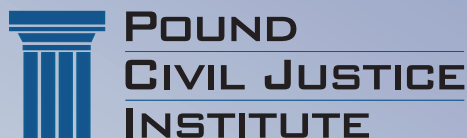


# STILL COEQUAL?

## STATE COURTS, LEGISLATURES, AND THE SEPARATION OF POWERS



*Report of the 2004 Forum for  
State Appellate Court Judges*



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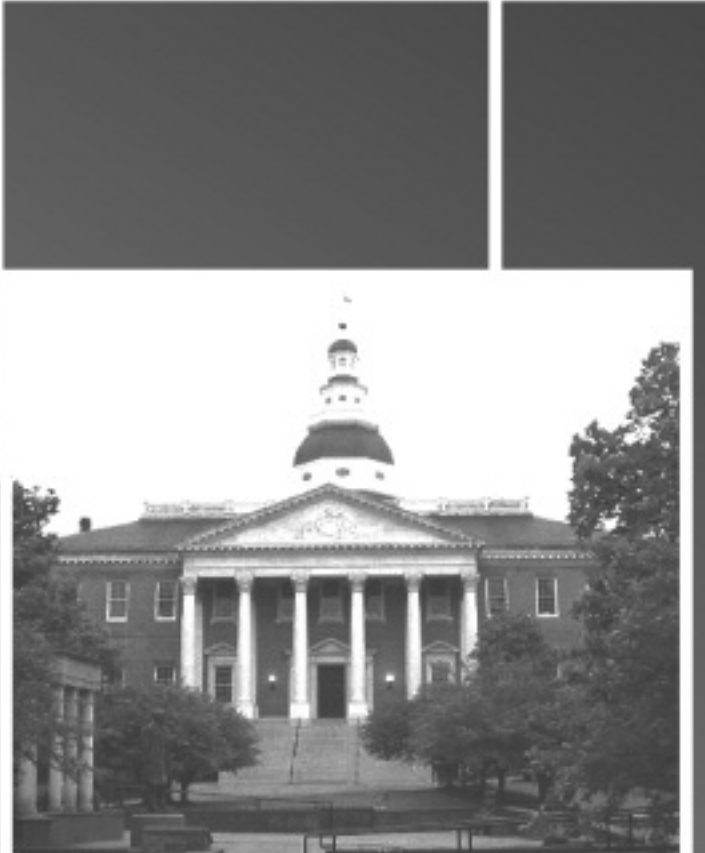
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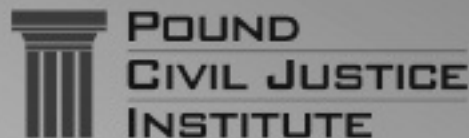


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State Appellate Court Judges*



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# Foreword

The Roscoe Pound Institute's (presently known as the Pound Civil Justice Institute) twelfth annual Forum for State Appellate Court Judges was held in July 2004, in Boston, Massachusetts. Continuing the standard of excellence that has marked our previous Forums, it featured outstanding scholars and panelists who examined the sometimes contentious relationship between state courts and their legislative counterparts. During the program, judges, scholars, and attorneys engaged in an intellectual and pragmatic debate over the impact of state legislature encroachment into the judicial realm and the appropriate deference state courts should show legislatures when reviewing legislation's constitutionality.

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 participate in a dialogue devoted to a timely issue, held on 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 Forums have examined such important topics as the rise of mandatory arbitration, state courts and federal authority, the jury in civil justice, judicial independence, the scientific evidence controversy, and secrecy in the courts. We are justifiably proud of our Forums and are gratified by the increasing attendance we have experienced since their inception, as well as the very positive feedback from attending judges.

The Pound Institute is indebted to many people for the success of the 2004 Forum for State Court Judges:

- Professor Robert F. Williams, of the Rutgers University School of Law-Camden, and Professor Helen Hershkoff, of the New York University School of Law, who wrote the papers that started our discussions;
- Our panelists: Honorable John M. Greaney, Honorable Steven H. Levinson, Sharon J. Arkin, Kathryn H. Clarke, Stephen Daniels, F. Drake Lee, Robert S. Peck, Edwin M. Speas;
- Our luncheon speaker, Honorable Herbert P. Wilkins, Chief Justice (retired), Massachusetts Supreme Judicial Court;
- 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 Pound Civil Justice Institute, and his staff, Marlene Cohen and LaJuan Campbell, for developing and running the Forum, and publishing and distributing this report.

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 that you enjoy reviewing this report and that you will find it useful when considering the how the separation of powers protects the right to trial by jury in the state courts.

**Richard H. Middleton Jr.**

President  
Roscoe Pound Institute  
2003-2005

**Gary M. Paul**

President  
Pound Civil Justice Institute  
2006-2007



# Introduction

One hundred forty-three judges, representing 39 states, took part in the Pound Institute's 2004 Forum for State Appellate Court Judges, held on July 3, 2004, in Boston, Massachusetts. They listened to presentations based on original papers written for the Forum by Professor Robert F. Williams, Rutgers University School of Law-Camden ("Keeping Co-Equal: State Court Responses to Legislative Encroachment"), and Professor Helen Hershkoff of New York University School of Law ("Lawmaking and Judicial Review: What Degree of Deference Should State Courts Give to Legislative Findings?"). Each presentation was followed by a panel discussion with distinguished commentators, followed by judges breaking into small groups to talk about the issue. A break between the morning and afternoon sessions provided time for lunch and a talk by the Honorable Herbert P. Wilkins, former Chief Justice of Massachusetts.

Responding to Professor Williams's paper were Sharon J. Arkin, a plaintiff lawyer from Newport Beach, California; Robert S. Peck, an appellate attorney from Washington, D.C.; Edwin M. Speas, an attorney from Raleigh, North Carolina; and the Honorable John M. Greaney, an Associate Justice on the Massachusetts Supreme Judicial Court.

Responding to Professor Hershkoff's paper were Kathryn H. Clarke, a plaintiff attorney from Portland, Oregon; Dr. Stephen Daniels, a researcher with American Bar Foundation in Chicago, Illinois; F. Drake Lee, a defense attorney from Shreveport, Louisiana; and the Honorable Steven H. Levinson, an Associate Justice on the Hawai'i 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 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. Judges, when identified, are only identified at the level of specificity of the region of the country they were from, i.e., "a Mid-western state" or a "southern state."

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.

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

**Richard H. Marshall, Ph.D.**

**Editor**

**Executive Director, Pound Civil Justice Institute**



# Papers, Oral Remarks, and Comments

## KEEPING COEQUAL: STATE COURT RESPONSES TO LEGISLATIVE ENCROACHMENT

**Robert F. Williams**

**P**rofessor Robert Williams begins his paper by reviewing the historical background of separation of powers issues relating to the state judiciary. In the early post-colonial years, state constitutions gave more power to legislatures than they did to the courts. The nineteenth century saw constitutional revisions that strengthened both the executive and judicial branches. In part II, Professor Williams distinguishes federal separation of powers doctrines from state doctrines, and also points out that different states have widely divergent arrangements for their governments in general and for their judiciaries in particular. Scholars have observed numerous differences between the state and federal judiciaries—differences that often give state courts more power within their spheres than federal courts have.

In part III, Williams utilizes an analysis in which the exercise of judicial power is based either on “freestanding” judicial power (the general power of the state’s courts within the state’s constitutional structure) or on “specific” grants of authority to the courts under the state’s constitution. Additionally, separation of power controversies can be addressed either “formally” or “functionally.” A formal approach emphasizes strong, substantive, “pure” separation of the powers of the branches of government, and analyzes alleged encroachments on judicial authority in ways that some critics believe yield “mechanical” results. The functional approach allows considerable judicial discretion in reaching a conclusion as to whether there has been encroachment and may tolerate technical encroachments if they cause no harm. Professor Williams then looks at a number of specific examples of the exercise of judicial power—both freestanding and specific. Among examples of the use of freestanding judicial power he cites are recent decisions striking down tort revision statutes in Illinois and Ohio. As examples of the use of specific powers provided to courts by their constitutions, Williams cites decisions striking down tort revision legislation under state constitutional provisions on citizens’ right to judicial remedies and to trial by jury.

In part IV, Professor Williams discusses five specific techniques state courts have used in defending against encroachments on their powers: declaring a legislative or executive act unconstitutional; *sua sponte* action by the court when it observes an action it considers unconstitutional; employing limited statutory interpretation; exercising its own judicial power to reach the same practical result as would a perceived encroachment; and, enforcement of judgments, sometimes by exerting their authority to seize government property and order it sold.

In his conclusion, Professor Williams emphasizes the tensions that can be caused by the courts’ right and duty to protect their constitutional authority. The courts’ actions with regard to revisions to the tort law system provide good examples. Courts should approach conflicts over their power carefully, Williams warns, but they also must be prepared to defend their authority. The liberty of their citizens depends upon the choice they make.

## I. Introduction

It is no surprise that after more than two centuries, the judicial and legislative branches of state government still regularly find themselves at odds over the precise boundaries of their respective authority. These questions will never be settled, and they probably reflect a natural consequence of the tension inherent in our widely envied distribution of powers scheme. Interestingly, however, a state judicial branch has the last word, short of an amendment to a state constitution, in such controversies.

The courts, of course, did not begin as a coequal branch of government under the original state constitutions. It is well known that the early state constitutions, although often textually recognizing the doctrine of separation of powers, favored the legislative branch.<sup>1</sup> James Madison observed in the Constitutional Convention that under the state constitutions, “[e]xperience had proved a tendency in our governments to throw all power into the Legislative vortex.”<sup>2</sup>

In Pennsylvania, for example, justices of the state supreme court under the 1776 Constitution “though appointed for a seven-year term at a fixed salary, could be removed by the legislature at any time for ‘misbehavior.’”<sup>3</sup> Final judgments of the Pennsylvania courts were regularly overturned by the legislature. Under New Jersey’s 1776 Constitution, the court of last resort was the upper house of the legislature, providing *political* review of *legal* judgments, and judges were selected by the legislature.<sup>4</sup> In sharp contrast, we find the ringing words of the 1780 Massachusetts Declaration of Rights, which are still relevant today:

**Art. XXIX.** It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit. It is, therefore, not only the best policy, but for the security of the rights of the people, and of every citizen, that the judges of the supreme judicial court should hold their offices as long as they behave themselves well, and that they should have honorable salaries ascertained and established by standing laws.

Bringing the other two branches to some form of parity, or at least bringing them closer to being “co-equal” with the legislature, would continue to occupy state constitutional framers for at least the next century.<sup>5</sup> As the state constitutions were revised over time, not only was the executive branch strengthened to enable it to stand up to the legislature, but the judicial branch was similarly strengthened for the same reason. The primary motivation, for example, behind the move to an elected judiciary between 1840 and 1860 was to enable the judges to check the still powerful, party-dominated state legislatures to protect property and individual rights.<sup>6</sup>

One of the most important elements of the development of independent state judicial power was the advent of judicial review in the states many years before *Marbury v. Madison*.<sup>7</sup> State courts had declared statutes unconstitutional under their own state constitutions as early as 1780.<sup>8</sup> This power of judicial review evolved to provide some of the checks and balances necessary to put teeth into separation-of-powers rhetoric. The state constitutions were periodically amended to impose limits on state legislatures, both procedural and substantive, and the state courts became the enforcers of these limits.<sup>9</sup>

The power to regulate the admission to the bar and the practice of law were claimed by some courts as an inherent power.<sup>10</sup> Also, after the turn of the twentieth century, a number of academic commentators and courts began to assert that it was within the courts' inherent judicial power to regulate practice and procedure in the courts.<sup>11</sup>

## II. State Constitutional Separation of Powers

Several important starting points must be recognized in evaluating state legislative encroachments on state judicial power. First, the states are under virtually no federal constitutional mandates with respect to the details of their governmental arrangements. Therefore, *federal* separation of powers doctrines developed by the United States Supreme Court, particularly with respect to judicial resistance to legislative encroachment, may be of little value in deciding what seem on the surface to be quite similar *state* constitutional separation of powers questions.<sup>12</sup> The state decisions on these matters (“horizontal federalism”) will be much more relevant than will the federal decisions (“vertical federalism”). Also, the states' individual arrangements concerning their internal distribution of power *among* the branches may differ substantially. Therefore, the specific details of the arrangements within each state's government structure must be analyzed as part of any state separation of powers analysis.<sup>13</sup> Finally, it must be remembered that the structure of the judicial branch *within* each state's judicial article will be substantially different among the states.<sup>14</sup> Even the states' constitutional separation of powers provisions may differ.

The modern state judiciary, therefore, differs from state to state, and state judicial branches are quite different from the federal judiciary.<sup>15</sup> Some of the most significant state-federal distinctions arise, as pointed out by former Oregon Justice Hans Linde, from the state courts':

- retention of broad common-law powers of lawmaking;
- day-to-day involvement in the administration of the great majority of criminal cases;
- greater involvement with the litigation of a wide range of issues that cannot be heard in federal courts because of the political question doctrine, as well as the standing, ripeness and mootness doctrines;
- power to regulate the practice of law and practice and procedure in the courts—both important issues with some public visibility;
- frequent requirement that judges are either elected or retained by some form of popular vote—possibly leading them to feel less constrained, as elected “representatives,” in expressing policy views;
- close proximity to their legislatures; and
- power, in some states, to render advisory opinions.<sup>16</sup>

In many very real respects, state courts are in fact more powerful within their spheres than are federal courts.

As important as the “protection” of one branch from another is, in this case the protection of the judiciary from the legislature, the underlying goal of judicial enforcement of separation of powers principles is not the protection of judges themselves, but rather the liberty of the citizens, “protecting individuals from the dangers of arbitrary government.”<sup>17</sup> Sometimes one branch seeks to *cede* authority to

**When judicial power is at stake, legislative encroachment calls for judicial defense.**

another branch, such as when the legislature seeks to delegate its power to the executive.<sup>18</sup> Alternatively, one branch, such as the legislature, may seek to *intrude* or encroach upon another branch’s powers. Encroachment is the more disturbing of the two types of problems, and is closer to the “legislative vortex” phenomenon observed in action during the Revolutionary period

and in subsequent years. The New Jersey Supreme Court has stated that encroachment problems require much greater judicial scrutiny than do abdication problems.<sup>19</sup> When judicial power is at stake, legislative encroachment calls for judicial defense.

### III. Defending State Judicial Power

In analyzing judicial power under modern state constitutions, Professor Adrian Vermeule of the University of Chicago has made a very important distinction between “freestanding judicial power” and “specific constitutional provisions that protect or regulate the judiciary’s authority and jurisdiction.”<sup>20</sup> The former category is the general concept of judicial power arising from a state constitution’s assignment of this power to the courts in the judicial article. The latter category covers the more specific state constitutional grants of authority to the judiciary, such as the court rulemaking power, the power to regulate the practice of law, and the prohibition on reducing judicial compensation.

There are two ways of looking at separation-of-powers controversies: formal or functional. As one scholar has explained, “[t]he formalist approach is committed to strong substantive separations between the branches of government, finding support in the traditional expositions of the theme of ‘pure’ separated powers, such as the maxim that ‘the legislature makes, the executive executes, and the judiciary construes the law.’”<sup>21</sup> Formalism in this regard has been criticized as yielding mechanical outcomes, but supporters note it provides the benefit of bright-line rules.<sup>22</sup>

The alternative to the formalist approach is a functionalist analysis:

In contrast, advocates of the “functionalist” approach urge the Court to ask a different question: whether an action of one branch interferes with one of the core functions of another . . . . The functionalist view follows a different strand of separation-of-powers tradition from that of the formalists: the American variant that stresses not the independence, but the interdependence of the branches.<sup>23</sup>

The functionalist approach seems to permit much more judicial discretion than the formalist approach.<sup>24</sup> The functionalist judge attempts to assess whether there is any actual harm arising from an alleged encroachment. Even if there is a minor encroachment, the functionalist judge will tolerate it if there is no resulting harm. The formalist judge evaluates encroachment claims based on a more abstract, conceptual view of what constitutes “judicial power.” Obviously, there is not a clear line of demarcation between these approaches.

The argument had been made that what has been called the functional approach would be insufficiently protective of judicial power because “case-specific balancing,”<sup>25</sup> where the specifics of the legislative policy are weighed against the allegedly conflicting judicial power, would often compromise judicial power in deference to an urgent legislative public policy. As Professor Vermeule put it:

The short-term benefits of “innovative action” would predictably appear far more appealing to the judges, in the setting of particular cases, than the seemingly abstract and speculative benefits of judicial independence.<sup>26</sup>

This paper will now survey examples of the defensive use of freestanding and specific judicial power, both from the formal and functional point of view. Some of these examples were also analyzed by Professor Vermeule.

## **A. FREESTANDING JUDICIAL POWER**

### **1. Tort Reform**

Most litigation over tort reform legislation arises under specific state constitutional provisions such as right to remedy clauses, jury trial rights, etc.<sup>27</sup> But tort reform cases from, for example, Illinois<sup>28</sup> and Ohio,<sup>29</sup> asserted freestanding judicial power claims. The Illinois court struck down a statutory damages cap on the alternative ground that it infringed on the case-by-case judicial power of remittitur.<sup>30</sup> The Ohio court struck down a statute containing a variety of reenacted tort reform measures that had already been invalidated by the court in earlier cases.<sup>31</sup> The new statute stated that the legislature “respectfully disagree[s]”<sup>32</sup> with the prior decisions, which the court saw as a legislative attempt to tell the courts to “treat as valid those laws which are unconstitutional.”<sup>33</sup> The court treated the reenactments as a direct attack on its judicial authority.

Also in the tort reform context, there are a few state cases striking down statutory changes in procedural or evidentiary rules, not on the basis of specific constitutional allocations of judicial powers, but on freestanding judicial powers claims. An Alabama case struck down a statute purporting to require de novo review by trial and appellate courts of all punitive damage awards. The court viewed the statute as interfering with the existing presumption-of-correctness approach the courts had applied prior to the statute.<sup>34</sup>

### **2. Statutes Altering The Effect of Judgments**

A Pennsylvania court struck down a statute authorizing defendants given heavy sentences for marijuana possession to apply for lesser sentences.<sup>35</sup> The court saw this as an interference with the judicial power of sentencing. This same issue, legislative alteration of final judgments, is currently being raised in the Terri Schiavo litigation in Florida. After a court order was entered authorizing the discontinuance of life support for Ms. Schiavo, and the exhaustion of all appeals, the Florida Legislature passed a statute (“Terri’s Law”) purporting to authorize the governor, by executive order, to require the resumption of life support (in effect, an executive order “staying” the judge’s order allowing discontinuation of life support).

A Florida trial judge recently declared “Terri’s Law” unconstitutional on a number of grounds, including encroachment on judicial power.<sup>36</sup> The judge stated:

The executive order, in effect, reversed a properly rendered final judgment outright, thereby constituting a forbidden encroachment upon the power that has been reserved for the independent judiciary in contravention of the separation-of-powers doctrine.<sup>37</sup>

### 3. Inherent Judicial Power to Compel Funding

Another assertion of freestanding judicial power arises in state court decisions asserting the inherent power to compel funding for necessary judicial functions. Among the best known is another case from Pennsylvania.<sup>38</sup> In this case, the Pennsylvania court stated that, faced with what it considered to be inadequate funding from a county for the operation of a trial court, “[T]he judiciary *must possess* the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities. . . .”<sup>39</sup> A more recent example is a West Virginia decision ordering a county to designate parking spaces for the exclusive use of judicial personnel.<sup>40</sup> Major litigation in New York over judicial funding was settled.<sup>41</sup>

**The judiciary *must possess* the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities.**

### 4. Sentencing

It is commonly understood that it is within the legislature’s plenary power to set the sentences for classes of crimes. On the other hand, although there are no specific constitutional provisions, actual imposition of a sentence upon a finding of guilt is viewed as a judicial function.

The legislatures in various states developed mandatory minimum sentencing and crime classification statutes in the 1960s and 1970s giving discretionary authority to prosecutors. This gave prosecutors extraordinary bargaining power in plea negotiations, because they were the only avenue through which a defendant could avoid imposition of the mandatory sentence or the risk of being charged with a higher classification of offense. For example, in California, a statute provided that certain offenses could be classified by the court as misdemeanors with the consent of the prosecuting attorney. This statute was challenged as an unconstitutional legislatively authorized executive encroachment on judicial power in *Esteybar v. Municipal Court*.<sup>42</sup>

In *Esteybar*, the defendant was charged with first-offense marijuana possession, which could be treated as either a felony or a misdemeanor. The prosecutor, citing the statute, refused to consent to the case being handled as a misdemeanor unless the defendant pled guilty, thus raising the constitutional separation-of-powers issue.<sup>43</sup> The California Supreme Court, relying on earlier related precedent,<sup>44</sup> struck down the statute as a separation-of-powers violation because the exercise of a judicial power (even granted by statute) could not require the judge to “bargain with the prosecutor.”<sup>45</sup> The court rejected the state’s claim that this was an exercise of the executive charging power, concluding that, “when a decision to prosecute has been made, the process which leads to acquittal or to sentencing is fundamentally judicial in nature.”<sup>46</sup> Clearly the California court saw the encroachment on judicial power as an actual threat to the liberty of the people to such an extent that even functionalist judges would be concerned.



The Florida Supreme Court, by contrast, upheld a drug statute imposing a mandatory minimum sentence for certain drug offenses, subject to an “escape valve” pursuant to which the prosecutor could request a reduced or suspended sentence if the defendant cooperated with law enforcement.<sup>47</sup> The court, relying on a New York decision upholding a similar statute, concluded that “[s]o long as a statute does not wrest from the courts the *final* discretion to impose sentence, it does not infringe upon the constitutional division of responsibilities.”<sup>48</sup>

The New Jersey Supreme Court adopted a middle-of-the-road approach when confronted with a similar drug statute purporting to authorize the prosecutor to invoke a mandatory minimum sentence provision for repeat drug offenders, “notwithstanding that extended terms are ordinarily discretionary with the court.”<sup>49</sup> The court noted that the separation-of-powers doctrine was intended to “prevent the concentration of *unchecked* power in the hands of any one branch.”<sup>50</sup> Responding to the statute’s purported assignment of unreviewable discretion to prosecutors, the court determined the statute “*would be* unconstitutional,”<sup>51</sup> but that the legislature “did not intend to circumvent the judiciary’s power to protect defendants from arbitrary application of enhanced sentences.” The New Jersey Supreme Court interpreted the statute to require guidelines for the exercise of this prosecutorial discretion to be adopted, reasons for prosecutors’ decisions to be stated on the record, and judicial review of such decisions.<sup>52</sup> The court has applied this same saving judicial interpretation to other, similar statutes.<sup>53</sup>

## B. SPECIFIC JUDICIAL POWER

By contrast to the “freestanding” judicial power emanating from the state constitutional grant of judicial power to the judiciary, there are also a number of specific judicial powers contained in state constitutions. These types of provisions, such as those granting court rulemaking authority or the power to regulate the bar, pose a different, more textually focused, kind of separation-of-powers issue.

### 1. Tort Reform

As noted above, most tort reform litigation has been brought under specific, rather than freestanding judicial power provisions in state constitutions.<sup>54</sup>

**Right to remedy.** Thirty-nine state constitutions guarantee that “the courts shall be open” to provide a remedy for injuries.<sup>55</sup> These provisions, by their texts, apply directly to the courts. Many states have applied these clauses to invalidate statutes that abolish or severely curtail common-law remedies without providing some kind of reasonable alternative remedy. While this approach is not without its critics,<sup>56</sup> state courts have applied the clause to invalidate a wide variety of statutes. For example, when the Florida legislature abolished property damage claims for automobile owners who did not purchase comprehensive insurance coverage, providing no alternative remedy, the Florida Supreme Court struck down that section of the state’s No-Fault Automobile Insurance Act.<sup>57</sup>

The Oregon Supreme Court applied the right-to-remedy doctrine in a case involving the state workers’ compensation statute. The statute had a typical “exclusive remedy” provision, coupled with an additional requirement that for an injury to be compensable, a work-related incident had to be a major contributing cause of such injury.<sup>58</sup> Where a worker could not meet that high standard, the act provided no remedy at all. The court invalidated this restriction because the statute provided no alternative remedy for an injury that was cognizable in 1857 when the remedy guarantee was adopted.<sup>59</sup>

**Civil jury trial rights.** A number of state courts have invalidated state statutory caps on damages as violating plaintiffs’ right to a jury trial. For example, the Alabama Supreme Court struck down a \$1 million cap on damages against health care providers.<sup>60</sup> The Alabama Court held that, because the state’s wrongful death cause of action, with no limitation on damages, existed in 1901 when the state constitutional jury trial guarantee was adopted (stating that the “right to jury trial shall remain inviolate”),<sup>61</sup> the constitutional provision “froze” the claim as it then existed.<sup>62</sup> The Oregon Supreme

Court reached a similar result, also concluding that assessment of damages was a question of fact reserved for the jury.<sup>63</sup>

**If government is to serve the people, each branch must seek to cooperate fully with the other two.**

These kinds of specific provisions are directed not only to the exercise of judicial power, they also guarantee individual rights at the same time. It is for this reason that tort

reform and other decisions based on specific judicial power provisions (which also guarantee rights) may appear to the public to be more legitimate and grounded in constitutional law than those based on freestanding judicial power provisions (which do not appear, by their specific terms, to guarantee rights).

## **2. Rules of Practice and Procedure**

To the extent that state constitutions now assign to the judiciary the power to promulgate rules of practice and procedure, conflicting statutes enacted by the legislature arguably constitute an unconstitutional encroachment on specifically enumerated judicial power. For example, in the 1950 New Jersey case of *Winberry v. Salisbury*,<sup>64</sup> the court struck down a statute on the timing of appeals that was in direct conflict with a court rule. Concluding that the matter was clearly concerned with “practice and procedure,” the court invalidated the conflicting statute but indicated that it would “not make substantive law wholesale through the exercise of the rulemaking power.”<sup>65</sup> Many years later, in 1973, the court upheld its own rule providing for prejudgment interest.<sup>66</sup> Against an argument that this was substantive, the court noted that the procedure/substance dichotomy was very unclear, there was no conflicting statute as there had been in *Winberry*, and because the court could make substantive law in its adjudicatory role, there should be no complaint when it arguably did so through rulemaking.<sup>67</sup>

In the converse situation, where the legislature enacted an arguably procedural rape shield law, and there was no conflicting court rule, the Colorado Supreme Court noted that this was a “mixed” question of substance and procedure, and upheld the statute.<sup>68</sup> It stated that:

[I]f government is to serve the people, each branch must seek to cooperate fully with the other two. Confrontations of constitutional authority are seldom in the long-term public interest and therefore are to be avoided where possible. Rather, mutual understanding, respect and self-restraint, the lubricants of good government, are to be sought.<sup>69</sup>

The Florida Supreme Court has been willing to accept policy judgments embodied in legislation which, although technically unconstitutional as an incursion into the court’s rulemaking power, reflect a needed change or addition to “practice and procedure.” It does this by adopting the legislative provision as a court rule.<sup>70</sup>

### 3. Regulating the Practice of Law

A number of state constitutions now make a specific assignment of the power to regulate the practice of law to their supreme courts. Once again, statutes that conflict with the court's rules in this regard would be unconstitutional. The New Jersey Supreme Court has held that its power in this area is exclusive.<sup>71</sup>

Still, however, the New Jersey Court has indicated its willingness to uphold important legislation even if it touches on the question of attorney discipline, as it did in upholding legislative conflict-of-interest restrictions on public officials, including judges.<sup>72</sup> The Court noted that it had not spoken by rule in the area and that although it had "ultimate power" over the matter, it could "tolerate actions of other branches of government" for legitimate public policy reasons where there is minimal encroachment.<sup>73</sup> The Court distinguished the *existence* of judicial power from its *exercise*.<sup>74</sup> This was clearly a functionalist decision, concluding that no harm arose from the minimal legislative encroachment.

### IV. The Tools of Judicial Defense

From this brief survey of state court decisions resisting legislative encroachment we can see that a variety of different devices have been deployed.

**Declaration of unconstitutionality.** This is the most obvious, and possibly the most drastic tactic. We saw it in the Ohio and Illinois tort reform cases, the New Jersey rules of practice and procedure case, the California criminal offense classification case, and elsewhere. This tactic is sometimes softened by a delay in the effect of the court's mandate, affording the legislature a chance to cure the constitutional defect.

**Sua sponte "advice" of unconstitutionality.** The Pennsylvania<sup>75</sup> and Michigan<sup>76</sup> high courts used the technique of drafting and sending a letter (later published in their reporters) to the other two branches indicating that a law purporting to apply the state "open meetings" statute to the courts' rulemaking processes was viewed by the court as unconstitutional and unenforceable.

**Limiting statutory interpretation.** This approach "saves" a statute that partially encroaches on judicial power by "interpreting" it as not conflicting with judicial power, or, as an alternative, as authorizing the exercise of judicial power. We saw this in the New Jersey ("middle-of-the-road") mandatory sentencing case, and it is also a technique that has been used by state courts to keep public sector collective bargaining statutes from applying to essential judicial employees.<sup>77</sup> Although this approach often saves the bulk of the statute, it can open the court to charges of "judicial activism" or "judicial amendment" of the statute.

**Accommodating legislative encroachments through exercise of judicial power.** Utilizing this technique, state courts declare that the legislative action is arguably, or even likely, an encroachment on judicial power but acknowledge the importance of the public policy issue. They then exercise comity by upholding the statute in the absence of a conflicting court rule, as we saw in the Colorado rape-shield case and in the New Jersey conflict-of-interest casino regulation case.<sup>78</sup> Further, we saw another version of this approach in the Florida Supreme Court's approach to important statutes that arguably encroached on the judicial rulemaking power, when the court "adopted" such statutes as court rules. Either of these approaches preserves (and declares) the courts' authority and facilitates future judicial oversight over the matter. They clearly acknowledge the formal view that encroachment is arguably taking place, but adopt the functionalist view that no adverse court action will be taken if the courts' powers or the liberty of the citizens has not been harmed, at least for the time being.

**Enforcement of judgments requiring legislative appropriations.** It is often said that the courts may not order the legislature to appropriate money. Yet, when courts render decisions that require appropriations, they do have several tools.

- *Equitable remedies.* When the New Jersey Supreme Court determined that the legislature's formula for financing the public schools did not meet state constitutional standards for a "thorough and efficient" education, and the legislature refused to revise the formula to make it constitutional, the Court enjoined officials from spending funds on the schools, thus effectively shutting them down (albeit during the summer).<sup>79</sup> A number of other, similar actions have been taken by other state courts in the often-contentious school finance litigation.<sup>80</sup>
- *Levy and execution.* Even after the Massachusetts Supreme Judicial Court ruled that the legislature was required either to appropriate funds necessary to implement the voter-initiated Clean Elections Law or repeal the law,<sup>81</sup> the legislature refused to comply. In an effort to enforce its judgment awarding funds to a specific candidate, the court ordered state property, including vehicles and land, to be seized and sold to raise the required funds.<sup>82</sup>

These are representative examples of tools the courts use to defend their authority and protect their citizens' liberty from encroachment by the legislature. They are not all available in every situation. These examples do, however, illustrate the fact that sometimes there are less, as opposed to more drastic alternatives available to the courts when they must defend themselves. Judges should evaluate this range of approaches, and consider, where possible, an approach that requires a less direct collision with the legislature. This may be useful even where it appears that the legislature has sought out a direct collision with the judiciary.

## V. Conclusion

There is a tension between strict enforcement of separation of powers to *protect citizens*, based on line drawing that can never be precise, and *threats to the public interest*, as noted by the Colorado Supreme Court, that can arise from confrontations between the branches. The cases briefly reviewed here indicate that there are several middle-of-the-road approaches that are sometimes available to courts in resisting legislative (and executive) encroachment. The Colorado court sought to exercise "mutual understanding, respect and self-restraint, *the lubricants of good government*. . ."<sup>83</sup>

The coequal status of the judiciary was not easy to achieve in the states. It needs to be protected. It seems quite clear, however, that legitimacy questions can arise from the judiciary's assertion of its power of judicial review to protect its own powers. The question naturally arises, "Who judges the judges?" This legitimacy issue may appear more acute to some observers when the courts are asserting freestanding judicial power than when they are asserting specifically allocated judicial power, which is more clearly associated with citizens' rights. The possible appearance of power-seeking that can arise from a court asserting and enforcing its own authority against either the legislature or the executive should not be lost on judges. Having said that, however, protection of the judicial power is a necessary element of the separation of powers, and one of the key mechanisms of checks and balances that are used to enforce separation-of-powers mandates.

**The possible appearance of power-seeking that can arise from a court asserting and enforcing its own authority against either the legislature or the executive should not be lost on judges.**

Professor Vermeule surveyed a number of state cases purporting to exercise "freestanding judicial power" (he did not analyze specific judicial power cases), and concluded that the cases he examined reflected the courts' "paranoid style," including a "tendency to rhetorical excess, in particular a certain belligerence and defensiveness."<sup>84</sup> He further concluded that they "sweep beyond any defensible conception of judicial power."<sup>85</sup> This led him to propose that freestanding judicial power claims be considered nonjusticiable.<sup>86</sup>

Recently, Professor John Fabian Witt of Columbia Law School has reminded us there was an earlier, more plaintiff-oriented, wave of tort reform statutes toward the end of the nineteenth century and the beginning of the twentieth century. These directed reform from what would now be considered the plaintiffs' side, rather than from the defendants' side as is the case currently. These were liability laws imposed on employers and the railroads (including liability for damage caused by engine sparks and destruction of cattle) and workers' compensation statutes. The courts' actions in striking down or limiting a number of these laws brought a strong negative reaction from both the public and the legislatures and a number of political attacks on the state judiciary, particularly when they stood in the way of workers' compensation. Professor Witt issues a cautionary note about the possibility of a new backlash to the state courts currently involved with tort reform litigation.<sup>87</sup> In fact, such a backlash has already begun in some states, where major political efforts to unseat judges have been undertaken, causing judicial election costs to skyrocket.<sup>88</sup>

Professor Vermeule's nonjusticiability thesis is too drastic a remedy for the legitimacy questions that arise from the courts' enforcement of freestanding judicial power. Professor Witt's note of caution, interesting as it is, cannot form the basis for state courts backing away from their duty to interpret and apply the state constitutions' limits as they apply to the more recent wave of state "tort reform" measures. When necessary the courts must be prepared to defend themselves for the sake of their powers and for the liberty of their citizens.

## ENDNOTES

- <sup>1</sup> Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 216-19 (1989) (stating that, although states introduced separation of powers clauses into their constitutions, in reality, the legislature continued to overshadow the other branches).
- <sup>2</sup> 2 The Records of the Federal Convention of 1787, at 35 (Max Farrand ed., 2d ed. 1937); *see also* The Federalist No. 48, at 322 (James Madison) (Sherman F. Mitchell ed., 1937) (cautioning against encroachment by the legislature). *See* Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and its Influences on American Constitutionalism*, 62 TEMP. L. REV. 541, 574-75 (1989).
- <sup>3</sup> Williams, *supra* note 2, at 556.
- <sup>4</sup> ROBERT F. WILLIAMS, THE NEW JERSEY STATE CONSTITUTION: A REFERENCE GUIDE 5 (Rev. Ed 1997).
- <sup>5</sup> *See* James A. Henretta, *Foreword: Rethinking the State Constitutional Tradition*, 22 Rutgers L.J. 819, 821-26 (1991) (Annual Issue on State Constitutional Law).
- <sup>6</sup> *Id.* at 834-35.
- <sup>7</sup> 5 U.S. 137 (1803).
- <sup>8</sup> Edward S. Corwin, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 AM. HIST. REV. 521 (1925). *See generally* William E. Nelson, *The Eighteenth Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893 (1978); SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION (1990).
- <sup>9</sup> Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 48 U. PITT L. REV. 797 (1987).
- <sup>10</sup> Thomas M. Alpert, *The Inherent Power of the Courts to Regulate the Practice of Law: An Historical Analysis*, 32 BUFF. L. REV. 525 (1983); Daniel B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992); *Petition of Fla. State Bar Ass'n*, 40 So. 2d 902, 905-06 (Fla. 1949).
- <sup>11</sup> *See, e.g.*, John H. Wigmore, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally*, 23 ILL. L. REV. 276 (1928); Roscoe Pound, *The Rulemaking Power of the Courts*, 12 A.B.A.J. 599 (1926). For an in-depth consideration of the inherent power of judicial rulemaking in Mississippi, *see* William H. Page, *Constitutionalism and Judicial Rulemaking: Lessons From the Crisis in Mississippi*, 3 MISS. C. L. REV. 1 (1982); Paul B. Herbert, *Process, Procedure and Constitutionalism: A Response to Professor Page*, *id.* at 45; William H. Page, *The Legitimacy of Judicial Rulemaking: A Reply to Professor Herbert*, *id.* at 59.
- <sup>12</sup> *See generally* G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. L. 329 (2003); Lawrence Friedman, *Unexamined Reliance on Federal Precedent in State Constitutional Interpretation: The Potential Intra-State Effect*, 33 RUTGERS L.J. 1031 (2002); Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 ROGER WILLIAMS U. L. REV. 79 (1998); James A. Gardner, *The Positivist Revolution That Wasn't: Constitutional Universalism in the States*, 4 ROGER WILLIAMS U. L. REV. 109 (1998); Hon. Ellen A. Peters, *Getting Away From the Federal Paradigm: Separation of Powers in State Courts*, 81 MINN. L. REV. 1543, 1554-62 (1997) (discussing the effects of separation of powers in state courts as compared to federal courts).
- <sup>13</sup> Robert A. Schapiro, *supra* note 12; Jonathan Zasloff, *Taking Politics Seriously: A Theory of California's Separation of Powers*, 51 UCLA L. REV. 1079 (2004).
- <sup>14</sup> Jeffrey A. Parness, *Respecting State Judicial Articles*, 3 EMERGING ISSUES IN STATE CONST. L. 65 (1990); Jeffrey A. Parness, *Comparative American Judicial Systems*, 24 U. RICH L. REV. 171 (1990) [hereinafter "Comparative"].

