Comment

The Honorable Stanley Feldman[*]

I was asked to present a perspective that differs from most of the other panelists—to look at these issues from the viewpoint of one on the bench. I must say, Professor Presser, that although I was gratified with your moderation in your suggestions, I think I have identified the culprit in the present problems. It is John Marshall, who, in *Marbury v. Madison*,[1] arrogated unto himself and the federal courts the power to declare laws unconstitutional.[2] Justice Marshall thereby set for that Court, and for all other supreme courts throughout this country, the obligation, if we may call it that, of deciding just what is constitutional and what is not.

Where I must respectfully take issue with you, Professor, is over the idea that judges have not made law during these last two hundred years and during the hundreds of years preceding. I am accused in Arizona of making law, and my answer to that accusation is, "Not since yesterday." Because I have been attending this symposium in Washington D.C., I have not made any law since the beginning of the week. As a judge, I cannot do anything *but* make law, because interpreting whether something is cruel and unusual punishment, or deciding whether an action violated the due process of law or the equal protection of law, or discerning whether a prosecutor has proved guilt beyond a reasonable doubt, or interpreting any other vague term used in the Constitution of the United States or of the State of Arizona involves drawing lines, and drawing lines is making law.

Whether you agree or you disagree with the United States Supreme Court's decision in *Bush v. Gore*,[3] one thing is certain: the Court made law. The Justices held that Florida's method of determining the validity of ballots (which, under Florida statute, depended on the intent of the voter), violated equal protection without the addition of standards to address that intent.[4]

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[1] 5 U.S. (1 Cranch) 137 (1803).

[2] *Id.* at 177-78 ("It is emphatically the province and duty of the judicial department to say what the law is.").

[3] 121 S. Ct. 525 (2000).

[4] *Id.* at 532. The Court held that:

> [I]t is obvious that the recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial

And, in the view of several Justices, those standards could only be provided by the legislature.[5] The Court, indeed, made law.

Daubert v. Merrell Dow Pharmaceuticals, Inc.[6] made law. It interpreted an evidentiary rule[7] that had been in existence for over thirty years, which had never been interpreted to require judges to be the gatekeepers of expert testimony. The Supreme Court chose to interpret this rule in such a way as to give judges such a gatekeeping function.[8] It is debatable whether *Bush v. Gore* and *Daubert* were good or correct, but in both decisions, the Court made law. In every judicial decision that interprets state or federal statutes, or constitutional provisions—many of which are vague and could be interpreted in different ways—we make precedent as to what the language means and how it should be applied. And that is making law.

Let me return to the current unhappiness, if we may call it that, that some people feel towards the involvement of state court judges in tort reform. I have seen, as all of you have, the recent and terrible hullabaloo that has occurred in judicial elections in Illinois, Michigan, and Ohio.[9] There is a great deal of unhappiness with judges at the moment, but that is not anything new. Perhaps I am one of the few here old enough to remember the uproar that occurred when Chief Justice Earl Warren authored *Brown v. Board of Education*.[10] I remember the billboards. You could not drive from Tucson to Phoenix without seeing the signs that read, "Impeach Earl Warren." And he was not the only Supreme Court Justice people wanted impeached. In fact, in Arizona, impeachment was a moderate view, because there were many who

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> additional work. It would require not only the adoption . . . of adequate statewide standards for determining what is a legal vote, and practicable procedures to implement them, but also orderly judicial review of any disputed matters that might arise.

Id.

[5] *Id.* at 533. The majority of the Court recognized the limitations of judicial review and chose to "leave the selection of the President to the people, through, their legislatures . . .". *Id.*

[6] 509 U.S. 579 (1993).

[7] FED. R. EVID. 702 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.").

[8] *Daubert*, 509 U.S. at 597. The Court assigned to federal judges a "gatekeeping" duty, stating that "the Rules of Evidence—especially Rule 702—do assign the trial judge the task of ensuring that an expert's testimony rests on a reliable foundation and is relevant to the task at hand." *Id.*

[9] *See* William Glaberson, *Justices Urge Stricter Rules for Judicial Elections*, N.Y. TIMES, Jan. 26, 2001, at A16 ("There were accusations in last year's judicial election in States like Michigan, Ohio, Illinois, and Alabama that the money flowing into judicial races effectively purchased judicial votes for interest groups.").

