

## Comment

*Richard Willard\**

As some of you know, over the years, I have developed a reputation as a skeptic of federalism. I am most critical when federalist beliefs exaggerate and romanticize the role of the states in our constitutional system of government. In particular, I have observed that over the past several decades, radical changes have been made in tort law and litigation practices in our state courts that pose a threat to the national economy, as well as to the integrity of our legal system.

The recent presidential election decision by the United States Supreme Court highlights, by its rarity, the kind of trouble that many litigants experience when they are at the mercy of state supreme courts.<sup>1</sup> Often, unlike President Bush, litigants in state courts have no recourse to federal courts in many cases because, as we have heard earlier today, when state supreme courts interpret state constitutions, they are rarely subject to judicial review by the federal courts and, ultimately, the United States Supreme Court.<sup>2</sup>

The goal of federalism is properly viewed as promoting liberty and preventing the two American sovereigns, both national and state, from imposing burdens on individuals. John Baker's paper is helpful in pointing out the "horizontal" component of federalism,<sup>3</sup> which I think has been insufficiently realized. Too often, people think of federalism as being purely a vertical problem (that is, involving only federal/state interactions), and of separation of powers as being a "horizontal" problem (involving only the constituent branches of the federal government). I think that both

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<sup>1</sup> *Bush v. Gore*, 121 S. Ct. 525 (2000) (holding that Florida's vote recount scheme did not meet "minimal constitutional standards"); *Bush v. Palm Beach County Canvassing Bd.*, 121 S. Ct. 471, 475 (2000) (vacating the Supreme Court of Florida's decision to require a hand recount of votes cast in Florida during the 2000 presidential election).

<sup>2</sup> See *Michigan v. Long*, 463 U.S. 1032 (1983) (holding that when a state decision "fairly appears to rest primarily on federal law or to be interwoven with federal law, and when the adequacy and independence of any state law ground is not clear from the face of the opinion" the Court will presume that it rests on federal grounds and review the case).

<sup>3</sup> See generally John S. Baker, Jr., *Respecting a State's Tort Law, While Confining its Reach to that State*, 31 SETON HALL L. REV. 698 (2001).

of these concepts have the opposite dimension as well: Separation of powers is important between the federal government and the state governments, and federalism plays an important role in allocating power territorially among the states.

If a state uses its tort law to redistribute wealth among its own citizens in an arbitrary way, it is up to the voters of that state to deal with that issue, and I do not think this presents a federal problem. Some states, however, might use their tort systems to expropriate wealth from, and regulate the conduct of, *out-of-state* entities. This is a problem the states cannot be expected to resolve individually and thus implicates federalism concerns.

Speaking as a representative of a manufacturing company, I would like to point out that manufacturers, in particular, are keenly aware of this concern. Unlike service providers, manufacturers cannot limit their products to any particular state because their products are sold in a national market. The problem is compounded for manufacturers, because in most product liability cases, plaintiffs from within a single state sue manufacturer-defendants who are almost always incorporated or headquartered in a different state. Therefore, some states may be tempted to skew their legal doctrines so that their courts can take money from "foreign" manufacturers and redistribute this wealth locally by awarding damages to resident plaintiffs. This scenario was very evident in the early years of the Reagan Administration, when there was a more romantic notion of states' rights. In response, President Reagan attempted to control the erratic nature of state tort law by advocating federal product liability regulations.<sup>4</sup> The Reagan response to the fractured state tort laws created

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<sup>4</sup> The Reagan Administration's attempts at tort reform, which included capping punitive damages, and capping lawyers' fees, were not well-received by all critics. See, e.g., Susan Bartlett Foote, *Independent Agencies Under Attack: A Skeptical View of the Importance of the Debate*, 1988 DUKE L.J. 223, 226-27; Theresa Moran Schwartz, *The Role of Federal Safety Regulations in Products Liability Actions*, 41 VAND. L. REV. 1121 (1988). Despite the criticism, however, the Reagan Administration's efforts likely influenced many states to reevaluate their tort policies. See Terry Carter, *The Social Agenda Hits a Brick Wall*, NAT'L L.J., Apr. 18, 1988, at 24 (noting "the real success in tort reform/ products liability reform has come during the past two years in the states as more than forty enacted legislation favorable to defendants").

In the late 1980s, the Bush Administration responded to these criticisms and proposed a modified plan to regulate tort law, specifically to "make tort law uniform in all states and to speed up product-liability disputes by keeping them out of the courts." *Product Liability in America*, ECONOMIST, Dec. 2, 1989, at 84. President Bush's proposals were better received. *Id.* The Economist wrote: "These goals make sense . . . . The most valuable part of the reform would be simply to establish uniform laws throughout the country, . . . [because states have such diverse tort laws] lawyers are adept at 'forum-shopping' expeditions to find a generous state in which to sue a company." *Id.*

In recent years, the Clinton Administration blocked tort reform efforts, arguing that the regulations advocated by the Reagan and Bush Administrations interfered with a victim's right to be compensated. See Nancy E. Roman, *Chamber of Commerce Doubles Hill Team*;

different beasts: the federal class action for mass torts, and the related process of multidistrict litigation consolidation.