- 15 Hans A. Linde, *Observations of a State Court Judge*, in JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 117 (Robert A. Katzmann ed., 1988).
- 16 *Id.* at 117-19. *See also* Hans A. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 248 (1972).
- 17 Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1565 (1991). *See* Robert A. Schapiro, *supra* note 12. *See also* Paul R. Verkuil, *Separation of Powers, The Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 302 (1989).
- 18 *See, e.g.*, Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederal Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167 (1999).
- 19 *See* Communications Workers of America, AFL-CIO v. Florio, 617 A.2d 223, 232 (N.J. 1992) (“Although both the giving and taking of power can be constitutional if not excessive, the taking of power is more prone to abuse and therefore warrants an especially careful scrutiny.”).
- 20 Adrian Vermeule, *The Judicial Power in the State (And Federal) Courts*, 2000 SUP. CT. REV. 357, 357 (2001).
- 21 Rebecca L. Brown, *supra* note 17, at 1523-24 (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 46 (1825)).
- 22 *See id.* at 1524-26.
- 23 *Id.* at 1527-28.
- 24 *See id.* at 1528. *See also* Vermeule, *supra* note 20, at 363-64.
- 25 Vermeule, *supra* note 20, at 365. *See also id.* at 363.
- 26 *Id.* at 368.
- 27 *See* Symposium, *Tort Reform and State Constitutional Law*, 32 RUTGERS L.J. 897 (2001). *See* Section III. B. 1. *infra*.
- 28 Best v. Taylor Machine Works, 689 N.E. 2d 1057 (Ill. 1997).
- 29 State ex rel. Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E. 2d 1062 (Ohio 1999). *See generally* Robert Peck, *Tort Reform’s Threat to an Independent Judiciary*, 33 RUTGERS L.J. 835 (2002).
- 30 Best, 689 N.E. 2d at 1079-81.
- 31 Sheward, 715 N.E. 2d at 1076.
- 32 *Id.* at 1074.
- 33 *Id.* at 1086. *See* Vermeule, *supra* note 20, at 374-77, 387-90.
- 34 Armstrong v. Roger’s Outdoor Sports, Inc., 581 So. 2d 414 (Ala. 1991). The court interpreted another part of the statute so as to preserve this power. *Id.* at 421. *See* Vermeule, *supra* note 20, at 377-79.
- 35 Commonwealth v. Sutley, 378 A.2d 780 (Pa. 1977). *See* Vermeule, *supra* note 20, at 381-82.
- 36 Schiavo v. Bush, 2004 WL 980028 (Fla. Cir. Ct., May 5, 2004).
- 37 *Id.*

- 38 Commonwealth ex rel. Carroll v. Tate, 274 A.2d 193 (Pa. 1971).
- 39 *Id.* at 197 (emphasis in original).
- 40 State ex rel. Lambert v. Stephens, 490 S.E. 2d 891 (W. Va. 1997). *See* Vermeule, *supra* note 20, at 382-86.
- 41 Howard B. Glaser, Wachtler v. Cuomo: *The Limits of Inherent Power*, 14 PACE L. REV. 111 (1994); Walter E. Swearingen, Wachtler v. Cuomo: *Does New York's Judiciary Have an Inherent Right of Self-Preservation*, 14 PACE L. REV. 153 (1994).
- 42 485 P.2d 1140 (Cal. 1971).
- 43 *Id.* at 1142.
- 44 People v. Tenorio, 473 P.2d 993 (Cal. 1970).
- 45 Esteybar, 485 P.2d at 1143. The court relied on Article III, Section 1 of the California Constitution, which reads. "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."
- 46 *Id.* at 1145, *quoting* Tenorio, at 996.
- 47 State v. Benitez, 395 So. 2d 514 (Fla. 1981).
- 48 *Id.* at 519, *quoting* People v. Eason, 353 N.E. 2d 587, 589 (N.Y. 1976).
- 49 State v. Lagares, 601 A.2d 698, 700 (N.J. 1992), *quoting* N.J.S.A. 2C:43-6f.
- 50 *Id.* at 701 (emphasis in original).
- 51 *Id.* at 704 (emphasis added).
- 52 *Id.*
- 53 *See* State v. Vasquez, 609A.2d 29 (N.J. 1992); State v. Kirk, 678 A.2d 243 (N.J. 1996).
- 54 For a list of state tort reform cases, see the Appendix to Victor E. Schwartz and Leah Lorder, *Judicial Nullification of Civil Justice Reform Violates The Fundamental Federal Constitutional Principle of Separation of Powers: How to Restore The Right Balance*, 32 RUTGERS L.J. 907, 939 (2001).
- 55 David Schuman, *The Right to a Remedy*, 65 TEMPLE L. REV. 1197 (1992).
- 56 *See, e.g.*, Jonathan M. Hoffman, *By the Course of Law: The Origins of the Open Courts Clause of State Constitutions*, 74 OR. L. REV. 1279 (1995); Jonathan M. Hoffman, *Questions Before Answers: The Ongoing Search to Understand the Origins of the Open Courts Clause*, 32 RUTGERS L.J. 1005 (2001); Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309 (2003).
- 57 Kluger v. White, 281 So. 2d 1 (Fla. 1973).
- 58 Smothers v. Gresham Transfer, Inc., 23 P. 3d 333 (Or. 2001).
- 59 *Id.* at 356.



- 60 Smith v. Schulte, 671 So.2d 1334 (Ala. 1995).
- 61 Ala. Const. § 11.
- 62 Smith, 671 So. 2d at 1342.
- 63 Lakin v. Senco Prods., Inc., 987 P.2d 463 (Or. 1999). *See also* Kansas Malpractice Victims Coalition v. Bell, 757 P.2d 251 (Kan. 1988).
- 64 74 A.2d 406 (N.J. 1950), *cert. denied*. 340 U.S. 877 (1950).
- 65 *Id.* Winberry v. Salisbury led to a spirited debate in the *Harvard Law Review*. *See* Benjamin Kaplan & Warren J. Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of Winberry v. Salisbury*, 65 HARV. L. REV. 234 (1951); and Roscoe Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28 (1952). An attempt to overrule Winberry by state constitutional amendment in 1951 failed. Kaplan & Greene, *supra*, at 252-53.
- 66 Busik v. Levine, 307 A.2d 571 (N.J. 1973).
- 67 *Id.* at 583.
- 68 People v. McKenna, 585 P.2d 275 (Colo. 1978).
- 69 *Id.* at 279.
- 70 *See, e.g.*, Avila South Condo. Ass'n v. Kappa Corp., 347 So. 2d 599, 607-08 (Fla. 1977); In re Clarification of Florida Rules of Practice and Procedure, 281 So. 2d 204 (Fla. 1973). *See also* Busik v. Levine, 307 A.2d 571, 583 n.10 (N.J. 1973).
- 71 McKeown-Brand v. Trump Castle Hotel & Casino, 626 A.2d 425 (N.J. 1993).
- 72 Knight v. Margate, 431 A.2d 833 (N.J. 1981).
- 73 *Id.* at 842.
- 74 *Id.* at 841.
- 75 In re Pa. C.S. § 1703, 394 A.2d 444 (Pa. 1978).
- 76 In re 1976 PA 267, 255 N.W.2d 635 (Mich. 1977).
- 77 Ellenbogen v. County of Allegheny, 388 A.2d 730, 234-35 (Pa. 1978) (judicially expanding statutory exemption for such judicial employees in certain counties to those in all counties); Matter of Michigan Employment Relations Comm'n's Order, 281 N.W.2d 299 (Mich. 1979); Washington St. Bar Ass'n v. State, 390 P.2d 1047 (Wash. 1995); Chief Administrative Justice v. Labor Rel. Comm., 533 N.E.2d 1313, 1316-17 (Mass. 1989).
- 78 Knight v. Margate, nn. 72-74 *supra*.
- 79 Robinson v. Cahill, 358 A.2d 457, 459 (N.J. 1976). *See* Jonathan Feldman, *Separation of Powers and Judicial Review of Positive Rights Claims: The Role of State Courts in an Era of Positive Government*, 24 RUTGERS L. J. 1057 (1993); Justin R. Long, Comment, *Enforcing Affirmative State Constitutional Obligations and Sheff v. O'Neill*, 151 U. PENN. L. REV. 277 (2002).
- 80 Michael Heise, *Schoolhouses, Courthouses, and Statehouses: Educational Finance, Constitutional Structure and the Separation of Powers Doctrine*, XXXIII LAND AND WATER L. REV. 281 (1998).

<sup>81</sup> *Bates v. Director of the Office of Campaign and Political Fin.*, 763 N.E.2d 6 (Mass. 2002). The court was interpreting Article 48 of the Amendments to the Massachusetts Constitution, requiring that if an initiated statute is not repealed the legislative “shall raise by taxation or otherwise and shall appropriate such money as may be necessary to carry such law into effect.” *Id.* at 10.

<sup>82</sup> See Benjamin Gedan, *Clean Elections Auction Falls Short: Lakeville Land Sale Brings Just \$2.4 M*, BOSTON GLOBE, July 11, 2002, at B7.

<sup>83</sup> See *supra* notes 68-69 and accompanying text.

<sup>84</sup> Vermeule, *supra* note 20, at 387. See also *id.* at 360.

<sup>85</sup> *Id.* at 360.

<sup>86</sup> *Id.* at 361, 398.

<sup>87</sup> See John Fabian Witt, *State Constitutions and American Tort Law: A History*, Paper No. 04-67, Social Science Research Network Electronic Library, <<http://ssrn.com/abstract=515662>> (visited June 16, 2004).

<sup>88</sup> See Robert F. Williams, *Foreward: Tort Reform and State Constitutional Law*, 32 RUTGERS L.J. 897, 899-900 (2001).

## ORAL REMARKS OF PROFESSOR WILLIAMS

I am honored to be here. I really enjoy spending time with judges. After all, you are the folks that actually do the work that enables us to write and talk about it. So, I'm quite honored to be here. What I have tried to do in the paper, and what I'll try to do in a much briefer fashion here this morning, is to take a current look at judicial independence and some of the tools that you use to protect your branch of government from legislative encroachment.

We know from a study of separation of powers—which is the rhetoric—and checks and balances—which is the teeth behind the separation of powers rhetoric—that encroachment by one branch into the affairs of another is the more serious problem in separation of powers. The alternative is situations where one branch will purport to cede authority to another branch. That's difficult as well, but it's a different sort of problem than the encroachment problem.

Frankly, it tends to be the legislature that is the most serious encroacher. Even back in the days of James Madison, he spoke of the legislative vortex. Today we would probably call it a black hole, trying to suck all power into itself. Of course, legislators accuse you of doing the same thing. They actually accuse you of encroaching on their territory. So, there is a back and forth here.

But we are talking about a subset of separation powers and checks and balances questions that is specific to the judiciary. In a situation where judges referee disputes between the legislature and the executive, the courts may seem disinterested. By contrast, in a situation where you are called on to rule about legislative encroachment into your domain, you are actually in a situation of being a judge of your own cause, ruling on the reach of your own authority. This can be awkward, and can lead people to accuse you of power grabbing.

In this separation of powers area, I have tried to argue in the paper that it is important to remember that your state judiciary is really quite a different kind of institution than the federal judiciary. In many ways, within your scope of authority, state judges are more powerful than federal judges. Therefore, the federal separation of powers doctrine may not be very useful to you in evaluating these kinds of state problems. In my paper, I describe some of the reasons for this enumerated by former Justice Hans Linde of Oregon, who many of you probably know.

But beyond that, the states are even quite different from each other, and even the state judicial articles within the states are quite different from each other. So, what I'm suggesting is a form of state-specific separation of powers evaluation, without too much concern for what other states do, and frankly not much concern at all for what the federal government does.

The judicial independence that you have today was not easy to come by. I tried to paint a very brief picture of the evolution from a dependent judiciary to an independent judiciary. This was difficult to achieve over the years, and it's not final yet. You judges still don't have the power of the purse. And the last time I checked, none of you have an army. But you have come a long way from the founding era, when it was the legislature that appointed the judges and decided how long they would sit on the bench. Now, when I speak to legislators, I say, "What's wrong with that?" And they all say, "Yes, that would be a great system." But I'm not going to say that to you.

I think it is important to remember that judicial independence is not an end in itself. The idea of judicial independence and separation of powers itself is not to protect the powers of government officials. It's really to protect the liberty of the citizens from the accumulation of too much power in one branch. When you are looking at your judicial authority vis-a-vis encroachment by the legislature, or even by the executive, one needs to remember, it's not about you. It's about the citizens of your state who will benefit from a robust, and in some ways competitive separation of powers and checks and balances regime.

But because you end up as the judge of your own cause in these judicial powers cases, you have to know—I don't think this is a secret to anyone—that you are vulnerable to criticism for power grabbing or aggrandizing your own power. I briefly note in the paper that at least one scholar from a major school has looked at some of these cases and concluded that they reflect a paranoid style, and these cases assert judicial power beyond any defensible conception of such power.

I don't want to personally associate myself with those conclusions, but you should know that these kinds of cases lead to this type of criticism and may eventually lead to attacks on judicial independence. We are talking about a situation where there is some tension, and I probably don't need to remind you all of this.

**Because you end up as the judge of your own cause in these judicial powers cases, you have to know that you are vulnerable to criticism for power grabbing or aggrandizing your own power.**

When we look at separation of powers, academics come up with distinguishing terms. Academics examine whether it's a formalist interpretation of separation of powers or a functionalist interpretation. Now, I doubt whether any of the state judges here associate themselves with being formalists or functionalists. You just sort of do these cases as best you can. The distinction is fairly useful though, it seems to me, in contrast to a lot of academic distinctions.

The formalist view sort of takes a bright line conceptual approach, or almost a definitional view. The concern here is to avoid slippage in judicial power in the face of pressing policy concerns that the legislature has articulated. For example, the war on drugs may lead to legislative attempts to interfere with judicial sentencing power in a way that I have outlined in the paper. This formalist view seeks to keep the camel's nose out of the tent, period.

The functionalists, on the other hand, ask the question, "Are our core functions here actually being interfered with?" Is there any real harm to the liberty of the citizens from this alleged encroachment that is going on? A functionalist thinks that maybe we could permit a step-by-step accommodation with the other branch on behalf of important public policy concerns. This view argues that, "If the camel's nose is in the tent a little bit, and it doesn't do any damage, it's okay. What's the matter with a little bit of camel nose?"

If you try to look at the cases I discuss in my paper from these two different points of view, you can see that the cases do reflect—without a perfectly bright line between them—some of these qualities that I have mentioned.

Just one other distinction if we could, and I think this is very important, the distinction between so-called—these are not my terms, I borrowed them from the professor who was so critical of your exercise of judicial power—“freestanding judicial power” and specific grants of authority to the courts found in state constitutions. Freestanding judicial power is based simply on the first line in most of your judicial articles that says the judicial power will reside in a system of courts. This is sort of a conceptual idea of judicial power. Specific grants of authority to the courts can also be found in all of the state constitutions, more or less. For example, the authority to promulgate rules of practice and procedure, which earlier in our history was thought to be inherent in the courts, is now expressed in many constitutions, although not all of them (the power to regulate the bar had the same sort of history). Other examples are jury trial rights and right to remedy clauses, which appear in about 40 of the state constitutions. Even specific bans on damages caps, which are present in a lot of the state constitutions, seem to be more specific kinds of judicial power clauses. I have tried to give examples of each of these in the paper, some of them arising from the tort reform context.

**One of the leading examples of conflict between the branches is in Ohio, where the situation has been characterized essentially as a war between the legislature and the courts.**

One of the leading examples of conflict between the branches is in Ohio, where the situation has been characterized essentially as a war between the legislature and the courts. And we’re lucky enough to have one of the warriors with us here today—the prevailing warrior as of now—Bob Peck. These kinds of situations have arisen all across the country in the tort reform context, but there are also examples of legislative attempts to try to provide for alteration of final judgments. Maybe the best current example of that is the Terri Schiavo case in Florida, where the legislature authorized the governor to issue a stay to a final judicial judgment. That would be great if they could do that, but it has been struck down by a trial judge.

One of my favorites is the inherent power to compel funding for the courts. This has to be a very tempting power to use, and its use does draw substantial criticism from the legislative branch. In my class I like to say, “Well, what if the governor could issue an executive order saying the executive must have the power to have adequate funding to take care that the laws be faithfully executed?” We never think of governors doing that. But judges do it sometimes—and they probably need to do it sometimes—but it has a tendency to look bad.

What we see is a set of differing tools that you all have used over the years in different circumstances. Let me just outline them very briefly, and I think maybe this will provide us the fodder for a follow-up discussion about how you choose these tools, and what each of them has to offer.

First, of course, is the declaration of unconstitutionality. This is familiar to us all. It’s in some ways the most drastic, and in some circumstances, it’s the only response. But there is maybe a halfway point if the reason for the unconstitutionality is curable by the legislature. And I’m talking about unconstitutionality in terms of interference with judicial power. I’m not talking about other reasons why a statute might be unconstitutional. So, possibly, there is the delayed mandate that lets the legislature go back and rethink its assertion, and rethink it in light of what you have had to say. That may be, as I have called it, a softening tool. The same is true, for example, of the statute of limitations cases that say, well, you can’t revitalize a case after a final judgment has determined that it’s out of time.

Another example that is very, very interesting to me, is the *sua sponte* letter of address, where the highest court in the state simply writes a letter to the legislature and the governor saying, “You all passed a statute. We have looked at it, and it’s unconstitutional.” This letter then gets published in the reporters with headnotes, and it’s in Lexis and Westlaw. It’s a very interesting tool of judicial defense. I have given two examples in the paper.

Another very powerful tool is the limiting statutory interpretation where the courts will essentially say to the legislature, “Well, you all couldn’t have meant that this statute is going to apply in a way that interferes with our judicial power. That can’t be right. The legislature must have intended this statute to operate in a way that doesn’t unconstitutionally interfere with our authority.” There are lots of examples of this. We saw this in the mandatory sentencing cases in New Jersey where the court says, “Well, no, the judge doesn’t have to bargain with the prosecutor, and in the collective bargaining cases for judicial employees. No, this collective bargaining for judicial employees can’t have been intended to interfere with our core judicial power.”

### People will say who judges the judges?

There are some accommodation mechanisms that we have seen. A statute that may well encroach on judicial power, but it’s not a bad idea. The courts have not promulgated any rule or policy to the contrary. This is sort of a functionalist view. There is a little bit of the camel’s nose in the tent, but it’s not doing any harm. This is a pretty good idea, okay. We saw this in the Colorado rape shield case that I mention in the paper.

The next step is for the court to actually adopt the statute that encroaches on legislative authority as a court rule. We have seen this in Florida. Once again, the statute may not be a bad idea: “You’re in our tent, pal, and we’re going to take this policy and transform it into a court rule over which we have continuing authority, not you, the legislature, but it’s not a bad idea.” This is a very interesting mechanism.

My final example is the enforcement of judgments. We have the example of the New Jersey Supreme Court closing the schools to enforce its mandate on school financing. Of course, it did close the schools during the summer. But the point was made as well. We also had that minor skirmish in the Commonwealth of Massachusetts, about financing for the so-called clean elections law, which actually led to the seizure and sale of state property to raise money.

So, here is my point in conclusion. People will say who judges the judges? People will look at these assertions of judicial power, particularly legislators who have attempted to encroach on your authority with a pretty skeptical eye. Some of the citizens may do the same thing. This is not to say that you shouldn’t defend the hard-earned judicial independence that you have. That’s very important, not just for you, but for the citizens.

If you look at the sentencing cases, they empower the prosecutor in a way that really could interfere with citizens’ liberty. And so, the assertion of judicial authority there is not to protect judges, it’s to protect citizens. But we must be aware that this kind of assertion of authority causes criticism about what you’re doing, and can have an impact—that some of you have felt—on judicial elections.

There is limited capital that you possess to protect your branch, and to protect your citizens. I would say as these cases come up, try to think when you can—obviously, many of you have, because we have all these examples on the books—of possible moderating sorts of remedies that may be softer than a pure declaration of unconstitutionality. There are situations where you will not be able to do that, and it seems to me your judicial oath calls on you to defend the liberty of the citizens. In those cases, I say, “Stay the course.”

The final point I want to make concerns freestanding judicial power versus the specific judicial power. The freestanding judicial power cases tend to generate more criticism, because this is kind of an abstract authority, this judicial power. It doesn't have a lot of specificity to it. The more specific judicial power cases can still generate criticism, but they are based on more concrete text, with specific constitutional history about why this particular authority is given to the courts. I think most importantly that the more specific judicial power provisions seem to also cover people's rights more clearly. We know that the freestanding judicial power also is intended to protect peoples' rights and liberty, but it's not as clear from the clause.

**When you get to something like the civil jury trial right, that's about judicial power, but it's also obviously about the citizens' rights.**

However, when you get to something like the civil jury trial right, that's about judicial power, but it's also obviously about the citizens' rights. When you get to the right to remedy clauses, that looks to the public and the legislature as not just about your authority, but

about citizens' rights. The same is true on the specific provisions on damage caps. They protect judicial authority, but they also do it by explicitly protecting citizens' rights. However, it's not as clear with the rulemaking power or the power to regulate the bar that your exercise of power is about protecting citizen's rights.

I noticed in a lot of cases that were studied by Professor Vermeule, who was so critical of what you do in your freestanding judicial power cases, there were alternative holdings. What he was criticizing was the alternative holding about pure or freestanding judicial power. If you are in a situation where you are going to make a ruling, and I don't presume to tell you what to do, I suggest maybe you would leave out that alternative holding about pure or freestanding judicial power. At least consider, given the fact that you are the judge of your own cause, that you may generate some real criticism of what you do.

What you do is necessary. We need it. Stay the course. Thank you.

## COMMENTS BY PANELISTS

**Sharon J. Arkin, Esq.**

**Edwin M. Speas, Esq.**

**Robert S. Peck, Esq.**

**Honorable John M. Greaney**

### **Sharon J. Arkin**

My husband has a very interesting life philosophy, and it's a philosophy of averaging. He thinks over the course of time, everything averages out. For example, I have hair, he doesn't. We average each other out. One of our daughters is a workaholic, the other is lazier than dirt. They average each other out. Rush Limbaugh, Michael Moore, they average each other out.

And when you start looking at the world that way, it works. That's what happens. And I have worked in the legislative process through our state trial lawyers association for the last several years, and watching democracy in action when laws are being drafted, and bills are being negotiated, everything averages out.

Our democracy is designed to have that tension, where no special interest group, no party, gets everything their way. There is a balance. There is a tension. And that's the way laws are supposed to be made. And that's the way laws are supposed to be enforced. The judiciary has the obligation of averaging out the legislature, and averaging out the executive, to make sure that there is a balance, to make sure that nobody gets it all their own way.

As Professor Williams's paper explains and demonstrates, the judiciary's job of making the separation of powers work is not always pretty, and it's not always easy. It is often controversial. The judicial system is often required to make very controversial decisions, and they are very difficult. In California a few years ago, our supreme court was wrestling with the decision about whether to uphold the law that required minors to get parental permission for abortions. It was a very controversial issue. The decision was going to come out right before retention elections for the supreme court. And our chief of our supreme court made a very courageous decision. Because they struck down the law, and they knew they were going to take a lot of heat for it, he said, "I'll write this decision." And he took the heat for it, and he survived the retention election despite that. But he had the courage to stand up and say this is wrong, and we're not going to allow this to be the law in our state.

And those kinds of controversial, courageous decisions are ones you have to make every day. The judicial branch has to face the populace. With legislatures, it's oftentimes a popularity contest. Judges don't have that imprimatur on what they do. They have to draw the line based on the law. Professor Williams's paper describes the tools that the judiciary has to fight that fight, to average out the things when the legislature or the executive goes too far.

One of the problems we have in California with our new "governator" is that in developing the budget, he set up the budget and released it to the media without ever once consulting with our chief



justice or our administrator of the courts to determine what their budget needs were, or what the amounts allocated to them should be. And that to me, is a huge example of how the legislature and the executives tend not to think of the judiciary as a coequal branch of government. They are treated like another agency, not as an equal branch with equal power in determining the laws and protecting the citizens.

And it's a hard fight, it's a controversial fight, and as Professor Williams explains, it can be hugely problematic for the justices who are making these decisions. But the judiciary must pick up these tools that Professor Williams describes and protect your power. But, that's the least of what you are doing. You are also protecting the citizens. And that's a big responsibility on your part, but it is your responsibility. And I encourage you to use the tools Professor Williams has described to do exactly what your job is, and that is to protect the citizens of this state, and to average out everybody else.

## Edwin M. Speas

I'm delighted to be here with you this morning and to have the privilege of commenting on Professor Williams's excellent paper. I spent most of my professional life with the Attorney General's office, and in that capacity I had the honor and privilege of representing the legislative and executive branches of government. And I wanted to talk to you today about some of the things that North Carolina has recently learned about relations among the three branches of government.

There is probably no area that produces greater tension between the judicial and legislative branches of state government than the judiciary being called upon to rule on the constitutionality of legislative redistricting plans. As you all know, there is from time to time, some partisan element in those cases, and I can assure you from my representation of legislators, that there is no area of the law where legislators feel a more direct and personal interest than they do in their own legislative seats.

**There is probably no area that produces greater tension between the judicial and legislative branches of state government than the judiciary being called upon to rule on the constitutionality of legislative redistricting plans.**

North Carolina has just come through those troubled waters, and along the way the General Assembly adopted a new procedure for resolving redistricting matters in the future that I thought might be helpful to discuss with you here today.

First, a bit of background. In May 2001, the North Carolina Supreme Court declared the legislature's efforts at adopting new redistricting plans unconstitutional. The legislature quickly drew a new plan. The trial judge declared that plan unconstitutional and drew his own plan. The supreme court declined to intervene, and that particular court drawn plan was used for North Carolina's legislative elections in 2002. Interestingly, the trial judge later determined that the court-drawn plan itself was unconstitutional.

The legislature, in late 2003, drew a new plan. And along with the plan, the legislature established a new procedure for resolving redistricting disputes. That procedure required that redistricting disputes be resolved not by one trial judge, but by three trial judges. Because redistricting is a statewide issue, it required one judge to come from the eastern part of the state, one from the central part of the state, and one

from the western part of the state. And because the legislature believed that redistricting plans in the end are its responsibility, it required the courts to give the legislature a last opportunity, in all cases, to redraw a plan that had been found constitutionally defective.

It was immediately challenged, and I am happy to report to you that the North Carolina Supreme Court unanimously determined that that legislation is in fact constitutional and that it does not infringe upon the judicial power. It does not infringe upon the chief justice's power to assign judges, and it does not deny citizens their remedies. That new procedure is in fact already in place, and is being utilized, because there is a currently pending challenge. But I think that new procedure has a number of benefits.

First, it eliminates forum shopping. Secondly, it assures, and I think this is very important, that redistricting matters will be tried before a diverse panel of judges—geographically diverse, politically diverse, and racially diverse. Thirdly, it protects the legislature's power to make the law. And finally—hopefully—it avoids the courts ever having to make the law through the drafting of legislation. So, I recommend that legislation to you, and hope you might find it of some value.

Let me end with a prediction. This past March, the United States Supreme Court in *Vieth v. Jubelirer* held that a challenge to Pennsylvania's legislative redistricting plan on the grounds that it was an unconstitutional political gerrymander was not justiciable. The last time the Supreme Court concluded that an issue of that sort was not justiciable at the federal level was in 1973, when the Supreme Court declared that there is no federally justiciable issue with respect to the funding and quality of educational opportunities in the public schools. You know that produced litigation in almost every state.

My prediction is that the determination that political gerrymandering claims do not present justiciable issues under the federal Constitution will shift the focus to the state courts. And I know you will have fun with those issues.

## **Robert S. Peck**

I don't know if you noticed, as I did, but when my friend Bob Williams was speaking, every time he uttered the words "judicial power" his hands rose up like this, obviously unconsciously, but demonstrating an ingrained reverence for judicial power.

Today's topic reminds me of a story that is told about President Grover Cleveland during his first term in office. Shortly after he entered the White House, he was visited by a friend of his, one of his supporters from New York's famous Tammany Hall. This pol walked up to him and said, "Here is some legislation the boys back home would like you to get Congress to pass." Cleveland scanned the document, looked at it and said, "But this is unconstitutional." His friend from Tammany Hall replied, "What's the Constitution between friends?"

Now, we know that politicians can often pass that buck. They can abdicate their responsibility, their oath of office to uphold and defend the Constitution of the United States, because they don't want to take the political heat, because they think the courts will take care of that. They can get a free vote on something blatantly unconstitutional, but perhaps popular with an important constituency, because it will be you who will end up having to take the heat.

But the fact of the matter is our courts do a remarkable job. Out of the millions of cases that go through the courts each year, only a small handful ever reach controversy, and this is because our courts do their job carefully. They take their responsibilities seriously. And one of those responsibilities is when the legislature goes too far, to strike that law down as unconstitutional.

Now, there are some who urge that courts ought to give greater deference to legislative enactments. The enacted law, we are told, is a reflection of popular will, although in these highly politically charged times, it is hard to ever say that anything is a reflection of popular will.

And there is the criticism that often what the courts are doing is simply putting their own public policy preferences into constitutional language. In his dissent in the *Griswold* case, Justice Potter Stewart referred to the Connecticut anti-contraception law as an “uncommonly silly law,” but that was not enough for him to strike it down as unconstitutional. When a court veers into that area, where it simply is talking about its own policy preferences, we get to the point that Justice Douglas talked about where the court acts as a super-legislature, and that’s to be avoided.

The problem that Bob Williams’s paper talks about is when the legislature becomes a super-judiciary. Dissatisfied with the decisions of the courts, dissatisfied with the trends that they see—often wrongly see—from juries, they will enter that field, and they will try to put over a rule of law that takes away the discretion, the authority, or the judicial power that our constitutions invest in the courts. And so, that is one reason why it is so important for the courts to be jealous guardians of their authority. As Bob said, judicial independence isn’t an end, but it is an instrumental means to achieving the kind of justice and liberty that our judiciary is most responsible for.

And this is even more important these days, not only when legislatures abdicate their responsibility with respect to the constitution, but even more so when we find our legislatures are filled more and more with non-lawyers, who have no clue about the limits of their authority, who look upon the judiciary as less than a coequal branch, as some sort of subservient branch that they have to rein in. This is when they try to bend the judiciary to their will. They try to limit the jurisdiction of courts. They try to do all sorts of things, and often they do this without great deliberation. Too often laws are introduced at midnight, with no deliberation whatsoever, without hearings, or with skewed hearings that are held only for show and without real representation of an opposing viewpoint.

**But the fact of the matter is our courts do a remarkable job.**

We see this in Washington, D.C., all the time, where the majority in Congress simply invites the people who are supporters of the legislation to testify at the hearings. They may give one witness among five to the other side, and suddenly they say, well, the overwhelming evidence received by the committee indicates that this is a problem. Well, when you set it up that way, it’s sure to be a self-fulfilling prophesy. Helen Hershkoff’s paper this afternoon will talk a little bit about those legislative findings, and some of the problems they have. But we see the modern attack on the courts being nonstop. It is not only from interest groups and the media, but it is also often from the legislature.

I had the honor of representing the Nevada legislature in the U.S. Supreme Court this past year. And doing it was actually in defense of the Nevada Supreme Court. A group of dissident legislators, unhappy with one of the court’s decisions, tried to bring up a decision of the Nevada Supreme Court to the U.S.

Supreme Court, blatantly asking in their petition for certiorari for the federal court to take supervisory authority over the Nevada Supreme Court, because the Petitioners claimed the Nevada court had violated their own constitution. They did this by invoking the U.S. Constitution's Guarantee Clause. This is the clause that guarantees a republican form of government, and the Petitioners basically asked the court—interestingly enough relying on *Bush v. Gore*—to take supervisory authority in order to force the Nevada Supreme Court to comply with their view of what the Nevada Constitution said.

The Court denied certiorari, which I'm happy to report, and the Nevada Supreme Court's authority to construe their own constitution is intact. But this type of attack on a court's authority is an increasingly discussed and used tactic. In fact, the First Circuit recently handed down a decision denying that the Guarantee Clause could be a means by which people, unhappy with the *Goodridge* decision of the Massachusetts Supreme Judicial Court, could try to get the U.S. Supreme Court or the federal courts to intervene.

Now, a legal challenge like that is just one of many ways to attack the state courts. Obviously, where there is disagreement and the legislature is pushing in one direction through which it is attempting to exercise judicial power, the courts properly are repelling this effort by finding those efforts to be unconstitutional.

One further area that needs to be discussed and should be of concern, which Bob very briefly touched on, is court funding. With the power of the purse, legislatures will often threaten to attempt, and sometimes even act, to reduce court funding in order to try to bend courts to their will. Obviously, this is to be resisted. This is an extra-legal attempt to invade the authority of the courts.

**One thing too often neglected about judicial opinions is that they constitute powerful educational tools. And they are a means to inform not only the public, but the legislature as well, on the meaning of judicial power and the real limits on that authority.**

But at the same time, there is some authority to say that when minimum necessary funding does not exist otherwise, that there is some authority to compel it. There is a case from the Pennsylvania Supreme Court, which is probably the leading case, called *Tate*, in which the court found that there was inherent judicial power to require minimum necessary funding. And that inherent judicial power is an important aspect of your authority.

Now, Bob suggested that perhaps you might want to shy away from what he called freestanding judicial authority. That is, if there are textual means to resist legislative encroachments, legislation abrogations of judicial power, that perhaps you would leave out any discussion as a secondary ground, this freestanding judicial power.

I would actually urge you not to. One thing too often neglected about judicial opinions is that they constitute powerful educational tools. And they are a means to inform not only the public, but the legislature as well, on the meaning of judicial power and the real limits on that authority. That's very important, and something that I think you should pay some attention to in writing opinions.

So, as I conclude here, I'm reminded again of something that de Tocqueville wrote in *DEMOCRACY IN AMERICA*, in the preface to the third edition of it. He noted that if the lights that guide us ever are to dim, it will be little by little, as if of their own accord. But if we are going to be true to them, then we will stop that dimming at the first instance before it does us harm. That is your job, and I thank you for it.

## **Honorable John M. Greaney**

Thank you, and thank you Professor Williams and Professor Hershkoff for your very thoughtful papers. What I would like to do in the time allotted is build a little bit on the formal versus functional approach that Professor Williams talked about in his tools for resolving disputes, because I think there are, and I would like to outline for you, certain principles that we can use when we are deciding state constitutional issues involving separation of powers and judicial independence.

The questions, I think, essentially come down to two. First, is the issue before the court one for the court to decide, or is it a matter exclusively, or as a matter of deference, reserved to the executive or the legislature? Second, has one of the other branches, usually the legislature, impermissibly encroached on exclusive judicial authority?

Let me outline for you, seven principles that I think are helpful in disposing of these issues when they come before us. Many of these you have already heard, and they are alluded to in Professor Williams's paper.

The first principle is what I call the principle of restraint and deference. Should the courts simply stay out of the dispute, treating it as one best resolved by the legislature? I think the key to answering, or applying, this principle is contemplating what the remedy might be. If you cannot, as a court, fashion for a constitutional violation a clear judicial remedy, then it seems to me you have to think very seriously about restraint and deference and leaving the problem for one of the other branches of government to resolve. This is where, for example, many states have gotten into trouble on the public school funding cases, because, when you think about it, we have no power to appropriate money and no power to order taxes to be raised. So, in this area, judicial remedies, or what look like judicial remedies, seem to me to be very weak. And as a result, the courts have gotten into a great deal of trouble. This then may be an issue where restraint and deference is important.

The second principle is what I call the principle of exclusivity. There are certain matters that are exclusively reserved to the other two branches, and the court should stay out of them whenever they are presented. For example, the executive branch determines who is going to be prosecuted for crimes, and for what crimes. District attorneys bring the indictments, determine the number of charges, and so on. This is a fundamental executive power. It's not the function of the courts—except within certain well-defined procedures on motions to dismiss and so forth—to intrude on that power or to usurp the power to charge and convict.

Similarly, putting aside some issues that Professor Williams talked about on mandatory sentencing, it seems that the issues of defining crimes and establishing sentences are almost exclusively reserved to the legislature, and that is why in all our decisions, and I'm sure you have written some of these, we say sometimes that we do not think this is a wise criminal law, but as a matter of policy, it's for the legislature to define the crime, and not for us to redefine or undermine it.

The third principle is what I call the principle of non-abdication. When the court is squarely faced with a major constitutional issue, it just has to decide if it is within the judicial power and a reasonable judicial remedy can be constructed. There was an allusion to the clean elections case that we had decided in Massachusetts. Frankly, on rethinking the remedy, the selling of state property to fund the law seems a weak judicial remedy. Recently we faced a major constitutional issue in the *Goodridge* case. I

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am one of the four that voted for same-sex marriage in that case, and drew the ire of the president of the United States. But *Goodridge* seems to me to be a case where there cannot be abdication.

