage claim. And decide, rather than the jury deciding, whether this is correct. The same thing is happening with class actions. This is an attack on class actions. It bothers judges at both levels of this monstrous flow of cases and parties in your courts.

It's a scare tactic. And fear works better than sex, it really does. If you can make people afraid enough, they're going to react. And this is a reactive society. It's a reactive judiciary, it's a reactive Congress, and it's a reactive state legislature. And they don't do anything that they don't have to do. But somebody says, "Oh, gee, there's a crisis in medical malpractice or there's a crisis in punitive damages or there's a crisis in class actions," and then they react.

**That seems to me what was the underlying subtext in this whole day's discussion—the notion that Congress, at the insistence of certain unnamed forces, is attempting to shanghai state court litigation.**

They don't want to enact a statute that provides for a particular substantive doctrine. What they want to do is use a judicial docket to do an end run around all of that, by limiting substantive procedure. This was at the heart of what was called tort reform. I think in most of the states, most of it was procedural as opposed to substantive. I went to a judicial conference, and a couple of us

were sent over to the state senate and testified on a tort reform bill a couple of years ago. I thought it was interesting. The senators were up there and we were down here in the audience, and in the back of the room there are these guys in dark suits. They are all saying to people up on the bench what kinds of statements they should like and shouldn't like.

I guess the point of this is, when legislatures, including the Congress, enact procedure to effect substantive ends that they don't want to do directly by some sort of policy statute, then you have got a problem. They tasted a little bit of power that way. I think across the board, across the country, that is the sort of thing that has been going on. What we have got here is the legislature's usurpation of judicial power to function, to start enacting procedural rules that camouflage the real intent.

I'm certainly no means an economist. But it seems to me that the cost of doing business in a mobile world such as ours, would obligate the company to bear the burden of multiple impacts, like knowing that an airplane may have people everywhere from Honolulu to Maine on it. And if that airplane goes down, that they're going to have potential plaintiffs everywhere from Honolulu to Maine, it's going to be part of their cost of doing business to settle their claims whether it's litigated or settled. Now, don't get me wrong, I'm not against efficiency. I think that that is a wonderful thing. But after we all agree that it would be nice to conserve judicial resources and be efficient, then the question is, how we can come up with a strategic process that recognizes all our separate prerogatives appropriately, that's going to allow us to be efficient rather than allowing one jurisdiction to just basically shanghai the whole thing. And that seems to me what was the underlying subtext in this whole day's discussion—the notion that Congress, at the insistence of certain unnamed forces, is attempting to shanghai state court litigation.

I think everything is cyclical in life, and things change from year to year. I would like to be a fly on the wall when this discussion is held six or seven years from now, when the feds have decided to open things up and the state courts, through a lot of pressure from the citizenry, will say, "Let's stop this gravy train." Then we will see where we are in this argument.

# Points of Agreement

In the discussion groups, the moderators were asked to seek out consensus—to the extent that it was achieved—on the issues raised in the Forum, and to characterize their groups' points of agreement in a few sentences, that were announced at the closing plenary session. The moderators' comments and informal summaries of their groups' discussions follow, edited for clarity.

## HAVE YOU SEE HARD EVIDENCE OF INABILITY FOR STATE COURTS TO HEAR COMPLEX CASES?

In our group, the answer was no.

The general opinion of our group was that state courts can handle these cases, class actions, as well as federal judges.

The judges are coordinating and handling complex matters in a sensible fashion, and there doesn't seem to be any great need for massive changes to the system.

They felt that they do have the ability to handle those cases fairly and that while there may be some cost issues, the means to handle the present level of class action complex cases in those states are proceeding well.

The overriding sentiment as stated by everyone here is that state court judges believe that state systems can handle the cases that are brought before them in an efficient way.

## RESOURCES

There is a resource issue, but it is a manageable resource issue by funding perhaps through the attorneys' resources.

