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States' Rights in the Twenty-First Century

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SYMPOSIUM

States' Rights in the Twenty-first Century

Panelists

The Honorable Mark Racicot *

The Honorable Robert Miller **

Dr. Michael Greve ***

Moderator

Jay Tidmarsh ****

Introduction

Well, good afternoon. I guess we should start. Thanks to everyone for coming out today. My name is Jim Schueller and I'm the Symposium Editor of the Law School Journal of Legislation and every two years we organize a symposium to discuss relevant issue of public policy and the topic this year is States Rights in the 21st Century.

Well, way back in the 18th century when the framers drafted the Constitution they created a unique system of governing where power was shared between the states which already existed and the newly created federal government. The framers in their day debated the proper allocation of power between these two governments and today, two hundred eleven years later, we do the same thing. This is an issue that will be with us as long as we as a nation exist and really goes to the core of what it means to be the United States.

The format today will be a moderated panel discussion where each panelist will be given about 10-15 minutes to present their views, a few minutes to respond to each others comments, and then we'll open up to the audience questions. We're very lucky to

* Governor, State of Montana. Governor Racicot graduated from Carol College and the University of Montana Law School. He served in the Army before returning to Montana to serve as a Deputy County Attorney, an Assistant Attorney General for the State of Montana, and as Montana's first Special Prosecutor. The governor became the Attorney General of Montana in 1988 and was elected Governor in 1992. In 1996, he was re-elected to a second term as Governor.

** Judge, U.S. District Court, Northern District of Indiana. Judge Miller graduated from Northwestern University and University of Indiana Law School. He began his career as a law clerk to the Honorable Robert Grant, U.S. District Court before becoming the youngest Superior Court judge in St. Joseph County, Indiana. Judge Miller was appointed to the federal bench by President Ronald Reagan in 1986.

*** Director, Center for Individual Rights. Dr. Greve received his Ph.D. in Government from Cornell University. The Center For Individual Rights has been involved in litigation on matters such as affirmative action and First Amendment rights. Dr. Greve has served as a Resident Scholar at the Washington Legal Foundation and as a Program Officer at the Smith Richardson Foundation. He has published and lectured widely in fields such as environmental law, administrative and constitutional law and civil rights law.

**** Professor, Notre Dame Law School. Professor Tidmarsh teaches Contracts, Remedies, Federal Courts, and Complex Civil Litigation. He was a faculty advisor to the Journal of Legislation until 1999.

have a distinguished panel with us today. And to introduce our first speaker, I turn the mike over to today's moderator and my first-year Contracts professor, Jay Tidmarsh.

Professor Tidmarsh

Thanks Jim, I was just kidding about that grade by the way. The three speakers that we have today are the Honorable Mark Racicot, the Governor of the State of Montana, the Honorable Robert Miller, a federal district court judge for the Northern District of Indiana and Dr. Michael Greve who is the Executive Director for the Center For Individual Rights.

To begin, Governor Racicot will begin today. Governor Racicot is a graduate of Carol College and of the University of Montana Law School. I'm given to understand he still holds the record for assists for his college basketball team. I do know he was also the Student Body President at Carol College. He was designated for distinguished service in the Army and after leaving the Army returned to Montana where he began a distinguished career in public service, serving as a Deputy County Attorney, as an Assistant Attorney General for the State of Montana, and then as well as Montana's first Special Prosecutor. He was elected to be Attorney General of the State of Montana in 1988 and then in 1992 was elected as the 20th Governor of that great State of Montana. In 1996, he was then re-elected by an overwhelming margin of 4-to-1, approximately 80 percent and is filling out now his second term as Governor of the State.

My first encounter with Governor Racicot was actually in his capacity as a wonderful late-night participant in a discussion with Jay Leno and my second encounter with him and the way in which I know him the best is as the father of one of my own student, Tim Racicot. Governor Racicot...

Governor Racicot

Thank you.

It is a genuine delight to be able to be here at the University of Notre Dame. I might parenthetically note that the reason that I had to pass the ball and have the record for assists is because, quite frankly, I couldn't shoot—which I understand from some of the audience is a genetic detail that's been passed onto my son.

We don't have an extraordinarily large amount of time this afternoon to talk about such a vast topic, a very interesting topic to me. So we're going to move with some speed and dispatch and I hope that you will pardon the intensity of that particular movement so that we can save some time for questions. I do applaud all of you quite honestly that on a Friday afternoon at four o'clock you are such dedicated students of Federalism that you would be here to discuss this topic. It is a very exciting topic to me—and one that we could talk about for many, many months—and I'm delighted that we have a chance to talk about it this afternoon. It has very significant practical implications for the United States of America and as a consequence of that, your interest is I believe of genuine importance to the people of this country.

Let me give you just a little bit of history to begin with because I think it's critically important to place this topic within its historical context. Following their victory in the Revolutionary War, the colonies became independent states and they were loosely held together under the Articles of Confederation. I'm certain that all of you will recall that [this] arrangement proved to be rather quickly a mess to be very honest. The national government was simply too weak and it was just not working. As a matter of fact, George Washington said the states were held together by "a rope of sand."