The fourth principle is to use advisory opinions to the legislature and the governor if you have the mechanism to do so. We have the mechanism in our constitution. The other branches can ask

us for a formal written advisory opinion on pending legislation or pending procedure. We have to give them an answer, generally speaking. They have done it about 400 times over the history of our court. Advisory opinions have concerned all kinds of questions such as “Can I veto this properly?”; “If we enact this statute, what will happen?”; “What is the state of federal law?”; “If we apply federal law to this proposed statute, will it be constitutional?” And so on. We used the advisory opinion process to organically shape our whole sex offender registry law in advance, our version of Megan’s law, and make it a tight, well-knit constitutional piece of legislation.

It’s an excellent procedure, and, to pick up on Professor Hershkoff’s paper this afternoon, a kind of informed partnership between both branches. You say you don’t have it? Let me suggest to you that you might be able to get your legislature, if you want this power of advisory opinion, to adopt it by way of statute.

Principle five is communication. That was touched upon by Professor Williams. We do not use the direct letter of address, although that seems to me to be rather remarkable. But we do use the informal letter of address, which is just simply a letter to legislature when some legislation is pending. We did this most recently with respect to action the legislature was going to take with the regulation of lawyers. We just sent a letter to them advising the legislature that, if it took the action, the statute would probably be unconstitutional. As a result, the legislature backed off. So an informal letter can be just as good as a formal letter.

Principle six is protecting judicial turf. You need a clear definition in a sentinal opinion of what you view as the source of separation of powers or the independence of the judiciary. If you don’t have such an opinion, you should create the definition in a series of opinions. We faced this last year in a decision I wrote called the “first justice” case, where the legislature, angry with us, attempted to transfer to the clerks of court the virtual complete running of the case lists, the functioning of our courtrooms, and all kinds of other matters that trespassed on our independent judicial power.

In the first justice opinion, we construed the legislation very narrowly, and held that, to avoid impinging on inherent judicial authority, the statute would have to be read in certain restrictive ways. Basically, the judges would have the final word on what occurred in courtrooms and in courthouses.

And the final principle, principle seven, is don't overlook your right to remedy clause, which has been talked about in state constitutions. Ours is a very elegant type of clause written by John Adams, and I would just like to read it, and then I want to tell you where it came from. Most people don't realize its history.

It says, "Every subject of the Commonwealth ought to find a certain remedy by having recourse to the laws for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, without being obliged to purchase it completely, and without any denial, promptly, and without delay conformably to the laws."

Well, that's a nice piece of writing, but where did Adams get that? Adams borrowed this directly from the Magna Carta. This clause can be traced to the Magna Carta, which read this way as Coke stated it. And just listen to this and compare it to what I read from Adams's Constitution. "Every subject may take as remedied by course of the law, and have justice and right for the injury done to him freely without sale, fully without denial, and speedily without delay." So, Adams's version is almost a verbatim copy of the provision found in the Magna Carta. And this provision, in addition to the separation of powers provision, infuses us with the authority to maintain an independent judiciary.

Let me conclude by saying that I think most of the time a sensible application of one or more of these principles will lead to the resolution of the issue before you without creating the least amount of acrimony. There will be times, however, and the other speakers have mentioned this, when the nature of the conflicts, such as we had in the *Goodridge* case and the clean elections case, is so intense, and the role of the court so paramount and fundamental, that there will be some residual bitterness.

**As judges, we have to be respectful of the other branches of government, but we must never shirk our duty to protect judicial independence and functions when they are impermissibly restricted by others.**

It seems to me that tensions are only normal in a tripartite form of government. As judges, we have to be respectful of the other branches of government, but we must never, as other speakers have said, shirk our duty to protect judicial independence and functions when they are impermissibly restricted by others.

I'll end by quoting Justice Brewer of the United States Supreme Court, who in *Wilson v. Shaw* said, "We, [meaning the court] have no supervisory control over the political branches of the government in their action within the limits of the Constitution." I suggest to you, the same is true with regard to the political branches and us.

## **Response by Professor Williams**

I'm very pleased by the attention that the panelists paid to what I said, and what they have added. I'm always happy to be contradicted by Bob Peck. Let me just say a word about what he said. If our differing views of this have brought it to your attention a little more clearly than it may have been before, that's all we want. I think, and Bob would say this also, we trust your judgment. As long as you think about this distinction between freestanding judicial power, and the more specific provisions, we will have

accomplished our purpose. And you can either follow what Bob said, or what I said, but as long as you think about it, we are satisfied. I have to say your point about the legislature acting as a super-judiciary is just terrific. I assume maybe you used that in the Ohio case. But I have never heard it put that way, and it's very, very powerful as an image.

Let me just say a couple of quick things about what Sharon Arkin said. I think that's right generally speaking, that the legislature acts to average out the various interests when the legislature operates the way it is supposed to. On the other hand, we have seen in a lot of instances, often with the most controversial legislation—I've seen it a number of times in the Pennsylvania legislature on abortion bills—a bill will never be introduced in the legislature. It will be carried around in the hip pocket of someone, while a vehicle bill, a noncontroversial bill, goes through one house, its committees, is debated on the floor, goes through the other house, its committees, and gets debated on the floor. Then twenty pages will be added to that vehicle bill at midnight and will include the abortion language that had been tucked in that hip pocket. That revised bill will never really see the light of day—by this I mean it will not be discussed in committee nor debated on the floor—but it will be voted on by the other house, and sent to the governor.

Now, as a result of that kind of practice, most states have specific clauses in the constitution designed to prevent these abuses. I alluded to this in my paper. And you, as state judges, are called on to enforce those kinds of provisions. Some states require a bill to be heard in committee, to be read a certain number of days, or not to contain more than one subject. And these kinds of clauses date from over 100 years ago, back to a period from the 1850s to the 1880s, when people were really disgusted with the way state legislatures were operating. These clauses were put in the constitutions, and the courts have had a mixed record of enforcing them, partly because there is a separation of powers concern going on the other side. How deeply should we intrude into the procedural operations of a coequal branch, the legislature?

**How deeply should we intrude into the procedural operations of a coequal branch, the legislature?**

Justice Hans Linde of Oregon noted that these provisions represented “due process of lawmaking,” a very interesting term. So, we do have mechanisms that try to require the averaging out kind of legislating. It doesn't always happen. These are circumstances where this isn't a direct attack on judicial authority, but it calls for a kind of separation of powers analysis that requires an understanding of why these 120-year-old provisions are in state constitutions. They look kind of boring. It feels like, “Gee, who cares if there is more than one subject in a bill?” But ultimately, these provisions have to do with the rights of the citizens to be represented in a certain way in the legislative process. These clauses are really pretty important. And there are some tort reform cases that are going on with this process now as well. So, I like the point. I just want to make that observation.

Ed Speas's point about redistricting illustrates a very interesting idea about the role of the judiciary in what political scientists call “agenda setting.” It sounds like the decisions of the North Carolina supreme court set an agenda for the legislature. Go back. Think about this again, work on it some more. After the legislature did that, it came back to the court, and the court said okay, fine. We see a lot of this in the give and take between judiciary and legislature. The Vermont same-sex marriage case is a good example. It forced this issue onto the agenda of the legislature. Of course, the legislature called the court a super-legislature and all that sort of thing. But it's a very interesting illustration, I think, of what political scientists call agenda setting.



I also want to underscore what Justice Greaney said about these remedy clauses. This is the kind of a provision that you never heard of in law school, unless you went to Rutgers, where I teach a course on state constitutional law (only 30 people take the course anyway). But this is not frivolous stuff. These clauses date back, as he said, to the Magna Carta. That's a reasonably good constitutional pedigree in our system, I think. They are real clauses, and are a very good example, once again, of the kind of a clause that has to do with judicial power on the one hand, but also has to do with citizens' rights on the other hand. A lot of these clauses are general in their terminology. There is no necessary plain meaning to these provisions. Of course you have some range available to you in how you interpret them. But these kinds of clauses have a real history to them. There are real judicial doctrines that have been developed over the last one hundred years, once again state by state, and also across states. There is nothing in the federal Constitution like this. I understand it was considered, and Madison rejected it.

So, for these kinds of provisions, you might want to say to lawyers appearing before you, "Get out there and do the hard work. Give us a reasoned argument under a state constitutional clause like this. And we don't care if you never heard about it before. You're a lawyer. Go out, read it, read the cases, read the history, and give us a reasoned argument."

## LAWMAKING AND JUDICIAL REVIEW: WHAT DEGREE OF DEFERENCE SHOULD STATE COURTS GIVE TO LEGISLATIVE FINDINGS?

### **Helen Hershkoff**

Professor Hershkoff begins her paper by asking what deference should a court show to the legislature's findings of fact about the need for legislation? If the court substitutes its own policy judgments for the legislature's, it will be charged with "judicial nullification." If it takes the legislature's fact finding at face value, however, the court may be abdicating its constitutional duties. In Part II of the paper, she cautions judges against assigning "fact" too rigid a definition, as facts sometimes also constitute "norms, hopes, aspirations, or opinion." Determining the level of deference one participant in the lawmaking process should accord the decision of another thus involves more than merely categorizing the question as one of "law" or "fact," and instead concerns a principled and strategic consideration of constitutional frameworks, structural arrangements, and substantive commitments.

Next, Professor Hershkoff reviews the "minimal rationality" standard by which federal courts review legislation. Under this standard, the court accords the legislature substantial discretion in making policy. A different standard of review is used, however, when a statute encroaches on the jurisdiction of Article III courts. State courts operate in a different milieu from the federal and are not bound by federal standards of review when they engage in matters of state constitutional interpretation. In addition, state courts have broad common-law powers; some state legislatures are more limited in their power than is the U.S. Congress; and positive rights are often woven into state constitutions, requiring the state courts to review legislative policy decisions. State judicial standards of review need to take these distinct features of state governance into account.

In Part IV, Hershkoff discusses the U.S. Supreme Court's 1995 change in the way it reviews federal legislation, describing its shift from "minimal rationality" to close scrutiny of certain legislation enacted by Congress under its Commerce Clause and Fourteenth Amendment powers. Among other concerns, the Supreme Court's new approach may have anti-democratic implications and upset checks and balances. However, she emphasizes the fact that state courts are not bound by the Supreme Court's approach in deciding questions of state constitutional interpretation.

Hershkoff then discusses several models of judicial review. In determining the standard of review that best accommodates state governance concerns, Hershkoff emphasizes that commentators see a characteristic common to almost all state systems, relative to the federal—a greater sharing of power among the branches of state government that emphasizes functional cooperation, rather than formal separation. Hershkoff emphasizes that a less deferential standard of review can improve state lawmaking in at least three ways: (1) encouraging more thorough legislative investigation of the subjects of lawmaking before action is taken; (2) requiring better factual justification for legislation, which works in favor of democratic participation; and (3) encouraging legislatures to be more explicit about the assumptions underlying policy, thus contributing to a more informed dialogue between the legislature and the judiciary. She then addresses a set of concerns about the proposed standard of review—whether a given state court possesses the institutional ability and the political will to engage in this form of legislative scrutiny. The question of ability is comparative; although state courts are limited in their practical power, so are state legislatures. While state legislatures can pass laws seemingly at will, some of them have weak institutional structures that undermine their ability to investigate complex subjects,

*thus diluting an important justification for judicial deference. State courts, in contrast, are more professional and permanent, and can acquire necessary information on a subject in many different ways.*

*In Part VI, Professor Hershkoff applies the proposed standard of legislative record review to an example of tort law revision with which she began her paper. She emphasizes that closer legislative scrutiny can foster dialogue, rather than confrontation, between the branches and protect the judiciary against the threat of political reprisal that subverts the court system's independence. In conclusion, Professor Hershkoff places her collaborative model of legislative record review in the context of what Roscoe Pound called a "functional attitude" that eschews strict law/fact distinctions. She acknowledges that such a practice will result in decisions that are sometimes characterized as "liberal" or "conservative," but no more so than currently is the case under other regimes of interpretation. Most important, it stands a good chance of improving lawmaking processes, encouraging popular participation, and enhancing the quality of judicial decision making.*

## I. Introduction<sup>1</sup>

Let us assume that your state legislature—wanting to reduce docket backlog, bring insurance costs under control, and attract new industry—passes a package of reforms.<sup>2</sup> The new law divests common law courts of jurisdiction to hear tort claims and remits them instead to a panel staffed by hearing officers, appointed by the legislature, who function without juries and are permitted to award damages of no more than \$10,000 per litigant according to a published rate schedule. Injured parties sue in state court to enjoin the statute, alleging state constitutional infirmities and also arguing that the statute does not apply to their situation. What degree of deference should the state court give to the state legislature’s findings about the need for reform? If the court rejects the legislature’s factual justification as an “orgy of guesswork”<sup>3</sup> and invalidates the law, is it guilty of “judicial nullification,” substituting its own policy judgments for those of elected representatives?<sup>4</sup> If the court rubber-stamps the legislature’s factual justification and upholds the law, does it commit “judicial abdication,”<sup>5</sup> failing to review the elected branch’s compliance with state constitutional norms?<sup>6</sup> Is there some middle ground available between these two polar extremes?<sup>7</sup> And what difference does it make that these questions arise within the state, and not the federal system?

This paper addresses the level of deference that a state court should accord state legislative fact-finding. By deference I mean the judicial “practice of accepting,” or not, “the factual and empirical judgments” that inform statutory lawmaking.<sup>8</sup> The conventional wisdom is that courts—or at least federal courts—should simply “say what the law is”<sup>9</sup> and decline to probe deeply into a statute’s factual support, except in specialized matters (for example, where fundamental rights or suspect classes are at issue or the negative commerce clause is involved). Since 1995, however, the Rehnquist Court has changed course and now engages in “legislative record review” in certain cases under Article I of the Commerce Clause and Section Five of the Fourteenth Amendment, a trend that is illustrated by the Court’s invalidation of portions of the federal Americans with Disabilities Act in its 2001 decision, *Board of Trustees of the University of Alabama v. Garrett*.<sup>10</sup> Whether state courts will and should adopt this new federal standard, and insist that elected representatives marshal hard evidence in support of legislative policy, is an unexamined question in the academic literature and the focus of my remarks.

**If the court rubber-stamps the legislature’s factual justification and upholds the law, does it commit “judicial abdication?”**

I start by exploring how differences in the level of deference that courts give to legislative fact-finding affects the judiciary’s role in interpreting and enforcing constitutional provisions.<sup>11</sup> I then turn to the old-style federal standard of deference and its salience for state court decision making. Following that, I look at the Rehnquist Court’s new-style “legislative record review” and assay its fit with state inter-branch relations. Finally, I suggest a state judicial approach to state legislative fact-finding that is rooted in the distinct features of state constitutions, recognizes the limited political capital of state courts, and takes into account the pervasive problem of empirical uncertainty. To preview my conclusion: many courts and commentators associate state inter-branch relations with a collaborative partnership between the courts and legislature. I argue that this special form of governance is best promoted through rules of judicial

interpretation that facilitate close judicial review of legislative fact-finding, but at the same time afford the legislature necessary breathing room to develop social and economic policy.

## II. Judicial Standards of Fact Deference and Constitutional Interpretation

All law, whatever its source or authority, depends on facts, and so the question of judicial deference to legislative fact-finding carries broad policy and institutional significance. Conceptually, however, “[l]abeling a matter one of ‘law’ or ‘fact’ is not a hard-and-fast jurisprudential characterization.”<sup>12</sup> Facts cannot always be distinguished from norms, hopes, aspirations, or opinion,<sup>13</sup> nor do facts inevitably resolve questions that involve principle or judgment.<sup>14</sup>

### A. DISTINGUISHING FACTS FROM LAW

Take one example. Assume that a state, responding to concerns about runaway taxation, enacts a flat income tax, basing its policy choice on the fact that “all men are created equal.” That “fact” is as much an article of faith as it is a statement of verifiable reality. Even if true, it bears only indirectly on the need for or the effectiveness of a flat tax. In reviewing the law, is the court required to accept the legislature’s factual judgment, without considering its relevance, nexus, or significance to the policy judgment under review, or does that level of deference undermine the judicial role by effectively ceding the court’s authority to interpret the constitution to another branch of government?<sup>15</sup>

I intentionally start with a provocative example because the issues that state courts face are likewise provocative: whether school funding levels are sufficient to support the state constitutional guarantee of a free public school system;<sup>16</sup> whether the institution of marriage includes the union of individuals of the same sex;<sup>17</sup> or whether business improvement districts can bar the homeless from their territory.<sup>18</sup> In each of these cases, factual judgments inevitably shape, inform, support, or distort legislative choices and so affect the court’s ability to ensure compliance with constitutional norms.

### B. FACTS AND INSTITUTIONAL DESIGN

I suggest that calling something a “fact” expresses a conclusion about where a legal system ought to locate initial responsibility for making a legal decision—say, with the jury rather than the judge, or with the trial court rather than the appeals judge, or with the legislature rather than the court.<sup>19</sup> In some circumstances, the initial decision maker’s factual judgment is irrebuttable because no other actor is permitted to review its content. As an example, consider the role of the federal criminal jury in issuing a verdict of “not guilty.” That verdict is unreviewable and cannot be overturned either by the judge or the legislature;<sup>20</sup> the standard of absolute deference respects the structural importance of the people in the constitutional scheme. In other situations, however, the initial decision maker’s factual judgment is rebuttable because some other actor is not only permitted, but also obliged to review its content or to consider the issue *de novo*. The old-fashioned idea of jurisdictional facts fits into this latter category,<sup>21</sup> as does the process of judicial review in a more general sense.<sup>22</sup>

From an institutional perspective, a rule of deference describes how authority to decide particular legal questions is allocated between and among actors in a shared interpretive enterprise. But a rule of deference is not only descriptive; it also normatively shapes the institutional exercise of power in the light of certain ideal assumptions.<sup>23</sup> Determining the appropriate level of deference thus turns on a complex mix of

constitutional frameworks, structural arrangements, and substantive commitments that bears not only a principled, but also a strategic relationship to constitutional norms.<sup>24</sup>

### III. Old-Style Federal Standards of Deference and State Court Review

Until recently, federal court treatment of legislative findings involving social and economic legislation could easily be summarized with the phrase “minimal rationality.” Using this approach, a court typically accepts a legislature’s action without regard to its underlying “‘logic,’ . . . ‘wisdom,’ . . . or ‘fairness,’ ”<sup>25</sup> while reserving more searching review for cases involving fundamental rights (for example, privacy claims under the First Amendment) and suspect classes (including race and, more grudgingly, gender).<sup>26</sup> When applying this test, Congress is not required to make “formal findings,”<sup>27</sup> and instead is

**Until recently, federal court treatment of legislative findings involving social and economic legislation could easily be summarized with the phrase “minimal rationality.”**

expected only to document the “factual plausibility” of the premises supporting a statute.<sup>28</sup> Courts and commentators justify this deferential standard largely in terms of separation of powers, federalism, and the federal Constitution’s failure to enumerate positive rights (such as a right to an education or to public assistance) within the text, thus leaving substantive policy choices to the political arena.<sup>29</sup>

The U.S. Supreme Court deploys a different standard of review in cases in which the statute intrudes on the jurisdiction of an Article III court.<sup>30</sup> Cases of this sort typically involve Congress’s decision to allocate judicial power to a non-Article III decision maker, such as a magistrate judge or an Article I administrative court, rather than to a life-tenured federal judge.<sup>31</sup> The federal standard in these cases is not whether the statute meets minimal rationality, but rather turns on a balancing test that asks whether the allocation of matters that are “inherently judicial” to non-Article III decision makers “is closely related to a public regulatory scheme, or generally, where the benefits of using a legislative court exceed the disadvantages.”<sup>32</sup> Many questions are still open about this standard—largely because Congress, until recently, has refrained from intruding too deeply into judicial prerogative.<sup>33</sup>

#### A. STATE COURT INDEPENDENCE

State courts reviewing state legislative outputs are not required to adopt the federal courts’ approach to deference and can instead develop forms of review that best effectuate their own state’s constitutional frameworks, structural arrangements, and substantive commitments.<sup>34</sup> Moreover, the justifications offered for the strong deference afforded by federal courts to legislative fact-finding—separation of powers, federalism, and the Constitution’s negative-rights framework—do not fit the institutional position of state governance systems.<sup>35</sup> By now, much of this material is familiar territory and requires only brief review.

The key justification for minimal rationality review rests on what commentators call the counter-majoritarian difficulty: the apparent undemocratic nature of having unelected judges second-guess the superior judgments of democratically elected representatives.<sup>36</sup> This argument, largely grounded in a

particular version of separation-of-powers doctrine, finds reinforcement in the view that federal judges possess only narrow common-law powers and so are not equipped to create policy other than on an interstitial basis.<sup>37</sup> State court judges, by contrast, are in many states elected or subject to recall. They possess the traditional broad lawmaking authority of common law judges, and their participation in policy formation is critically implicated by the explicit inclusion of social and economic provisions in state constitutions.<sup>38</sup> In addition, although federal constitutional decisions are final and beyond legislative revision, state court decisions are more easily changed by state constitutional amendment, further contributing to the state judiciary’s “democratic imprimatur.”<sup>39</sup>

State legislatures similarly do not display the same comparative advantages of Congress.<sup>40</sup> Article I of the federal Constitution reflects the view that Congress can be trusted to carry out the majority’s policy goals in almost any way imaginable, subject to the constraints of state sovereignty and the Bill of Rights.<sup>41</sup> State constitutions, by contrast, show distrust toward state legislatures, hemming in their power in both procedural and substantive ways.<sup>42</sup> Moreover, although Congress now has a well-developed committee structure, staff, and other information-gathering resources that work to open up avenues of constituent participation,<sup>43</sup> many state legislatures lack committees, meet only part-time, tolerate dual office holding, and rely on “very strong partisan leadership”; majoritarian rule in these circumstances can mean little more than the glad-handing arrangements of “three men in a room.”<sup>44</sup> In addition, local or private actors make many state decisions; these decision makers lack the deliberative and majoritarian features that motivate the U.S. Supreme Court’s deferential stance.<sup>45</sup>

Turning to federalism, this justification for the Court’s deferential approach has no salience when a state court reviews state legislative fact-finding. State constitutions lack a principle of dual sovereignty; as Professor Daniel B. Rodriguez explains, “Whereas states occupy an essential role in the American constitutional system, there is no equivalent principle of federalism . . . in state constitutionalism.”<sup>46</sup>

Finally, deferential review is also said to be justified by the federal Constitution’s close identification with negative rights, a tradition that commits the government to no particular social or economic policy—whether expressed as a right to government-provided public assistance or as a right to be free from excessive taxation.<sup>47</sup> The absence of positive rights at the federal level supports the Court’s hands-off approach to social and economic legislation, on the view that policy is a matter of political expedience and not constitutional principle.<sup>48</sup> The various reasons for Congressional action—constituent pressure, symbolic expression, and emergency situations—are thus all permissible, provided Congress stays within the limits of its constitutional authority.<sup>49</sup>

**Many state legislatures lack committees, meet only part-time, tolerate dual office holding, and rely on “very strong partisan leadership”; majoritarian rule in these circumstances can mean little more than the glad-handing arrangements of “three men in a room.”**

State constitutions, by contrast, typically incorporate a variety of specific social and economic policies, ranging from the provision of public assistance<sup>50</sup> to limits on municipal indebtedness.<sup>51</sup> Where a state constitution commits legislative power to the achievement of a specific goal—whether to supporting decision making by juries or providing judicial, rather than administrative, remedies for tort injuries—the state legislature is not free to disregard these commitments by enacting other policies, however plausible those alternatives might be. In such

circumstances, the test of constitutionality is not whether the statute is rational, as in the federal system, but rather whether it carries out the constitutional command.<sup>52</sup> The explicit inclusion of statutory-like clauses in state constitutional texts, implicating the state courts in the enforcement of substantive policy goals, thus necessitates judicial examination of factual judgments to ensure that legislative outputs comply with constitutional mandates.

#### IV. New-Style Federal Legislative Record Review

Since 1995, the U. S. Supreme Court has taken a bold turn away from rationality review, and now closely examines the factual justification for certain federal legislation enacted under the Article I Commerce Clause and under Section 5 of the Fourteenth Amendment.<sup>53</sup> Even commentators who criticize the Court's decisions on the merits—because they disagree, for example, with the Court's narrowing of congressional power—nevertheless acknowledge the possibility of positive benefits flowing from the federal judiciary taking a tougher look at legislative fact-finding and thereby fostering more informed inter-branch dialogue<sup>54</sup>

**The U.S. Supreme Court's new wave of decisions has thus generated a great deal of criticism from commentators who see them as unprincipled and result-oriented, evidence of the Rehnquist Court's Kulturkampf against the New Deal and civil rights.**

Some commentators, however, question whether the Court's new approach reflects legitimate institutional necessities or only illegitimate partisan goals. The implicit charge is that legislative record review is “sham” review,<sup>55</sup> a smokescreen for a Court that is on “a mission” to strike down laws that it finds disagreeable.<sup>56</sup> Adding to these critics' skepticism is the fact that the Court applied its new standard of review to legislation enacted during a different interpretive regime, rather than first alerting Congress to its fact-finding obligations through adoption of a prospective rule. Predictability in law matters, including predictability about judicial rules that direct what level of deference a court will accord a legislature's fact-finding: advance notice and a healthy period of transition, even if not constitutionally required, seem important as ways to avoid inter-branch friction.<sup>57</sup> Exacerbating these concerns is the fact that in the federal system, a finding of unconstitutionality carries high stakes; given the extraordinary barriers to federal constitutional amendment, statutory invalidation often effectively closes a contested issue to political change. Enhanced record review in the federal system may produce the perverse effect of blocking democratic expression and impeding inter-branch dialogue.<sup>58</sup>

The U.S. Supreme Court's new wave of decisions has thus generated a great deal of criticism from commentators who see them as unprincipled and result-oriented, evidence of the Rehnquist Court's Kulturkampf against the New Deal and civil rights.<sup>59</sup> Wherever one stands on the substance of this debate, the Court's familiar justification for its new approach to legislative record review—separation of powers and, more strongly, federalism—does not quite fit the situation of state courts reviewing state legislative activity.



## V. Articulating State Levels of Deference for State Legislative Fact-Finding

So, what is a state court to do? In practice, patterns of deference in the state system do not cleanly track the federal model. In some states, federal doctrine exercises a strong influence on the judiciary, even in the interpretation of state constitutional provisions.<sup>60</sup> However, in other states, particular areas of decision developed outside federal doctrine<sup>61</sup>—as, for example, a state court’s closer scrutiny of economic regulation, which works to protect against monopoly and the expropriation of public resources by private interests.<sup>62</sup> Still other state judges, absorbing the lessons of the new federalism, are constructing modes of independent review more firmly grounded in state constitutional concerns and that reflect the distinct position of the states within a national interpretive community.<sup>63</sup>

In addition, judicial review in some states comports with the theory of “due process of lawmaking,” made famous by former Oregon Supreme Court Justice Hans A. Linde.<sup>64</sup> Under this approach, courts review legislative outputs not for rationality, as in the federal system, but rather for compliance with process norms—for example, single-subject limitations on legislation or rules regarding the makeup of the legislature itself.<sup>65</sup> This approach builds on the distinct features of state constitutions that limit not only the scope of legislative power, but also the manner in which that power can be exercised. Similarly, some state courts, asked to interpret and enforce state constitutional provisions guaranteeing the affirmative provision of particular goods and services, such as free public schooling, that lack federal constitutional analogue, have developed independent approaches to judicial review, and, in particular, undertake a searching inquiry into the factual judgments underlying the legislature’s efforts to carry out constitutional commitments. In recent years, for example, litigation involving state constitutional education clauses has required state courts to look closely at state legislative fact-finding involving the raising and allocating of state tax revenues to fund public school systems.<sup>66</sup>

Finally, some state courts exercise closer review of state legislation that purports to restrict judicial remedies or to eliminate jury decision making.<sup>67</sup> Again, this approach to constitutional interpretation reflects the rich textualism of many state constitutions and their explicit guarantee of common law remedies or to forms of popular fact-finding in civil cases.<sup>68</sup> In *Lucas v. United States*,<sup>69</sup> for example, a challenge to statutory caps on medical malpractice damages, the Texas Court, answering questions certified by the federal appeals court, invalidated the provision under the Texas Constitution’s open-courts clause, finding it, “[i]n the context of a person catastrophically injured by medical negligence . . . [to be] a speculative experiment to determine whether liability insurance rates will decrease.”<sup>70</sup>

### A. STATE INTER-BRANCH COLLABORATION

State judicial practices, and the relation between state interpretive methods and legislative fact-finding, thus display a diversity of approach that differs from the federal system’s use of minimal-rationality review. Despite this variation, however, commentators emphasize a distinct pattern that is highly relevant to the question of judicial deference in both its descriptive and normative aspects. For in almost all states, the distribution of power among the branches of government reflects a “principle of shared, rather than completely separated powers . . . a system of separateness with interdependence, autonomy with reciprocity.”<sup>71</sup> This collaborative framework—encouraging an inter-branch “dance,” to borrow from Wisconsin Supreme Court Chief Justice Shirley Abrahamson<sup>72</sup>—reflects a working partnership between the judiciary and legislature on issues of shared responsibility, as well as the inextricable connection between rights (and, in particular, state constitutional rights) and empirical judgments.

## B. THREE BENEFITS OF HEIGHTENED REVIEW

Closer judicial scrutiny of state legislative fact-finding in cases involving state constitutional norms best effectuate this collaborative partnership and can be expected to improve lawmaking in three ways by (1) encouraging greater legislative deliberation, (2) fostering increased political participation, and (3) providing the base for more informed judicial review. First, by insisting on more than just a hope and a hunch to support legislation, heightened review will encourage representatives to investigate issues, explore alternatives, weigh competing arguments, and to document choices. Currently, some state legislatures prepare very minimal reports. In New York, for example, Court of Appeals Chief Judge Judith S. Kaye notes, “[T]ypically, all the courts have are the Bill Jackets containing the Governor’s approval memorandum, the Sponsor’s memorandum and assorted constituent letters.”<sup>73</sup> Substantiation of factual judgments will make more transparent the legislature’s assessment of competing positions and ensure that balanced deliberation in fact takes place. The heightened standard would not require a legislature to act like a court or an agency<sup>74</sup>—to the contrary, legislators can and should continue to rely on a range of evidentiary sources that draw on the “rich informality” of representative deliberation.<sup>75</sup>

Second, requiring a higher level of factual justification can improve lawmaking by promoting greater democratic participation. The building of a legislative record encourages interactions between constituents and their elected representatives and supports democratic values.<sup>76</sup> Absent exigent circumstances, the “three men in a room” model would be taken as a signal of a hasty, secretive, and therefore defective process.<sup>77</sup> A requirement of this sort can thus be expected to enhance, rather than diminish, popular constitutional expression—a marked contrast to the federal experience, in which the new-style legislative record review is said to exclude both the people and their elected representatives from the process of constitutional development.<sup>78</sup>

**Requiring a higher level of factual justification can improve lawmaking by promoting greater democratic participation.**

Finally, by asking the legislature to make explicit the factual assumptions on which policy is based, the standard can be expected to encourage more articulate dialogue between the legislature and the judiciary in elaborating state constitutional norms and allowing for adaptation and adjustment in light of

changing conditions.<sup>79</sup> State constitutions, departing from the negative-rights framework of federal doctrine, require close attention to factual judgments to ensure that statutes more likely than not carry out the substantive norms that distinguish state constitutions from the federal. The approach is consistent with the conditional nature of state constitutional adjudication that tolerates provisional remedies and revisable solutions, and draws power from the common law authority of state courts to make interstitial policy consistent with state constitutional commitments.

## C. PRUDENTIAL CONCERNS

Far from effecting an abrupt or unexpected change in inter-branch relations, heightened review instead comports with the model of “due process of lawmaking” associated with state practice. And rather than causing friction or suggesting disrespect, the court’s interpretive stance evinces a cooperative willingness to work in partnership with the state legislature. Nevertheless, even if closer scrutiny of state legislative factual judgments is consistent with the legitimate needs of state governance, one might still question whether state courts have the ability or the political will to sustain a less deferential approach.

The answers to these questions are interrelated: the interpretive techniques available for legislative record review are also ways to increase the judiciary’s political capital through inter-branch collaboration.

The court’s ability to carry out this task raises a question of institutional capacity [the capability of an institution to achieve particular goals broadly understood]. Institutional capacity is, of course, a comparative matter.<sup>80</sup> Although adjudication has its limits, state legislatures are likewise constrained—by resource deficits, structural biases, and institutional custom—in their ability and motivation to develop information and to undertake evaluation.<sup>81</sup> As Justice Linde emphasizes, commentators tend to view the state courts as more professional than the state legislatures which “have relatively weak institutional structures or traditions of pursuing a complex subject.”<sup>82</sup> By contrast, state courts have a demonstrated ability to marshal and to analyze social facts not only through adjudicative hearings, but also through a range of “auxiliary devices,” including the subpoena power, the amicus brief, and the appointment of experts.<sup>83</sup> As important, state courts can deploy a variety of interpretive techniques, such as dicta,<sup>84</sup> advisory opinions,<sup>85</sup> rules requiring legislatures to state the intention of statutes clearly and explicitly,<sup>86</sup> and legislative remands,<sup>87</sup> that encourage the legislature to engage in serious fact-finding and also facilitate institutional dialogue.

**State courts lack an inexhaustible fund of political capital; their electoral dependence, the possibility of judicial recall, and the ease of state constitutional amendment—plus intense media attention—make them more vulnerable to popular pressure than Article III judges are.**

The resulting collaboration between the courts and legislature should work to reduce friction between the branches and so lower the possibility of political retaliation. State courts lack an inexhaustible fund of political capital;<sup>88</sup> their electoral dependence, the possibility of judicial recall, and the ease of state constitutional amendment<sup>89</sup>—plus intense media attention<sup>90</sup>—make them more vulnerable to popular pressure than Article III judges are.<sup>91</sup> Not surprisingly, studies suggest that elected judges are less likely to invalidate statutes on constitutional grounds than are appointed judges whose office is largely insulated.<sup>92</sup> Moreover, by using interpretive techniques that give the legislature a second chance, whether to substantiate choices or to make different choices, the court resists monopolizing constitutional expression and instead provides space for the development of provisional remedies in the face of empirical uncertainty.<sup>93</sup> Indeed, at least one commentator sees legislative record review as particularly “helpful when courts have underenforced a constitutional norm” and are reluctant, single handedly, to develop constitutional policy.<sup>94</sup>

## VI. Testing the Proposed State Judicial Standard of Deference

So let us return to the opening hypothetical and the ways in which legislative record review would influence the state court’s response. Arguably, a statute that establishes a panel to adjudicate tort claims and limits judicial remedies—thus removing the courts from an important area of constitutional policy—runs counter to the “rich history of cooperation and respect” that marks state inter-branch relations.<sup>95</sup> Indeed, by allocating a judicial function to a legislative-branch appointee, the legislature increases its own power at

the expense of the judiciary, thereby undermining checks and balances and giving warrant for a closer look at the statute's factual justification.<sup>96</sup> Possibly the statute's withdrawal of judicial jurisdiction also bumps up against a state constitutional "right to remedy" clause.<sup>97</sup> As in cases involving suspect classes or fundamental rights, the court would have warrant to give the legislature's factual finding closer scrutiny to ensure consistency with state constitutional norms.

The legislature may be withdrawing judicial jurisdiction on the view that common law tort decisions are mere "junk science verdicts."<sup>98</sup> The decision to cap damages, however, disproportionately allocates the costs of reform to potential plaintiffs and the benefits to potential defendants. The reform thus raises questions of whether particular groups have used politics to grab control of an important public resource—the system of tort rules.<sup>99</sup> Legislative record review would require the legislature to explain the factual basis for its proposed changes; transparency gives the people greater access to decision making processes and makes it easier for voters to monitor statutory reform.<sup>100</sup> A closer look at the legislature's fact-finding also enables the reviewing court to be better informed about the factual judgments underlying the new compensation plan. Finally, through careful use of advisory opinions, dicta, rules of interpretation, and legislative remand, the court can encourage greater dialogue with the legislature before taking the more serious step of statutory invalidation.

## VII. Conclusion

Almost a century ago, Dean Roscoe Pound criticized "the sharp line between law and fact in our legal system which requires constitutionality, as a legal question, to be tried by artificial criteria of general application and prevents effective judicial investigation or consideration of the situations of fact behind or bearing upon the statutes."<sup>101</sup> This paper, building on the realist insight, urges state courts to take a closer look at legislative fact-finding, but to do so in a spirit of collaboration and experimentation. The substantive implications of such an approach—whether it shows a preference for liberal or conservative policy—are at most contingent and uneven; as Judge Posner explains, "It will produce liberal or conservative outcomes depending on whether the courts are at the moment more or less liberal than other institutions."<sup>102</sup> But its practical implications for improving lawmaking are clear and direct, consistent with what Roscoe Pound termed "a functional attitude, asking not merely what law is and how it has come to be but what (in all its senses) it does, how it does it, and how it may be made to do it better."<sup>103</sup>

## ENDNOTES

<sup>1</sup> I want to thank William Buzbee, Barry Friedman, Clayton Gillette, Stephen Loffredo, and Robert Schapiro for comments on an earlier draft. Adam D. Hill, a student at New York University School of Law, provided helpful research assistance.