There is a consensus that there is a problem in that there is insufficient administrative support for some of these cases and a need for further resources, but it is a problem of allocation of resources which is not solved by abdicating the response and simply giving it up to the federal system.

## CLASS ACTIONS

They indicated that there is a certain small percentage of cases that come into their respective states for class actions and complex litigation.

They all agreed that there is little desire by federal judges to have more class actions on their plate based on their conversations. The same holds for state judges. They would rather have fewer also. They are realists.

They were just as happy to have the federal courts deal with the cases, but philosophically and they all agreed with this, philosophically they believe that they have the responsibility in their state to assure that the state's laws are properly applied for the protection of the state citizens and that because of that responsibility they don't want these kinds of cases that are based on state-based causes of action taken out of their courts.

They thought that the Congress trying to remove class actions from state judges was insulting. That was the term used in our group, and it basically reflected on their perceived inability to handle such cases.

With regard to whether attempts have been made to enjoin the state courts from proceeding in class actions the answer was no.

#### CERTIFICATION

They unanimously do not believe that class actions are more likely to be certified in their state courts than in federal courts.

There was a clear call for use of the certification process by federal courts to get answers to the state law questions. That works well if the state court is receptive to certification issues and it is a way of solving the problem of inconsistent state and federal resolutions of state law problems.

**They thought that the Congress trying to remove class actions from state judges was insulting.**

The last question from the morning session, do you think state courts are more likely to certify class actions than the federal courts, and the answer is basically unknown. We are not sure. We don't have a clear feeling on that issue. It has to be studied.

#### PREEMPTION

They encountered preemption in the area of air bags, medical devices, seat belts, railroad liability, the Securities Act, age discrimination, and of course, ERISA.

To the question "Do you believe your state tort law constitutes regulation such that it is preemptive?" the answer was generally no. It is not regulation. It may have some effect, potentially salutary on conduct of a party, but that is not "regulation."

There was total agreement that Daubert is not being forced on the states but some states are embracing it or at least parts of it because they want to

## DO YOU BELIEVE FEDERAL JUDGES AND/OR LEGISLATOR TRUST STATE JUDGES TO REACH PROPER RESULTS IN COMPLEX CLASSIFICATION?

There was a resounding no to that question.

There was a consensus that the legislators do not trust the state courts to reach proper results in complex or class litigation.

These judges did not feel that they were considered to be second-class citizens in terms of complex litigation or cross-sectional litigation by the federal judiciary for the most part, but they did feel that plays by Congress but some by their own state legislatures and definitely by the defense bar.

There was generally a sense of yes with further discussion saying that since there are all of these legislative issues, obviously some legislators are motivated by political factors and are proceeding in that fashion.

**There needs to be an education program to inform the public that 95 percent of all litigation is handled through state judges and not through the federal courts.**

They wanted to pass this on. There is a perception out there in the public that federal judges are better. They think that perhaps it comes from the fact that they have great power through legislation. They think there needs to be an education program to inform the public that 95 percent of all litigation is handled through state judges and not through the federal courts, that there needs to be education of the public so that they understand that, that there is politics in the selection of federal judges just like there is for state judges and finally,

### FEDERAL AND STATE COURTS

There is certainly a recognition that there is a tension between the perceived desirability of uniformity and consistency on the one hand and creativity of state law answers to state law questions on the other.

They thought it was illusory to think that there would be conformity by going to the federal courts because they said, “We are going to get variation from district to district anyway. So, the concept that now we are going to have conformity is just not going to work.”

They do give some deference to the federal courts but not a lot.

They also felt that there was no real need for a greater role in resolving complex or class litigation affecting the states by the Federal Government.

In terms of why one party might want to go in to federal court versus state court, there is certainly a difference in courts that require unanimity versus those that don't. There are also procedure rules that are different in the respective courts, notably the *Daubert* standard. Another reason that was discussed was the perception of how receptive one forum might be as opposed to the other.

## CONDUCT OF LAWYERS

In regard to the conduct of counsel in these multi-state complex cases the general consensus was counsel proceed very professionally and it is high-caliber attorneys that appear in these type of cases and they have the kind of disciplinary authority.

