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SYMPOSIUM: THE FEDERALIZATION OF STATE LAW

INTRODUCTION

*Susan Bandes**

Federal courts scholars do not always pride themselves on their topicality. Indeed our field has been accused, with some justification, of being "arcane."¹

However, this Symposium on the federalization of state law is topical in the best sense of the word. It addresses a subject currently under vigorous debate by governmental policymakers.² Moreover, it is a subject which goes to the heart of federal courts jurisprudence: whether or not there is a means of identifying the proper functions of the federal courts.

A definition of the topic is in order. As Judge William Schwarzer and Russell Wheeler define the issue in their seminal article for the Federal Judicial Center, federalization is "the extension of federal court jurisdiction to civil causes of action and criminal prosecutions that could be maintained in state courts."³ Given the largely concurrent nature of federal and state jurisdiction, this is a vast category

* Professor of Law, DePaul University College of Law and Chair of the Section on Federal Courts of the American Association of Law Schools. The papers in this Symposium were first presented at the 1995 Annual Meeting of the AALS, by the Section on Federal Courts, as part of a program entitled "The Federalization of State Law."

1. Ann Althouse, *Late Night Confessions in the Hart and Wechsler Hotel*, 47 VAND. L. REV. 993, 997 (1994) (discussing complaints by scholars who do not concentrate in the field of federal courts that the subject is "inevitably 'arcane'").

2. The debate is one in which federal courts scholars have been instrumental. For example, William Marshall, one of the contributors to this Symposium, was an organizer of the three-branch conference discussed below. Several other federal courts professors organized or testified at the conference. In that regard, the topic is an excellent illustration of the theme of the annual meeting at which these papers were presented: "Beyond the Classroom: Scholarship and Teaching in the Service of Public Policy." (See 1995 Annual Meeting of the Association of American Law Schools Program, on file with the DePaul Law Review.)

3. WILLIAM W. SCHWARZER & RUSSELL R. WHEELER, ON THE FEDERALIZATION OF THE ADMINISTRATION OF CIVIL AND CRIMINAL JUSTICE I (Fed. Jud. Ctr. 1994), reprinted in 23 STETSON L. REV. 651 (1994).

of cases. By what means should it be determined which types of cases belong in which court system? Is there, as Schwarzer and Wheeler ask, "a basis for a principled allocation of jurisdiction between the two court systems?"⁴

The question is far from rhetorical. For example, the increasing federalization of criminal matters is widely criticized for overloading the federal docket with garden variety state criminal cases.⁵ Conversely, the Violence Against Women Act of 1994⁶ is lauded for more effectively addressing the problem of domestic violence by federalizing enforcement mechanisms.⁷ Proposed expansions of the RICO statute;⁸ high profile federal prosecutions of crimes already prosecuted in state court;⁹ judicial construction of implied rights of action;¹⁰ all raise questions of proper allocation of judicial resources in a system of concurrent jurisdiction.

The question has received substantial recent attention from the governmental entities most immediately affected by its resolution. In early 1994, a three-branch conference was convened by Attorney General Janet Reno, Chief Justice William Rehnquist and Senator Joseph Biden to discuss the federalization of state law. The topic was also a major focus of the recent draft report, and subsequent public hearings, by the Long Range Planning Committee of the United States Judicial Conference.¹¹ In short, debate about federali-

4. *Id.*

5. See William P. Marshall, *Federalization: A Critical Overview*, 44 DEPAUL L. REV. 719 (1995) (citing and summarizing over 100 new federal crimes created by The Violent Crime Control Act of 1994); see also William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 WIS. L. REV. 1, 6-7 (noting "serious concerns about the numbers and types of crimes now being funnelled into the federal courts").

6. Pub. L. No. 103-322 §§ 40001-703, 108 Stat. 1796 (1994).

7. See, e.g., Judith Resnick, "Naturally" Without Gender: *Women, Jurisdiction and the Federal Courts*, 66 N.Y.U. L. REV. 1682, 1750 (1991) (stating, prior to the enactment of The Violence Against Women Act, that since domestic relations have traditionally been a matter of state law, women have felt "only obliquely related to the federal courts").