<sup>2</sup> The hypothetical is by no means fanciful. See, e.g., Arthur R. Miller, *The Pretrial Rush To Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003) (stating that perceived problems in the litigation system have “engaged the attention of all three branches of the federal government as well as many state legislatures.”).

<sup>3</sup> Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1153 & n. 12 (1992).

<sup>4</sup> Victor E. Schwartz & Leah Lorber, *Judicial Nullification of Civil Justice Reform Violates the Fundamental Federal Constitutional Principle of Separation of Powers: How To Restore the Right Balance*, 32 RUTGERS L.J. 907, 907 (2001).

<sup>5</sup> Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 44 (1972) (“A common defense of extreme judicial abdication is that the state has considered the contending considerations. Too often the only assurance that the state has thought about the issues is the judicial presumption that it has.”).

<sup>6</sup> See Robert S. Peck, *Tort Reform’s Threat to an Independent Judiciary*, 33 RUTGERS L.J. 835, 926-927 (2002) (arguing that “[t]ort restrictionist laws . . . constitute a severe transgression on the constitutional separation of powers” and an assault upon the jury).

<sup>7</sup> See Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1579 (2001) (questioning “an ‘all-or-nothing’ conception of the judicial role”).

<sup>8</sup> Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 946 (1999).

<sup>9</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power Over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1241 (2002).

<sup>10</sup> 531 U.S. 356 (2001); William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 101-119 (2001) (tracing the emergence of the Court’s “new legislative record review” after 1995, in which “review of the predicate for Congressional legislation has assumed a less deferential cast”).

<sup>11</sup> The standard used comprises one of a number of “conceptually distinct doctrinal rules that direct how courts—faced, as they inevitably are, with epistemic uncertainty—are to determine whether the constitutional meaning has been complied with.” Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 9 (2004); see also Dan T. Coenen, *The Rehnquist Court, Structural Due Process, and Semisubstantive Constitutional Review*, 75 CAL. L. REV. 1281, 1282, 1314 (2002) (using the term “semi-substantive review” to refer to the Court’s use of “Findings-Based ‘How’ Rules”).

<sup>12</sup> Saul M. Pilchen, *Politics v. The Cloister: Deciding When the Supreme Court Should Defer to Congressional Fact-finding under the Post-Civil War Amendments*, 59 NOTRE DAME L. REV. 337, 340 (1984).

<sup>13</sup> Cf. *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982) (stating, in the context of appellate review, that “We [do not] yet know of any other rule or principle that will unerringly distinguish a factual finding from a legal conclusion.”).

<sup>14</sup> See Deborah Jones Merritt, *Constitutional Fact and Theory: A Response to Chief Judge Posner*, 97 MICH. L. REV. 1287, 1291, 1293 (1999) (contending that facts “can influence” but cannot “resolve constitutional issues”).

<sup>15</sup> See Timothy Zick, *Constitutional Empiricism: Quasi-Neutral Principles and Constitutional Truths*, 82 N.C. L. REV. 115, 166

(2003) (“Empiricism also now functions as a check on ‘novel’ or ‘implausible’ government theories and causal claims.”).

<sup>16</sup> See, e.g., Martha I. Morgan, Adam Cohen & Helen Hershkoff, *Establishing Education Program Inadequacy: The Alabama Example*, 28 U. MICH. J. L. REF. 559 (1995) (describing a state constitutional court challenge to the adequacy of school financing methods in Alabama).

<sup>17</sup> See, e.g., Brad K. Gushiken, *The Fine Line Between Love and the Law: Hawai‘i’s Attempt To Resolve the Same-Sex Marriage Issue*, 22 U. HAW. L. REV. 149 (2000).

<sup>18</sup> See, e.g., Richard Briffault, *A Government For Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365 (1999).

<sup>19</sup> See Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 234 (1985) (explaining that “The categories of law and fact have traditionally served an important regulatory function in distributing authority among various decisionmakers in the legal system.”).

<sup>20</sup> See Rachel E. Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 36 (2003) (explaining that when a criminal jury issues a general verdict of “not guilty,” “the jury’s decision is *unreviewable*”) (italics in original).

<sup>21</sup> See Monaghan, *supra* note 19, at 249 (explaining the historic origins of the jurisdictional fact doctrine).

<sup>22</sup> See Alexander M. Bickel, *The Least Dangerous Branch* 1 (1962) (defining judicial review as the court’s “authority to determine the meaning and application of a written constitution”).

<sup>23</sup> Cf. Helen Hershkoff, *State Courts and the “Passive Virtues”: Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1906-1908 (2001) (discussing state justiciability doctrine as both a normative and a descriptive statement about state inter-branch relations).

<sup>24</sup> See Lawrence Gene Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 962 (1985) (“Like other legal rules, constitutional rules bear a pragmatic, strategic relationship to the concerns that animate them.”) (emphasis in original omitted).

<sup>25</sup> See Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1136-37 (1999).

<sup>26</sup> See Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 410-411 (1993) (summarizing the doctrine).

<sup>27</sup> *Katzenbach v. McClung*, 379 U.S. 294, 299 (1964).

<sup>28</sup> Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and United States v. Lopez*, 46 CASE W. RES. L. REV. 695, 712 (1996).

<sup>29</sup> I have covered some of this ground, as applied to the applicability of federal rationality review in state court cases involving state constitutional welfare clauses, in Hershkoff, *supra* note 25, at 1153-1169 (discussing the justifications for federal rationality review and their lack of fit in state constitutional cases involving claims to government assistance and other social and economic rights).

<sup>30</sup> See RICHARD H. FALLON JR., DANIEL J. MELTZER, & DAVID L. SHAPIRO, *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 319-417 (5<sup>th</sup> ed. 2003) (presenting the classic collection of cases on Congress’s power to distribute judicial power).

<sup>31</sup> See, e.g., *Crowell v. Benson*, 285 U.S. 22, 64 (1932) (“We think that the essential independence of the exercise of the

judicial power of the United States in the enforcement of constitutional rights requires that the federal court should determine such an issue upon its own record and the facts elicited before it.”).

<sup>32</sup> Erwin Chemerinsky, *Federal Jurisdiction* 236 (4<sup>th</sup> ed. 2003).

<sup>33</sup> The Court may soon need to resolve some of these questions. *See generally* Roberto Iraola, *Enemy Combatants, the Courts, and the Constitution*, 56 OKLA. L. REV. 565 (2003).

<sup>34</sup> *See generally* David R. Keyser, *State Constitutions and Theories of Judicial Review: Some Variations on a Theme*, 63 TEX. L. REV. 1051 (1985) (discussing the relation between state constitutions and standards of review).

<sup>35</sup> This section draws from Hershkoff, *supra* note 25, at 1157-1169 (arguing that state courts, interpreting state constitutions, are not obliged to conform the scope of their review to federal practice and, in particular, ought to hesitate before adopting minimum rationality in determining the constitutionality of social and economic legislation).

<sup>36</sup> *See* David L. Faigman, “Normative Constitutional Fact-Finding”: *Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 547 (1991) (“An unelected judiciary passing on the validity of laws promulgated by elected representatives is at variance with the basic principles of democracy.”); *but see* Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 6 (1998) (referring to “bromides about democracy” that are offered to justify judicial restraint).

<sup>37</sup> *See* Pilchen, *supra* note 12, at 338 (discussing the assumption that “Congress has an institutional or structural advantage over the courts in finding and evaluating the facts”).

<sup>38</sup> Hershkoff, *supra* note 25, at 1157-1161 (discussing the democratic legitimacy of state judicial review from the perspective of the counter-majoritarian difficulty).

<sup>39</sup> Burt Neuborne, *Foreword: State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 899-900 (1989); *see also* Hershkoff, *supra* note 24, at 1161-1162 (explaining that rules of federal judicial deference try “To limit those areas in which the Court — unelected, undemocratic, and unaccountable — might otherwise assume the role of the Constitution’s final arbiter.”).

<sup>40</sup> *See* Cornelius J. Peck, *Comments on Judicial Creativity*, 69 IOWA L. REV. 1, 6-7 (1983) (questioning whether the state legislative process “is always superior to the judicial process”).

<sup>41</sup> *See* A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court’s New “On the Record” Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328, 376 (2001) (contending that the federal Constitution “leaves to Congress’s determination the manner of record to compile in support of legislation”).

<sup>42</sup> *See* G. Alan Tarr, “Introduction,” in *CONSTITUTIONAL POLITICS IN THE STATES: CONTEMPORARY CONTROVERSIES AND HISTORICAL PATTERNS* xiii, xiv (G. Alan Tarr ed., 1996) (observing that state constitutions “not infrequently . . . prescribe the means by which [state constitutional policy] commitments will be met”); *see generally* Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 17 PUBLIUS: J. FEDERALISM 91, 92 (1987) (explaining the adoption of state constitutional constraints on state legislative power).

<sup>43</sup> *See* Neal Devins, *Congressional Fact-finding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1178 (2001) (discussing the information-gathering resources of Congress).

<sup>44</sup> *See* Richard A. Briffault, *Beyond Congress: The Study of State and Local Legislatures*, 7 N.Y.U. J. LEGIS. & PUB. POL’Y 23, 24-25 (2003).

<sup>45</sup> *See* Hershkoff, *supra* note 23, at 1925 (discussing local decision-making structures).

<sup>46</sup> Daniel B. Rodriguez, *State Constitutional Theory and Its Prospects*, 28 N.M. L. REV. 271, 278 (1998).

- <sup>47</sup> See Hershkoff, *supra* note 25, at 1155-1157 (observing that “Federal rationality review rests on a baseline assumption that the U.S. Constitution does not guarantee positive rights against the government”).
- <sup>48</sup> *Id.* at 1155 (referring to federal questions concerning social and economic policy, such as the provision of welfare, as a political “contingency”).
- <sup>49</sup> See John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2449 (2003) (observing that “modern rationality review [in the federal system] posits that the judiciary must respect . . . ‘imperfect’ legislative outcomes”); see also Mark Tushnet, *Subconstitutional Constitutional Law: Supplement, Sham, or Substitute?*, 42 WM. & MARY L. REV. 1871, 1879 (2001) (“Subconstitutional doctrines . . . need not be inconsistent with normative democratic theory if they do not foreclose any substantive legislative choice.”).
- <sup>50</sup> See HELEN HERSHKOFF & STEPHEN LOFFREDO, *THE RIGHTS OF THE POOR* 3-4 & nn. 29-33 (1997) (discussing state constitutional rights to welfare).
- <sup>51</sup> See, e.g., Stewart E. Sterk & Elizabeth S. Goldman, *Controlling Legislative Shortsightedness: The Effectiveness of Constitutional Debt Limitations*, 1991 WIS. L. REV. 1301, 1315-1316 (1991) (reporting that debt-limitation clauses appear in three-quarters of the states’ constitutions).
- <sup>52</sup> See Hershkoff, *supra* note 25, at 1183-86 (describing a “jurisprudence of consequences” for state court enforcement of state constitutional positive rights clauses).
- <sup>53</sup> See Ruth Coker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 80-81 (2001) (reporting the large number of statutes that the Court has invalidated since 1995 for lack of sufficient federal fact-finding). The court also more closely scrutinizes legislation that touches on First Amendment concerns. See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 653-61 (1994) (reviewing the basis for “must carry” cable rules under the First Amendment).
- <sup>54</sup> See, e.g., Coker & Brudney, *supra* note 53, at 113 (acknowledging that some commentators relate tougher judicial review with the possibility of improved inter-branch dialogue).
- <sup>55</sup> Compare Tushnet, *supra* note 49, at 1876-79 (contending that structural review involving heightened legislative record review is resulted oriented), with Dan T. Coenen, *Structural Review, Pseudo-Second-Look Decision Making, and the Risk of Diluting Constitutional Liberty*, 42 WM. & MARY L. REV. 1881, 1882-87 (2001) (rejecting the “sham decision” argument).
- <sup>56</sup> See Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1712, 1720 (2002).
- <sup>57</sup> Devins, *supra* note 43, at 1197 (“If the Court were, for example, to precondition approval of legislation on formalized fact-finding, Congress almost certainly would comply.”).
- <sup>58</sup> See Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 42 (2002) (contending that the Thayer-inspired level of deference to legislative judgments allows for inter-branch dialogue on contested constitutional questions).
- <sup>59</sup> For use of the word “Kulturkampf” to different effect, see *Romer v. Evans*, 517 U.S. 620, 635 (1996) (Scalia, J., dissenting) (“The Court has mistaken a Kulturkampf for a fit of spite.”); see also Gary Lawson, *An Empirical Test of Justice Scalia’s Commitment to the Rule of Law*, 26 HARV. J. L. & PUB. POL’Y, 803, 803 (2003) (discussing the Court’s decision in *Bush v. Gore* and quoting “the immortal words of Bugs Bunny, ‘Of course, you know *this* means *war*.’”) (italics in original).
- <sup>60</sup> See, e.g., Richard Briffault, *Fifteenth Annual Issue on State Constitutional Law—Foreword: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L. J. 907, 956 (2003) (observing that “[T]he state courts’ many references to state fiscal limits as matters of state economic policy, and the repeated calls for deference to the legislature on fiscal questions, indicate that state courts accept the Supreme Court’s *Carolene Products* settlement.”).



- <sup>61</sup> See Advisory Commission on Intergovernmental Relations, *State Constitutions in the Federal System: Selected Issues and Opportunities for State Initiatives* 83 (1989) (explaining that “[S]tate supreme courts relied on various provisions of their respective constitutions to protect ... [economic] rights well before the Supreme Court discovered substantive due process”).
- <sup>62</sup> Hans A. Linde, *Without “Due Process”: Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 129 & n. 11 (1970) (collecting sources); see also *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1498-1499 (1982) (noting the presence of “majoritarian,” as distinct from “antimajoritarian,” review by state courts as a means “for protecting majorities that have been unable to protect themselves”).
- <sup>63</sup> See generally Richard C. Turkington, *Constitutional Limitations on Tort Reform: Have the State Courts Placed Insurmountable Obstacles in the Path of Legislative Responses to the Perceived Liability Insurance Crisis?*, 32 VILL. L. REV. 1299, 1347 (1987) (contending that state judicial invalidation of state tort reform statutes reflects a “recognition of the special political morality and values presented by the specific and unique textual language of the state constitution”); Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147 (1993) (discussing the importance of an interpretive community to state constitutional development).
- <sup>64</sup> Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976).
- <sup>65</sup> See Frickey & Smith, *supra* note 55, at 1712 (stating that “in recent years the state supreme courts are becoming more aggressive in enforcing the single-subject requirement, especially in the context of ballot measures submitted to the people through the initiative process”).
- <sup>66</sup> See, e.g., Helen Hershkoff, “School Finance Reform and the Alabama Experience,” in *STRATEGIES FOR SCHOOL EQUITY: CREATING PRODUCTIVE SCHOOLS IN A JUST SOCIETY* 24 (Marilyn J. Gittell ed., 1998) (discussing Alabama school finance litigation).
- <sup>67</sup> See Schwartz & Lorber, *supra* note 3, Appendix at 939-951 (collecting state constitutional cases invalidating tort reform statutes on grounds including jury trial rights and open-courts provisions); see, e.g., *State ex re. Ohio Acad. of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 715 N.E.2d 1062, 1086 (1999) (exploring the relation between the state constitution right-to-remedy clause and the length of a statute of limitations).
- <sup>68</sup> See, e.g., Randy J. Holland, *State Jury Trials and Federalism: Constitutionalizing Common Law Concepts*, 38 VAL. U. L. REV. 373 (2004) (discussing the jury right under the Delaware Constitution and its common-law roots).
- <sup>69</sup> *Lucas v. United States*, 757 S.W.2d 687 (1988).
- <sup>70</sup> *Id.* at 690.
- <sup>71</sup> See Shirley S. Abrahamson & Robert L. Hughes, *Shall We Dance? Steps for Legislators and Judges in Statutory Interpretation*, 75 MINN. L. REV. 1045, 1093 (1991) (discussing interpretive partnerships between the state judiciary and state legislature).
- <sup>72</sup> *Id.*
- <sup>73</sup> Judith S. Kaye, *Things Judges Do: State Statutory Interpretation*, 13 TOURO L. REV. 595, 599 (1996-1997).
- <sup>74</sup> See Bryant & Simeone, *supra* note 40, at 368 (opposing federal legislative record review on the ground that “Congress is not an agency”).
- <sup>75</sup> Coker & Brudney, *supra* note 52, at 117.
- <sup>76</sup> See generally Victoria Nourse, *The Vertical Separation of Powers*, 49 DUKE L.J. 749, 782 (1999) (arguing that shifting decision making from one branch to another changes incentive structures “of those who govern in ways that may silence or amplify some popular voices at the expense of others”).

<sup>77</sup> Thus, for example, in *Best v. Taylor Mach. Works*, 689 N.E.2d 1057 (Ill. 1997), a challenge to an Illinois tort reform statute, the court invalidated on state constitutional grounds a law that had been “introduced at 11:40 p.m., voted out of committee the very next day, voted off the floor of the lower house that week, and the following week passed by the senate,” citing a violation of separation of powers and the ban on special legislation. Robert S. Peck, *In Defense of Fundamental Principles: The Unconstitutionality of Tort Reform*, 31 SETON HALL L. REV. 672, 674 (2001) (citing *Best*, 689 N.E.2d at 1065 (recounting legislative history of Illinois Public Act 89-7)). See also Richard L. Abel, *Questioning the Counter-Majoritarian Thesis: The Case of Torts*, 49 DE PAUL L. REV. 533, 543 & n. 87 (1999) (recounting the legislative history of Cal. Civ. Code § 1714.45 (West 1998), a California tort reform statute).

<sup>78</sup> See Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 157 (2001) (characterizing the Rehnquist Court as driven by “the Justices’ conviction that they and they alone are responsible for the Constitution”).

<sup>79</sup> Hershkoff, *supra* note 25, at 1177 (observing that changes in standards of review can encourage elected representatives to better educate themselves about policy issues and so to create a better legislative record for judicial review).

<sup>80</sup> Devins, *supra* note 43, at 1206 (stating that “whether courts or lawmakers will do a better job of uncovering social facts is highly contextual.”).

<sup>81</sup> See Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1858, 1866 (1998) (linking the court’s lack of institutional capacity to comprehend legislative history to its “dependence on the parties,” leading to “[e]rrors of information” and “[e]rrors of evaluation” in statutory interpretation).

<sup>82</sup> Hans A. Linde, “Observations of a State Judge,” in JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 117, 118 (Robert A. Katzmann ed., 1988).

<sup>83</sup> See Mark V. Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698, 1711 (1980).

<sup>84</sup> See, e.g., *In re Sarah K.*, 66 N.Y.2d 223, 242, 487 N.E.2d 241, 251 (1985) (using dictum to emphasize the court’s view that “it would be highly desirable” for the legislature to reexamine a statute “in the light of” experience and continuing judicial dissatisfaction with the statute’s operation); see Abrahamson & Hughes, *supra* note 71, at 1056-1057 (citing *In re Sarah K.* to illustrate the state judiciary’s use of “opinion as a vehicle to draw legislative attention to statutory deficiencies”).

<sup>85</sup> See, e.g., Opinion of the Justices No. 338, 624 So.2d 107 app. (Ala. 1993). The author served as co-counsel to the plaintiff class in this lawsuit while an associate legal director of the American Civil Liberties Union. See also George D. Brown, *Binding Advisory Opinions: A Federal Courts Perspective on the State School Finance Decisions*, 35 B.C. L. REV. 543, 546 (1994) (describing state court remedial decisions in state constitutional school finance cases as “binding advisory opinions”).

<sup>86</sup> See generally William N. Eskridge Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992).

<sup>87</sup> See Sanford Levinson, *Identifying the Compelling State Interest: On “Due Process of Lawmaking” and the Professional Responsibility of the Public Lawyer*, 45 HASTINGS L.J. 1035, 1047 (1994) (discussing the use of the legislative remand in strict scrutiny cases); see, e.g., Tonja Jacobi, *Same-Sex Marriage in Vermont: Implications of Legislative Remand for the Judiciary’s Role*, 26 VT. L. REV. 381 (2002) (discussing the use of the remedial remand by the Vermont Court in dealing with same-sex marriage).

<sup>88</sup> Cornelius J. Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265, 293 (1963-64) (“Probably the greatest danger of an active and openly creative reform role for the judiciary is that it might produce or even facilitate a legislative counterattack by the lobbies and pressure groups that favor the status quo.”).

<sup>89</sup> See, e.g., James L. Wright & M. Matthew Williams, *Remember the Alamo: The Seventh Amendment of the United States Constitution, the Doctrine of Incorporation, and State Caps on Jury Awards*, 45 S. TEX. L. REV. 449, 458 (2004) (discussing efforts to amend the Texas Constitution, in response to a state court decision invalidating statutory damage caps).

<sup>90</sup> See Robert F. Williams, *Thirteenth Annual Issue on State Constitutional Law—Foreword: Tort Reform and State Constitutional Law*, 32 RUTGERS L. J. 897, 899 (2001) (referring to “high-visibility” state constitutional decisions and “the popular press” attention that they have received); see, e.g., *Divided Ohio Supreme Court Strikes Down Tort Reform Law*, 6 ANDREWS MASS TORT LITIG. 3 (1999) (discussing press reaction to the invalidation of an Ohio tort reform statute on state constitutional grounds).

<sup>91</sup> See Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 727 (1995) (discussing the “compromised protection of constitutional rights” in elected judiciary regimes).

<sup>92</sup> See Christine M. Durham, *The Judicial Branch in State Government: Parables of Law, Politics, and Power*, 76 N.Y.U. L. REV. 1601, 1607 (2001) (stating that popularly elected judges are less likely to overturn statutes than judges from merit systems are) (internal quotations and citation omitted).

<sup>93</sup> See Susan Haack, *Truth and Justice, Inquiry and Advocacy, Science and Law*, 17 RATIO JURIS. 15, 19 (2004) (observing that “[b]ecause of the tensions of fallibilism with finality, the legal system sometimes asks more of science than science can give: When courts need an answer to some scientific question . . . , there may still be reasonable disagreement among scientists in the relevant field, or agreement that no warranted answer is yet available”).

<sup>94</sup> Harold J. Krent, *Turning Congress into an Agency: The Propriety of Requiring Legislative Findings*, 46 CASE W. RES. L. REV. 731, 747 (1996).

<sup>95</sup> Victor E. Schwartz, Mark A. Behrens, & Mark D. Taylor, *Illinois Tort Law: A Rich History of Cooperation and Respect Between the Courts and the Legislature*, 28 LOY. U. CHI. L. J. 745 (1997) (inverting this “rich history” to justify legislative exclusivity in the area of tort reform).

<sup>96</sup> See Krent, *supra* note 94, at 737 (“When the factual issue concerns a political entity’s jurisdiction, some might argue that more stringent judicial scrutiny is appropriate.”).

<sup>97</sup> See Jonathan M. Hoffman, *By the Course of Law: The Origins of the Open Courts Clause of the State Constitutions*, 74 OR. L. REV. 1279, 1279 (1995) (reporting that thirty-nine state constitutions contain “open courts” or “remedies” clauses); see, e.g., Ohio Const. Art. I, § 16 (“All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.”).

<sup>98</sup> See PETER W. HUBER, *GALILEO’S REVENGE: JUNK SCIENCE IN THE COURTROOM* 4 (1991) (“Junk science verdicts, once rare, are now common.”); but see Kenneth J. Chesebro, *Galileo’s Retort: Peter Huber’s Junk Scholarship*, 42 AM. U.L. REV. 1637, 1652 (1993) (criticizing Huber’s argument as merely “the endless repetition of anecdotal horror stories and conclusory assertions, without empirical substantiation”).

<sup>99</sup> Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive To Use the Legal System*, 26 J. LEGAL STUD. 575, 579 (1997) (arguing in favor of restricting the tort system, but urging, among other proposals, “that defendants should pay for more than just the harm that they cause in adverse events: they should incur a bill equal to harm plus total litigation costs”); see *Holden v. Pioneer Broad. Co.*, 228 Or. 405, 365 P.2d 845, 846 (1961) (Sloan, J., dissenting), *cert. denied*, 370 U.S. 157 (1962) (explaining that less deference is owed to legislation that “limits or denies access to a court for the redress of a wrong committed. All too often such attempted restrictions have been for the benefit of the few at the loss of the many.”).

<sup>100</sup> See Krent, *supra* note 94, at 734 (commenting that “[T]he greater dialogue between the legislative and judicial branches, sparked by requiring findings, can only inure to the benefit of the public.”).

<sup>101</sup> Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 458 (1908-1909).

<sup>102</sup> Richard A. Posner, *The Meaning of Self-Restraint*, 59 IND. L. J. 1, 12 (1983).

<sup>103</sup> Roscoe Pound, *Sociological Jurisprudence*, in 18 JURISPRUDENCE 454, 458 (1908-1909).

## ORAL REMARKS OF PROFESSOR HERSHKOFF

Good afternoon and thank you. I am going to talk today about the level of deference that state courts owe to state legislative findings. Let me start with a hypothetical.

Let's assume that your state legislature gets on the tort reform bandwagon and enacts a new law. The law is very radical: essentially, judges and juries will no longer have power to decide tort cases. Instead, injured parties are required to take their claims to a panel that is staffed by hearing officers who have authority to award damages. The panel's powers are limited so that however bad the injury is, the hearing officers can't award more than \$10,000 in damages.

Inevitably, someone is going to file a lawsuit and challenge this law under the state constitution. In deciding the state constitutional claim, does the state court have to accept the facts that the state legislature relies on to justify the reform?

Whichever way the court decides the case, we can all predict the headlines. If the state court rejects the state legislature's fact-finding—on the view that the fact-finding is no more than an “orgy of guesswork”—we can see a headline accusing the state court of engaging in judicial nullification because the court has usurped the legislature's role. On the other side, if the state court rubber stamps the legislature's fact-finding and upholds the law, then there will be a headline accusing the court of judicial abdication because the court has failed to take seriously its duty to enforce the state constitution.

In thinking about the hypothetical, I want to focus on one issue, namely, the level of deference that a state court owes to fact-finding that a legislature puts forward to support new legislation. The conventional wisdom is that a court, or at least the federal court, ought in most cases accept the factual and policy judgments of legislatures. Courts are not supposed to probe too deeply into the factual bases of laws, in particular when those laws involve social and economic matters. Some commentators believe that state courts should follow federal courts in lockstep in terms of the deference they give to legislative fact-finding. This means that if the federal courts give great deference to congressional fact-finding, then state courts likewise should give great deference to state legislative fact-finding.

**Courts are not supposed to probe too deeply into the factual bases of laws, in particular when those laws involve social and economic matters.**

Until recently, federal courts, under the doctrine of rationality review, accorded great deference to federal legislative fact-finding. However, at least since 1995, the United States Supreme Court seems to have adopted a new approach to rationality review, taking a very tough look at congressional fact-finding, at least in certain cases where the laws are enacted

under the Article 1 Commerce Clause or under Section 5 of the Fourteenth Amendment.

Should state courts follow the United States Supreme Court's lead? If so, should state courts follow this new-style federal review, and give state legislative fact-finding very close scrutiny? Or should state courts take an independent approach? What are the pros and cons of having state courts closely scrutinize state legislative fact-finding?

To answer this question, let's examine the concept of deference through a second hypothetical. Suppose we have a rule that says a court always has to accept the facts that a legislature puts forward to

support a new law. In reviewing the constitutionality of the law, the court must still determine whether something is indeed a “fact” that is deserving of judicial acceptance or, instead, whether the “fact” is just a hunch or a hope or an aspiration or a prediction or an estimate. Moreover, even if the “facts” comprise hard statistical evidence showing longitudinal trends and supported by regression analyses with lots of charts, the court still has to determine how to analyze the facts to decide whether the new law is constitutional. Facts alone do not answer constitutional questions. Data do not inevitably provide an answer to constitutional questions. The answers to constitutional questions require not only fact-finding, but also the exercise of judgment and of principle, qualities that we associate with judges more often than we associate with legislators.

In my paper, I suggest that we think about deference—the amount of weight that a court should give to legislative fact-finding—in institutional terms. I suggest this definition: from an institutional perspective, calling something a fact expresses a conclusion that a particular entity or body or agent of government is making an initial decision about something. For example, we might have the judge decide something rather than the jury. Or we might have the legislature decide something rather than the court. It is an initial decision. Often, that decision is rebuttable. Sometimes the decision is irrebuttable.

What kind of decision would be irrebuttable? Well, think about a criminal jury in the federal system issuing a verdict of not guilty. Can the court review that verdict? Can the legislature overturn it? No, it is an irrebuttable decision. Legislative judgments that fall into the category of political questions are irrebuttable. The court can’t touch matters of this sort. No judge is allowed to review it. The legislature makes the facts about going to war. The court is not going to review the underlying facts about why we have gone to war or not.

**The answers to constitutional questions require not only fact-finding, but also the exercise of judgment and of principle, qualities that we associate with judges more often than we associate with legislators.**

However, if the decision is rebuttable, then different parts of the government share responsibility for reaching the decision. To say that a question is justiciable, to say that a legislative judgment is subject to judicial review, means that the legislature by necessity is making its decision in partnership with the judges. When a question is justiciable, the legislature and the courts act together, but in a sequenced relation, in deciding how the Constitution is to be enforced.

From an institutional perspective, a standard of deference thus allocates responsibility between the legislature and the court in deciding how facts can and should be decided. It’s a rule of allocation. It divides responsibility among multiple actors sharing responsibility and working in partnership to enforce a constitution.

Until recently, federal courts assumed that the appropriate level of deference to accord legislative fact-finding, even in cases that are justiciable, at least when social and economic matters are involved, is very strong, as summarized in two words: rationality review. Under the standard of rationality review, Congress is not required to make factual findings. Congress barely even needs to demonstrate the factual plausibility of its legislative outputs. The federal court is very deferential. It essentially rubber-stamps legislative decisions. Commentators thus say that rationality review inevitably is fatal to a plaintiff’s constitutional challenge.

Are state courts bound to follow what I call “old style” rationality review? This morning you heard Professor Williams say that state courts are free to think about separation of powers in an independent way. Separation of powers is one of the major justifications for federal rationality review. So is federalism. And so is something called the negative rights structure of the Constitution, the idea that the federal Constitution doesn’t guarantee positive rights against the government. The federal Constitution doesn’t grant a right to public schooling. The federal Constitution doesn’t grant a right to health care. The federal Constitution doesn’t grant a right to minimum wages. Some of those provisions actually are included in state constitutions, but the federal Constitution is silent on positive claims. It has a negative rights structure. These three justifications for federal rationality review—separation of powers, federalism, and a negative-rights structure—do not accurately describe the situation of state courts and state legislatures.

State courts are free and independent of federal doctrine in determining how they are going to view separation of powers. Their obligation is to follow the state constitution. It follows that they likewise are free and independent from the federal courts in deciding the level of deference that they will provide to a state legislature’s fact-finding. A court’s level of deference derives not only from the constitution, but also from notions of prudence. State courts, as common law courts, sit in a pragmatic relationship with other entities of government, and that pragmatic relationship affects the level of deference they owe to the policy outputs of other governmental actors.

Although state courts are not bound to follow federal practice, they may independently decide to follow the federal lead. Over the last decade, the Supreme Court has altered its traditional approach to legislative fact-finding and seems now to take a tougher look at fact-finding, resulting in the surprising number of cases in which congressional legislation has been overturned.

Should state courts follow the federal court’s new approach? In my paper, I summarize the different approaches that state courts currently are taking to this question. Very briefly, some state courts follow federal rationality review and accord strong deference to state legislative fact-finding. It will be interesting to see whether these courts now reverse field with respect to state fact-finding so that by continuing to follow federal practice they now will take a closer look at state legislative fact-finding.

**State courts are free and independent of federal doctrine in determining how they are going to view separation of powers. Their obligation is to follow the state constitution.**

Other state courts, as Professor Williams suggested this morning, follow a model of due process of lawmaking, based on the very rich detail of state constitutions including the limitations that state constitutions place on the legislature. State courts enforce what some might call technical restrictions on the legislature such as single subject rules. We don’t have a single subject rule in the federal Constitution, and it’s hard to imagine the

United States Supreme Court striking down a congressional law on the basis of something even close to that kind of restriction on legislative power. But the due process of lawmaking model is very strong in some states.

In addition, some state courts, taking their cue from the new federalism, have adopted and constructed new approaches toward review of legislative fact-finding. In particular, state courts are adopting innovative methods in cases involving state rights and state constitutional provisions that have no federal analog, for example, school finance cases. Fact-finding is essential to a court’s determination of

whether a system of school financing comports with a state constitutional standard of adequacy. Courts by necessity look at the facts in these cases.

In general, current practice shows a broad diversity of approach among the states with respect to the level of deference given to state legislative fact-finding. But I do think one idea joins all the states together in how their courts relate to the other branches of government, and that idea is one of collaboration. My calling state inter-branch relations collaborative runs contrary to views expressed earlier in the day that emphasize the tension between courts and legislatures, the war between courts and legislatures, the confrontation between courts and legislatures. However, as I describe in my paper, I am not alone in describing state inter-branch relations as a kind of collaboration, a working partnership that flows from the state courts' common-law powers and from special features of state constitutions that differ significantly from the federal constitution.

In my paper, I argue that this kind of collaboration, this working partnership, is best promoted through the state courts' taking a tougher look at state legislative findings. If we take seriously the proposition that legal activity—whether judicial review or legislative enactment—should be purposive and aimed at the improvement of life, then heightened judicial review of fact-finding can improve legal activity by encouraging legislatures to take their jobs more seriously, by encouraging democratic participation, and by improving the quality of judicial review.

## COMMENTS BY PANELISTS

**Kathryn H. Clarke, Esq.**

**F. Drake Lee, Esq.**

**Stephen Daniels, Ph.D.**

**Honorable Steven H. Levinson**

### **Kathryn H. Clarke**

It's a real pleasure to be here. I have only a few comments to make—three precisely. And I would like to start with the question, what legislative findings? I don't know about your state, but I know about my state, and there is no requirement for legislative findings. In fact, there usually aren't legislative findings. There isn't even a requirement for hearings, and sometimes we see bills in fact pushed through at the end of sessions—I think that was mentioned in one of the papers—with very little background material available. There simply aren't any legislative findings a good deal of the time.

What you do find if you go to the legislative history, it's this odd mishmash of testimony that somebody wants you to accept as being the legislature's conclusions, because they decided to adopt legislation that that testimony was offered in favor of. But indeed, you see sometimes that the record is being salted here, just like the other side is trying to salt the record. And in fact, the legislature never makes any findings. There simply are none.

The line then between fact and policy, I'm going to suggest, is even finer than the line between fact and law. And it is policy that the legislature is choosing to make whether or not there are lots of facts to support it. Or whether those are simply assumptions about the way the world is run. This is particularly true when you have legislatures that have mostly non-lawyers, whose concept of the Constitution is sometimes a little rusty, if they have one at all.

So, my suggestion is that sometimes this is simply not going to work. The idea that courts should take a closer look at legislative findings when analyzing a constitutional issue isn't going to work very well. It even may be inconsistent, as it could be conceivably in my state, with the approach to statutory construction generally. The court is reluctant to go to legislative history to even see what the statute was intended to mean unless they can find an ambiguity. So, there may be some inconsistency between this proposition and the approach to statutory construction.

Secondly, what difference do findings make if there is a specific constitutional right or specific constitutional grant of authority? The difference is then between the freewheeling judicial authority that Professor Williams was talking about this morning and the specific clauses, which is what we tend to turn to—the Remedies Clause, the Trial by Jury Clause, the Privileges and Immunities Clause. It shouldn't make any difference what rationale the legislature had, or how clearly it was articulated, if in fact the end result is, as in the professor's hypothetical, to deny somebody a complete remedy. With the \$10,000 limit on damages, and a complete stripping of their jury trial rights, we conceivably have a violation of both



clauses. What difference does it make what crisis they saw, or how well they documented it, if in fact the effect is to deprive someone of a remedy or deprive them of a right to trial by jury.

The focus you are dealing with, it seems to me, is specific constitutional rights and grants of authority. The focus is not on what the legislature thought it was doing when it enacted the statute, but on what the constitutional framers thought they were doing when they enacted the provision in the constitution. And here we have access to that rich history that Professor Williams mentioned this morning. The history of the remedies clause dating all the way back to the Magna Carta, and the sudden, increasing appearance of the remedies clauses in state constitutions in the early 1800s and mid-1800s. The Trial by Jury Clause also has an honorable history. So does the Privileges and Immunities Clause. These are clauses that were intended to limit the legislative exercise of power, and preserve a right to the public, and also preserve the judicial system and its role.

**The focus is not on what the legislature thought it was doing when it enacted the statute, but on what the constitutional framers thought they were doing when they enacted the provision in the constitution.**

So, for example, *Lakin v. Senco Products, Inc.*, which was the case that invalidated the cap on economic damages in the state of Oregon, didn't talk about why the cap on damages was enacted. There is not much discussion of that, if there is even a reference to it. What it talks about is the jury trial right, and what the framers meant by that, and where it takes us in terms of preserving the jury's role in making factual determinations. The Oregon Supreme Court in *Smothers v. Gresham Transfer* invalidated

a workers' compensation provision, where the legislature had come in and made it more difficult for the claimant to prove that case in the worker's compensation context than it would be in court. And they invalidated that under the Remedies Clause. Again, you don't see the discussion in that opinion of why the legislature made that move the decade before. You simply find an extensive discussion of the Remedies Clause.