They know that attorneys will forum shop. They understand that that will occur. They don't have a problem with that. They believe that they have to be vigilant to discourage it but they understand that people are going to try to go to the court that gives their client the best shot on either side.

# Appendices

## PARTICIPANT BIOGRAPHIES

### Paper Presenters

**Professor Georgene M. Vairo** is the William M. Rains Fellow and teaches law at Loyola Law School, in Los Angeles. She teaches courses on civil procedure, complex litigation, mass tort litigation, and federal courts. She received her B.A. from Sweet Briar College, a M.Ed., with distinction, from the University of Virginia, and a J.D., *cum laude*, from Fordham University. She was a professor and associate dean at Fordham Law School before joining Loyola's faculty in 1995. She was a trustee and, later, chairperson of the Dalkon Shield Claimants Trust, which distributed settlement funds to women harmed by Dalkon Shield IUDs. In addition to serving as an expert in several major mass tort litigations, she is a member of the Board of Editors for *Moore's Federal Practice* and writes a monthly column on Forum Selection Problems for the *National Law Journal*. She is a member of the American Law Institute.

**Professor Wendy E. Parmet** teaches law at Northeastern University School of Law. The courses she teaches include constitutional law, health law, bioethics, disability law, and federal courts. She received a B.S. from Cornell University and a J.D. from Harvard University. She is an expert on discrimination and health law, directs the law school's JD/MPH program with Tufts University School of Medicine, and is a co-founder of the Public Health Advocacy Institute. She has written on discrimination and health law as well as AIDS law and serves on the editorial board of the *Journal of Law, Medicine and Ethics*. In 1998, Professor Parmet served as co-counsel in *Abbott v. Bragdon*, the first AIDS/HIV case to come before the US Supreme Court under the Americans with Disabilities Act.

### Luncheon Speaker

**Honorable Frank J. Williams** is Chief Justice of the Rhode Island Supreme Court. He received A.B., J.D., and LL.M. in Taxation degrees from Boston University. After serving as a solicitor and arbitrator for a number of Rhode Island towns and communities, he became a judge of probate, a member (and later chairman) of the state's board of bar examiners, and an elected delegate to the 1986 Rhode Island Constitutional Convention. He joined the Rhode Island Supreme Court after serving for nearly six years as an Associate Justice of the Superior Court. In addition to his judicial duties, he serves as an adjunct professor at Roger Williams University School of Law.

### Panelists

**John H. Beisner** practices law in Washington, D.C., where he heads the Washington office of O'Melveny & Myers and leads the firm's Class Action Practice Group. He received his

B.A. from the University of Kansas and is an honors graduate of the University of Michigan Law School. He specializes in the defense of class action, mass tort, and other complex litigation before both federal and state courts and regulatory agencies and also works in corporate crisis management. He is a member of the American Bar Association's Task Force on Class Actions and testifies frequently on class action and mass tort matters before committees of federal and state legislatures and judicial bodies. He is a member of the American Law Institute.

**Honorable John L. Carroll** is Dean and Professor of Law at Cumberland School of Law, Samford University, Birmingham, Alabama, where he teaches federal courts, civil procedure, complex litigation, and computer-based data discovery. He received his B.A. from Tufts University, his J.D., *magna cum laude*, from Samford University, and an LL.M. from Harvard University. Judge Carroll served as a United States magistrate Judge in the Middle District of Alabama for more than 14 years. Before joining the judiciary, he was the Legal Director of the Southern Poverty Law Center in Montgomery, Alabama, where he specialized in the trial of death penalty cases and conducted major class action civil rights litigation. In addition to Cumberland, he has taught law at Georgia State, Mercer, and the University of Alabama. He has been active in the Judicial Conference of the United States (the principal policy-making body for the United States Courts), serving as a member of the Conference's Advisory Committee on Civil Rules and as chair of its discovery subcommittee.