8. See, e.g., *National Org. for Women, Inc. v. Scheidler*, 114 S. Ct. 798, 802-03 (1994) (allowing abortion clinics to bring a claim against abortion protesters under the civil RICO statute).

9. See, e.g., *United States v. Koon*, 833 F. Supp. 769 (C.D. Calif. 1993) (involving the federal prosecution of the police officers accused of beating Rodney King after the California state system had acquitted them), *aff'd in part*, 34 F.3d. 1416 (9th. Cir. 1994).

10. See, e.g., *Transamerica Mortgage Advisers, Inc. v. Lewis*, 444 U.S. 11, 18-19 (1979) (holding that a statutory provision which declares certain contracts void "fairly implies a right to specific and limited relief in a federal court," but that a provision which merely proscribes certain conduct does not imply such a right of action).

11. See COMMITTEE ON LONG RANGE PLANNING, PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS, JUDICIAL CONFERENCE OF THE UNITED STATES 19-32 (1994) (discussing the expanding role of the federal courts despite limited federal jurisdiction).

zation is occurring well outside the walls of the academy; and decisions about federalization have far reaching substantive and political ramifications on a wide range of matters of public concern.¹² Federal courts scholars have been a continuing part of the debate.

The papers in this Symposium do much to enrich the debate. William Marshall, in *Federalization: A Critical Overview*,¹³ examines the political forces at work in the federalization debate. He observes that there is too much political incentive to argue in favor of federalizing "important" issues, and argues against the use of "importance" as the criterion for determining what issues ought to be federalized. In his words, this approach amounts to "an invitation to rather than a limitation on federalization."¹⁴

Linda Mullenix is the foremost scholar arguing in favor of federalizing mass tort actions. In her *Mass Tort Litigation and the Dilemma of Federalization*,¹⁵ Professor Mullenix examines the arguments for and against federalization and their relevance to mass torts. She concludes that the usual tests for federalization are unhelpful to resolution of the issue of mass torts, which she calls "a distinctive litigation entity."¹⁶

Burt Neuborne, in his *Parity Revisited: The Uses of a Judicial Forum of Excellence*,¹⁷ revisits (as his title suggests) his pathbreaking article, *The Myth of Parity*¹⁸ and concludes that the quality gap he identified in 1977 still exists between state and federal courts. Moreover, it is a gap which policymakers are constrained from recognizing. Professor Neuborne argues that the allocation debate cannot proceed without asking the crucial allocational question: what is the best use of a trial forum capable of excellence in a judicial system where the norm is minimal competence?

Renee Landers, in her *Federalization of State Law: Enhancing*

12. See Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 B.Y.U. L. REV. 67, 75-76 (discussing Congress' role in allocating federal jurisdiction and the political consequences of its decision).

13. See Marshall, *supra* note 5.

14. *Id.* at 735.

15. Linda S. Mullenix, *Mass Tort Litigation and the Dilemma of Federalization*, 44 DEPAUL L. REV. 755 (1995).

16. *Id.* at 785-86.

17. Burt Neuborne, *Parity Revisited: The Uses of a Judicial Forum of Excellence*, 44 DePaul L. Rev. 797 (1995).

18. Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977). For the record, when I asked Professor Neuborne to participate in this Symposium, I promised him he would NOT have to talk about the Myth of Parity again. It was entirely his own choice.

Opportunities for Three-Branch and Federal State Cooperation,¹⁹ presents the Justice Department's view on the federalization of state law. As she points out, the current Justice Department has taken the initiative in examining this issue; for example, convening the three branch conference. Ms. Landers argues that it is unhelpful to search for overarching, abstract theories of federal-state allocation. Instead, she says, the Justice Department sees its task as fostering federal-state cooperation, with the federal government taking whatever role will best advance national interests in the particular context.

Of course I make no attempt to summarize these papers—they are too nuanced as well as too enjoyable to be summarized. Indeed, if there is single insight which these very different approaches can be said to share, it is that the question of allocation yields no easy bright line tests or answers. It is a question of politics, of historical context, of evolving law, and of national goals and values.

19. Renee M. Landers, *Federalization of State Law: Enhancing Opportunities for Three-Branch and Federal-State Cooperation*, 44 DePaul L. Rev. 811 (1995).