The class action device is really not well-suited for dealing with mass torts,<sup>5</sup> neither is its second cousin, the consolidation of lawsuits under the multidistrict litigation process, which is more likely in mass tort cases. The real problem in both of these procedural devices is choice of law. Under the *Erie* doctrine,<sup>6</sup> even if these cases are brought in federal court based on diversity, state law applies to determine liability, defenses, and the amount of damages.<sup>7</sup> It is very difficult, almost unmanageable, to develop a coherent class action strategy with fifty different states involved. Virtually all of these cases end up settling because it would be unbelievably complex to try to litigate them and apply the kind of choice of law analysis that *Erie* mandates in these kind of cases.

I think that limiting state court class actions to the citizens of one state, as Professor Baker has proposed,<sup>8</sup> makes sense, but I do not think it is enough. I would expect that the prime defendant would move out-of-state to avoid liability. I believe, therefore, that those cases deserve to be removed to federal court that justify diversity jurisdiction generally—that is, only plaintiffs who have genuine diversity of citizenship to the

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*New Lobbyists to Counter Union Efforts*, WASH. TIMES, Dec. 27, 1997. Although President Clinton signed bills that limited the liability of small aircraft manufacturers, community health centers, cruise ship operators, and Amtrak, he vetoed the 1996 Common Sense Product Liability Legal Reform Bill. Bob Van Voris, *Clinton's a Surprising Tort Reformer*, NAT'L L.J., Aug. 14, 2000, at A1. The bill would have capped punitive damages, imposed a two-year statute of limitations provision in tort cases, and immunized the manufacturers of products that were more than fifteen years old. *Id.*

<sup>5</sup> See, e.g., William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 437 (2001) (noting that mass tort class actions have been "housed uneasily in an adjudicatory system devoted to a two-party model of adversarial litigation"); Roger H. Transgrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69, 69 (1989). Professor Transgrud argued against mass tort class actions, and instead advocated an effort to "coordinate and consolidate pretrial discovery and motions practice but then individually try the tort cases in an appropriate venue. After a number of cases have been tried substantial incentives will operate to encourage the private settlement of many of the remaining claims." *Id.*

<sup>6</sup> *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

<sup>7</sup> As the *Erie* Court put it:

Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law.

*Erie*, 304 U.S. at 78.

<sup>8</sup> Baker, *supra* note 3, at 713-16.

defendant could bring a class action in federal court.<sup>9</sup> Plaintiffs in this kind of class action, however, could defeat diversity by adding a named plaintiff from the defendant's home state. I do not think that should be permitted. Another common device to defeat diversity would be to add an in-state party, such as a dealer or distributor, as a defendant. To eliminate this common device for defeating diversity, the federal product liability legislation that has been proposed for many years has a useful provision that takes wholesalers and distributors out of most cases.

Thus, I would support legislation to loosen the standards for removal of class actions to federal court. I would also support legislation that would curb the ability of states to entertain nationwide class actions—or for that matter class actions of any kind other than those which are limited to residents of their own states.

Additionally, there is a need for federal choice of law legislation. This is something that, when I was in private practice, was something of a personal bugbear of mine. I often received legal memoranda that were prepared for me by young lawyers or law students who did not consider choice of law. The young lawyers and law students would simply jump into a legal question and start citing cases, both state and federal, without much concern for what law should apply. I became known as something of a stickler because I insisted that before launching into *any* legal analysis, any choice of law problems be resolved. Furthermore, if we were going to cite a federal case that was a diversity case, I insisted that we needed to know what state law that federal court was applying. Although I have to say, in the defense of the young lawyers and law students, that sometimes the federal courts do not bother to decide that either (at least in their opinions), so answering that question can be difficult.

I believe that any federal choice of law legislation should be based on bright-line rules. I am a big fan of the *Restatement of the Laws, Conflict of Laws*. I think the *Second Restatement*, and its vacillation on many issues, is utterly inexcusable.

However, I still think we need federal product liability legislation, in addition to choice of law and class action reform. Even if we take a very simple one-party case, states will still have an overwhelming incentive to favor rules that expand liability because that will favor an in-state plaintiff over an out-of-state defendant. Therefore, I think it is appropriate for federal legislation to try to redress this imbalance by setting rules that will limit liability in product liability cases, even when they are litigated in state courts. I do not think product liability law should be entirely federalized,

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<sup>9</sup> See 28 U.S.C. § 1332 (1999).

but I do think it is appropriate to adopt some simple restrictions on state court damage awards that would redress this imbalance.

I think that Professor Baker's paper has presented some excellent and novel ideas, but I view them not so much as *alternatives* to traditional tort reform, but rather as things we should be doing in *addition* to traditional tort reform.