Another example that just came to mind—I haven't read the decisions yet—the Patriot Act. It doesn't matter how much of an emergency was felt to exist. The problem is it deprives someone of a right to counsel. It deprives someone of a right to a hearing. And so, certain portions of the Patriot Act have been invalidated by some courts, no matter what the rationale was.

It might be different, I suggest, if the issue is an encroachment on freestanding judicial authority, but when you've got a specific clause, and that includes the technical clauses, such as the single subject rule, then I suggest that turning to legislative findings, even if they exist, and you're so fortunate as to have them, doesn't particularly assist in the analysis.

## F. Drake Lee

I got the material that I was directed to read and comment about, and it dawned on me, I don't practice constitutional law. I'm a commercial litigator. I don't deal with these kinds of issues every day. In fact, I haven't dealt with a lot of them in twenty odd years. So, I thought to myself, what in the world am I going to do? I'm going to stand up in front of an audience of over 100 judges of intermediate courts of

appeal, courts of last resort from the states, and esteemed law professors. What in the world am I going to say?

I don't know if any of you had a mentor. I did. He died 17 years ago, and there is not a day that goes by that I don't think what would he have done were he in my situation? And I said, Sidney—Sidney Cook—I've got this problem. What in the world am I going to do? And the thought that came to me that he used to often say, when we had a complicated case come in, and we were all scurrying around for days or weeks or months, "You know, this thing is like trying to carry a mattress upstairs. We've just got to get a handle on it."

**I would argue also it stands that all claims, all cases that come to your desk, are based on facts.**

So, I thought to myself, how am I going to get a handle on what I need to say about this topic? And I thought about it—and I haven't spoken with Ms. Clarke—and what occurred to me is the same thought that she listed as point number two in her remarks. Why does it make any difference to you as judges who sit on courts of appeal in the state? Why should this subject be of importance to you? When is it going to be relevant to a matter that is sitting on your desk?

There is a point in Professor Hershkoff's paper to the effect that all laws are based on fact. I would argue also it stands that all claims, all cases that come to your desk, are based on facts. There has to be some articulated basis that brings the matter into the court to bring it before you. If I have a client that says the legislature has enacted a law and I don't like it, it makes me unhappy, it makes me uncomfortable—that doesn't get from A to Z. There has to be some articulable basis for the plaintiff to come into court and argue against the constitutionality of the statute that is under review in your court. So, I thought to myself, when is it going to matter to you as judges on the courts of appeal and supreme courts of your states what the legislature may have had to say, if anything, about the factual basis upon which it has enacted the statute at which you are looking?

And I went through the paper, and I read both of them, and I read things about freestanding powers, and I read things about specific grants of authority under constitutions, and I said to myself, as was just said in Ms. Clarke's remarks, if the challenge is that the statute violates a specifically conferred authority, or the freestanding power of the court, why does it matter what any state legislature may have had to say about the underpinning facts or policies that led to the enactment of the statute? I agree with the proposition it doesn't.

When then does it matter? I'm not sure it ever does. And that is why I would like to hear commentary from the others, and I look forward to hearing comments in the sessions this afternoon. The hypothetical that forms the basis of Professor Hershkoff's paper led me to think about a statement made by one of the former justices of the Supreme Court of Louisiana when he was discussing the minimal rationality test.

He said, "You know arguably it would support the proposition that the legislature could enact a law that said to kill a rat, you may burn down the barn." And I thought if a statute is under review for some sort of minimal rationality test, that is to say, if the fact ultimately that is offered to support the statute that is under review is important, if the statute depends for its constitutionality upon the accuracy of the fact or facts cited by the legislature as underpinning its policy in enacting it, then the

question becomes relevant, how much deference, if any, should an appellate judge pay to the stated policy of the court?

I'm not sure that ever comes to the table. In the minimum rationality test, I don't believe it does, if I understand it correctly. The question is simply whether there is some logical nexus, an arguable connection between some perceived set of fact or policy that is sought to be served and the statute that is enacted. If so, end of test. If there is an argument being offered for the proposition that the courts of appeal and supreme courts that you should go further and inquire into the factual accuracy of the statement that is said by the legislature to underpin its policy, I would argue that inquiry more properly remains in the legislative sphere.

## Stephen Daniels

I would like to thank the Pound Institute for inviting me to participate today. I'm the outsider. I'm the social scientist that Richard mentioned this morning. I'm not a judge. I'm not even a lawyer, but I'll confess to knowing something about constitutional law. I have taught it for nearly 30 years. But I'm not here because I'm a political scientist, which is my social science training, who knows something about constitutional law. I'm here because I'm one of the people who study the facts that are supposedly unimportant. There are a number of us across a variety of academic disciplines who study the civil justice system and how it operates—and how it doesn't operate.

The latter idea—how the system doesn't operate—is as important as how the system does operate. Much of the commonly accepted view of how the civil justice system operates is simply wrong. Typically, the system is cast as seriously dysfunctional by proposed and even enacted legislation, hence the need for the often substantial changes the legislation seeks. The problem is that much proposed and enacted legislation dealing with the civil justice system is out of touch with the reality that emerges from the research we have been doing.

Researchers like me study the way the courts work, the way juries work, what lawyers do. We study in depth many of the issues that are involved in the reform debates today, like medical malpractice. We're

**Much of the commonly accepted view of how the civil justice system operates is simply wrong.**

inherently skeptical. We want to find out what is actually going on, not what everyone just assumes is going on. We do this not simply because we have an academic interest in pursuing these matters, but because we are interested ultimately in better lawmaking. This, I think, is the bottom-line point of Professor Hershkoff's paper, where she draws from Roscoe Pound in the very last sentence of her paper. It's really all about improving the lawmaking process, and that's why we do the research that we do.

From a researcher's perspective, what are most important are accurate and reliable facts about the civil justice system and areas like medical malpractice. It is hard to imagine how a lawmaking process can be reasonably successful, constructive, and fair if it is unconcerned about the factual basis for what it does. Good lawmaking requires a reasonably accurate picture of the processes and issues involved. Yet I am amazed when I look at what often happens in state legislatures when they debate issues like the one Professor Hershkoff talked about in her hypothetical, and the easily accepted assumptions that are made

about the issues involved. I am also amazed when those same assumptions are offered as reasonable or rational when so-called “reforms” are challenged in the courts. Those easily accepted, common assumptions about the civil justice system are all too often out of touch with reality. I admit to be a little troubled by the idea, if I think about the two previous commentators, that the facts may not ultimately be important for a court.

Perhaps the most basic thing I took from the paper with regard to improved lawmaking is that somebody needs to be skeptical about the reasons offered—the factual basis—for certain kinds of legislation. Legislatures, as a general proposition, don’t do a very good job of being sufficiently skeptical. There’s often not much political gain in seeking factual accuracy, and at times there is even reason to avoid accuracy. Accurate and reliable facts can be very inconvenient. This morning Bob Peck observed that even congressional hearings often wind up as one-sided dog and pony shows rather than an attempt

to get at the facts. And having testified in those hearings in Congress and in state legislatures myself, I think he is absolutely right.

**Legislatures, as a general proposition, don’t do a very good job of being sufficiently skeptical. There’s often not much political gain in seeking factual accuracy, and at times there is even reason to avoid accuracy. Accurate and reliable facts can be very inconvenient.**

As a practical matter, it seems that the only place where you can really get any consideration of whether a piece of legislation makes sense factually is in the courts. At least the courts can offer the opportunity to realistically challenge the underlying factual situation and make an argument that says there may well be real

problems with this legislation because as a factual matter it is out of touch with reality. That it simply won’t work because it assumes a distorted picture of reality and that the distorted picture of reality is being used to benefit special interest at the expense of the public interest.

Realistically, the courts wind up as the last resort for a check on bad or dysfunctional policy. There is, however, a potential problem with this as others have noted. Is this an appropriate role for the courts? Should courts be second-guessing what legislatures actually do? People have very different views on the question. Having hop scotched through some of the morning discussion sections, I heard a great variety of views on how far courts should go in second-guessing or reviewing the policy judgments that their legislatures make. And I’m not going to pretend that I have the answer to a question that has been debated so intensely for so long.

But I like Professor Hershkoff’s pragmatic idea of courts looking at and thinking about the factual bases for a variety of these policies as a way of beginning a dialogue. It is the idea of collaboration, of a partnership that may develop in practice by judges paying attention to the factual underpinnings and being willing to at least question them. It offers a way for courts to have some influence on the policymaking process without going too far. As such a partnership and ongoing dialogue develop the outcome may well be improved lawmaking.

Finally, there is another reason—a somewhat selfish one for a researcher—why I like the idea of judges thinking more about these factual matters. For many of us who do empirical research on the underlying logic for the types of laws and policies discussed today, it is appellate court opinions, federal

and state, to which we look for cues. What are the important issues? What are the real problem areas? How are these issues being framed? What should we empirical researchers look at? Opinions can help guide us so that we can ply our trade in a way that can inform the lawmaking process. The research community pays attention to what happens in your courts and our research agendas are influenced by it. This morning, Bob Peck talked about opinions as educational tools, although he was thinking about education for legislators. But they are educational tools for the research community as well, giving us a sense of what the important questions are, of where the points of controversy lie, and what we should be looking at. While this may be a researcher's selfish reason, it is terribly important in terms of the overall goal that Professor Hershkoff has in mind, the one she takes from Roscoe Pound—improved lawmaking.

## Honorable Steven H. Levinson

I have here a book by the late Professor Bernard Schwartz of the University of Tulsa Law School. He was a prolific writer, and sufficiently credible to have much of his work published by as august an institution as the Oxford University Press. And you will learn, if you turn to page 182 of the paperback version of the *BOOK OF LEGAL LISTS*, which was written in 1997, that I authored the eighth worst non-United States Supreme Court decision ever written.

I was thinking about that shortly before May 17, as I was also thinking fondly of John Greaney and his court, and the day that the mandate of the *Goodridge* decision was going to take effect. So I decided to buy this book, because I believed that someday it would become a legal classic. But let me share with you what Professor Schwartz said of my opinion.

“The *Baehr* decision is so contrary to both established law and common sense, that one is almost speechless before this patent *reductio ad absurdum* of equal protection jurisprudence. In the first place, there is the universal meaning of marriage, for example the Oxford English Dictionary definition, an act of marrying, the ceremony of procedures which two persons are made husband and wife. If the state is to follow the method of Humpty-Dumpty in *THROUGH THE LOOKING GLASS* ‘when I use a word, it means what I choose it to mean,’ it is surely for the legislature and not the courts to redefine marriage. The legislature has, however, continued to use the term in its universally accepted sense.

“Aside from *Baehr*, [this is as of 1997] stated a federal court of appeal in 1995, unanimously American courts have held that same-sex couples are not constitutionally entitled to attain the legal and civil status of marriage. The *Baehr* holding that such legislative use of the word is presumptively unconstitutional is contrary to that of every other court which has considered the matter.”

And I'll skip to the end. “The *Baehr* decision is an affront to both law and language, that well deserves its place on the list of worst decisions.” Well, after Vermont and Massachusetts, with all due deference to St. Bernard....

Having gotten that off my chest, what I want to do substantially is extend on what Kathryn addressed, and really the other speakers as well, what the significance of legislative fact-finding is, I think, for most of us. And that is in the realm generally of statutory construction. Many civil disputes are governed by statute. Certainly all criminal disputes are governed by statute. And following the orthodox canons of statutory construction, as our court, if in our opinion, the language of a statute is plain and

unambiguous, then it means what it says, and we look no further unless a literal interpretation of the statute would produce an absurd or an unjust result, which is seldom the case.

If there is an ambiguity in the statute, we look to extrinsic sources to glean what the legislature thought its enactment meant, in other words, to glean the intent of the legislature with respect to the meaning of the statute. And if not the first, one of the first avenues that we resort to in such instances, of course, is legislative history. Now, what legislative history means to us is legislative committee reports. And most notably, conference committee reports. Generally speaking, legislative committee reports simply parrot the language of the statute, and are of very little assistance in gleaning what this body collectively meant or intended when it enacted the statute.

Which begs the question raised earlier, whether we are assuming facts not in evidence, and the legislature really didn't have any particular intent in mind, it simply did what it did. But we act as though the legislature has intent in construing statutes. It's a game that we have to play, or at least that we choose to play.

What I'd like to do is share a couple of illustrations with you of the consequence of statutory construction that frequently arises in the course of the work that appellate courts do in generating what Chief Justice Wilkins referred to at lunch as a dynamic tension between the court and the legislature. And to do that, I would like to use a couple of illustrations arising out of opinions that I wrote. And because of my choices, we are going to be talking about sex. So, we'll elevate the spice level of this conversation a little bit more.

**If there is an ambiguity in the statute, we look to extrinsic sources to glean the intent of the legislature with respect to the meaning of the statute. And if not the first, one of the first avenues that we resort to in such instances, of course, is legislative history.**

Being a good model penal code jurisdiction, in Hawaii a person commits the class A felony offense of sexual assault in the first degree if the person, among other things, intentionally or knowingly subjects another person to an act of sexual penetration. A class A felony in Hawaii is punishable by a non-probationable, indeterminate prison term of 20 years.

A person commits the class C felony of sexual assault in the third degree if the person intentionally or knowingly subjects another person to an act of sexual contact. A class C felony is probationable, and other things being equal, punishable by a maximum indeterminate prison term of five years in lieu of probation.

So, it matters a lot whether we are dealing in any given matter, with sexual penetration or sexual contact. It's the difference between a class A and a class C felony. Until recently, sexual contact was defined in the Hawaii penal code as any touching of the sexual or other intimate parts of a person not married to the actor, or of the sexual or other intimate parts of the actor by the person, whether directly or through the clothing.

Sexual penetration was defined as intercourse, anal intercourse, fellatio, cunnilingus, anilingus, deviate sexual intercourse, or any intrusion of any part of a person's body, et cetera, et cetera, subject to the caveat that for purposes of this chapter, each act of sexual penetration shall constitute a separate offense.

We had before us, an appeal from the conviction of a defendant of sexual assault in the first degree for committing on the complainant—we say complainant rather than victim in Hawaii—of an involuntary act of cunnilingus. Now, interestingly enough, the record of the trial was devoid of any evidence of penetration whatsoever. In fact, the prosecution conceded in its brief on appeal that there was no evidence of penetration.

You would think that what the prosecution had proved then would be sexual contact, a touching by one person of the sexual or intimate parts of another person, a class C felony, sexual assault in the third degree. But a 1991 decision of my court, comprised of our predecessors, had construed cunnilingus so as not to require actual penetration, and yet still satisfy the statutory definition of sexual penetration.

That created a number of problems, one of which was that in theory a criminal defendant engaged in that conduct with the requisite state of mind could be convicted either of sexual assault in the first degree, or sexual assault in the third degree, because the elements would be identical, and under our jurisprudence that would be a violation of the defendant's right to equal protection, among other things, if convicted of the greater offense.

And so, we overruled our earlier decision and held that in order to rise to the level of sexual penetration, cunnilingus had to entail some penetration. The legislature responded to the holding in a cooperative manner. It simply amended the definitions of sexual penetration and sexual contact so as to remove the anomaly, and make it clear that cunnilingus got you a class A felony conviction whether you actually perpetrated any penetration, however slight or not.

Now, in another matter that I am not going to have time to discuss adequately, we were required to face clear, explicit legislative findings with respect to what constituted a continuing course of sexual conduct. These legislative findings were contained in Section 1 of the act the legislature passed, so that we didn't even have to look to legislative history. We simply read the act, and it told us that the legislature was intending to create a continuous course of conduct.

By a three to two split, our court held that whether the legislature deemed what it was characterizing as a continuous course of conduct or not, it couldn't be by its very nature. That what it was describing did not have the attributions of a continuing course of conduct.

What did the legislature do? The initial legislative response was to fix the statute in order to require jury unanimity with respect to the particular acts involved. But that initial submission morphed in the course of the legislative process into a bill that among, other things, is going to place on the ballot this November, I believe, a proposed constitutional amendment that will add the following section to Article 1 of the Hawaii Constitution.

Article I of the Hawaii Constitution is the bill of rights. And so, you may regard this provision as being peculiarly placed when it is enacted, as I think it surely will be. But the provision provides as follows. "The legislature may define what behavior constitutes a continuing course of conduct in sexual assault crimes." That's a constitutional amendment.

I suggest to you that that is an abusive use of constitutional amendments. That's micromanaging. But that is what the legislature is proposing to do. But that is the legislature that also brought us Article 1, Section 23 of our bill of rights, which provides that the legislature shall have the power to restrict marriage to opposite-sex couples.

## Response by Professor Hershkoff

I want to thank the panelists for their careful treatment of my arguments. Let me address them in turn. Kathryn Clarke offered the first major criticism of the proposal saying that it won't work. State courts cannot give close review to state legislative fact records because state legislators don't do their job—they don't produce legislative records.

Well, the democratic justification for having courts defer to legislators is, first, that legislators are elected and so presumed to engage in a democratic decision-making process; and, second, that legislators are presumed to be better at investigating social problems. If legislators are not better at investigating social problems, if laws simply result from glad-handing and back-room deals, what Richard Briffault of Columbia Law School calls the “three men in a room syndrome of state legislation,” then the justification for judicial deference is not present. In such a circumstance, I suggest that the state court has an obligation to use its power of review to encourage their partners in government to do a better job.

**I don't have a heroic view of government, but I do have a great amount of faith in judges, and particularly state court judges, to bring notions of prudence and pragmatism to the review of statutes.**

A court can create incentives for the legislature to undertake serious fact-finding by remanding an issue back to the legislature. Rather than ruling on the constitutionality of a statute that emerged from a back-room deal, the court can insist that legislators do their job. A remand in such a situation would function the way clear statement rules do in other contexts: encourage the lawmaking branch to fulfill its constitutional responsibilities.

The second criticism that some of the panelists make is that inadequate fact-finding by the legislature is not a problem. Facts, they say, aren't important, because legal answers are clear. Consider a statute that says no sleeping in the park. Under this statute, should a court convict a mother with a sleeping baby? Or should the court look to the facts underlying the statute to figure out why the legislature enacted it? Even when a statute seems explicit, language lacks the determinacy that some of the commentators ascribe.

Finally, Steve Daniels is wildly enthusiastic about my proposal, and so I want to throw in a wet towel. Don't be too enthusiastic about legislative record review. Don't expect too much from the legislature in the following sense—life is filled with uncertainty, and nothing will ever happen, no change will ever take place, if a legislature has to document every single reform. A court should temper its close review of facts with judgment and principle. I don't have a heroic view of government, but I do have a great amount of faith in judges, and particularly state court judges, to bring notions of prudence and pragmatism to the review of statutes. So, I think state courts are all very well equipped to encourage their legislative brothers and sisters to do a much better job than I'm told they are currently doing.

## Questions and Comments from the Floor

**Participant:** I don't understand where you get the idea that it's their duty to present some facts. In



our state, we don't even keep a legislative history. So what are the facts, and why is it their duty to do something about it? Where does that duty come from?

**Professor Hershkoff:** Their duty comes from the obligation to enact laws that comply with a state constitution. The duty comes from the requirement to work in a system of separation of powers, one that allows for checks and balances. A court cannot do its job unless the legislature does its job. And so, when I talk about collaboration between the legislature and the courts, judicial review can take place in an informed way only if the legislature tells a court clearly what law it is enacting and gives some sense of what the basis for the law is.

The fact that this requirement is not written into a constitution does not mean the obligation does not exist. Is there anything in a state constitution that says state courts must publish decisions or opinions or written memoranda or explanations? Not every state constitution has that requirement, but we all take it for granted that that's what courts do. And what I'm suggesting is that we need to adapt our views of what legislatures do in order to improve lawmaking in the United States.

**Participant:** Let's assume for a minute that there has been fact-finding. And let's assume we completely disagree with it. Aren't we bound by that fact-finding, just as we would be bound by the fact-finding of a trial court, assuming that there is some evidence to support it? Or are you suggesting that we then supplant our judgment and say we don't think the facts are as you say they are?

**Professor Hershkoff:** Well, I'm not quite sure what you mean when you say suppose we don't agree with the facts. First, the standard of review and the level of fact-finding will differ from claim to claim. The government's justification is probably different in a case involving free speech than it is in a case involving commercial matters.

**The court does not just act on its own opinion or belief, because that is not what a judge is supposed to do.**

Some fact-finding will require very specific expertise, for example, scientific expertise. In order for a state judge to disagree with the legislative facts, presumably the court has held hearings. Maybe the court has appointed a court expert. Maybe the court has asked for *amicus curiae* briefs. Maybe the court has asked for

interveners. The court has acted on skepticism about the quality of the legislature's deliberation.

It may be that the best approach is for the court to remand the matter back to the legislature in light of the evidence that the court has marshaled through the adjudicative process. The court does not just act on its own opinion or belief, because that is not what a judge is supposed to do.

**Participant:** Perhaps more a comment, but eventually a question. In order for a court to invalidate any legislation, we have to identify a constitutional provision that has been violated. And the principle issue with which I struggle with the thesis that has been offered is that, in a number of ways, I can't identify a relevant constitutional provision, in our state at least, in which the factual premises under which the legislators labored to enact the legislation has anything to do with whether it's constitutional or not. There is no rational review in our state as such, because there isn't a requirement that legislation be rational. And it's just true, it isn't. And when you say that the legislature has to do its duty, its duty is to enact legislation. If it has to do more than enact the legislation, as in think about it before it does so, you have to identify the constitutional provision that requires it to think, or think in a particular way, or know certain things.

I doubt in most state constitutions that there will be a source for the very task you want the courts here to perform. The federal system is very different, because there is a whole host of limitations and needs for particular sources of law for Congress to act. Our legislatures have plenary power. They don't have to have any reason to do something.

**Professor Hershkoff:** Do you have a schools provision in your state?

**Participant:** Sure.

**Professor Hershkoff:** As far as I know, 49 out of the 50 states have schools provisions. And suppose a lawsuit is brought saying that your school system of financing is inadequate because the textbooks are from 1957, and they say that one day we'll go to Mars. The system is inadequate because the schools lack heating and air conditioning. It's inadequate because classrooms have 42 students in a room. The court needs to look at the facts of the situation to determine whether the statute is constitutional in practice.

**You either are satisfied from the record developed at the adjudicative phase that the schools meet the constitutional command or not. And it makes not a whit of difference what thoughts were behind the legislative judgment.**

**Participant:** It depends on what record is presented by those challenging the adequacy of the school system. And you either are satisfied from the record developed at the adjudicative phase that the schools meet the constitutional command or not. And it makes not a whit of difference what thoughts were behind the legislative judgment. They either don't have an adequate constitutionally satisfactory form of school or they do. And it doesn't matter what they thought or what they believed.

**Professor Hershkoff:** You have said, judge, it doesn't matter what the legislator thought. And I agree with you, it doesn't matter what the legislator thought. In one of the panels this morning, one of the judges drew a distinction between the legislature's intent and the purpose behind the statute. It doesn't matter what the legislature thinks. What matters is the factual support underlying the legislature's policy judgments. If the legislature believes that it's sufficient to fund schools at \$100 a student, it doesn't matter whether they think that that's okay or not. What matters is the empirical showing that the legislature is making. And what I would suggest is that it's more respectful to the legislature to invite them to come into one of these constitutional hearings, rather than just leaving it to the private party to defend the constitutionality of the school system or some other law. If you really want a partnership with the legislature, you have to hear from them.

**Participant:** I would just say if they think it's \$100, I don't care. It doesn't matter whether that is adequate or not in their terms. The findings they say that \$100 is adequate has nothing to do with whether it's adequate or not. But as I say, I can't identify a source for the requirement you want to have this dialogue be based on.

# 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 (for general points of agreement that arose out of the discussion groups, please see the following section). No attempt has been made to replicate precisely the proportion of participants holding particular points of view, but we have tried to ensure that the various viewpoints expressed in the discussion groups are represented in the following discussion excerpts.

## THE RELATIONSHIP BETWEEN THE BRANCHES

### Still Coequal?

*Judges discussed their relationship with their state legislatures, and whether or not they were “still coequal.”*

I think in theory, but not in practice.

I'm afraid one of the problems is, and maybe we are too coequal in the sense that the aura of the jurisprudential outcome that used to go in the decision has been lost. We are just looked upon as another political arm, like the legislature. People used to respect the judiciary and were willing to accept their decisions. Now, it's the old liberal-conservative. “Well, he's a liberal judge.” Well, I don't know what a liberal judge is. And then the other one, he's a conservative judge. It just seems like we have been drag down into the political quagmire and can't seem to extricate ourselves. I don't know why we are there, but it's happened in my lifetime.

Until the case comes up and our courts exercise the power, and there is recognition given at that point that we are coequals. When it comes down to the budget process, no. Maybe no in the eyes of the individual citizen. But when it comes down to it, and there is an important case, yes.

In our southern state, the legislature has started to treat the courts as another state agency. And so, they have put a lot of performance measures on the courts, and they have required the courts to comply with a lot of personnel policies and things of that sort that are reserved for other state agencies under the executive branch. It has created some tensions and has served to kind of reduce this partnership that we have been talking about. I know a lot of the judges and a lot of the courts have really resented that part of the process.

Quite frankly, if we were ranking the different branches of government, we are all coequal, but they are a little bit more equal than we are, and we have to deal with them.

*Several judges discussed encroachment by their legislatures into their realm of power, and how they as courts have dealt with this.*

We've got a lot of those situations in our southern state where the legislature has come in and made all these administrative remedies that are designed to bypass the court system.

In our Mid-western state, the legislature, known for its independence, decided they would permit people to represent corporations and companies in small claims court who were not lawyers, and the supreme court put an end to that very quickly.

We had state senators that, for example, introduced bills that say any decision that our state's appellate court makes that is going to cost the taxpayers money, the amount of money that it is going to cost

**Quite frankly, if we were ranking the different branches of government, we are all coequal, but they are a little bit more equal than we are.**

shall be deducted from the judicial budget. The legislature two years ago took away all of the judges' CLE money, because they were upset. So we have to go get grants for CLE.

Why is it the role of the legislature to tell the judiciary how it is to interpret standards? It seems like that is one of the essential functions.

It is pretty clear in our jurisprudence now that the general assembly cannot retroactively undo a supreme court opinion. They now presumably know it.

One of my colleagues on the court of appeals affirmed a multi-million dollar award against a state agency for a whistleblower. It went up to the supreme court and was affirmed. And everything was fine until it went to the legislature, and the head of the House Appropriations Committee said, wait a minute, we could use that money on public education a lot better than paying it to this whistleblower. Luckily, the lieutenant governor, who presides over the senate, said, "Now wait a minute, we've got a court judgment here that's been affirmed. And surely, we don't want our state saying we don't pay our judgments." And so, he backed them down.

In reading these materials, I frankly was seeing them as pretty liberal. In the context that they are presenting it, they are talking about legislative encroachment on the judiciary. I was also reading it, however, in the context of the judiciary's encroachment on the legislature. You start getting functionalist, then what is the chance that that is going to spill over and we are going to start encroaching on the legislature? If you start the fuzzy line, then is there a greater risk that we are going to be the encroachers?

*Judges discussed the issue of separation of powers and noted that while they had concerns about legislative intrusions into their sphere of power, they also had to be cognizant of overstepping their bounds.*

I think one of the big problems we have with this separation of power issue, is that we can't get too excited in the short run. Like the lady said this morning, it all averages out.

I think if you are ever going to invalidate a legislative act on the basis of separation of powers, you always want to premise it on the fact that it hurts the right of the people, as opposed to, it protects the right of the judiciary.

We have got a strange and bad situation in terms of separation of powers because of jealousy over the budget.

It is not absolute separation it is really checks and balances. Separation is the formula—the reality is the checks and balances that the legislature would control the purse strings of the judiciary. We've got impeachment powers. Each branch has the ability to check the others constitutionally.

Now, the topic of this is just really timely for us. I feel like the dark side of the force is moving in. I respect the judiciary. I was not a wealthy person. I did not work for a distinguished law firm. I was not a distinguished member of the state bar. But my point is this, I'm just an idealistic Boy Scout, but I want to be a judge, and I want to stay being a judge, and I want to keep doing what I'm doing. I'm learning more all the time just from people I've gotten to talk to here. It's been very gratifying. And I don't give a darn about running for the Senate or being governor, or anything else. So, it disturbs me that our traditional system of government, regarding separation of the branches and checks and balances, and the coequal status is under such a huge and powerful political attack.

There couldn't be a stronger sense of separation of powers or functions along the three branches that we have in our Mid-Atlantic state and, yet, the relationships are cordial, friendly and cooperative. I mean, there are individual members in the legislature who are anti-judiciary and there are issues that put us at loggerheads, but by and large, it has been a very successfully operated cooperative system.

When the legislature pokes us, it is annoying to us. It is my personal experience and belief that, by and large, the legislature doesn't understand the construct of separation of powers and throws its weight around as it can.

**It is my personal experience and belief that, by and large, the legislature doesn't understand the construct of separation of powers and throws its weight around as it can.**

One of the problems, it seems to me, is the concept of the separation of powers tends to blur. In those blurry zones, it is not always easy to say which branch of government is responsible for what.

The notion that we are supposed to be the cops on the block and make sure that the legislature is a good legislature, I just think is completely in violation of separation of powers on our side.

You could flip this. Separation of powers also means that the judiciary can't get involved in the legislature's stuff. What would happen if this argument were made? The legislature looks at a court opinion which lays out all the facts, their reasons for the ruling. And the legislature says "We want to hold a hearing

to see if those facts are really right.” The courts would say “Are you out of your mind?” But yet the argument is we should do that with the legislature.

*Judges were asked whether they considered themselves in a partnership with their state legislatures.*

No.

Not in the sense that the paper presents the partnership, no.

Our northeastern state has a good relationship between the two branches.

I think what the author was trying to put forth was somewhat of a utopia situation between the judicial branch and the legislative branch when she talked about a partnership, which I don't think we'll see that happening because of the animosity we talked about earlier between the legislative branch and the judiciary branch.

Only when we are talking about salaries. Then we cultivate them.

For many years we had a very cordial relationship between the judicial and the legislative branches, and that was because the chief judge of the court of appeals and others actively worked at that in ways that did not impinge on separation of powers that were very informal. and it worked. We never got everything we wanted and there were occasional flashpoints, but, by and large, it was a very cordial relationship and the judiciary did quite well. Regrettably, in the last few years that has not continued for a variety of reasons. Judges on the court of appeals are deeply concerned about it and would like to do whatever we can do to reestablish that relationship, because it worked well for both branches. It is important. It really is important.

I think it is a combination of hostility and cooperation. I know that the battle is looming on tort reform. I know that. I also know though that our judicial conference has attempted with some success to develop informal relationships between judges and their global representatives to the state legislature. I know that our judicial conference does judicial impact statements on proposed legislation, many times at the request of the legislature, so that they have that judicial perspective when they go about the task of enacting legislation. So I think it is just a mixed bag.

I think most states are probably unanimous that there is a huge antagonism between the legislative and judiciary. It could care less about issues like constitutionality and whatever. As a former legislator, it took me six weeks to learn, you don't try to defeat a bill by arguing constitutionality. They shut you right off. You are just talking to a wall—it doesn't work. So you appeal to very selfish interests, and you get them to start working some other way.

I think we have a reasonably good relationship at the moment. I think I would characterize it that way. Inevitably, there is a partnership. You can't avoid the existence of a partnership because you are jointly involved in providing services to people through government. The laws need to be established and they need to be enforced and interpreted. And the funds have to be made available for activities to take place. So, whether it is an awkward marriage at some point where the relationship is not functioning very well or not, we are a partnership. We can't avoid it.

I think it sort of takes two sides to make a partnership. I'm not sure that the legislature is really too interested in making a partnership with the judiciary.

Our state is somewhat different, as everyone here knows, but I have been on the court since '96. I was in the legislature for nine years prior to that, and the relationship has always been very amiable. There has been no conflict between them, but there is a definite recognition on the part of the judiciary and the legislature that they both have their scope of influence and their scope of duty and they try not to step on the other's toes, and it has worked pretty well.

We have, I would say, a good working relationship with a legislative body on matters that directly impact the judicial branch, judges' salaries, staffing, budget. We have paid legislative relations people in our

**The wonderful thing about that is that the legislature would care what the judiciary thought. In our southern state, they could care less.**

judicial branch who on an ongoing basis are working with committees and committee staff, alerting them, answering their questions. So, there is an ongoing legislative effort. However, we have nothing like that on the subject of law matters that don't directly impact the life of members of the judicial branch. We don't have joint committees about whether we should have tort reform or whether we ought to do this or

whether we ought to do that. I think that is as it ought to be, but that is my own personal view of it. We have that dichotomy.

Sometimes I think that perhaps we think that we have a relationship with the legislature, but I am not sure it is really reciprocated. I wonder whether the legislature ever has conversations like this, to contemplate whether they are in a relationship with the judiciary. I am not sure that conversation takes place.

The wonderful thing about that is that the legislature would care what the judiciary thought. In our southern state, they could care less.

Well, I don't know if I want to be in that close of a partnership. I'll be a drinking partner with you. That's about as close as I want to be. There ought to be a mutual-respect kind of partnership. And I think we get that. We get the mutual respect.

*Several judges noted that while relationships between the two branches can be good, often an unpopular decision will affect that partnership.*

It is like an accordion. Sometimes it's good. Sometimes it's bad. You know, it depends on if we decide a case that they get irritated about. It is sour for a while. Then it comes around. Bridges are rebuilt and it is—I would say—loose, friendly, and tense at times.

It is more cooperative in our western state unless we declare something unconstitutional or contrary to what they thought was a clear corrective statute.

I think that any time we declare one of their statutes unconstitutional, I think it makes them very angry, as evidenced by the fact that a lot of the time they come back and enact the very same law that we rendered unconstitutional.

We are still paying for redistricting.

*Judges described the often tumultuous relationship with their colleagues in the legislative branch.*

Extremely distant with the legislature, moderately close with the executive branch.

I think in our southern state, we have made the conscious decision to try to work indirectly with the legislature, and not try to work through confrontation, because I think the legislature is always going to win that battle. I know the legislature does a brilliant job of working each court of appeals in pitting it against the other. So, it's the old divide and conquer routine.

I think because of this tension in our southern state, the legislature more than ever attempts to micro manage not simply tort law, but all aspects of law.

It has gotten so mean in our southeastern state that two years ago they took away staff from the supreme court, and law clerks. They were going to take away all of their judicial assistants.

A friend of mine—I'm a former legislator—asked me, "What in the heck are you all doing over there?" I said, "I'm trying to figure out if I've got a jail big enough to put all of you in."

I can tell you that I am sorely disappointed with the absolute disrespect and disdain in which they treat the judiciary when we do appear. And that's why I say I think more has to be done by judges to suggest to the public that they need to start bringing more accountability into the legislature.

## Reaching Out to Legislatures

*Several judges talked about ways they or their courts have tried to cultivate legislators to improve relations.*

It's also helpful in a social setting. In our Mid-western state, for example, we have a very large group of judges, and we meet monthly. We have a legislative night where we invite them to our social hour and have dinner and drinks. And we have had a lot of luck just by doing it on a social level, and really have been able to have an impact on them.

One of the things that our state does with all of our judiciary is work to have informal dinners with legislators across the state. It is a statewide trial judges thing, and it has been great. It really helps communication, because we are all in this together, is how the theory is.

We do the same thing. We instituted a program of, bring your legislator to court, and have them sit in the jury box and listen. At least the input, whether they are trying to tell you what you want to hear, or they are being honest about it, you are getting input that this was a wonderful experience. They didn't realize how hardworking you are, what goes on in a courtroom, never been in a courtroom before. Much of what they have by way of prejudice towards the court is learned from walking in the doors of the legislature. It is repeated, it becomes lore, and then it becomes fact. It has really been helpful.



In our state, I think because of judicial outreach, we haven't had the horror stories that are coming out of Alabama and Mississippi and some of the other southern states. Our chief justice came up with a lot of different and good ideas. We had a law school for journalists, and invited all the print and TV media from throughout the state, and it was well attended, partly because it was well funded. And that worked well. And we're going to have a law school for new legislators this fall. But I guess we have done what we have learned at conferences like this is what other states do—the legislative day in court. All the trial judges will have their local legislators actually sit on the bench with them for a day. That really impresses the legislators, how hard the judges work. Of course the judges set up the day on one of their busy days. I mean it's just working the process. And so, I think just judicial outreach is something that we all just need to do. I think it has helped in our state, because we haven't had the problems that you have had. It makes us feel good to hear how bad things are in some places. It may happen to us some day, but I think we are doing our homework.

One of the things that we have done just in our court is we have invited all of our legislators who represent our area to actually come and visit our court. We just started this, but I think it's going to be very

**Much of what they have by way of prejudice towards the court is learned from walking in the doors of the legislature. It is repeated, it becomes lore, and then it becomes fact.**

helpful, because a lot of times the legislators do not understand what we do. And with one, I even just took down a bunch of opinions I had written and just went through them, here is the background of the facts we do. Here is our statement of what the law is. Here is how we apply the law to the facts of this case. He said, "This is really something. Now I can understand what you all are doing, and why it's so important for us." I think having them come to your court, showing them around, and introducing them to

our your staff is very helpful, because now they have a frame of reference when your budget matter comes up, or some other issue comes up involving your court.