**Honorable Stanley G. Feldman** is a Justice, and past Chief Justice, of the Arizona Supreme Court. He received an LL.B. from the University of Arizona College of Law, and served as an instructor, lecturer, and adjunct professor at the University of Arizona College of Law for eight years. He is a member of the American Judicature Society.

**Patrick A. Long** practices law in Santa Ana, California. His practice includes general business litigation, insurance defense, toxic torts, professional liability, transportation and aviation law. He received a B.A. from San Diego State University and a J.D. from Southwestern School of Law. He has served the California legal community as an Examiner for the California State Bar's Disciplinary Committee, and as a Judge Pro Tem of courts in Los Angeles and Orange Counties. He is a member of the American Judicature Society and serves as Editor-in-Chief of *Verdict Magazine*, a publication for Southern California defense counsel. In 2001-2002 he serves as Secretary-Treasurer of the Defense Research Institute.

**Honorable James D. Moyer** is a *magna cum laude* graduate of Yale University, and received his J.D. with honors from the University of Virginia. His private practice emphasized civil litigation and employment law. He is a past-president of the Louisville Bar Association and was the recipient of the first Pro Bono Award from the Kentucky Bar Association. He has been a United States Magistrate Judge since April 1996, and he serves on the Committee on Federal-State Jurisdiction of the Judicial Conference of the United States.

**Robert S. Peck** Robert S. Peck is President of the Center for Constitutional Litigation, P.C., a law firm dedicated to challenging laws that impede access to justice. Mr. Peck also serves as a member of the adjunct law faculties at American University and George Washington University, where he teaches an advanced constitutional law seminar. He is president of the Supreme Court Fellows Alumni Association, a member of the Board of Overseers of the RAND Corporation's Institute for Civil Justice, the Lawyers Committee of the National Center for State Courts, and

the First Amendment Advisory Council of the Media Institute. He is also a member of the governing Council of the American Bar Association's Tort Trial and Insurance Practice Section and co-chairs the ABA's Individual Rights and Responsibilities Section's First Amendment Rights Committee. Mr. Peck is also the author of numerous books, including *Libraries, Cyberspace and the First Amendment*, *The Bill of Rights and the Politics of Interpretation* and *We the People: The Constitution in American Life*, companion volume to the award-winning public television series for which he served as project director and senior script consultant.

**Kenneth M. Suggs** practices law in Columbia, South Carolina, specializing in medical malpractice, products liability, insurance bad faith, mass torts, and general negligence law. He received his B.A. from Clemson University and his J.D., *cum laude*, from the University of South Carolina. He is a past-president of the South Carolina Trial Lawyers Association, and in 2005-06, he serves as President of the Association of Trial Lawyers of America. He is a Fellow of the American College of Trial Lawyers and a Trustee of the Roscoe Pound Institute.

**Honorable Gerald W. VandeWalle** is Chief Justice of the North Dakota Supreme Court. He holds both a B.S.C. and a J.D., *magna cum laude*, from the University of North Dakota. Before joining the state supreme court, Justice VandeWalle served for 20 years in legal positions in the North Dakota state government, including First Assistant Attorney General. He has been very active in legal affairs at the national level, having headed both the Conference of Chief Justices and the National Center for State Courts. He also is one of four state chief justices who serves on the Committee on Federal-State Jurisdiction of the Judicial Conference of the United States. In 2002, Justice VandeWalle chaired the council of the ABA's Section of Legal Education and Admissions to the Bar.

## Discussion Group Moderators

**Sharon J. Arkin** practices law in Newport Beach, California. She received her B.S. from the University of California, Riverside, and her J.D. from Western State University School of Law. Her practice is concentrated in business torts, insurance litigation (ERISA, HMOs, bad faith actions), and she has written and lectured widely on those subjects. Ms. Arkin is a Governor of the Association of Trial Lawyers of America, a past-president of the Consumer Attorneys of California, and a Trustee and Fellow of the Roscoe Pound Institute. She was a contributing author for a major business litigation treatise, *Business Torts* (Matthew Bender, 1991).