[10] 347 U.S. 483 (1954).

wanted to shoot all of the United States Supreme Court Justices. There was, in short, a great deal of unhappiness.

Judges will continually have to make law on important issues, because in our country, our Constitution constantly needs to be interpreted and applied to situations that could never have been foreseen by the drafters. By making these decisions, however, they will unavoidably make a large segment of the population unhappy, and you will see this unhappiness reflected in many ways. I think we need to take all of this with a little grain of salt and realize that judges, for the most part, are trying to do what they see as right. Unfortunately, they do not always do what is right in the eyes of all people, and sometimes any objective view of what has been done will lead to the conclusion that a decision was wrong.

I must also respectfully disagree with the idea that when making law, applying common law, and defining common law, judges act with some sort of divine knowledge. There is nothing divine about what I do. I claim no such power. I try only to use my best judgment to do what I think is right.

When I was interviewed by Governor Bruce Babbitt for appointment to the Arizona Supreme Court, he proceeded to give me a ten-minute lecture on the proper function of judges, which, in his opinion, was to stay out of the way of governors, and not to interfere with the accomplishment of any program that the governor had managed to get through the legislature. After about six or seven minutes, he looked at me. I was sitting there trying not to smile. While looking at me, he said, "You don't believe a word I'm saying, do you?" And I answered, "Well, I wouldn't put it that way, Governor, but . . . ." He stopped me, and said, "You're not going to do what I'm telling you, you're going to do what you think is right." I replied, "Yes, I am."

All that we judges can do is what we think is right. Many difficult issues come before us. In trying to define the proper interpretation of the words and terms in the Constitution, and in trying to define statutes and apply them in a sensible manner, we can only use our best judgment. In doing so, we will always make a substantial number of people unhappy. Sometimes we make everybody on both sides of the case unhappy, and *then* I think we have really done our job well.

Let me discuss tort reform, specifically. In Arizona, we have some unusual constitutional provisions in the state constitution that deal with torts. One is a non-abrogation clause.[11] This clause forbids the state legislature from enacting any law that abrogates the right of action for damages. And the second is a non-limitation clause, which appears two places in the

[11] ARIZ. CONST. art. XVIII, § 6 ("The right of action to recover damages for injuries shall never be abrogated.").

constitution[12] and forbids the legislature from enacting any law that limits the amount of damages recoverable. Do these provisions preclude the legislature from exercising any regulatory ability in the field of torts? Do they leave everything to the courts?

No. The Arizona Supreme Court has held that the legislature has the ability to regulate in many aspects under the aforementioned provisions. For example, we have upheld acts that require contribution among joint tortfeasors,[13] and which allow for comparative negligence.[14] Similarly, we have upheld an act that eliminated joint and several liability, and imposed a regime of several liability only.[15] We have, however, held unconstitutional—thereby causing a great deal of unhappiness—a statute of repose that prevented the filing of an action after the statute of limitations had run, because we believed it would have abrogated a cause of action.[16] We have also held unconstitutional a law that required successful medical malpractice plaintiffs to accept annuity payments from defendants, because we believed that forced annuity payments put a limitation on damages.[17]

Each of these decisions that held a law unconstitutional was met with a great deal of unhappiness among certain segments of the business community, and three times now there have been attempts in Arizona to amend the state constitution to remove each of these tort provisions. Three times now those attempts have been defeated; the first time rather closely, the second time with a broader margin, and the third time with a vote that implied, "Go away, and don't ever bring this back again." And it has not been brought back again. Thus, I am not sure that the unhappiness with judges in the field of tort law can be attributed to the entire population of a state. Rather, this dissatisfaction usually arises from those who were unhappy with the results of particular cases.

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[12] ARIZ. CONST. art. II, § 31 ("No law shall be enacted in this state limiting the amount of damages to be recovered for causing the death or injury of any person."); art. XVIII, § 6 ("The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation.").