## Changes in the Legislature

*Many judges expressed dismay over the declining number of lawyers in their state legislatures, a phenomenon that seems to have led, in most cases, to less respect for the judiciary.*

I think another big problem is a lack of lawyers in the legislature. In our Mid-western state, the chairman of the judiciary committee is not a lawyer; they just don't have enough. I think the average citizen has such disrespect for the profession of law that that carries over in the legislature. They are really not that interested. They may be polite to you. We have had picnics for our legislators, we have invited them to try to get friendly. Then when they get back down to the state capital and the bills come up, forget about all that. Anti-lawyer, anti-judge, anti-whatever. It is just ingrained into them.

When I started practicing law in 1963, most of the legislators were lawyers, legally trained. Since then, the chamber of commerce has become very active politically, and most of the legislators now are not

lawyers. When the court recently changed the common law a little bit to make slip and fall proof easier, in the next legislature they took it away.

The problem is no matter how often you talk and who talks for you, if the legislators are not lawyers, they don't care. They will do what they will do.

As recently as 25 years ago in our state, a senate rule prohibited a non-lawyer from being a member of the senate judiciary committee. Now there are not enough lawyers in there to people the committee.

Our legislature, like I think a lot of them, has fewer and fewer lawyers. Our state has a lot of people from agri-business and they are the businessmen. But if you go back to them and say, legally here is the mistake you are making, their response is very negative. The last thing they want to hear is that the lawyers are telling them that it is wrong. If you don't take the functional approach, you do end up with an antagonist rather than someone you can work with.

**If you go back to them and say, legally here is the mistake you are making, their response is very negative. The last thing they want to hear is that the lawyers are telling them that it is wrong.**

In my state, some of our greatest proponents are non-lawyers. On our appropriations committee, where it comes to money—non-lawyers head both of them—they were our biggest proponents for raises.

Our lawyers in the legislature are leaders and they are also lightning rods. And we're losing one this time, because he took a stand and stopped a bill on same-sex marriage or something, and they are just running him out. And he decided to quit.

We decry the diminishing of the number of lawyer legislators, and we have a lot of the lawyer legislators that check their legal baggage at the door. They are perhaps the most populist gung-ho legislators there are. That deliberative quality that we ascribe to our profession is not always there. There are some notable exceptions in our legislature, but a lot of the lawyers in our legislature are really no better than the people we have been roundly criticizing throughout the day as being kind of clueless.

No firms want their associates to go and be legislators. And unless you are independently wealthy, you can't afford to go with all the expenses incurred. So, it used to be we had a third of the legislature was attorneys. Now, out of 60 there are four.

There is another reason in our state. There are fewer and fewer lawyers in the legislature because firms are getting bigger, and people gravitate toward the law firm rather than hanging out a shingle or having a two-or-three-man firm. Most of the larger firms prohibit their people from participating in elected office.

We have fewer and fewer lawyers in the legislature, and, in the past, they have been the ones who have understood the needs of the court and the judiciary and appreciated what we are doing and the role we play and why we may not always render popular decisions. I think without lawyers participating

in the legislature, we lose a huge voice and a huge sort of constituency that has effect with the other legislators.

When I testify in front of the legislature, I have to start at the very, very beginning of that education process. Usually, in response to a question from the legislature, I learn that they don't understand that there are three branches of government. But it has really been a problem when I realize that I have to spend maybe the first three or four minutes on a very basic civics lesson, and then maybe I'll have an opportunity to talk about the procedural or substantive issues of merit. But, often, we don't even get that far.

*A couple of judges noted that the legislative staff plays a large role in legislature-judicial relations.*

The staffs do a lot. They are a dangerous group.

The staff is the major problem in our southern state. They are very antagonistic to the judicial branch.

It is the legislative staff that ends up running the shop.

In the states where you have term limits, it is really the staff that drives so much of this. The staff continues long after you have the rotation in the legislators. That has been a problem that we have had.

It makes your relationship with the staff people in the legislature that much more important, because a lot of them outlast the legislators now.

We had a good working relationship with the staff to the legislature.

*According to some judges, the impact of term limits on state legislatures has had an effect on the relationship between the two branches.*

What about term limits? Do you all have term limits in the legislature? It's awful. They get there, and they don't worry whether they are going to stay or not. They come there with an ax to grind.

It's every man for himself, is what I'm hearing in our legislature now, talking to the old heads that have followed the legislature for years. People who have always had respect for the system, and they say it's just awful.

They have to get that second term, so they have to do something during the first term to stay in the second term.

We have term limits that comes into play, and you just don't have any history that you can go to. It is a real problem.

The other thing is that with term limits in the legislature, there is no incentive to get along and compromise. They say "We are going to be gone." I'm going to throw my bombs, and I'm going to be out of here.

This legislature today is a term-limited legislature. It's awful. I mean they don't have any lord. They don't have any history. When I was a legislator I could go to those old heads and say, man, I've got a bill that

does this. What do you think about that? And he says, “Well, we tried that in 1986.” It was that history. And you could rely on it. And you could rely on that old head in 11. He told you something. It was better than a written contract. It was in blood. And now they just lie like dogs.

We have got term limits and our legislators only serve two-year terms. That has been in place for a while. At one time there were legislators that had long relationships with the court. There were a lot of lawyers on the legislature and that is not true anymore. We have people with very little institutional knowledge and very few lawyers now.

*Judges noted the influence of politics on legislative behavior.*

They want to get reelected. It’s feel-good legislation. They don’t need it. They just want to do it.

The legislature succumbs to these lobby groups. They listen to them more than they do judicial authority, and that’s the tension we are facing.// We don’t contribute to their campaigns.

Our local paper rates the legislators according to how much legislation they have sponsored and passed. And I think sometimes the best job they do is to kill what is proposed and stop it. And why are they promoting all this creation of more statutes, when there is not necessarily any need?

I just think that sometimes our legislature passes laws that they know damn good are going to get struck down, but they do it for political purposes.

Unfortunately, you would think that the legislature would guard its legislative prerogatives quite jealously, but they don’t. They actually like these initiatives because it takes the heat off. They don’t have to take positions on tough issues. They just let it go that way, and let special interests duke it out.

**I just think that sometimes our legislature passes laws that they know damn good are going to get struck down, but they do it for political purposes.**

When I was in my state’s House of Representatives, I, as a country lawyer, was going before the House to fight a bill. And I would say, “Well, this bill is totally unconstitutional.” And very quickly one of the House members who was a lawyer would say, “There is separation of powers. We don’t care whether it’s

constitutional or not. We’re going to pass this bill, and let the court worry about it.” They do things for political purposes, obviously.

This dissension in the political world—which seems to be acute in my state—is such that you don’t just merely disagree strongly, you hate. They hate each other. They don’t talk. What happened to Benjamin Franklin’s spirit of compromise? Where has this gone?

When you are talking about monies, it doesn’t matter if you are a brother-in-law. Now I’ve got to get reelected, and I can get reelected with a new playground swing, as opposed to you hiring another paralegal or adding onto your courts. Because the public doesn’t understand that when it’s election time. They see this project going up, and I can get reelected with that project. And maybe in a good year when nobody is watching, they will take care of the courts.

*Several judges spoke of the impact that public opinion has not only on the legislature, but on their institution.*

We are in such a disadvantage in public opinion, the legislature is going to rip our rears, and we can't say a word about it. We have to really pick our fights to make sure the public is with us.

Can I say it's fair game, too, for judges to suggest to the people that they should participate more with their legislators, and should invite them to take a look at the laws that are being enacted. And I think that that is kind of fair game with judges who end up taking a lot of heat for some of the laws that we end up having to enforce.

**If we are so aware of public opinion, what happens to our independence?**

We have to be very aware of public opinion.

If we are so aware of public opinion, what happens to our independence?

We have to remember, public opinion is out there. And if we pick fights over things that are pretty insignificant, the public is going to not be too excited about it. But if we are picking the fights on things that are of importance, like for example the functioning of the courts, being able to function five days a week, we are probably going to have a lot more success in rallying public opinion behind us. And in a democracy, that public opinion is very important.

*A couple of judges discussed their media outreach and attempts to educate the media and the public.*

Our southern state has got a spokesman for the supreme court, but it's very bland, and it's got nothing to do with trying to marshal public opinion one way or the other. It's just very bland, factual.

Our supreme court does, too. It's of recent origin, and I'm not sure how much help it's been, but it's better than nothing, that's for sure.

Our supreme court has a media person.

The other thing that responds to the particular case, we found the bar community doesn't work, because it can't react fast enough. They can't get together fast enough. And so, we use our public information officer, particularly in high-profile cases, and we issue a press release. She deals with the press on these cases to be sure they understand. And we try to write them in an understandable fashion. That has been useful, particularly in the high-profile cases.

One thing that we do occasionally on something that is going to be fairly controversial, and maybe hard to understand, is to put a sound bite in it that puts the pieces together in a statement that is likely to be picked up by the press. Because they have a hard time compressing long opinions that have a number of issues in them. Sometimes we know that political figures pick that up, too.// You put a sound bite

in the opinion, or separately issued?// Put it in the opinion.// And is it invariably picked up?// Yes, especially if you put it in the first paragraph.

## Funding of the Courts

*A major point of contention between the legislatures and judiciaries is over funding for the courts.*

The money issue is probably one of the biggest things affecting judicial independence. I mean, it really is cutting through so much right now.

We have funding issues a lot.

They cut the funding to the courts. And instead of being challenged, the court laid off I think one-third of personnel statewide. One legislator went on TV bragging “We cut the pay of the judges.”

We haven’t had an increase in judges in the appellate system in our state since 1988. And since 1988, the population of our state is half again as much. We’ve gone from 2,100 filings in our 12 judge court when I was appointed, to 5,500 filings.

The legislature does have the power of the purse. It’s very difficult for us.

I will say that I think that we have kind of directly gotten in conflict a couple of times with regard to judicial funding. We have had several judges who wanted to go to the inherent powers doctrine in order to enforce that. But I think that we have resolved it in the public’s view, again, since we are elected, by compromising on issues so that we get more money for our staff, and more money for lawyers, as opposed to pay raises directly for ourselves.

I think one state did that. I think in the weight of the budget crunch they went to a four-day work week. And I think any time that the judiciary has done that, it’s with the hope that the media would pick it up, and would demonstrate that the citizens aren’t being served by legislative appropriations. But that doesn’t always happen.

Well, when you get to the point though where the citizens’ rights are being impinged by not being able to have trials, then I say, hey, it’s not because of me. Hey, I don’t have to work as much. That would be fine. But you have to cast it as a citizen’s right to get a trial in court—suggest to the legislature that it’s impinging on citizens’ rights.

It’s one thing for them not to give judges pay. It’s another for them to gut the entire system.

We got cut. Judicial salaries didn’t get cut, but certainly staff got cut.

They can cut staff personnel. You no longer have 12 secretaries. You have 10. That happens to us on a regular basis.

Well, we are facing a situation right now where the legislature is demanding that we cut our budget 5 percent. Our budget is 95 percent solid. If we have to cut it 5 percent, we have no pencils, no coffee.

The budget problem has gotten so severe that they have been closing courthouses in our western state. Some of the smaller court buildings that are serving some of the more distant communities are just getting shut down completely. It is happening across the state. So, in terms of access to the court and services to people, it has definitely affected that. They have yet to start shutting down courtrooms within the main courthouse, but that will probably be the next step.

The legislature is entitled to cut your budget. I would say, unless and until they eliminate court functions of what it means to be a judge.

**We just issued a warrant against the treasury and told the treasurer he was going to jail if he doesn't release the money, and that was the end of it.**

We had a problem like that in our southern state a couple of years ago, and we dealt with it informally. The supreme court sent a warrant against the treasury and just appropriated the money. We just issued a warrant against the treasury and told the treasurer he was going to jail if he doesn't release the money, and that was the end of it.

Isn't judicial funding, for example, always a matter of freestanding power? I mean, it seems to me to be the ultimate freestanding power for the judiciary to protect it.

There is another factor that I was going to mention earlier. We have a unique provision that you all might want and that is that the supreme court of our state certifies to the legislature how much money is necessary to run the state judicial system, and they are prohibited from reducing that amount of money. Now, the court, not just the term I have been on it, but historically in all the time they have had it, is very, very careful about the use of that power and bends over backwards to respond to legislative inquiry. But when push comes to shove, the court system gets the money it needs, period.

We were at the point of desperation with the funding issue, and got the lawyers and the bar involved. And then we got our hands slapped by the judicial ethics committee for participating with the lawyers at an event where they were actually raising funds to pay for a lobbyist on our behalf.

*Judges also decried legislative efforts to reduce their salaries.*

In our state the legislature created a judicial compensation commission, of which I am vice chair. We had very specific testimony from economists and from political scientists about the need to increase salaries of judges. We had a study done by a very well-respected economist. We had empirical data comparing salaries to lawyers and salaries to judges in other states, and documented, which is what the legislature said for us to do. They didn't buy into our recommendations. Not only that, but they gutted the commission.

Like I said, we haven't had a raise for seven years. And judges are mad. Legislators are mad. It's a very volatile situation right now.

Some of our biggest opponents of pay raises were the lawyers in the legislature.

We are paid about \$152,000 plus a car, and that's always an issue with the legislature.

Ten years ago, our legislature created a COLA which was specifically set as a part of a judicial salary. It isn't a raise in pay—it's an adjustment. Two years ago, our legislature decided that they would waive their COLA. We were all given them at the same time, so they waived it on behalf of the judiciary and the executive as well. We notified the legislature that that was an unconstitutional effort on their part to change our salaries during the terms of our office. And so, they recognized finally in debate with us that they had committed an unconstitutional act in giving it up for us. They kept it for themselves. They passed new legislation that provided for our pay, and the governor then vetoed the legislation. So, we brought a lawsuit then against the governor and the legislature.

We haven't had a judicial pay raise in seven years.

Our view is, we had a raise four years ago, and our view is that we will probably never see another one, at least through most of our lifetimes.

As a former legislator, I think a lot of the antipathy does come from sort of a general hatred of lawyers, and judges are lawyers, so therefore, it's that. In our Mid-western state, I think it's also that we are paid twice as much as they are. They are full-time. We are full-time people. They don't see judges as being worth twice what they are paid, and so there is just some antipathy as a result of that comparison.

**Our view is, we had a raise four years ago, and our view is that we will probably never see another one, at least through most of our lifetimes.**

*Several judges discussed the impact that low, or frozen, judicial salaries have on the quality of the bench.*

They are having to leave because of the high cost of living. So, what you get, especially when judges are running for election, are more and more inexperienced judges, who a lot of times are lawyers who just need a job, to be frank about it. It's tough in private practice, and so for them, coming on for a while with the salary might not be a bad idea. The lower salary, I think the case is being made, invites less-experienced persons.

The corollary that has to be mentioned is that because of the low pay, you will have people who only run for the job as a stepping stone to higher political office. It's a notch on your resume. And so you don't encourage a long-term environment where people stay, learn the job, enjoy being a judge, and then decide that's what they want to do as a career. You have people that because of their current wealth and political position, oh, sure they'll be on the supreme court for a little while, and then they'll move on.

How about the lawyer that makes a \$500,000 or \$1 million a year, and he wants to get on the supreme court so he can run for the Senate, the House of Representatives, or lieutenant governor. He could



care less about being a judge. This is just a place to hang your hat while you are campaigning for the next job. That's wrong for our judiciary, and that's happening more frequently as a result of the inability to retain, not only for the pay problem, but for the political problem.

But you get that one lawyer, \$100,000 a year looks like a heck of a lot of money to him. But he's out there starving to death at \$35,000.

*Some judges noted that their branch employs lobbyists to work on their behalf in the state legislatures, normally funding and court operation issues.*

Ours lobby on the matters affecting the court of justice. They don't lobby on matters in legislation in general.

We have an appellate judges association funded by the state, and we have a paid lobbyist. Funding is very bad in our state and the legislature decides to cut the budget for the whole judiciary. The supreme court absorbs the cost, so it is not passed on to us.

We also have a 2,000-member voluntary judges association that is like a bar, but it is voluntary. They have a paid lobbyist. We get in it and communicate frequently.

We have a lobbyist that works for us in the legislature and they quietly tell them we have got problems with such and such a law.

We do. There is another way that you can communicate to the legislature and advise about what they might be doing.

We have a lobbyist. I wouldn't say our lobbyist is powerful though.

Ours hasn't worked. We haven't gotten a pay raise.

I don't think any of our judges try to talk directly with the legislators. We go through lobbyists. Our lobbyists are very powerful.

We have three people on the payroll in the judicial department and their sole function is to be liaison with the legislature, and they are, in effect our lobbyists.

We call ours liaisons.

We can't call ours a lobbyist.

*Several judges discussed using the state bar associations as allies in their dealings with the legislature.*

The court should more aggressively work with the bar in approaching the legislators in the various states to increase funding, to enact more appropriate legislation and to deter inappropriate legislation.

A tactic that our court takes, when something of that nature happens, is to get the bar involved in it. The

bar association then sometimes, when they feel like it, takes on the battle and brings these things to a head, or at least to the attention of the proper people—sometimes to the attention of improper people.

An effective way that we handle it in our western state is with coordination with the bar association, and there are mutual interests with the bar association in saying that these constitutional issues are better understood by the legislature and having lawyers who are speaking not formally on behalf of the court, but, in effect, advancing the court's interests as well as the bar's in addressing legislation that is pending.

That is where the bar association comes in, where they get involved. They are involved all the time on the legislative process and lobbying on the legislative process. To the extent they see something is going to be an encroachment on the judicial power, they do get involved.

Our state bar has a committee that focuses on these issues. And what they have done is they set up kind of PR events for judges, but it's the bar coordinating it. They will invite some judge to come speak on a topic to the public. Not that these issues are resolved in our state by any means. But that's a good step in the right direction. I think to have the bar provide the impetus is important.

*Some judges did note that the bar associations can be part of the problem.*

When law professors say that when you are exercising your constitutional authority, particularly in the inherent context, you should explain that you are doing this for the people, not for the courts. He is technically right, but I think practically, it has become that you are exercising it for the plaintiff bar versus the defense bar, and judges are seen as either being pro one or pro the other. That is how it analytically gets played out. And judges don't have any control over that. The bar has created this

whole, "that judge is a defense judge, or that judge is a plaintiff's judge," and that leads to real political problems for judges in my view.

**The bar association then sometimes, when they feel like it, takes on the battle and brings these things to a head, or at least to the attention of the proper people—sometimes to the attention of improper people.**

If you go to the Web pages of these bar organizations, including the local bars, they have judges rated.

I think that maybe we as judges need to do a better job of helping our bar associations understand that it's really in their best interest

to make sure that our independence is preserved and protected. Because I really get the feeling a lot of times that the bar and attorneys are not interested in making sure that they are protecting judicial independence and judicial integrity as much as they should be. And I think that they could really be on the front lines, helping us out tremendously.

I think that it is important to make sure that the bar understands it's the system, not just individual cases. It's the system that they've got to be making sure is protected, so that they can protect their own livelihood.

## JUDICIAL APPROACHES TO CONSTITUTIONAL QUESTIONS

### Specific Clauses v. Freestanding Power

*In his paper, Professor Williams made a distinction between basing a ruling of unconstitutionality on a specific clause in a state's constitution, such as the right to trial by jury, or basing it on a more general understanding of freestanding judicial authority. Most judges said that they use specific clauses to rule statutes unconstitutional.*

Most of us all start with a specific constitutional provision.

You have some constitutional provisions that are specific. The best common example is adequate education. But then you have other specific provisions that are general. So if we are invoking due process or equal protection or law of the land, that gives us a great deal of room to move. But we are invoking a specific clause of the constitution.

I think in our state, when they use that word, it is always after they have already said, flowing from the separation of powers, or flowing from this specific constitutional provision, and inherent in that constitutional provision is this thing. So they are always basing it on a specific section.

The process is a specific constitutional provision. But we don't use language like freestyle. These are words that are foreign to the way we think, the way we address a problem. It is easy for Professor Williams to use it, but as a practical matter we don't think that way, nor do we use words that are glib. I consider it a glib phrase.

I have been on the court almost 14 years, and I can't remember a time when we have looked to the inherent powers as opposed to the specific powers to call something unconstitutional.

I want to throw out from my perspective what happens here. I think everybody in the room starts off with a specific constitutional provision. Some of us end up limiting ourselves to the exact language of that constitutional provision. Some others in the room might carry it a little bit further. Then you get to the Douglasses of the world, who want to create penumbras for certain constitutional provisions, and then you get to some people who want to say, "I have this inherent power," and they go even further out. What happens with you folks, I think, is, you look on hindsight at what we did, and then classify our decision as either functionalist or formalist, but do you really think any of us are thinking that through as we are writing the opinion?

If you say it is inherent in this provision of the constitution, at least you are arguably grounding it in some way.

The starting point is always going to be specific constitutional provisions. That is your safe haven. Then if that isn't sufficient, you go beyond that. But I think most people would start with specific provisions, because that is probably where the argument and the discussion begin.

The way I prefer to talk about it is that there are certain provisions in our constitutions that allow more room for interpretation than others, things like the due process clause or the equal protection clause. Rather than simply rely on this concept of inherent power, I would prefer personally in every case to see a decision that is at least arguably grounded in some provision of the constitution.

**I think we tried to find specific constitutional provisions to hang our hat on.**

Doesn't a lot of it depend on the state constitution itself? Some constitutions are more specific than others. When I have seen these challenges, they have generally pinpointed a specific constitutional provision that the legislature has encroached upon.

I think we tried to find specific constitutional provisions to hang our hat on. We had one judge who always said it was the inherent power of the judiciary, and a lot of us didn't feel that was sufficient, because that can be interpreted then along the line as precedent about anything. It's a fallback argument then for the appellate lawyers. You have the inherent authority or whatever, the freestanding judicial authority. And so, it would lend itself to abuse, we felt.

If you have a constitutional provision with respect to separation of powers, why would you rely on freestanding, whatever you all mean by freestanding?

*Some judges did acknowledge using their freestanding power, either in combination with a specific clause or as a last resort.*

The answer is both, at least in our northeastern state.

Courts in our southern state typically use both. They will attempt to derogate their powers from specific grants, but if that is not the case, we are not hesitant to use the term, what is called freestanding judicial power. I'm not sure the distinction is that valid, quite frankly, because the results in most cases are the same, regardless of the methodology that one uses. I think sometimes it depends on the extent of the inclusion. If courts feel that the inclusion is not that great, they will be loath to reach a constitutional issue, whether it is under the freestanding model or under the specific judicial power model. We prefer to use the specific judicial power, but at times we will use the freestanding judicial power. At times, our supreme court will address a constitutional question even when it is not brought up. They slap our hands when intermediate appellate courts do that. I think we have the power to do that, but they have told us time and time again not to.

My guess is that most high courts use both, and you would like to be able to avoid the inherent power of the court, and you would like to be able to point to specific provisions within the Constitution.

I've been in the judiciary now five-and-a-half years, and one thing that I have learned very quickly is that

the trial judges will much more quickly use inherent power than appellate judges will. And I think that the higher up you go in the judicial chain, the less we are apt to use inherent power.

It seems to me one thing to say that using the freestanding power argument is a justification when you are talking about matters that are essentially inherent in the functioning of the third branch of government. But when you start trying to use that as a justification for telling the other two branches of government what they ought to be doing, that is a far different thing. It is a dangerous thing, it seems to me, because it begins to look like the judicial branch is being as arbitrary and power grabbing as the other branches.

**I've been in the judiciary now five-and-a-half years, and one thing that I have learned very quickly is that the trial judges will much more quickly use inherent power than appellate judges will.**

It would be my experience in 13 1/2 years, that we need to be very cautious with this freestanding judicial power because it sort of reeks of substantive due process. It is the “eye of the beholder” sort of thing. My personal judicial philosophy is that I might be highly offended by something, but I would be very careful. I would want to find something textual. Most of my colleagues would agree with that.

I think we have had cases in the past that were inherently using the freestanding judicial power. However, I think the political climate has changed, and it is no longer acceptable, shall we say, to not just use the specific power granted. We had lots of inherent power cases back in the '60s and '70s. I shouldn't say lots, but enough to establish a precedent. But they haven't been used in a long time.

I would say we would rely on freestanding judicial power only as a last resort and I probably wouldn't get a lot of support.

As a relative newcomer to the appellate court, what I gained out of what he was saying was you might deflect some criticism. In other words, look for those specific constitutional provisions first, make sure you research that issue and then use, as you pointed out, the freestanding power as a last resort, so it doesn't look like people over here are flexing their judicial muscle.

*Several judges noted that it was safer to rule using specific constitutional language rather than on the general freestanding power.*

I think generally, most state courts operate under the specific because it seems less active. So I think if you can mold it as a specific, generally you write it that way, because it does seem that it is more inherently in our power to operate in those arenas than the general. I think it is politically more defensible.

If you go back and look at the prior case law, long before the '60s, you saw considerably more use of the broad power with the political climate. In states where most of us are elected and face retention elections, the climate is such that the whole focus is against the concept of, quote, judicial activism—although we all know that how that is defined is in the eye of the beholder.

It does resonate, but we do shy away from just saying it's inherent power, for a lot of other reasons too, because of the tension and the friction between the judicial branch and the legislative branch. It's very thick right now in our Mid-western state. We are having a very difficult time in our relationship, so we don't like to wave the red flag in front of them either. So mostly, we try to rely on constitutional provisions.

In general, we try to pretend we don't even have any freestanding judicial power in our southern state, except in very rare instances, because of the danger of being labeled a judicial activist. Of course, an activist is someone who wrote an opinion that you don't like, in general. I am from a very conservative state, and I think the more conservative approach for elected judges, particularly with an intermediate court of appeals, is to stay as far away as possible from anything that might reek of freestanding judicial power.

I would submit that any judge who is elected is rarely if ever going to use the freestanding judicial power.

I think Williams makes a real good point in his paper, where he is talking about legitimacy issues and how the public perceives the basis for decision making. I think the more we base decisions on these abstract notions of freestanding judicial power, whatever that might mean, I think the more we run the risk of being labeled, at least in our western state, as judicial activists. I think that the more we have some solid specific basis for our decisions regardless of what the issue is, the less likely that is to happen, especially when it is a specific rights-type provision in the state constitution, and I think most of our state constitutions have those types of rights provisions. As long as it is based in that, I think there is less likelihood of that happening.

**Of course, an activist is someone who wrote an opinion that you don't like, in general.**

### **“Formal” v. “Functional”**

*Also in his paper, Professor Williams talked about the “formal” and “functional” approaches judges apply take to separation-of-powers questions. The formal approach emphasizes strong, substantive, and “pure” separation of the powers of the branches of government, and strictly analyzes alleged encroachments on judicial authority. The functional approach allows considerable judicial discretion in reaching a conclusion as to whether there has been encroachment and may tolerate technical encroachments if they cause no harm. Judges discussed this distinction and how they approached legislative encroachment.*

I think it really depends on the type of case and the tools that you have to work with. So I would have trouble characterizing my court as either approaching these in a functional or a formal method. I think it is something you pull out, depending on the nature of the issue that you are facing.

I think it is hard to answer how we could characterize a court's approach, because I think it really depends

on the type of case. In a certain type of case and depending on the issue raised, your best bet may be to try to apply a bright line rule

The labels aren't used, but the points of view are fairly clear. Based on our court, they are quite well drawn about that. Especially when you work with somebody over time, your colleagues start falling into some of these general parameters. While it is true we don't necessarily attach an academic label to them, they do represent points of view that are reflected, at least in my opinion, fairly accurately in these papers.

The legislature in our western state, as I suspect in many states, has codified, by statute, the rules of evidence. Now, think about it. I think historically, the determination of the rules of evidence governing proceedings in court has traditionally been the prerogative of the judiciary to fashion. The legislature has presumed to take that function over. We have thought about it a lot, but we have chosen not to make an issue of it. That I think is an example of the functionalist approach. It may be unconstitutional, but is there any real harm, or if there is harm, are we willing to live with it?

You have a point of view about whether your approach is going to be formalist or functionalist. I think in my case, and looking at the members of my court and the intermediate court of appeal in my western state, there is a mixture of those values. They go into every case.

I just want to comment about the camel with the nose in the tent. With the legislature, you give them an inch, they'll take a mile. So, I don't want the nose in the tent to begin with.

You really have to ask the question, is there an attempt on one part of the government to exercise coercive authority over the core function of another part? I'm a bright line guy, but I think that is an individual inquiry in every case.

I think formal is more bright line. It just says, this is a judicial function, this is a legislative function. The functional approach is more accommodating. You look at the degree of encroachment.

I think it is partially an academic distinction, functional being the practical effect, as opposed to what is there.

I find that the formal approach is the approach that is espoused by the litigators and the functional approach is the way our courts use to resolve these matters.

I think that is my personal concern with the functionalist approach, when a court finally decides to draw the line, if it has accepted similar action by the legislature in the past, it presents itself with the challenge of trying to explain why what they don't like now is different from what they accepted before. So I worry that our functional approach gets us into that go along-get along attitude that can actually make it more difficult when the tough case comes to draw the line.

*Judges discussed how they often tried in cases to avoid ruling on constitutional grounds, or limiting statutory interpretation in order to prevent legislative encroachment.*

We will excise from a legislation that which is offensive, so long as it doesn't do gross injustice to the legislation, and sustain the rest. Or I guess the advisory opinion kind of cases, where we might

interpret the statute as constitutional as applied in a particular fact situation, but signal that it is unconstitutional if it is any broader than applied.

I think ours follow the concept that there is a presumption that statutes are constitutional, and you have to interpret it narrowly to do that.

The first one [purposely limiting statutory interpretation] we do all the time.

There are other times when they limit the statutory interpretation or they do all of these things. I think every supreme court and appellate court is faced with all of these remedies at times. Sometimes it is a little rule making and you work it out. I think you have to be a little ballet dancer in this business.

In our Mid-western state, we have a rule that recognizes great deference to the legislative powers. The rule is to avoid constitutional challenges where a case could be decided on other grounds.

In the eight years that I have been on the court, it has adopted a practice of what I would call under-enforcing the constitutional norms as a way of avoiding dealing with what the constitution requires. Our court has done that over and over again.

**I think you have to be a little ballet dancer in this business.**

As somebody pointed out earlier, we try to decide cases on non-constitutional grounds if possible. This is a narrower ground. You can interpret the statute in a way that avoids that constitutional question, or even says the legislature couldn't have meant that—they must have meant this, and we are going to go that route.

This suggestion that he makes, that a state's court declared a legislative action arguably or even likely an encroachment of judicial power, but then upheld the statute, it seems like kind of a weenie's way out. It is like, somebody comes in and invades your home, and then you say, you are actually a guest. If they are encroaching on your judicial power, I don't know that you ought to be exercising comity and saying we are going to let you do it.

Intermediate appellate courts have to have written decisions in every case. You are talking about judges being responsible for eight to 15 opinions a month. In our Mid-western state's intermediate appellate court at one time, we were up to 10 or 12 a month to do everything. So the first thing you do is, if it's going to be reversed, find one thing on reversal and avoid everything else, because you don't have time to address everything else.

## **The Role of Judges and the Courts**

*Many judges expressed concern with the arguments presented by both professors and discussed how their suggestions might force the courts to take a role with which the judges were not comfortable. There was a broad discussion on how the courts should act, and how their actions might affect judicial independence.*



I spent over 20 years on the appellate court, and all I looked for was their error in the trial court. I go through the trial and see whether or not there was error. And if there was error, was it of such significance that it denied either side a fair trial?

I think some of those speakers wanted us to be super-legislators.

We are judges. We are not legislators. We don't make the law.

We are not a policy branch of government. I don't subscribe to the notion that we are junior legislators. We are not there to sort of finish up the business that they imperfectly did. I think we were being challenged this morning to do that. I think the suggestion this morning was that we should sort of fill in our own policy thoughts to make it a more perfect policy.

I think the line of demarcation is between the government and settling disputes. We must stay on the side of settling disputes and not governing when we directly give advice to the legislature or to the governor—we are, in effect, doing their job and we are governing—we are becoming a political organ of the government, which we must not do.

If we're going to be lightning rods, they ought to at least pay us for it. I was before the Rotary Club in my hometown about three months ago, when some guy held up his hand. He said, "What are we going to do about all of these activist judges?" I said, "Do you know the difference between an activist judge and a courageous judge?" And he said, "What?" I said, "It's which side of the controversy you're on."

There is a quote, and I think it comes from Oliver Wendell Holmes, "If the country wants to go to hell in a hand bag, it's my job to help them get there."

When I first joined our Mid-western supreme court, I had five colleagues who were appointed by the previous governor, and I want to say that none of them was what you would call a flaming liberal. I was in one of the early case discussions after oral arguments and said something about policies, and one of my very conservative

colleagues looked at me and said, "I don't do policies." I was looking to see if there was any kind of smile, because we do. It was kind of a powerful lesson because we make the decisions more acceptable to the extent that you appear not to be overtly doing policy or talking about policy. What you are really talking about is law. These distinctions that are drawn in the first two questions, it seems to me, are useful distinctions because they are from the standpoint of structuring what we say in judicial opinions. The closer we adhere to the language of a constitutional provision, the more acceptable our decisions are, and the more we wander off into some kind of rhetoric about separation of powers or judicial functions and all that kind of stuff, the more we appear—at least to our readers and I hope our readers are the public—to be making stuff up. Now, we come from a tradition, the common law, in which judges make stuff up, but it seems to me that in constitutional adjudication, we ought at least to appear not to be doing policies and not to be making stuff up. So, there is a number of sort of contradictory things in there, but I think there is a clear message for all of us.

**The closer we adhere to the language of a constitutional provision, the more acceptable our decisions are, and the more we wander off into some kind of rhetoric about separation of powers or judicial functions and all that kind of stuff, the more we appear to be making stuff up.**

The thing that I remind myself of a lot, after going through now three elections in 20 years as an appellate judge, is that in addition to me staying on the bench, I have been given an obligation to protect the franchise. There are going to be occasions where the line has just got to get drawn. When that line has to get drawn, you do it, you explain it as succinctly and as appropriately as you can, and if you have to use a general principle rather than a specific one, you use it, and then you take your lumps.

I think the key is that we are all seeking to bolster the legitimacy of what it is we are doing.

## Judicial Rulings on Legislative Encroachment

*Judges were asked if they had occasion to rule on the constitutionality of various statutes that might infringe upon the judicial branch, such as laws that altered the common law, procedural or evidentiary rules, limited damages, or provided inadequate funding for the courts.*

Our western state has a lot of cases in this general area that you are talking about. We have got to make all the anti-abrogation clauses in our constitution, which basically says that there shall be no law

**It seems to me most of the statutes now in the whole criminal arena are removing the discretion from the trial judges.**

that abrogates any common law cause of action. So the question has arisen for decades in our jurisdiction. Does that mean a cause of action that exists in the constitution adopted in 1912? Or is this a continuing target that each time the court announces a new cause of action, which our supreme court from time to time does—does that create a cause of action that is then protected and, in a sense constitutionalized the law of torts. And the

supreme court justices have gone round and round with opinions on this, some of which are very inconsistent with each other.

We have had cases over the years. We have not had one dealing with funding for the courts—thank goodness. But we have had cases that affect the other three.

It seems to me most of the statutes now in the whole criminal arena are removing the discretion from the trial judges.

Our state has just the opposite of that. Our constitution specifically allows and authorizes the legislature to alter or change the common law.

*Some judges discussed the rule making in their state, and how, on some occasions, the legislature has encroached on their power.*

We have a provision in our state's constitution saying the supreme court promulgates rules of procedure.

Our legislature didn't like that, and so they were going to propose a constitutional amendment that the legislature should promulgate these rules. I don't know how far it would have gotten popularly, but what happened was a compromise was reached, and the supreme court, which appoints the rules committees to say where the effective power is to draft the rules, now is putting a legislator or two on each of the committees.

We have done what was mentioned this morning, namely, we adopted a court rule to avoid the confrontation, but still maintain our separation. We go ahead and follow our court rule, even though it is the same as the statute that we feel they shouldn't have enacted.

In our southern state, the supreme court has rule making power for the appellate court system. And it has the power to define appellate jurisdiction, which is interesting to say the least. But they have not taken on the legislature on any of those subjects in the last three or four years because of the budget contretemps.

There was an interesting experience that our supreme court had, more than 15 years ago, where their general assembly enacted a statute that required the state in a criminal case to turn over written statements of any witnesses who testified immediately after their testimony. The supreme court found that to be an unconstitutional incursion into its rule-making authority. Judges in our state did not get a raise for several years after that decision. This particular decision was lengthy and fairly attacked the general assembly for encroaching. There was a fairly substantial payback for it.

Back in the '70s, there was a lot of controversy in our state about whether the court could establish procedural rules or whether it was the authority of the legislature to do it. Over a few years' time of a lot of controversy between the ruling members of the state senate and the chief justice of the supreme court, the legislature has now backed out of it altogether, and it is very clear that the supreme court promulgates procedural rules, evidentiary rules, everything that is within the purview of the court system. We have no problem with the legislature trying to involve itself into that.