**Kathryn Clarke** is an appellate lawyer and complex litigation consultant in Portland, Oregon. She specializes in medical negligence, products liability, punitive damages, and constitutional litigation in both state and federal courts. She received a B.A. from Whitman College, an M.A. from Portland State University, and a J.D. from the Northwestern School of Law of Lewis and Clark College. She served as president of the Oregon Trial Lawyers Association in 1995-96, and is a governor of the Association of Trial Lawyers of America and a Fellow of the Roscoe Pound Institute.

**Gary M. Paul** practices law in Santa Monica, California, specializing in products liability, professional malpractice, business torts, insurance bad faith, and class actions. He received a B.S. in engineering from Arizona State University and an M.S. in engineering from UCLA, and worked for 10 years as a missile and space engineer before attending Loyola Law School, Los Angeles. He has served as President of the California Trial Lawyers Association and is co-author of a five-volume treatise, *California Tort Practice Guide* (Clark Boardman & Callaghan, 1995). He is Vice-President of the Roscoe Pound Institute and a member of the Board of Governors of the Association of Trial Lawyers of America.

**Ellen Relkin** practices law in New York City, where she concentrates on pharmaceutical products liability, toxic torts, medical malpractice, and women's health issues. She received her B.A. from Cornell University and her J.D. from Rutgers University, where she served as executive editor of the *Women's Rights Law Reporter*. She is a member of the American Law Institute and a Fellow of the Roscoe Pound Institute.

**Herman J. Russomanno** practices law in Miami, Florida. He received his B.A., *magna cum laude*, from Rutgers University, and his J.D. from Cumberland School of Law of Samford University in Birmingham, Alabama. He has served as President of the Florida Bar and as a member of the American Bar Association's House of Delegates. He is a Fellow of the American College of Trial Lawyers and Treasurer of the Roscoe Pound Institute.

**Gerson Smoger** practices law in Oakland, California, and Dallas, Texas, with a concentration in environmental and toxic tort cases. He served as lead counsel in the Times Beach, Missouri, toxic pollution litigation, and represented a group of veterans' service organizations as *amici*, contesting the Agent Orange class action settlement before the U.S. Supreme Court in 1994. He has lectured on litigation and environmental subjects throughout the United States (including at the National Judicial College in Reno, Nevada) and in Russia, Austria, and Vietnam. He has served as a Governor of the Association of Trial Lawyers of America, and is a Fellow of the Roscoe Pound Institute and Chair of its Environmental Law Essay Contest Committee.

## Forum Moderator

**Mark S. Mandell** practices law in Providence, Rhode Island. He received his B.A. from the University of Alabama and his J.D. from Georgetown University Law Center. From 2001-03, he was the President of the Roscoe Pound Institute, and he continues to serve as a Trustee of the Institute. He has served as President of the Rhode Island Bar Association and as chair of the Federal Board of Bar Examiners for the U.S. District Court for the District of Rhode Island. He is a member of both the American Law Institute and the American Judicature Society, and is a past-president of the Association of Trial Lawyers of America.

## **JUDICIAL ATTENDEES**

### **Alabama**

Honorable Eddie Hardaway, Circuit Judge, Marengo County  
Honorable Tennant M. Smallwood, Circuit Judge, Jefferson County

### **Arizona**

Honorable Stanley Feldman, Justice, Supreme Court (panelist)

### **California**

Honorable Lawrence Crispo, Judge, Superior Court  
Honorable Malcolm Mackey, Judge, Superior Court  
Honorable Thomas I. McKnew Jr., Judge, Superior Court  
Honorable James M. Sutton Jr., Judge, Superior Court