The country was burdened with a \$60 million dollar debt at the time. There was no national tax system and as a result there was no means of repayment. Vermont, for in-

stance, and one of the maladies that was noticed at the time was being claimed by three different states. There was no national court system to resolve disputes. Trade restrictions and a fragmented monetary system strangled the economy and to the rest of the world this was not a nation at all to be taken seriously. It was just a coincidental collection of disparate and floundering sovereigns. And as a result a group of state legislators and citizens, 55 of them, met in Philadelphia for a Constitutional Convention that lasted four months in the summer of 1787 and embodied what in my view is the most important public policy decisions in the history of Western civilization.

I might make note as well that, parenthetically, that there's an example of extraordinary leadership that all of those people brought to that convention that could stand to be emulated today. They were incredibly different. They came with different thoughts and intuitions and emotions and interests, but somehow came together to put together a document that has continued to mystify and serve as the basis for our government throughout the course of the last 200-plus years in a way that I quite honestly believe is miraculous in its results. Somehow, when you think about it, how lucky we are that we live in a country that's based upon freedom and respect without anyone ordering us to have this voluntary association. It really is, when you think about it, a miracle that we've been able to govern ourselves that way for in excess of 200 years.

There's another example of leadership I think during the Constitutional Convention that is particularly noteworthy as well, and that modern political leaders could probably stand to imitate as well, and that is the leadership of George Washington. I don't know how many of you already know, but the fact of the matter is, George Washington spoke only once during the Constitutional Convention. Throughout the period of May to September of 1787 he was very disciplined in his discourse and only when it came time to talk about how you were going to divide the leadership of this country in Congress did George Washington speak to the Great Compromise. We would probably be well advised, all of us who serve in public office, to speak less frequently and to speak with more authority and more precision as George Washington did, and I believe the lesson that he provided during the Constitutional Convention obviously could stand to be imitated again.

There were two major issues that emerged during the Constitutional Convention. The first was how to balance the interest of large states and small states and that was addressed with the Great Compromise. Two houses of Congress, one apportioned by population, the other by the states. The major issue was more difficult and it was critically important to the very existence of this republic: What would the relationship be between the states and the national government?

A government dominated by the states was a matter of concern after the experiences that we have had with the Articles of Confederation. On the other hand, the delegates having just secured their freedom were wary of turning over the regulation of their lives to a central government some distance away. Their solution was to create two governments. A national government with a list very specific responsibilities like national defense, foreign policy, interstate commerce and the coining of currency and with these things the national government they said would be supreme, limited, but supreme. All the powers that were not specifically given to the national government, the overwhelming majority of the powers, would remain with the states and with the people and this remarkable constitutional creation has endured for 200 years in the United States of America. As a matter of fact, every time I say that it gives me the chills.

The United States of America has survived the devastating Civil War, conflicts around the planet and is the most powerful nation on earth. The checks and balances between the three branches have worked and continue to work. The balance created between small states and large states has been maintained as well. But the balance of

power that has evolved between the states and the national government would probably cause James Madison and the other delegates great pause. It was not within their contemplation or hope that some day there would be volumes of federal laws and regulations prescribing in great detail how every state, county, city and school district must conduct what we believe are uniquely local responsibilities. Now the topic of this discussion, the new Federalism suggests that some think there is such a thing as an old Federalism and that it either no longer exists or it is on its way out. And there is certainly a lot of evidence that would suggest the balance of power among the federal government and the state and local government is in fact shifting. In 100 words or less I would summarize and defend as follows:

The Constitution gives the federal government powers that are limited to several enumerated objects but over the years the federal government has increased dramatically the scope of that power. Congress and the Executive Branch have been for the most part unable or unwilling to halt the continual erosion of states' authority through over regulation—through cost shifts to the states and through the preemption of state laws. But in the past decade the states and more recently the United States Supreme Court have taken actions that reaffirm and reinvigorate the role of states in the federal system.

Today the pendulum is definitely moving in the direction of stronger states' rights. State governments are doing a good job, a better job of carrying out their responsibilities as laboratories for change in such arenas as welfare reform, child health insurance, environmental regulatory balances, litigation against the tobacco industry, data management and scores of other areas.

The nation's governors I know are working together in a manner that promotes consensus rather than gridlock and partisan rhetoric which seems to accompany the workings of the federal government these days. We are witnessing increasing public support for state and local governments rather than the loss of trust that is associated with federal officials according to recent surveys. And I predict that the change towards a more balanced state and federal relationship will continue to the states advantage. It will be a slow change, tentative and fragile, but I believe it will continue—that is unless a natural disaster occurs on the order of the Great Depression and then the pendulum probably will swing the other way again.