You asked what the demarcation line in our state, at least there is a demarcation line because we have court rules by supreme court, but also legislative statutes that have to do with procedures and so forth, but this is how our state has drawn the line. Although we will recognize statutory evidentiary rules that supplement the court's rules, the legislature cannot repeal the court's rules and we draw the line when it enacts a statute that conflicts with or tends to engulf a general rule. At least in the area of evidence rules, that is how we draw the line.

*On a related note, judges discussed the active role that many state legislatures have taken in changing the tort system and how their state courts have addressed those reforms.*

The legislature now has passed two tort reform bills, particularly medical tort reform that includes very clear procedural steps necessary to the institutional maintenance of that lawsuit. There was no inquiry at the court. So, it will come sooner or later, of course, by writ of prohibition or by appeal from a tried case. There was no communication. They just were going to do that come hell or high water.

In our southern state, they passed some statutes limiting judgments. The supreme court found them unconstitutional. The supreme court got voted out. The legislature re-passed it. The new supreme court said we invite you to bring that issue back before us. I think it's predetermined.

In our Mid-western state, we had a supreme court that found tort reform unconstitutional. So, the insurance lobby in the state legislature makes sure that the next people that are elected to our supreme court felt otherwise and it now fits in shallow ground. Nothing is happening.

**In our southern state, they passed some statutes limiting judgments. The supreme court found them unconstitutional. The supreme court got voted out. The legislature re-passed it. The new supreme court said we invite you to bring that issue back before us. I think it's predetermined.**

We have had that sort of legislative encroachment directly as a result of an opinion by the court. It happens fairly regularly in our southern state, where in response to a court opinion, the legislature will modify a statute or a court article. There is a huge amount of legislative micro-management of tort law.

Fights that used to be waged in the legislature are now waged in the court. Tort reform is a perfect example of that.

We had some tort reform a number of years ago that had passed. And the state supreme court found it unconstitutional. Last year, our legislature passed this tort reform again, but guess what they did this time? They passed it as a constitutional amendment and took it to the voters, and the voters approved it. So, now the courts can't do anything about it, because it is in the state constitution. The legislature has a pretty heavy club on stuff like this. There is no way we can judicially review this constitutional amendment, which is now part of our constitution.

I am from a state that has never struck down any of the tort reform legislation.

We recently held the tort reform damages cap unconstitutional. We specifically pointed to the constitution with regard to provisions. Not freestanding, not legislative judicial actions—there were specific reasons given for setting aside that special legislation, such as equal protection under the law.

Ours is called the open courts clause. It is exactly the same thing that has been used to strike down a lot of tort reform things, where there is no remedy substituted, and it was a remedy at common law. I would say that courts in our western state use that specific provision the most of any.

We just recently finished one on punitive damages and said that it was constitutional for the legislature to decide that a percentage of a punitive damage award would go to a victim's assistance fund, as opposed to the plaintiff.

*Judges were asked if they had ever taken action sua sponte when faced with an encroachment on their court's authority.*

No.

We would never do that, but you might in an opinion drop a footnote and say no one has raised a question about this issue. So, we express no opinion about it. It is designed to say to somebody, “Does anyone want to raise a question about that.” But that is the only vehicle we would use *sua sponte*.

An advocacy group doing something like that is one thing, but the court sending a letter to the governor or to the legislature in advance of the enactment of a provision really seems to violate the separation of power principles, the cases and controversies principle. I was astounded to hear that it is a regular practice.

I think the point about it not being brought up *sua sponte* and only coming up in a case of controversy reinforces the best argument that the judiciary is acting within its role. To write a letter *sua sponte* is to me the extreme activist. But if the case is presented to you, then it is within your role to address it.

*Professor Hershkoff suggested that through the use of advisory opinions, dicta, rules of interpretation, and legislative remand, courts can encourage greater dialogue with the legislature before taking the more serious step of statutory invalidation. Most judges said that they were reluctant to issue advisory opinions—some were appalled by the idea or were forbidden by law—while others noted their states’ allowed such a practice.*

Typically, we are limited to the controversy and the litigation right before us. In our southwestern state, and I’m sure this is not unique, we declined expressly to issue an advisory opinion, saying we will wait until those stats come before us. Otherwise in this situation it would be advisory, and we will not do that.

That is inconceivable.

We don’t give advisory opinions, or we like to say we don’t.

We can’t give advisory opinions either. What states can give advisory opinions?

In our state, the attorney general does the advisory opinions. A colleague and I were laughing. There is no way we’re going to wrestle that away from the attorney general.

In our southeastern state, the governor can ask for the state supreme court’s advisory opinions, but not the legislature. It doesn’t happen too often. It’s pretty rare.

Our Mid-western state is one of the states that you can request an advisory opinion from our supreme court, and 99 out of 100 times they turn it down. But three or four times in the last 20 years, they have issued advisory opinions.

I have read some discussion about the idea that you go talk to the legislature, or you write a letter to the legislature about some law that they are passing that might be unconstitutional. And what wrinkles me about that I guess is the ethical aspect of it. If they are doing something, how can we step in and

take some action on something that may come before us? What if they say, “Well, we’re just not going to agree with you,” and go ahead and pass the thing. And then months later the case is before us, and we have already expressed an opinion about it.

Apparently the legislature was passing some legislation that said that the courts’ deliberations were subject to the Open Meetings Act. Our supreme court sent them a letter saying, “You have got to be kidding.” They apparently backed away from it. But that is the only time I’m aware of.

With bills that the legislature is coming up with that will effect the judiciary, there is discussion regarding those, but, generally, about other substantive legislation, we would not touch it. We’ll just wait until it became an issue before the court, if it did.

We will say in our opinion that we have these suspicions and suggest the legislature ought to do something about it. We have done this for a number of years. I wonder whatever becomes of these opinions, if there is anyone reading these. I asked the legislative counsel whether they had a unit that reads our opinions and takes note of these things. He says no. We write, but obviously no one reads, unless it is on an issue of great public interest. But of course, the vast majority of opinions we write are on statutes that only affect a pretty small constituency, and they read it, but the legislature doesn’t necessarily. So that is the only method that I know in our state’s constitutional framework to get a message to the legislature.

*Some judges did note that there were informal ways to communicate with their legislature when problematic legislation loomed on the horizon.*

I must say talking about just telling the legislature that something that they were doing or in the process of doing might be unconstitutional occurred just recently in our state.

**I don’t think you are going to find very many courts that are going to write and tell the legislature that this needs to be corrected.**

When the legislature was in session, a bill was proposed to redo the district courts of appeal. There is a provision in the state constitution that basically requires the certification of judges and the alignment of judicial districts in our appellate system in our southeastern state to originate in the supreme court. I happened to be on our budget committee for the district court of appeal as one of the five chief judges,

and we were in direct communication with the sponsors of this legislation and talking to them about it. We said to the legislators, this on its face is unconstitutional. The legislature cannot originate this kind of a thing. The one house that sponsored this passed it unanimously. And the other house, with whom we had, shall we say, greater rapport, killed it.

I don’t think you are going to find very many courts that are going to write and tell the legislature that this needs to be corrected. We’re not going to do that. We’ll handle it informally.

There are informal ways of developing relationships with the legislatures that are probably more often used than probably some people want to admit in those states in particular where we are prohibited

from, for example, giving advisory opinions. But there is still a lot of informal methods of working with the legislature that we are forced to use.

Many times the chief justice is talking with the head of the legislature, and it is sort of an informal advisement. We don't have the other procedures, but I think that's done. There is a lot of that done. Our legislature should do more of it, because we have a runaway legislature. They just love to pass bills. Our western state just loves to initiate new laws.

We might informally buttonhole the leadership, or buttonhole the governor, and say, "You might want to kill this bill," but we don't have a provision for doing that. We wouldn't do that. I'm not going to say we wouldn't do it informally in some fashion, because we are political animals, too.

That sounds like you all have opened up an avenue for communication, which I think was one of the points that we made, that a lot of the states don't have, whether it is institutionalized or not.

**Professor Hershkoff said in some cases you should remand it to the legislature. I thought, "Wow, do some states have that mechanism in place? What a great concept." A totally foreign idea in our western state.**

It all boils down to personal relationships.

Many of us have had longstanding political connections, personal connections, legal connections with legislative leaders. Consistent with the canons of ethics, I think there are appropriate ways to have non-case specific discussions out of the sunshine.

How do you pick up the phone and call the governor if you are a chief judge of a state, or any other judge of a state, or call the president of the senate or the speaker of the house of delegates, and say, "There is this issue, we want you to do A, B, C, and D." Because if they turn around and call you up and say, "We want you to do A, B, C, and D," that would be a hell of an encroachment on the judicial independence. In fact, if it was a case that was likely to be involved in controversy, you might get in big trouble.

*Judges also discussed the possibility of using legislative remand.*

There was a very interesting notion—let me just toss this out, because I really picked up on this. Professor Hershkoff said in some cases you should remand it to the legislature. I thought, "Wow, do some states have that mechanism in place? What a great concept." A totally foreign idea in our western state.

Apparently in Massachusetts they send the bills over to the supreme court first to see if they pass muster. So I guess that is sort of a remand concept.

I was taking it more as, you learn from the declaration of unconstitutionality. In other words, there is a case, and you send the message to them in that case. You don't send it back to them and tell them to change it and put it on remand or something like that. You strike it down, and then whether it is that particular issue or just another one that comes down the pike that is controversial, they say, if we

want it to withstand constitutional muster this time, let's back it up. That is the message I was getting from it.

She seems to indicate that we can send this back to the legislature and say, "Guys, look at this again." Now, in our southern state they would laugh out loud if we tried to do something like that.

There is one area in which it can be done and that is in redistricting. If the court says, "No, your plan is no good" and the legislature does have time to make a constitutional plan before the next legislative election, that would be a perfect time to do that instead of the court drawing the plan itself.

We have the power to remand a case.

What I get from her is demand more, and you'll get more. In other words, if you say there is no legislative history here and send it over to the legislative council bureau, say therefore we have to use reason and whatever to come to a result. But as far as remanding it, I don't know any state that has a process where we remand to the legislature. That's silly.

The idea of remand says the judiciary is going to supervise the legislative process until the legislature gets it right.

*Judges discussed ruling on the constitutionality of legislation.*

If they are right constitutionally, they are right. If they are wrong, they are wrong.

In constitutional adjudication, it seems to me that if anything were I think we should be more concerned about the input, not the output. The output is what the words are on the paper that they said, and our constitution gives us a lot of responsibility of looking at things like the

**What I get from her is demand more, and you'll get more.**

subject, the title, whether it was heard and so forth, and read. So, all of that process stuff is judicially reviewable, as distinct from whether or not there was something else going on, other than what they put out in their words that are in the statutes.

If the facts are against you and the law is against you, then they argue the penumbral rights. You get probably those arguments best in amicus briefs, the people that have been working on this particular issue forever, just looking for a forum to go into, and you get this tremendous brief that you are now confronted with.

If it's constitutional, we have to uphold it.

Our constitution has been interpreted only as a limitation upon the otherwise plenary power of the legislature. They can enact anything they want to, unless the court determines that it runs afoul of some specific provision. They don't have to have the grant of authority as the federal legislature does. The constitutional concept is totally different between the states and the federal government, so that is what the courts in our state are always looking for—is there some constitutional provision that the legislation offends, either federal or state? We don't look for



authority to enact it. We look for the provision that would prevent it from being effective or constitutional.

We have an arbitrariness clause in our southern state, and I think a lot of states do. If it is arbitrary, then it is unconstitutional.

You are presuming that every issue is presented in the constitutional context, in the violation of some constitutional provision. Maybe this whole forum is designed that way, but not every challenge to a statute is based upon a violation of the constitution.

*Judges also discussed instances where the legislature has taken its own stand in interpreting the state constitution.*

Our legislature tried to amend our constitution last month, and this is the way they wanted the constitution to read: The courts shall have the power to determine if acts of the general assembly are in compliance with this constitution and the Constitution of the United States to rule invalid any act found unconstitutional, but shall not order substitution of alternative law for any act now unconstitutional. The courts shall not order the general assembly or any member to pass any law for the increase or creation of any tax or appropriations.

We've got a legislature that decided that they don't like the particular decision judgment, so they will just do something about it. I think we have it no different from any other state in terms of how the legislature reacts to certain judgments and certain kinds of things. And then they say, well, we're never going to pay them, but let's make sure it never happens again. But that is typical, I think, of many legislatures on how they approach the relationship between the judiciary and the state having to pay the bill.

Is not one of the fictions of statutory interpretation that they are presumed to know the status of a law when they enacted a statute? We are assuming that they read the latest opinion to interpret that law.

Our legislature has an attorney general that represents them all the time. He is the biggest problem the courts have, because they have managed to get an attorney general that tells them what they want to hear. If they want to do it, then it is constitutional.

The governor or a legislator can ask for the attorney general's opinion as to the constitutionality of a certain thing, and they will then furnish them with a courtesy opinion. Sometimes it takes them two years to do that and by that time the issue is over, but the AG's will do that.

In our southern state for several years now, the legislature through private counsel hired usually by the speaker of the house, sometimes by the president of the senate, sometimes by both, intervenes into every major constitutional challenge to their litigation.

*Judges were asked if, in approaching state constitutional questions, they had occasion to consider the constitution as a whole, rather than focusing on specific provisions such as an "open courts" article or more general ideas like "due process."*

Not in my court.

That is what they call an end run.

Yes.

It obviously depends on the nature of the issue that you find, but if some provision bears on another provision, you would look at both.

I don't know that we have ever done that. One difficulty perhaps would be that you get stuff stuck in state constitutions. Ours is very easy to amend, so you have a lot of things in there that are not particularly constitutional in their nature and are sometimes kind of strange. So if you look at the document as a whole, it begins to become kind of unwieldy. So we have never, but it certainly is a general idea that makes sense if you would look at the constitution as a whole, the structure, if you could deduce a coherent one from it.

**A lot of the times when we go back to get that type of constitutional legislative history, you don't really need it. We have got the decision down, and that is just sort of beefing it up.**

I think it would be a rare instance that we should look at the whole.

The big part of any constitutional analysis ought to include not only looking at the text and where it appears in the constitution, but what part of the constitution does it appear and structurally how does it bear on other issues.

*Judges were asked what role their state's constitutional history has played in their judicial review of legislation.*

I think we would be remiss if we didn't inform ourselves where there is a question as to what the delegates to the constitutional convention debated about. Did they consider, for example, the very problem that we have before us in the constitutional issue? If they didn't, then you can close the book and go on your way, but if they did, why wouldn't you look at it?

A lot of the times when we go back to get that type of constitutional legislative history or whatever you want to call it, you don't really need it. We have got the decision down, and that is just sort of beefing it up.

You do it in the context of finding some kernel or seed to support your legal analysis. What do the words mean, and what was the constitutional history behind the adoption of that part? If you find something that is helpful, you put it in to give more legitimacy to your opinions, more acceptability to your opinions, than if you just say we disagree or agree with the legislative enactments.

I wrote a case like that. It was a statute of limitations on medical malpractice, because in our Midwestern state we have a very tight malpractice statute. And it's two years from the date of occurrence. But all our other statutes of limitations are two years from discovery. So, we went back to the constitutional convention, and looked at the convention reports about the statute of

limitations history, and if there were any limitations on malpractice cases before the constitution was written.

We get a lot of our history about the constitution out of constitutional conventions. The proceedings are all bound in these real old books. You don't have any of that history with respect to constitutional provisions that get in there by initiative.

When you look into constitutional history, there, you do have quite good records, generally. There is generally pretty good proceedings of records, even back in the 1870s.

We have been able to go back on one or two occasions in the archives and find some of the debates in the constitutional commission in 1853 or 1854, when they tried to take out the separation of powers for the constitution. They even had poems in there written in the newspapers back in 1850 by one side, the people that wanted to take out the separation of powers concept. So we have some pretty good historical references in our state.

Talking about constitutional history, it comes up very rarely in my experience, because those types of issues typically can be decided without going back to the constitutional history of the particular constitutional provision, which is what we have to be talking about. But I did have occasion to get into it not too long ago when a firearm restriction was challenged. It said you can't carry firearms in our public parks. This was a great argument made by all the gun people that this violates the U.S. Constitution and our southwestern state's constitution. But we found in our constitutional history that at the time of our state's constitutional convention, they restricted where you could carry firearms. There was a lot of talk about it, and apparently it was chronic at the time. We think of the West certainly fitting in that category, and everybody packed two guns at a time everywhere they went. That wasn't the case, maybe because firearms were so commonly used that they did have a lot of restrictions on where you could take your firearms. You couldn't take them to church, you couldn't take them into a bar, and you couldn't take them into a post office. So suddenly, that solved the entire case for us, because we had a very detailed constitutional history on that basis. It surprised me, frankly.

*Some judges discussed whether their state had a "right to remedy" clause.*

We have had many occasions where the statute would alter common law to remedy. Most courts, I think, are okay with that as long as there is some remedy provided and there is no alteration to the fundamental right to recover damages.

Workers compensation took away remedies. No-fault took away remedies. If you now say, those are different remedies, they are not different remedies, they are the same remedies—where do you draw that line?

From what I have seen in my court, there is a reluctance to go to what I call the remedies clause.

I am embarrassed to admit that I don't know if our state has a right to remedy clause in our constitution. It has never been involved in a case that I have been involved with or have had to review. But after reading this paper and attending this conference, I can assure you, when I go back, I will look at our constitution more closely and see if it is there. But that, from what I am interpreting today, could be a

specific constitutional provision that may be really relevant to a lot of issues that are coming before the courts today.

The study in constitutional reality to me is that the 39 states that have a right to remedies clause, actually have a franchise protection right there. It is a question—do we have the collective courage to breathe life into that or not?

## REVIEWING THE ACTIONS OF STATE LEGISLATURES

### Legislative Intent

*Judges discussed a reluctance to closely examine legislative intent when reviewing the constitutionality of legislation.*

One of the things I think we have be reminded of is that decisions in the legislature are not oftentimes driven by lawyers over constitutional considerations. For the most part, the reasons why they come up with certain laws have nothing to do with our ultimate concern, which is interpreting the law. They have all kinds of policy reasons that drive them, that I certainly don't think we should be invited to look at it unless there are some circumstances, as we were talking about before, where there is some ambiguity.

**To me it is like Justice Scalia saying, we don't care what the legislature intended, we only care what the words say.**

She is talking about the creation of a statute which can't simply be arbitrary. I see what she is saying on a conceptual basis. Our legislators can't be flipping a coin and deciding the level of school funding, for example. I will assume that they are people of good will and conscience and some intelligence at least, and that they are doing these things with some effort, but it is not recorded. There is nothing that we usually look at in any kind of legislative record or history that would assist us.

In our rule, and I think it's the majority rule in the United States, is that if it's clear and unambiguous on its face, you enforce it, unless it reaches an absurd result. And so, unless there was an ambiguity in there, or it reaches an absurd result, we enforce it as written. And we don't even touch legislative intent. We don't even touch the record of the legislature itself.

Is it our job to enforce it on them? Indeed, I would like to see better legislatures, but we have got our constitutional limitations, too, and I don't know that that is our role in talking about a rational basis for what the legislature did. Again, and I'm sure this is different in different states, but in my state, where we tend to not have any legislative history, we infer that rational basis, if it is fairly inferable. We do that all the time.

To me it is like Justice Scalia saying, we don't care what the legislature intended, we only care what the words say.

Our legislative services drafts legislation, puts out an analysis. That is irrelevant in the courtroom. We

look at it for any helpful clue we can as to what the legislature intended, but it is irrelevant as a device of persuasion.

The majority may have passed it for some reason different from what the intent of the original drafter.

In every single state, and my state specifically—and I don't know how Justice Scalia would like this—there is a statute that says, in all matters of interpretation, the courts shall seek diligently the intent of the legislature. I think that makes the process collaborative, in the sense that the legislature obviously wants us to look for their intent, and in the course of searching for their intent, we are not to think them fools, and to do something reasonably in line with whatever the intent of the legislature was.

We are all sitting here talking about legislative intent and rational basis, but maybe you are talking about a legislature that is actually a professional lawmaking bunch. I am dealing with dairy farmers and funeral home directors and others that come in every other year for two-and-a-half months, and whatever the people told them would be a good idea, they write them down and they get a vote, and then they go back home.

When you talk about legislative intent, certainly statutorily, even in a kind of constitutional provision, it seems to me that that is kind of a dangerous word to use. But I have a word that I substitute for it and that is “purpose.” Here is what the words are. What was the purpose? What was it trying to do as opposed to trying to shrink the heads of the people who wrote those words and figure out what their intent might have been? It may seem like a funny distinction, but it seems to me that it is a much more acceptable distinction because it keeps you closer to law.

I know that in our northeastern state, some of the sharper legislators who, say, are opposed to a bill they know is going to pass will make a statement on the record to narrow it, and 10 years later, you are reading it, and that isn't what the legislature had in mind at all, but, yet, that is what is sticking out as the intent of the legislature.

I think every state has a due process clause in their state constitution, and it imposes a limitation on a legislature not to enact arbitrary or unreasonable legislation. Even under a minimum rationality test, a legislature has to be able to establish that there is a rational relationship between the legislation and some kind of legitimate state interest. I think all she is saying is that it might not be a bad idea if they were a little bit better at providing explanations for what they do. I don't think that is that unreasonable.

## **Legislative Fact-Finding**

*An issue that was discussed by Professor Hershkoff and the panelists was whether judges should scrutinize legislative facts when reviewing statutes for constitutionality.*

Is her hypothesis that if you can undermine the factual basis for a piece of legislation, then it is unconstitutional? Is that what she is saying? I disagree with that. I don't think we should go that far.

We now start saying our fact-findings are better than your fact-findings. We are in an out-and-out war

with the legislature now. We are going to say we are better equipped to be correct than you when we review something. I just question, do we want to go there?

I think that her paper is awfully confident about the ability of courts to gather facts and awfully derogatory about the ability of the legislature to gather facts. And I think the legislature is in a much better position. That's what it does through the committee process, through a system of lobbyists on all sides, and many other ways. I just can't see having a court-appointed expert come in and be a real effective substitute for that kind of a process. Maybe it's because I'm from a state with a full-time legislature. Maybe things are different elsewhere, but if they are, I would say the solution is to beef up the legislature, not have the court become a super-legislature, because who does judge the judges? I think that they are much less accountable to the people than legislators. There is something in the paper about the problem of having three guys in a room write a law. That's what judges do on their own in the bigger systems I've seen.

What are we talking about finding facts? We don't find facts.

They keep saying like we are supposed to be like the trial judges and find facts from what the legislature does. That is not my job as an appellate judge.//In fact, if you do that, you are not doing your job right.

I think there is an underlying thesis, too, that sometimes you have lobbyists come in, push legislation through that doesn't really have a factual basis for what's going on there. That it's special interest-legislation. She would like to see a better legislative record, and a more democratization of the process, and more fleshing out of the process.

I have an example of a case that I had this year that I think kind of illustrates what she is talking about in terms of the factual basis. We had a case involving a petroleum marketing law, which makes it illegal for a gas station to sell gasoline below cost if the effects are intended to injure competition, or

**What are we talking about finding facts? We don't find facts.**

to otherwise injure a competitor. The question was if somebody lowers their price or sells a little bit below cost, what does it mean to injure a competitor? Does that mean the competitor is going to make less money, or does it mean that the competitor is actually

going to have to sell his product below cost? There was absolutely no legislative history. I mean, it was a crazy piece of legislation. So, we gave it an almost equally crazy interpretation, but sort of came out on the side of the consumers, who are the beneficiaries of lower-cost gasolines. But that is sort of almost a common-law filling in the blanks that the legislature didn't. If they came back and defined injury the way the petroleum guys were saying it should be defined, then we would probably go with it.

We had it come up in a non-criminal context. An adult bookstore challenged a local ordinance on the constitutional grounds that made them close between the hours of midnight and 1 A.M. We looked at the fact-finding. We looked at the legislative history—we actually had some for a change. I did the dissent in that case, but the majority found that the factual findings did not sufficiently support the conclusions that were drawn, that this caused problems A, B, C, and D in the neighborhood and led to more venereal diseases and blah, blah, blah. But they had no empirical evidence of that. It was just statements and assumptions. I dissented because I thought what they did have was enough to get

you there. The majority said, no, we have looked at the rationale. This was very unusual. This is one of the few cases I can remember with an actual legislative history done.

So long as our state general assembly isn't passing the law binding the people in our Mid-western state to do certain things, we don't really need to make that inquiry. For example, let's take caps. Let's say that the legislative body determines that the sky rocketing cost of malpractice insurance is causing OB/GYNs to leave their practice because the premiums are too high. So, there is a cap that comes up, and now someone is challenging the constitutionality of the cap. It seems to me an inquiry for us isn't whether or not they are right, but whether or not the cap violates some provision of our constitution in either an open court, equal protection, or whatever other constitutional issue there might be that has to do with caps, not whether they are out-to-lunch on their factual underpinnings. To ask us to decide whether we think they are factually wrong is to ask us to be a super-legislative body.

If we want to say \$100 is not enough to educate a child, that is not because the legislature has considered that evidence and made their law based on that. It is because the litigant brings evidence to the court that \$100 is not sufficient. I just think the fact-finding is placed in the wrong position. It should be placed in the litigation of the statute rather than the creation of a statute.

I really identified with Ms. Clarke, when that was the first thing she said. That was the first thought I had when reading what I think was a very thoughtful article by Professor Hershkoff. But our legislative facts, I think I have seen them in one case in the 12 years I have been there.

*Judges discussed legislative findings, or the lack thereof, that accompanied statutes.*

We have only one statute that I can think of in our southern state that had any legislative facts at all. That was our very first medical malpractice reform statute enacted in 1979, and a lot of the courts did look at it. It was actually in the preamble to the statute that had the findings that they made and a lot of the state courts did look at those facts in determining which construction of the statute was proper. One of the big issues was whether or not it imposed a damage cap and one of the big issues, which was addressed a few years ago, was whether or not punitive damages were intended to be included within the damages cap. They looked specifically to those findings to resolve that. They accepted it.

**I just think the fact-finding is placed in the wrong position. It should be placed in the litigation of the statute rather than the creation of a statute.**

We never get legislative findings. And I also agree with Justice Levinson who said that really he felt like this whole area, if it was of assistance at all, it was in the area of statutory construction. We have all gone back to the committee hearings for things like legislative history and legislative intent. Every once in a while we'll have a preamble or something of that sort. But I'm not sure that I understand how all of that impacts on our role as judges in any other way than maybe some sort of statutory construction. I don't see that it impacts in any other way.

I would say that I was bound by those findings and accept that, unless some litigant made a showing before the trial judge that they were false, which he should be free to do.

It is the emperor without clothes. I know that my legislature, when they review that bill after reviewing their debates and their discussions, that that legislature made none of those findings.

So, are we simply asking the legislature to be more explicit, or are we evaluating its factual findings by some standard other than explicitness?

They are making findings that something is important. I mean, they make these statements. We are now seeing some of these preambles in some of the tort reform legislation about the cost of litigation, and so forth. So, they are there and I have actually never heard of anybody questioning those facts.

If we are dealing with an equal protection question, it seems the legislature could be very helpful in making findings, if they would identify what is the compelling state interest and how they see the relationship between the system they are enacting to address that. But what we really get are not legislative findings that tell us those things, but usually the attorney general or a litigant's attorney hypothesizing to us about what could be the compelling state interest and how the legislature would have viewed the relationship. So, really and honestly, on the court we sit around and hypothesize what is the state interest, too. What is it we are supposed to be weighing here in judging, whether this is a constitutional enactment or not? The legislature seldom helps us with that. It becomes hypothesizing on the part of the court and the attorneys.

We had a constitutional provision, and that is where the constitution or the statute itself requires a finding of fact by someone, and the legislature undertakes to make a finding. We have a constitutional provision that permits contracting out, private contracting, for state services, if the agency does not have the expertise in house. So that is a constitutional provision. Then we have legislation with findings to the effect that the state's department of transportation did not have the expertise in house to conduct some sort of engineering work, then followed by a provision of the legislation that permitted the department of transportation to contract with private vendors to provide these services. That is where legislative finding are critical. Our supreme court concluded that it was not based on adequate evidence, and in effect, reversed the finding and thereby held the statute unconstitutional because a finding was necessary for a statute to be constitutional. That is an example where legislative findings are critical.

Do you look behind the findings? I would think in most cases, you would not. You are stuck with what the legislature tells you. You don't do your own investigation to determine whether they really did do the legwork necessary to come up with those findings.

*One area of legislation, medical malpractice reform, was discussed by judges as an example of where evidence of an insurance crisis may have been factually incorrect, but some judges felt that, even if it were, it was not necessarily their place to strike down the legislation on that issue.*

We have medical malpractice legislation as the result of the legislature saying we have an insurance crisis. I don't care how much more record they bring me up on appeal, there is no insurance crisis. I don't have a right, I don't think, to throw out the legislation just because the findings may have been wrong. If they decide that they are going to have perhaps a medical malpractice statute, unless it violates some other provision of the constitution, whether there was no insurance crisis or there was an insurance crisis is, I think, irrelevant for us.



Who cares about all that, if these companies are moving out or making money or what? That's the policy.

But that's the stated fact that that is why they are putting caps, is because the malpractice insurance rates are going up. So, it's a false premise.// Well, I'm not sure that it matters.// I'm not either.

We had another one of our medical malpractice insurance crises that we have had every decade since the mid-seventies. And this time they wanted to, because of the unaffordability of medical malpractice insurance rates, they wanted to put caps on damages, which they did, both in the form of legislation and in the form of a constitutional amendment that in essence overruled the open courts provision of our state constitution. And guess what? There was an article in the newspapers across the state just the other day that medical malpractice insurance rates have actually gone up. They haven't gone down at all. Well, to borrow the professor's paper, as a judge, suppose that I come to the conclusion that we were led astray? It was all a big fraud. Medical malpractice insurance premiums haven't gone down any, and that can't be the rationale for these caps on damages. What do I do about it? I don't think I can declare the statute unconstitutional.

In 1986, we passed a bill putting a million dollar cap on malpractice. Okay. That bill started off with a statement of legislative intent and purpose and then it declared the reason why the legislature thought they should do this in the area of medical malpractice and not do it everywhere else. When the court first upheld that cap three or four years later, the court made specific reference to the legislatures determination in a rationality test under equal protection. The court said we will look at these findings and find that that was a rational choice and since it is of an economic nature, as well as an equal protection matter, we will accord great deference. We will only make a minimal examination of the legislature's rationale in appellate court. The court, within the last two years, was called upon to uphold that again and did so, again with reference to the legislature's statement intent and purpose.

**Do you look behind the findings? I would think in most cases, you would not. You are stuck with what the legislature tells you. You don't do your own investigation to determine whether they really did do the leg-work necessary to come up with those findings.**

*Judges talked about whether they examined the legislative history of a bill when they reviewed its constitutionality.*

In our western state, it's extensive. It's extensive and deep.

I'm not familiar with our court going and seeking out legislative history, to the extent that it even exists in my state.

I was just going to say that in our southern state we have the complete history of the tracking of a bill on the Internet and then if you want to get committee hearings, those are available, and we can get them. Oftentimes I have done that in cases where you want to know a little bit more about a statute, but I have to say it is very difficult to find anything useful in it because sometimes the bill will go to two or three different committees, and some senator or representative will say I am persuaded by this fact or

that fact. I don't know how you can take the work of one committee that reviews a bill and say this is what the legislature was thinking. You just can't do it.

The only thing that I have ever seen has been some minuscule legislative history, or maybe a preamble that could be used for statutory construction purposes.

In our western state, we have the option to look at things. We can call for the legislative history if we want to. It includes committee reports and staff reports and debates and so forth. None of that is binding. There are no legislative findings. I have never heard of those.

Let me take issue with not having legislative history. Our state officially doesn't have legislative history. That is the buzzword or whatever. But if you have records, you have legislative history. I am an amateur historian—I am certainly not a professional historian—but everybody knows that you go digging in the records. One of our supreme court justices is noted for his opinions that include a lot of legislative history. He gets it the old-fashioned way, with hard work. He digs it up. He may have some obscure constitutional commentary from the 1700s or whatever.

**Are we creating a monster that, if they are really good at what they do, they are going to hog-tie us?**

We have a rule of construction where we can't even get there unless we find the language is ambiguous. So, first, we have to look at the statute and then if it is ambiguous, then we can look at the other stuff. But as one of my colleagues repeatedly points out, the legislative history tells you what individual legislators thought, what they intended. You may have the statement by the person who originally put forward the bill, but by the time it gets through the legislative sausage machine, you have no idea what the legislature intended. So, you might as well just give up before you start.

This is all quite academic and impractical. The reality is, these people are elected to represent their constituents. Their constituents want something. We all know that many of these hearings aren't orchestrated. They can create any record they want. If we tell them they have to create a record, they will. Now they have got a record. Maybe the opposing party actually does its homework, and assuming they can get in edgewise after the chairman of the committee has orchestrated the whole thing, they get something in the evidence, or they submit something in writing, and now it comes to us. Are we creating a monster that, if they are really good at what they do, they are going to hog-tie us? A really skilled trial judge can go a long way to hog-tie an appellate court with findings of fact. Aren't they going to get good at that, too?

Today, we have so many links from bar associations as to what the legislative history is. You can go in find everything that is going on, and what the bar association's position is. It is all out there. It is in the public domain. So, it is available.

Occasionally I have seen things where you wish there was some legislative history, depending on the specifics of the problem or the issue. I would kind of like to know what they were thinking or what they based this on. It is simply not there. But I would assume that there was some sort of legislative history.

I kept getting the feeling we were talking about apples and oranges in there. The only time I look at legislative history is if I have some kind of ambiguous language in a statute and I am trying to apply it to a fact situation. It doesn't arise in issues of constitutionality. It arises in applications with ambiguous wording.

*Several judges discussed other legislative materials that might be available to them when they make rulings.*

We get a realm of material. We get all the public hearings. We get all the legislative debate, and we get the opinion of the legislative staff's office as to the effect of the legislation and its financial impact.

**What is available in most states on that is absolutely nothing.**

I wouldn't stop with what they gave us anyway. I mean, I wouldn't trust it. Invariably, it is not complete. So, we go down and pull it all up ourselves.

If it is not presented at the case, we can go get it. We are not limited to what they give us.

There is a lot of interest groups, associations and that type of thing. They make a habit of practice of supplying judges with material.

We have kept microfiche back to 1972 in our state law library, all the proceedings of all the committees of all of the house bills and the senate bills.

Yes, in the sense that the material at the end of every legislative session is collected in the state archives. So, it sits there. Whatever exists is safe. It is on tape.

What is available in most states on that is absolutely nothing.

We can also sometimes get transcripts of the committee hearings and that is it, and, you know, hardly ever do the litigants provide us with that at the appellate court level. We have to seek it out ourselves.

We have bill files that we consult. With everything there. It varies. There is no rhyme or reason to what is in there.

Ours are recorded and transcribed, and all we have to do is call the legislative reference bureau, and they will actually go through it and find the portions of the debate and send those up to us. Many of the committees also where evidence is taken are available to us.

If they are recorded, they are not transcribed. They are not part of the record that we have readily available to us. But people will testify, and will also submit a written statement of what they testified to. That written statement will be in there.

I think most of us have access to dictating equipment, tape cassettes, and things like that now. When I first came to the bar, the rule was that the judges would not consider any of this material unless you reduced the debate to a transcript and had it certified as accurate by the library and the archivist. That has fallen by the wayside over the years. Quite frankly now, in most of the cases we get, the lawyers

make references to what was said in the legislative debate, with no citations or sources provided. So if we want to consider it, we have to go next door to the library and archives and get it ourselves.

It's hard to find statements that will really help you. But every now and then you can find something, particularly in the committee, because it hasn't gotten to the floor or they are passing it. But if somebody asks the question on the floor, and the sponsor says it's my intent, and then the vote is taken, sometimes you can use that.

**We want to find out what the world looks like for people and what is the practical impact of that on people who work in this area every day.**

Our legislature has been tape recording their floor sessions since 1955, so those are available. For the last two years, they are videotaping their sessions, plus their committee sessions, so we have videotape for two years, and audiotape of committee sessions for about 15. We have access to the bill jackets, basically just the bill and the amendments and the engrossing information and all that sort of thing. There are rarely written committee reports, so we do not get committee reports or materials that are submitted to committees, but we get all the other ingredients of the actual bill itself.

*Judges were asked if they used any of the auxiliary devices (amicus briefs, outside experts) mentioned by Professor Hershkoff.*

Amicus briefs, of course, are a commonplace way to get additional information to help you sort out what it is you are being asked to decide in a specific case, but beyond that, I don't know of any other device.

We have been much more proactive in seeking amicus briefs from experts. For example, for a real estate situation, we might go to a law school with a real estate professor whose specialty is condominium law, and invite them to submit an amicus brief. We want to hear about the practical aspects of that. If we were dealing with a maritime issue, and we know that there is some expert out there, we might invite that person through our chief judge or the bar association to submit briefs. I think the amicus brief is becoming more of a helpful tool to appellate courts, especially courts of last resort, because we are always thinking about the ramifications of this one decision. It is not just error correction. We are looking at the ramifications of this one decision for all the other similar cases that are coming down the pike—and especially if this is the first time we are interpreting our condominium statute or some maritime provision that we are not really familiar with because we have never dealt with it before. We want to find out what the world looks like for people and what is the practical impact of that on people who work in this area every day.

We certainly did amicus briefs.

My attitude is all the books are out there. All the law review articles are out there. They are for my eyes and I am free to read them. I am free to share them with my colleagues, and I am free to cite them.