### **Connecticut**

Honorable Antoinette Dupont, Judge, Appellate Court

### **Florida**

Honorable Ronald M. Friedman, Circuit Judge, Eleventh Judicial Circuit  
Honorable Mario P. Goderich, Judge, Court of Appeal, Third District  
Honorable Robert L. Shevin, Judge, Court of Appeal, Third District  
Honorable Edward F. Threadgill Jr., Judge, Court of Appeal, First District  
Honorable Peter D. Webster, Judge, Court of Appeal, Second District

### **Georgia**

Honorable Anne Elizabeth Barnes, Judge, Court of Appeals  
Honorable M. Yvette Miller, Judge, Court of Appeals  
Honorable Leah Ward Sears, Justice, Supreme Court

### **Hawaii**

Honorable Simeon R. Acoba Jr., Associate Justice, Supreme Court  
Honorable Steven Levinson, Associate Justice, Supreme Court  
Honorable Paula A. Nakayama, Associate Justice, Supreme Court  
Honorable Mario R. Ramil, Associate Justice, Supreme Court

### **Illinois**

Honorable Calvin C. Campbell, Presiding Justice, Appellate Court, First District, Division Six  
Honorable Shelvin Louise Marie Hall, Presiding Justice, Appellate Court, First District,  
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Honorable Allen Hartman, Justice, Appellate Court, First District, Division Five  
Honorable Jill McNulty, Justice, Appellate Court, First District, Division Two  
Honorable Alexander P. White, Circuit Judge, Cook County

### **Iowa**

Honorable Rosemary Shaw-Sackett, Chief Judge, Court of Appeals

Honorable Gary Wenell, Judge, District Court

### **Kansas**

Honorable Daniel A. Duncan, Judge, Wyandotte County District Court

Honorable Gerald T. Elliott, Judge, Tenth Judicial District

### **Kentucky**

Honorable John William Graves, Justice, Supreme Court

Honorable Joseph R. Huddleston, Judge, Court of Appeals

Honorable Thomas J. Knopf, Judge, Court of Appeals

Honorable James D. Moyer, U.S. Magistrate Judge, U.S. District Court for Western District of Kentucky (panelist)

### **Maine**

Honorable Robert W. Clifford, Justice, Supreme Court

### **Maryland**

Honorable Robert M. Bell, Chief Judge, Court of Appeals

Honorable Alan M. Wilner, Judge, Court of Appeals

### **Massachusetts**

Honorable John M. Greaney, Justice, Supreme Judicial Court

### **Michigan**

Honorable William B. Murphy, Judge, Court of Appeals

### **Mississippi**

Honorable Larry Buffington, Chancery Court Judge, Thirteenth Chancery District

Honorable Oliver E. Diaz Jr., Justice, Supreme Court

Honorable Chuck Easley, Justice, Supreme Court

Honorable Robert G. Evans, Circuit Judge, Thirteenth Circuit Court

Honorable John S. Grant, III., Chancery Court Judge, Twentieth Chancery District

Honorable James E. Graves Jr., Justice, Supreme Court

Honorable Tomie Green, Circuit Judge, Hinds County

Honorable Tyree Irving, Judge, Court of Appeals

Honorable Leslie D. King, Presiding Judge, Court of Appeals

Honorable Billy Joe Landrum, Circuit Judge, Eighteenth Circuit District

Honorable Jannie M. Lewis, Circuit Judge, Holmes County

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Honorable Frank C. McKenzie Jr., Chancery Court Judge, Nineteenth Chancery District

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### **North Dakota**

Honorable Gerald W. VandeWalle, Chief Justice, Supreme Court (panelist)

### **Ohio**

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Honorable Shirley Strickland-Saffold, Judge, Court of Common Pleas

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Honorable Marian P. Opala, Justice, Supreme Court

### **Oregon**

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### FORUM UNDERWRITERS

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# About the Roscoe Pound Institute

## What is the Roscoe Pound Institute?

The Roscoe Pound Institute is a legal think tank dedicated to the cause of promoting access to the civil justice system through its programs, publications, and research grants. The Institute was established in 1956 to build upon the work of Roscoe Pound, Dean of Harvard Law School from 1916 to 1936 and one of law's greatest educators. The Roscoe Pound Institute promotes open, ongoing dialogue between the academic, judicial, and legal communities, on issues critical to protecting and ensuring the right to trial by jury. At conferences, symposiums, and annual forums, in reports and publications, and through grants and educational awards, the Roscoe Pound Institute initiates and guides the debate that brings positive changes to American jurisprudence and strives to guarantee access to justice.