[13] *See, e.g.*, Larsen v. Nissan Motor Corp., 978 P.2d 119 (Ariz. 1999); Lerma v. Keck, 921 P.2d 28 (Ariz. 1996); Jimenez v. Sears, Roebuck & Co., 904 P.2d 861 (Ariz. 1995).

[14] *See, e.g.*, *Jimenez*, 904 P.2d at 861; Hall v. A.N.R. Freight Sys., Inc., 717 P.2d 434 (Ariz. 1986); City of Phoenix v. Superior Court, 717 P.2d 447 (Ariz. 1986).

[15] *See, e.g.*, *Larsen*, 978 P.2d at 119; *see also Jimenez*, 904 P.2d at 861; Dietz v. General Elec. Co., 821 P.2d 166 (Ariz. 1991). The lower courts have also upheld this principle. *See* Neil v. Kavena, 859 P.2d 253 (Ariz. Ct. App. 1993); Church v. Rawson Drug & Sundry Co., 842 P.2d 1355 (Ariz. Ct. App. 1992).

[16] Hazine v. Montgomery Elevator Co., 861 P.2d 625 (Ariz. 1993).

[17] *Smith v. Meyers*, 887 P.2d 541 (Ariz. 1994), holds that "the statute which allows for the periodic payment of any judgment for loss of future economic benefits in medical malpractice cases is constitutional." *Id.* at 1280.

I will conclude with two thoughts. First, people often question the motives of the plaintiffs' bar. I did a lot of plaintiffs' work before I got appointed, and some defense work, also. I knew a lot of plaintiffs' lawyers. Many were greedy, but this is America. The question in America is not whether you are greedy but whether your greed can promote some public good. And in the field of tort law, I would submit that deterrence is a public good and that the greed of plaintiffs' lawyers, in many cases, does produce something valuable for the public. I do not agree with the proposition that corporations speak for me. I think it was "Engine" Charlie Wilson who said, "What's good for General Motors is good for America."[18] I think he was wrong. I thought he was wrong then, and I think he is wrong now. The proper statement should be, "What's good for America will, in the long run, be good for General Motors."

I ascribe no evil motives to corporations. I hold a lot of stock, which enables me to afford the job I presently have. But I did not vote for the President of Microsoft, or for any other corporate head, to set the public policy of America. They do not represent me in that way. I vote for them to run their company, *my company*, in the best interest of that company, not to run their business in the best interest of the United States of America. I vote for members of the House and the Senate, and for the President of the United States, to choose policies that are in the best interest of America. I expect corporations to operate in their own self-interest. I do not attribute any evil motive to them. I would advise them the same way I that would advise any other businessman or woman: Work in your own interest.

Finally, let me tell you that I am a victim of tort, so I understand the situation from the other side of the bench. I happen to have an interest in a small partnership that owns a larger commercial building. It is a valuable asset. I received a phone call one morning, and the person on the line informed me that while inspecting a broken water pipe, it was discovered that the fireproofing in this building contained asbestos. I was surprised and said, "Oh, how much would it be to remove it?" He told me that it would cost thirty dollars a square foot to remove. In other words, it made the building unsalable, unrentable (if I may coin that phrase), and almost valueless until a large amount of money was spent to fix it.

Where do I turn for compensation? Who should pay to remove this product that was bought and installed for the purpose of protecting this building and rendering it safer, yet has rendered the building valueless? Should it be me? Should it be the manufacturer? Of course, I have a self-

[18] OXFORD DICTIONARY OF QUOTATIONS 737 (Angela Partington ed., 4th ed. 1992) (quoting Charles E. Wilson, President of General Motors 1941-53 ("For years I thought what was good for our country was good for General Motors and vice versa. The difference did not exist. Our company is too big. It goes with the welfare of the country.")).

interest in this, so you know what my view was. But from the objective view of the court, I think it is an interesting question and one that cannot and should not always be solved by legislation.

Let me close by saying that I think the courts are doing the best they can, and one should have a little more patience with judges. Judges are activists, and represent all viewpoints—conservatives, liberals, and moderates. They are activists because they try to do what they think is right (or at least we hope they try to do what they think is right). When they do that, however, they are always going to make certain people unhappy.