Somebody tried that case. Somebody was responsible for that. It sounds to me that once it gets to the court of appeals or the supreme court, can we now decide who is going to win based on what we can discover? I didn't think that was the way we proceeded as judges. I thought we were bound by the record presented, and whether that party prevails based upon having demonstrated by a preponderance, or the defendant wins because they have not demonstrated that.

Once they have written their briefs and they are now in the court of appeals, they are bound by what is in that record. Your disposition on the matter should be a result of what is in the record. I may know of a number of things that could have helped you, but, guess what, they are not in this record. I can't refer to them when I write that opinion.

The answer is clearly yes. If you are reading a medical transcript and somebody uses a medical term and you are not familiar with it, will you hesitate for one moment to go to some medical dictionary? Or would you say, "Wait a minute, I can't do that because I am not sure whether that was defined in the record." I wouldn't hesitate to look in a medical dictionary to figure out what that expert witness was saying.

I think we have a rule that would allow us to consider a source beyond what is submitted in the briefs, but if we did that, then we would have to notify each party and give them an opportunity to respond to it.

General information is out there for anybody to access and picking up a law review article, picking up a dictionary, in my mind is very different than picking up the phone and calling an expert.

You can't consult with an expert unless you disclose it to the other side.



# Points of Agreement and Closing Comments

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, which the moderators presented at the closing plenary session. The moderators’ comments and their informal summaries of their groups’ discussions follow, edited for clarity.

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## RELATIONSHIP WITH LEGISLATURES

There was agreement that all judges from all states are involved in a tension with their legislatures. That there needs to be more cooperation from bar committees and others in education of the public to try to help the judiciary in that regard.

The most compelling agreement everyone had was on the question of characterizing the relationship with the state legislature—the adjectives that rang a chord were distant and tense. And the only partnership was akin to a partnership in a prize fight.

As far as a partnership, it was good when it came to purely judiciary issues, and matters of managing the judiciary. When it came to other issues like the pledge of allegiance or gay marriage or the death penalty, the relationship between the legislature and the judiciary became more tense.

The courts are not necessarily really in a partnership, but that maybe that’s okay. Courts, however, have been unwillingly pulled into the political vortex in the last few years, because as one of our judges put it, some of the political issues that used to be solely in the legislature have now been taken to the courts. And the image of the courts appears to be impacted by that.

We did talk a fair amount about the tension between the branches of government. That is real. That’s increased. But it also, to a large extent, natural and maybe the adversarial nature of that is what we mean by checks and balances.

## DECLINE OF LAWYERS IN THE LEGISLATURE

There is a sense of fear and alarm at the decline in lawyer legislators, and a decline of lawyers who serve on key committees where legislation that might be subject to challenge later, where there are no lawyers who serve on those committees or very few. Sometimes this makes it very difficult to make sure that the legislature understands what the role of the judicial branch is.

Their relationship with the legislature is more strained than it was in the past, and one reason being they feel like there are not enough lawyers in the legislature, and that politics are more ideological now than they were in the past.

One key point that came out is a decline in the number of lawyer-legislators means that the judiciary cannot rely on the legislature understanding assumptions about separation of powers that lawyers

would take as gospel. As one judge put it, when the legislature refers to the judiciary as an agency, you're in trouble.

Interestingly, I was expecting to hear a comment that the lack of lawyers in the legislature attributable as a reason why the tension seems worse, but we had just the opposite. We had comments to the effect that some of the lawyers in the legislature are the worst offenders.

#### FUNCTIONAL VS. FORMAL

The decisions in our panel on constitutionality have been based on the functionality basis. All of the judges agree they try to be pragmatic.

**The courts have only so much political capital.**

The dichotomy between the formal and functional did not seem to be so clear. The sense was that in contemporary times you had to be pragmatic. Everyone found the tools suggested by Justice Greaney helpful with regard to how to approach these issues.

Questions that tended to be more controversial were treated on a more functional level, and questions that were under the radar, so to speak, were treated in perhaps a more formal way. Sometimes this depended on the structure of the court, and who it was in the appellate system, and who was permitted to decide constitutional questions.

Almost all agreed that they rely on specific constitutional provisions with a combination of both a formal and functional approach to the separation of powers issues.

#### REVIEWING LEGISLATION

Our panel agreed that they sometimes have to pick and choose the fights that they enter into on statutory interpretation and constitutionality, from both the standpoint of problems with the legislature and public opinion. The quote was, “the courts have only so much political capital.”

There was a lot of experience in the room on constitutional decisions. I think that they all conceded that these issues are coming before them more and more.

Our judges all agree they start with the presumption that a statute is constitutional, and then try to interpret it to preserve its constitutionality. In their reasoning, they always mention a specific constitutional remedy.

Specific constitutional provisions were the ones that led them to make the decisions on constitutionality. They have had experience reviewing most of the different kinds of subject areas of constitutionality that we listed, with the exception that funding for the courts had not come up in our group.

In terms of the way they go about that, one comment was you do what it takes to protect the franchise.



You use what you are given. You use the nature of the issue as it is put before you, and that dictates where you go with the constitutional analysis.

With respect to the questions of using specific constitutional provisions or freestanding judicial power or both, there was no great consensus. But I think that a lot depended on the judicial culture of the individual state, as well as the language of the constitution in that state. And it also seemed to depend on whether it was a state that was relatively at peace, or relatively at war.

Avoid constitutional issues when you don't have to get there.

Many of them had had occasion to rule upon the constitutionality of statutes altering common law rules, statutes that would have effect on judicial judgments, and statutes that would purport to alter procedural evidentiary rules.

For some, freestanding judicial power would be a judicial power of last resort.

There was a general consensus that one would use the use of inherent power as only a last resort, and instead would refer to specific constitutional clauses when they are and applicable.

#### LEGISLATIVE AND CONSTITUTIONAL HISTORY

With regard to what is there for the judges to review, there is just an incredible dearth of legislative history on the state level. It's rarely there, and it is rarely provided by litigants.

What was interesting, one judge commented that he saw more legislative history on the local level than on the state level. Most judges indicated that in their states, there is not transcription of legislative debate, so there is just not typically much legislative history to work from.

**For some, freestanding judicial power would be a judicial power of last resort.**

As far as materials that are provided to them, they go by the record, so I think that's the same as what we are hearing from all the groups, that it is what is in the record. They get legislative findings, and legislative history easily, but they would never go back out and say we're going to go out and get some information on our own.

As far as the constitutional history, they felt that's where they go when they want to find out whether a particular statute is unconstitutional. They are not going to look at what the legislature did, or what the legislature thought. They are going to look at the specific constitutional provision, and attempt to understand what that provision is actually saying, and how it applies to the particular case. They do not use the auxiliary devices, such as subpoena power. They have never done that, and do not think that would be a good idea.

A number of the courts are blessed with constitutions that are hundreds of pages long. They get a half dozen new amendments every year bubbling up out of the initiative process, and that makes it very difficult to use constitutional history.

## REVIEWING FACT-FINDING

Our panel said that the review of the facts makes no difference in determining the validity of a statute, but that the facts may make a difference in determining the construction of a statute.

There is a strong consensus across the group that generally they do not look at the legislative facts. The looking to legislative facts is limited to ascertaining legislative intent. And they are not in the business of looking with skepticism at legislative facts, nor do they intend to get into that business. Even on the limited occasions when they do look at legislative facts, the quality of the information available generally is very low.

There is quite a bit of difference between different issues, and some of the issues that are brought for constitutional review kind of inherently raise the question of factual premise, like the adequacy of school funding and some other specific constitutional provisions that told the courts to do if the facts were in a certain way. But those are adjudicatory fact findings.

Those are not reviews of legislative fact findings. So, we still don't really have any agreement even on those examples with the notion of sending things back for the legislature to get a better factual premise.

They have not had occasion really to scrutinize any legislative facts except what has been put in the preamble of the actual legislation itself.

There was a ringing endorsement of Kathryn Clarke's rhetorical question—what legislative findings? It varies some, but they don't see a lot of material on that question.

**They do not want to be in an advisory role. The states that don't have it, don't want it. And my impression was the states that do have it would just as soon not.**

## ADVISING THE LEGISLATURE

They do not want to be in an advisory role. The states that don't have it, don't want it. And my impression was the states that do have it would just as soon not.

*Sua sponte* actions on behalf of the jurists, no, they don't do that. That was not considered to be a good thing to do.

We did not have experience in our group with *sua sponte* approaches to the legislature, except for the informal consultation, the verbal kind of relationships that people have across the branches of the government. But not through letter writing, nor campaigns to head the legislature off before they make a mistake.

They don't take action *sua sponte* like letter writing or anything like that. It's done more informally. Some states call it lobbyists, others call it employees. But obviously, the judges are able to get across either through a formal procedure through a lobbyist, or informally in discussion in committees, their view on issues that are going on in the courts.

Almost everyone recognized that there are informal ways that communication takes place among the branches from the judiciary to the other branches, and those ways would include simply communicating privately, working together with bar associations, or working on issues jointly on committees.

#### FUNDING OF COURTS

There was widespread discussion, however, as to the inadequate funding being a threat to judicial independence. In some states that situation is more critical than others. One state in particular has a constitutional budgetary protection, which was interesting, and many of the other states looked to that with delight.

## PANELIST COMMENTS AT CLOSING PLENARY SESSION

**Professor Williams:** Let me just share with you the things that I have learned, that I would have put in my paper if I were writing it now, instead of before I came here. The first one of course is that there are judicial salaries and then there are all other questions. That's the first one.

The second one, in all seriousness, is the real importance of informal channels of communication. I was aware of this, but I have been made much more aware of it by the discussions today. This is very important. As long as it is not a pending case that one is discussing, it seems very important to be able to make the views of the judiciary known. There are more formal ways of doing that than legislative hearings and what have you, but private discussions, the idea of avoiding a constitutional crisis is very important to the citizens and to the smooth flow of government. This is an idea that will resonate with most legislators.

The final thing I wanted to say is I think I oversimplified the tension between the need to enforce separation of powers to protect the liberty of citizens on the one hand, and being concerned with the interference with the public interest that a constitutional crisis raises. I had forgotten the third element of that, and that is that there are certain members of the legislature or the executive branch who make political hay out of a constitutional crisis. So, there is a third element: If somebody wants to run against the court, run against the judges, they may seek a constitutional crisis, even if you attempt to avoid it.

I learned a whole lot of other things, but those are the key elements that I would add if I were writing now. Thank you very much for educating me.

**If somebody wants to run against the court, run against the judges, they may seek a constitutional crisis, even if you attempt to avoid it.**

**Professor Hershkoff:** I certainly have learned a lot, and I thank you all. Some of you have expressed special interest in the mechanics of legislative remand. Let me focus specifically on that.

First, if you are in an intermediate or appeals court, you are 100 percent right, you are not going to expand your record. You are not going to enhance your record. You are going to remand to the trial court with instructions that will set out the legal standard, and you are going to explain to the trial court the kind of evidence that it should be putting together.

It may be that at the intermediate appeals court level you can invite the legislature to come in through an appearance of the attorney general, but even there I believe that that is more appropriately done at the trial court level, so again it would involve a remand by the higher intermediate appeals court to the trial court to invite the views of the legislature.

What happens if you don't want to do a remand to the trial court, and the legislative record is silent as to how this statute effectuates a constitutional norm? Well, here you could write an opinion setting out what the constitutional standard is, perhaps suspending the application of a statute until the legislature comes forward and responds to your constitutional decision. Or you could simply invite the legislature to amend a statute that you feel at this point may not comport with constitutional principles, but you are just not sure, because you don't have the necessary information that you need.

Some of you have raised questions about the appropriateness of an analogy to the United States Supreme Court, and particularly the appropriateness of looking at the new-style federal review. And the argument here is that the Supreme Court is essentially applying close scrutiny to jurisdictional questions. That's half the story. It's applying close factual scrutiny to jurisdictional questions in the Article 1 Commerce Clause setting, where jurisdiction is clearly the issue. But when dealing with the exercise of Congress's Section 5 power under the 14th Amendment, here I think you've got a very close analogy to substantive rights provisions of state constitutions.

Two other points. I'm actually startled to hear some of you describe your relation with the state legislature as that of "tension," "war," and "competition." You are telling me loud and clear that you do not see yourselves in a collaborative partnership with the state legislature. I think Professor Daniels, the social scientist on the panel, is in a fine position to conduct an empirical study about state inter-branch relations. There is a large literature about the concept of divided government. What happens when legislators and executive officials come from different political parties? Divided government often results in policy paralysis. What happens when judges are added into the political mix? Students of divided government could do a very interesting empirical study of this question.

Let me close with Roscoe Pound. Three generations ago, Roscoe Pound called for the establishment of a ministry of justice that would help the state legislatures and help the state courts put together the facts that they need to improve the quality of lawmaking in the United States. That idea went nowhere three generations ago. Maybe it's an idea whose time has now come—unless legislative fact-finding improves, the very integrity of the lawmaking process will be called into question.



# Appendices

## PARTICIPANT BIOGRAPHIES

### Paper Presenters

**Robert F. Williams** is Distinguished Professor of Law at Rutgers University School of Law in Camden, New Jersey. He teaches civil procedure, state constitutional law, and statutory interpretation, in addition to writing and practicing in those areas. He received his B.A. from Florida State University in 1967 and his J.D. from the University of Florida College of Law in 1969. Prior to attending law school, he served as legislative assistant in the Florida Legislature during the 1967 Constitutional Revision Session. He practiced law with Legal Services in Florida and represented clients before the 1978 Florida Constitution Revision Commission. Professor Williams received an LL.M. from New York University School of Law in 1971, and an LL.M. from Columbia Law School in 1980. He is the author of *STATE CONSTITUTIONAL LAW: CASES AND MATERIALS* (3d ed., Lexis Law Publishers 1999), and *THE NEW JERSEY CONSTITUTION: A REFERENCE GUIDE* (Rutgers University Press rev. ed. 1997) and numerous journal articles about state constitutional law and legislation. He is also coauthor (with Hetzel and Libonati) of *LEGISLATIVE LAW AND STATUTORY INTERPRETATION* (3d. ed., Lexis Law Publishers, 2001).

**Helen Hershkoff** is Professor of Law at New York University School of Law, where she also codirects the Arthur Garfield Hays Civil Liberties Program. Professor Hershkoff is a 1978 graduate of the Harvard Law School. She graduated from Harvard College in 1973 and in 1975 was awarded a second B.A. in Modern History from Oxford University, which she attended as a Marshall Scholar. Before joining the faculty at NYU in 1995, Professor Hershkoff practiced law for almost two decades in New York City, first as a litigation associate at the firm Paul, Weiss, Rifkind, Wharton & Garrison; then as a staff attorney at The Legal Aid Society of New York Civil Appeals & Law Reform Unit; and finally as an associate legal director of the American Civil Liberties Union. In her last year of full-time law practice, New York Magazine featured Professor Hershkoff as among the most important civil rights lawyers in the City. She serves on the Board of Directors of nonprofit organizations including the Brennan Center for Justice and the Urban Justice Center, both in New York City. Professor Hershkoff teaches civil procedure and federal courts. Her scholarly focus includes state courts and state constitutions, *see Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999) and *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833 (2001).

### Luncheon Speaker

**Honorable Herbert P. Wilkins** was the Chief Justice of the Massachusetts Supreme Judicial Court from 1996 to 1999, and served on the Court since 1972. He is currently the Huber Distinguished Visiting Professor at the Boston College Law School, where he teaches insurance, local government law, and conflicts of law. Justice Wilkins received his undergraduate and law degrees from Harvard University. Justice Wilkins received the Herbert Harley Award from the American Judicature Society in 1999, which is given to individuals who make outstanding contributions that substantially improve the administration of justice in their states. He has served on the Harvard Board of Overseers, including two years as president.

His contributions to the legal system are many, including his leadership in the adoption of the new Massachusetts Rules of Professional Conduct. A member of the American Law Institute and the American College of Trial Lawyers, he has received the Boston Bar Association's Citation of Judicial Excellence Award, and the Haskell Cohn Distinguished Judicial Service Award. He is the former Town Counsel for Acton and Concord.

## Panelists

**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 an Honorary Trustee and Fellow of the Pound Civil Justice 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 Pound Institute.

**Stephen Daniels, Ph.D.** is a Senior Research Fellow at the American Bar Foundation in Chicago, Illinois. He received his B.A., *magna cum laude*, at Benedictine University and his Ph.D. in Political Science at the University of Wisconsin. He is an Adjunct Professor of Political Science at Northwestern University and an Adjunct Professor of Law at Northwestern School of Law. Dr. Daniels conducts research on law and public policy and the various aspects of the American civil justice system. He is the coauthor, along with ABF colleague Joanne Martin, of *CIVIL JURIES AND THE POLITICS OF REFORM* (1995). He has testified before congressional and state legislative committees on the subject of civil justice reform, and served as an expert in cases dealing with large jury awards and/or constitutional challenges to civil justice reform. Dr. Daniels is a member of the Pound Institute's Academic Advisory Committee.

**Honorable John M. Greaney** is Associate Justice on the Massachusetts Supreme Judicial Court. Justice Greaney received his B.A. with honors from the College of the Holy Cross, and his J.D. from New York University School of Law, where he was a Root-Tilden scholar. He has honorary degrees from Western New England College, Westfield State College, Bypath College and New England School of Law. Justice Greaney served with the 104<sup>th</sup> Tactical Fighter Group of the Massachusetts Air National Guard, and was engaged for 10 years in the general practice of law with the firm of Ely and King in Springfield, Massachusetts. Prior to joining the Supreme Judicial Court in 1989, where he is now the senior justice, he served as the presiding judge of the Hamden County Housing Court, as an Associate Justice of the Massachusetts Superior Court, and as an Associate Justice and Chief Justice of the Massachusetts Appeals Court. He has taught law at Western New England College Law School and Westfield State College, and lectured and written extensively for continuing legal and judicial education programs. Justice Greaney has served on special government commissions, including the Massachusetts Housing Partnership and the Alternative Dispute Resolution Task Force. He is the past chair of the Appellate Judges conference within



the Judicial Division of the American Bar Association.

**F. Drake Lee Jr.**, is a shareholder in the firm of Cook, Yancey, King and Galloway of Shreveport, Louisiana, having practiced with that law firm since 1976. He attended undergraduate school at Tulane University and Louisiana State University. He received his law degree from Louisiana State University and was admitted to the state bar of Louisiana in 1975. Upon graduation from law school, he served a one-year term as Law Clerk for the Honorable Ben C. Dawkins, Jr., Senior United States District Judge for the Western District of Louisiana. He is a member of the Louisiana Association of Defense Counsel (Board of Directors, 1999-2002); the Defense Research Institute (Louisiana State Representative, 1999-2002; Board of Directors, 2003-2006); and the International Association of Defense Counsel. He is a Master Bencher in the Harry V. Booth and Judge Henry A. Politz American Inn of Court. His practice involves commercial litigation, appellate advocacy, construction law, oil and gas litigation, and professional liability defense.

**Honorable Steven H. Levinson** is Associate Justice on the Hawai'i Supreme Court. He attended Stanford University and the University of Michigan Law School. He served as a law clerk to the late Justice Bernard H. Levinson of the Hawai'i Supreme Court and practiced law in Honolulu for almost seventeen years, concentrating in personal injury and commercial litigation. He was appointed by Governor John D. Waihee III to the Hawai'i First Circuit Court in February 1989 and was assigned for three years to the Criminal Division, from 1989 to 1992. Governor Waihee appointed him to the Hawai'i Supreme Court in March 1992. In February 2002, the Hawai'i Judicial Selection Commission retained Justice Levinson for a second 10-year term of office. He was the chairperson of the Hawai'i Judicial Council's Advisory Committee to Conduct a Comprehensive Review of Hawai'i Penal Code, a member of the exploring modes of ADR in criminal cases, and a member of the Chief Justice's Standing Committee on Delay Reduction in the Circuit Courts. He was a member of the Chief Justice's Committee on Jury Innovations for the Twenty-First Century. Finally, he was the court's liaison justice to the Committee to Consider Adoption of the ABA Model Rules of Professional Conduct prior to the adoption of the new Hawai'i Rules of Professional Conduct.

**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 cochairs 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.

**Edwin M. Speas** is a partner with Poyner & Spruill, LLP in Raleigh, North Carolina. He graduated from Wake Forest College in 1967 and Wake Forest University School of Law in 1971. Before joining Poyner & Spruill, Mr. Speas served successively as Head of the Special Litigation Division and as Chief Deputy Attorney General for the North Carolina Department of Justice. In those positions, Mr. Speas represented and advised North Carolina's executive and legislative branches in a series of lawsuits impacting

separation of powers issues. These suits included the litigation concerning the scope of the limitations on the legislature's power to draw legislative districts, *Stephenson v. Bartlett*, 355 N.C. 354 (2002), and litigation concerning the scope of the obligation of the legislative and executive branches to educate public school students, *Leandro v. State*, 488 S.E.2d 249 (1997). Additionally, Mr. Speas participated in the decade-long litigation over North Carolina 12<sup>th</sup> Congressional District (*Shaw v. Reno*, 509 U.S. 630 (1993), *Shaw v. Hunt*, 517 U.S. 899 (1996) and *Cromartie v. Hunt*, 526 U.S. 541 (1999) and a political gerrymander challenge to the North Carolina's method of electing trial court judges. *Republican Party v. Hunt*, 980 F2d 943 (4<sup>th</sup> Cir. 1993), *cert. denied*, 501 U.S. 828 (1993). Mr. Speas is a Fellow of the American College of Trial Lawyers.

## Discussion Group Moderators

**William A. Gaylord** practices in Portland, Oregon, specializing in major products liability and medical negligence litigation. He received his B.S. from Oregon State University and his J.D. from the Northwestern School of Law of Lewis and Clark College. He has been integrally involved in constitutional litigation involving Oregon legislation on damage award limits. He is a member of Trial Lawyers for Public Justice, a past president of the Oregon Trial Lawyers Association, and a Fellow of the Pound Civil Justice Institute.

**Maria Glorioso** is the Managing Partner of The Glorioso Law Firm, in New Orleans, Louisiana, specializing in medical malpractice, wrongful death, and products liability, with a special emphasis on cases involving children. She received her B.A. in Psychology from Loyola University (New Orleans), where she took postgraduate studies in Criminology, and received her J.D. from Loyola University School of Law. She was a member of ATLA's Board of Governors, the past chairperson of ATLA's New Lawyers Division, and past cochair of the ATLA Student Trial Advocacy Competition Committee. Ms. Glorioso is member of the Board of Governors of the Southern Trial Lawyers Association and the Louisiana Trial Lawyers Association (LTLA). She has been an educational speaker for programs held by Loyola University School of Law, ATLA, LTLA, and the Melvin Belli Society. She is a Fellow and Trustee of the Pound Institute.

**Richard D. Hailey** practices law in Indiana and Colorado in the areas of personal injury, medical malpractice, products liability, and class actions. He earned his J.D. from Indiana University, and a LL.M. from Georgetown University Law Center. He is a past president of ATLA, on the Board of Directors of the Indiana Trial Lawyers Association, a member of the American Law Institute, and has been named to *Best Lawyers in America* every year since 1998. Mr. Hailey is a frequent lecturer throughout the United States and has appeared on CLE programs in 47 states. He is a Fellow and Honorary Trustee of the Pound Institute.

**Eva Mancuso** is Managing Partner for Hamel, Waxler, Allen & Collins, in Providence Rhode Island. She earned her BA, *summa cum laude*, from the University of Rhode Island and her J.D. from Suffolk University Law School. She has also taken advanced coursework at Harvard School of Public Health in the field of Legal Medicine. Ms. Mancuso is a former Assistant District Attorney, Bristol County, Massachusetts, and a former Assistant Attorney General, Chief, Career Criminal Unit, State of Rhode Island. Ms. Mancuso is a certified civil trial specialist and practices in the area of plaintiff personal injury. A former president of the Rhode Island Trial Lawyers Association, she serves as chairperson of the ATLA

State Affairs Committee and on the ATLA Board of Governors.

**Wayne D. Parsons** practices law in Honolulu, Hawaii. He has received B.S., M.S., and J.D. from the University of Michigan. He is a member of the Board of Governors of ATLA. He is a past president of the Consumer Lawyers of Hawaii and is a director of the Hawaii State Bar Association. He is a Fellow of the Pound Institute. Mr. Parsons has been active in educating the public about the work of lawyers and the courts and is a founder of the Hawaii Peoples' Law School Program and the Hawaii Applesed Center for Public Interest Law.

**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 Pound Institute.

**James E. Rooks, Jr.**, is Senior Policy Research Counsel for the Association of Trial Lawyers of America. He received his A.B. from Dartmouth College and his J.D. from Boston University, and has spent his entire career in the area of tort law. He is a member of the District of Columbia, Maryland and Massachusetts bars. He is co-author of a treatise on firearms litigation and of *RECOVERY FOR WRONGFUL DEATH* (4<sup>th</sup> ed., Thomson/West, 2005). He has also written a number of articles, the most recent of which is *Settlements and Secrets: Is the Sunshine Chilly?*, 55 S. C. L. REV. 859 (2004).

**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 Pound Institute.

**Nicole Schultheis** practices law for Schultheis & Walton, P.A., in Baltimore, Maryland. She received her BS from the Massachusetts Institute of Technology and her J.D. from Boston University School of Law. Ms. Schultheis has long been an active member of Trial Lawyers for Public Justice, serving as president of The TLPJ Foundation in 1999-2000. She has also served as Chair of ATLA's Section on Toxic, Environmental, and Pharmaceutical Torts and has also chaired ATLA's Legal Affairs Committee. Ms. Schultheis has been involved in drug and medical device litigation for most of her career and writes frequently on issues such as secrecy and protective orders, technology, and using the Internet effectively in one's practice.

**Larry A. Tawwater** practices law in Oklahoma City, specializing in products liability, aviation, and general negligence litigation. He received both his B.A. and J.D. from the University of Oklahoma. He has served as president of the Oklahoma Trial Lawyers Association and as a governor of the Association of Trial Lawyers of America. He is a member of the American Society of Law, Medicine and Ethics, the American Judicature Society, and the International Society of Barristers, and is a Fellow of the Pound Institute.

**John Vail** is Vice President and Senior Litigation Counsel with the Center for Constitutional Litigation. He has been counsel on several cases in the United States Supreme Court, and spearheads ATLA's fight against mandatory arbitration. He is a graduate of the College of the University of Chicago and of Vanderbilt Law School. Mr. Vail is President of the Board of Directors of the Virginia chapter of the

American Civil Liberties Union.

**President, Pound Institute; Forum Moderator**

**Richard H. Middleton, Jr.**, the president of the Pound Institute in 2004, is the founder of the Middleton Law Firm in Savannah, Georgia. Mr. Middleton is a past-president of the Association of Trial Lawyers of America. He is a past-president of the Savannah Trial Lawyers Association, past-president of the Georgia Chapter of the American Board of Trial Advocates, and has also served on the national Board of Directors of the American Board of Trial Advocates, Trial Lawyers for Public Justice, Civil Justice Foundation, and the Southern Trial Lawyers Association. He is also a Trustee of the American Jury Trial Foundation, and has recently been named to the Advisory Board of the Commonwealth Institute. Mr. Middleton has been honored as a Diplomat of the American Board of Professional Liability Attorneys. He has spoken throughout the United States and Canada on civil trial matters and has served on the faculty of the National College of Advocacy and the Editorial Board of the Maritime Law Reporter.

# Judicial Attendees

## Alabama

Honorable Tennant M. Smallwood, Judge, Tenth Judicial Circuit

## Arkansas

Honorable Donald L. Corbin, Associate Justice, Supreme Court

Honorable Betty C. Dickey, Chief Justice, Supreme Court

Honorable Jim Hannah, Associate Justice, Supreme Court

## Arizona

Honorable Phillip G. Espinosa, Chief Judge, Court of Appeals, Division Two

Honorable A. John Pelander, Chief Judge, Court of Appeals, Division Two

## California

Honorable William W. Bedsworth, Associate Justice, Fourth District Court of Appeal, Division Three

Honorable Candace Cooper, Presiding Justice, Second District Court of Appeal, Division Eight

Honorable Lawrence W. Crispo, Judge, Los Angeles Superior Court

Honorable Thomas E. Hollenhorst, Associate Justice, Fourth District Court of Appeal, Division Two

Honorable Malcolm Mackey, Judge, Los Angeles Superior Court

Honorable James Marchiano, Presiding Justice, First District Court of Appeals, Division One

Honorable Thomas I. McKnew, Judge, Los Angeles Superior Court

Honorable Vance W. Raye, Associate Justice, Third District Court of Appeal

## Colorado

Honorable Russell E. Carparelli, Judge, Court of Appeals

## Connecticut

Honorable Thomas A. Bishop, Judge, Appellate Court

Honorable Joette Katz, Associate Justice, Supreme Court

Honorable William J. Lavery, Chief Judge, Appellate Court

Honorable William J. Sullivan, Chief Justice, Supreme Court

## Florida

Honorable Robert Tyrie Benton, Judge, First District Court of Appeal

Honorable Edwin B. Browning, Judge, First District Court of Appeal

Honorable Virginia M. Hernandez Covington, Judge, Second District Court of Appeal

Honorable Gary M. Farmer, Chief Judge, Fourth District Court of Appeal

Honorable Ronald M. Friedman, Judge, Eleventh Judicial Circuit Court

Honorable Mario P. Goderich, Judge, Third District Court of Appeal

Honorable Melvia B. Green, Judge, Third District Court of Appeal

Honorable Charles J. Kahn, Judge, First District Court of Appeal

Honorable Joseph Lewis, Judge, First District Court of Appeal

Honorable Phillip J. Padovano, Judge, First District Court of Appeal

Honorable William D. Palmer, Judge, Fifth District Court of Appeal

Honorable Juan Ramirez Jr., Judge, Third District Court of Appeal  
Honorable Peter D. Webster, Judge, First District Court of Appeal

### **Georgia**

Honorable Anne Elizabeth Barnes, Judge, Court of Appeals

### **Hawaii**

Honorable Steven H. Levinson, Associate Justice, Supreme Court (panelist)  
Honorable Paula A. Nakayama, Associate Justice, Supreme Court

### **Idaho**

Honorable Karen L. Lansing, Chief Judge, Court of Appeals

### **Illinois**

Honorable Tobias G. Barry, Justice, Third District Appellate Court  
Honorable Robert C. Buckley, Justice, Appellate Court  
Honorable Calvin C. Campbell, Justice, Appellate Court  
Honorable Robert L. Carter, Chief Judge, Thirteenth Judicial Circuit  
Honorable David R. Donnersberger, Judge, Chancery Division Illinois, Third District  
Honorable R. Peter Grometer, Justice, Appellate Court, Second District  
Honorable Allen Hartman, Justice, Appellate Court, First District  
Honorable Maureen Durkin Roy, Judge, Circuit Court of Cook County  
Honorable Daniel L. Schmidt, Judge, Appellate Court, Third District  
Honorable Kent Slater, Judge, Appellate Court  
Honorable Alexander P. White, Judge, Circuit Court of Cook County

### **Indiana**

Honorable Patricia A. Riley, Judge, Court of Appeals

### **Iowa**

Honorable Larry J. Eisenhauer, Judge, Court of Appeal  
Honorable Michael J. Streit, Justice, Supreme Court  
Honorable Gary Wenell, Judge, District Court

### **Kansas**

Honorable Robert L. Gernon, Justice, Court of Appeal

### **Kentucky**

Honorable J. William Graves, Justice, Supreme Court  
Honorable Rick A. Johnson, Judge, Court of Appeals  
Honorable William L. Knopf, Judge, Court of Appeals

### **Louisiana**

Honorable Thomas F. Daley, Judge, Fifth Circuit Court of Appeal  
Honorable Robert D. Downing, Judge, First Circuit Court of Appeal  
Honorable Charles R. Jones, Judge, Fourth Circuit Court of Appeal

Honorable Edwin A. Lombard, Judge, Fourth Circuit Court of Appeal  
Honorable Walter J. Rothschild, Judge, Fifth Circuit Court of Appeal  
Honorable Ulysses Gene Thibodeaux, Chief Judge, Third Circuit Court of Appeal

#### **Maine**

Honorable Robert W. Clifford, Associate Justice, Supreme Judicial Court

#### **Maryland**

Honorable Lynne A. Battaglia, Judge, Court of Appeals  
Honorable Dale R. Cathell, Judge, Court of Appeals  
Honorable Andrew L. Sonner, Associate Judge, Court of Special Appeals  
Honorable Alan M. Wilner, Judge, Court of Appeals

#### **Massachusetts**

Honorable John M. Greaney, Justice, Supreme Judicial Court (panelist)

#### **Michigan**

Honorable Richard A. Bandstra, Judge, Court of Appeals  
Honorable Karen M. Fort Hood, Judge, Court of Appeals  
Honorable Kathleen Jansen, Judge, Court of Appeals  
Honorable William B. Murphy, Judge, Court of Appeals  
Honorable Peter D. O'Connell, Judge, Court of Appeals

#### **Mississippi**

Honorable Larry Buffington, Chancery Court Judge, Thirteenth District  
Honorable Robert G. Evans, Judge, Thirteenth Circuit Court  
Honorable Tyree Irving, Judge, Court of Appeals  
Honorable Forrest Al Johnson, Circuit Court Judge, Sixth Circuit District  
Honorable Leslie D. King, Presiding Judge, Court of Appeals  
Honorable Jannie M. Lewis, Circuit Court Judge  
Honorable Percy L. Lynchard Jr., Chancellor, Third Chancery Court District  
Honorable Patricia D. Wise, Chancery Court Judge

#### **Missouri**

Honorable Gary M. Gaertner, Senior Appellate Judge, Court of Appeals, Eastern District  
Honorable Michael A. Wolff, Judge, Supreme Court

#### **Montana**

Honorable John Warner, Justice, Supreme Court

#### **Nevada**

Honorable Robert S. Rose, Justice, Supreme Court  
Honorable Miriam Shearing, Chief Justice, Supreme Court

#### **New Jersey**

Honorable Howard H. Kestin, Presiding Judge, Appellate Division, Superior Court

**New Mexico**

Honorable James J. Wechsler, Chief Judge, Court of Appeals

**New York**

Honorable Anthony T. Kane, Justice, Supreme Court, Appellate Division, Third Department

Honorable Edward O. Spain, Justice, Supreme Court, Appellate Division, Third Department

**North Carolina**

Honorable Robin L. Hudson, Judge, Court of Appeals

Honorable John M. Tyson, Judge, Court of Appeals

**Ohio**

Honorable Diane Karpinski, Judge, Court of Appeals, Eighth Appellate District

Honorable Anne L. Kilbane, Judge, Court of Appeals, Eighth Appellate District

Honorable Mark P. Painter, Judge, Court of Appeals, First Appellate District

Honorable Kenneth A. Rocco, Judge, Court of Appeals, Eighth Appellate District

Honorable Joseph J. Vukovich, Judge, Court of Appeals, Seventh Appellate District

Honorable William H. Wolff Jr., Judge, Court of Appeals, Second Appellate District

**Oklahoma**

Honorable Daniel J. Boudreau, Justice, Supreme Court

Honorable Marian P. Opala, Justice, Supreme Court

**Oregon**

Honorable Rex Armstrong, Judge, Court of Appeals

Honorable Paul J. De Muniz, Associate Justice, Supreme Court

Honorable Henry Kantor, Circuit Court Judge, Multnomah County

Honorable Rives Kistler, Associate Justice, Supreme Court

Honorable Darleen Ortega, Judge, Court of Appeals

Honorable Robert Wollheim, Judge, Court of Appeals

**Pennsylvania**

Honorable Linda K.M. Ludgate, Judge, Court of Common Pleas

**Rhode Island**

Honorable Robert G. Flanders Jr., Justice, Supreme Court

**South Carolina**

Honorable Costa M. Pleicones, Associate Justice, Supreme Court

Honorable H. Stilwell, Judge, Court of Appeals

**Tennessee**

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# About the Pound Civil Justice Institute

## What is the Pound Civil Justice Institute?

The Pound Civil Justice Institute (known at the time of the 2004 Forum as 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 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 Pound Civil Justice 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 mandatory arbitration, 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, South Carolina, and Alaska and examined such topics as judicial independence, scientific evidence, the civil jury, and secrecy in the courts.

**Law Professors Symposium**—One of the primary goals of the Pound Civil Justice 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 POUND CIVIL JUSTICE INSTITUTE

### Reports of the Annual Forums for State Court Judges

2003 • *The Privatization of Justice? Mandatory Arbitration and the State Courts.* Report of the eleventh Forum for State Appellate Court Judges. Discussions include the growing rise of binding arbitration clauses in contracts, preemption of state law via the Federal Arbitration Act (FAA), standards for judging the waiver of the right to trial by jury, the supposed national policy favoring arbitration, and resisting the FAA's encroachment on state law. (Price per bound copy-\$40)

2002 • *State Courts and Federal Authority: A Threat to Judicial Independence?* Report of the tenth Forum for State Appellate Court Judges. Discussions include efforts by federal and state courts to usurp the power of state court through removal, preemption, etc, the ability of state courts to handle class actions and other complex litigation, the constitutional authority of state courts, the relationship between state courts and legislatures and federal courts. (Price per bound copy-\$40)

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.poundinstitute.org](http://www.poundinstitute.org)). (Free)

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