## What Programs Does the Institute Sponsor?

**Annual Forum for State Appellate Court Judges**—The Annual Forum for State Appellate Court Judges brings together judges from state Supreme Courts and Intermediate Appellate Courts, legal scholars, practicing attorneys, legislators, and the media for an open dialogue about major issues in contemporary jurisprudence. The Forum recognizes the important role of state courts in our system of justice, and deals with issues of responsibility and independence that lie at the heart of a judge's work. Pound Forums have addressed such issues as secrecy in the courts, judicial independence, the jury as a fact-finder, and the use of scientific evidence. The Forum is one of the Institute's most respected programs, and has been called "one of the best seminars available to jurists in the country."

**Regional Trial Court Judges Forum**—Following the overwhelming success of the Annual Forum for State Appellate Court Judges, the Institute created a program for trial court and other judges conducted at judicial seminars around the country. In order to expand our outreach to the judicial community, this program is held in conjunction with national and regional groups working with judges. These programs feature panels comprised of judges, lawyers, and legal scholars engaging the attendees in a dialogue on important judicial issues. The Pound Institute has held regional Forums in Texas, Hawaii, and South Carolina and examined such topics as judicial independence, scientific evidence, and the secrecy in the courts.

**Law Professors Symposium**—One of the primary goals of the Roscoe Pound Institute is to provide a well-respected basis for challenging the claims made by entities attempting to limit individual access to the civil justice system. To this end, the Institute inaugurated the Law Professor Symposium, which offers an alternative to the "law and economics" programs being cultivated on law school campuses by tort reformers; it seeks to develop a new school of thought emphasizing the right to trial by jury and to provide a fertile breeding ground for new research supportive of the civil justice system. The Institute held its first Symposium on

the subject of mandatory arbitration in conjunction with Duke University Law School in October, 2002. The papers from the 2002 Symposium appear in a special issue of the Duke law journal, *Law and Contemporary Problems* [67 LAW & CONTEMPORARY PROBLEMS (2004)]. The Pound Institute held its Symposium in 2005 on medical malpractice at Vanderbilt Law School, and the papers from that program will appear in the Vanderbilt Law Review in 2006.

**Research**—The Institute actively promotes research through grants to scholars and academic institutions, as well as through in-house scholarship. We have sponsored academic research on soft-tissue injury cases, juror bias, and the contribution that lawyers make to the economy. Our goal is to ensure that first-rate, respected, and useful research is conducted on the civil justice system.

***Civil Justice Digest***—The *Civil Justice Digest* was created to alert judges and law professors to information and scholarship that supports the utility of the civil justice system or counters negative campaigns against it. Through the *CJD* we seek to provide a sophisticated readership of judges and law professors with information and commentary on current issues affecting the civil justice system, including material that debunks the myths of a jury system run amok. The *CJD* is distributed without charge to more than 10,000 federal and state judges, law professors, and law libraries. If you would like to be on the mailing list for *CJD*, please e-mail us at [pound@roscoepound.org](mailto:pound@roscoepound.org).

**Law School Awards**—The Pound Institute annually presents three law school awards which recognize individuals whose accomplishments serve to further the cause of justice: The **Elaine Osborne Jacobson Award** was established in 1991 to recognize women law students with an aptitude for, and commitment to, a career of advocacy for the health care needs of women, children, the elderly, and disabled persons; the **Richard S. Jacobson Award for Teaching Trial Advocacy** recognizes outstanding law professors who exemplify the best attributes of the trial lawyer: teacher, mentor, and advocate; the **Roscoe Hogan Environmental Law Essay Contest** is designed to develop law student interest and scholarship in environmental law and serves to provide law students with the opportunity to investigate and offer solutions to the multitude of injustices inflicted on the environment.

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## PAPERS OF THE ROSCOE POUND INSTITUTE

### Reports of the Annual Forum for State Court Judges

2001 • *The Jury as Fact Finder and Community Presence in Civil Justice*. Report of the ninth Forum for State Appellate Court Judges. Discussions include the behavior and reliability of juries, empirical studies of juries, efforts to blindfold the jury, the history of the civil jury in Britain and America, the treatment of juries by appellate courts, how juries judge cases in comparison to other fact finders, and possible future approaches to trial by jury in the United States. (Price per bound copy-\$40)

2000 • *Open Courts with Sealed Files: Secrecy's Impact on American Justice*. Report of the eighth Forum for State Appellate Court Judges. Discussions include the effects of secrecy on the rights of individuals, the forms that secrecy takes in the courts, ethical issues affecting lawyers agreeing to secret settlements, the role of the news media in the debate over secrecy, the tension between confidentiality proponents and public access advocates, and the approaches taken by various judges when confronted with secrecy requests. (Price per bound copy-\$40)

1999 • *Controversies Surrounding Discovery and Its Effect on the Courts*. Report of the seventh Forum for State Appellate Court Judges. Discussions include the existing empirical research on the operation of civil discovery; the contrast between the research findings and the myths about discovery that have circulated; and whether or not the recent changes to the federal courts' discovery rules advance the purpose of discovery. (\$40)

1998 • *Assaults on the Judiciary: Attacking the "Great Bulwark of Public Liberty."* Report of the sixth Forum for State Appellate Court Judges. Discussions include threats to judicial independence through politically motivated attacks on the courts and on individual judges as well as through legislative action to restrict the courts that may violate constitutional guarantees, and possible responses to these challenges by judges, judicial institutions, the organized bar, and citizen organizations. (\$40)

1997 • *Scientific Evidence in the Courts: Concepts and Controversies*. Report of the fifth Forum for State Appellate Court Judges. Discussions include the background of the controversy over scientific evidence; issues, assumptions, and models in judging scientific disputes; and the applicability of the *Daubert* decision's "reliability threshold" under state law analogous to Rule 702 of the Federal Rules of Evidence (Only available in electronic format at [www.roscoepound.org](http://www.roscoepound.org)). (Free)

1996 • *Possible State Court Responses to the American Law Institute's Proposed Restatement of Products Liability*. Report of the fourth Forum for State Appellate Court Judges. Discussions include the workings of the ALI's Restatement process; a look at several provisions of the proposed Restatement on products liability and academic responses to them; the relationship of ALI's proposals to the law

of negligence and warranty; and possible judicial responses to suggestions that the ALI's recommendations be adopted by the state courts. (\$35)

1995 • *Preserving Access to Justice: The Effect on State Courts of the Proposed Long Range Plan for Federal Courts*. Report of the third Forum for State Court Judges. Discussions include the constitutionality of the Federal courts' plan to shift caseloads to state courts without adequate funding support, as well as the impact on access to justice of the proposed plan. (\$35)

1993 • *Preserving the Independence of the Judiciary*. Report of second Forum for State Court Judges. Discussions include the impact on judicial independence of two contemporary issues: judicial selection processes and the resources that are available to the judiciary. (\$35)

1992 • *Protecting Individual Rights: The Role of State Constitutionalism*. Report of the first Forum for State Court Judges in which more than 100 judges of the state supreme and intermediate appellate courts, lawyers, and academics discussed the renewal of state constitutionalism on the issues of privacy, search and seizure, and speech, among others. Also discussed was the role of the trial bar and academics in this renewal. (\$35)

To order hard copies of previous Forum Reports, please submit a request via e-mail to [pound@roscoepound.org](mailto:pound@roscoepound.org), or by regular mail to the address below:

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