Now you might guess that being a governor I would never admit that there is such a thing as a reasonable cost shift from the federal government to the states and that no preemption of state law is ever justifiable. But I would tell you that's not the case. Although our federal Constitution left to the states in the words of James Madison, "a residual and inviolable sovereignty over all objects other than those enumerated that were placed under the jurisdiction of the federal government." the notion of a republic—a union of states—was so essential to one form of government, our form of government, that the founders allowed it to trump the governments of the individual states in reference to those precise topics. And as James Madison answered his own question, he reminds all those who have had the chance to pay attention to his words that if the sovereignty of the states could not be reconciled to the happiness of the people, then the former—namely the sovereignty of states—should be sacrificed to the latter—namely the happiness of the people.

The Federalism debate has focused and will continue to focus upon what the proper balance of power is. It is never static. War, peace and foreign commerce or external objects as Madison called them are obviously within the jurisdictional authority of the federal government. But the remaining enumerated powers are not so easily defined and the exercise of them by the federal government must be constantly checked to determine if proper legal authority exists. And it is my belief in keeping with the Constitutional

scheme that any doubt about where power resides ought to be construed in favor of the states. That Congress should constantly consult with elected and state officials and carefully consider whether the objective of any proposed national legislation may be accomplished by some means other than a means that is detrimental to the states.

Now let me briefly explain my version of what has happened in the past 10 years. The first tip of the federal-state balance towards the federal government and then to begin slowly return power to the states. As we all know, there were two significant trends during the 1990s that further upset the federal-state balance in favor of increased federal authority: the proliferation of unfunded mandates imposed on the states by the federal government and the growth of federal preemption of state laws. The decade began with the continued creation and expansion of national programs, the funding of which was often shifted to the states, in part because of growing federal budget deficits. Of course, cost shifts alone are not necessarily bad, but these shifts were like abundant. That is, there was no simultaneous shifting of revenue sources to the state and local governments to pay for the programs resulting in the destruction of their ability to find adequate revenue to operate the programs, let alone to improve or create new ones.

State and local governments responded by demanding that these cost shifts cease and as a result Congress passed the Uniform Unfunded Mandates Reform Act of 1995, which requires among other things that a Congressional budget office analysis be completed for any federal legislation that had a significant federal impact which is set at the level of \$1,500 or more on the states. By the way, the states have begun to follow Congress' lead by passing similar types of laws that make it more difficult for them, namely states, to pass on unfunded state mandates to local governments. Since the passage of the Reform Act of 1995, the number of unfunded mandates seems to be fewer and I have to assume (or hope) that this trend will continue unless some national event were to come along and reverse things such as another spiraling upwards of the federal deficit. I expect that to be the case.

The 1990s also saw the federal governments continued interference with the ability of states to set their own priorities through the increased incidence of federal preemption of state authority. This is an even more dangerous turn of events for the states than is the increase in unfunded mandates because preemption removes the authority of the states to control their own destiny and once it occurs it is unlikely ever to be reversed. Now some of these changes in the law are warranted and governors supported them. Examples are the North American Free Trade Agreement and GATT, which precluded or preempted state laws from regulating international trade. The Kennedy-(muffled) legislation on Health Insurance Affordability and Accountability Act is another example of federal preemption that was supported by the nations governors—but many instances of federal preemption enacted during this decade were questionable efforts to intrude in areas that historically been addressed by the individual states.

For instance, states recently lost their long-standing authority to regulate in state securities activities through the passage of the Securities Litigation Uniform Standards Act of 1998 and further national securities legislation is being considered that will further weaken the states enforcement authority to protect their consumers. The Internet Tax Freedom Act of 1998 imposed a three-year moratorium on internet access taxes and extension of the moratorium is being considered—and I can tell you from very personal experience that states are having no luck finding new sources of tax revenue that are acceptable to the public and moratorium measures like this one will have a significant effect, especially on those states that rely upon sales tax revenue. The Telecommunications Act of 1996 stripped state and local regulators of their traditional authority over local telephone service and transferred that power to the FCC, and as a result state public utilities commissions no longer may exercise their traditional authority to insure

affordability of services to their citizens or to impose certain charges on public rights-of-way or to apply zoning restrictions on communications antenna, towers and satellite dishes.

In some areas the federal government has proposed measures that would impose more lenient standards than what state laws would allow if a state law is preempted. This was the case with a composed bill to prevent the practice of slamming in the telecommunications industry and national proposals for managed care and a Patient's Bill of Rights have actually watered down some states' laws that had been on the books for some period of time.

So needless to say, state and local governments are increasingly concerned because they see a growing eradication of their ability to raise revenue, promote economic development within their borders and to protect their citizens. Governors have encouraged Congress literally across the board, whether Democrat or Republican, to address the preemption problem by adopting legislation that would require explicit statements and committee reports and by creating a rule of statutory construction that preemption would apply only if explicitly directed and the rule or law or if there was no direct conflict with federal and state law and ambiguities would be resolved in favor of the states. It's obvious why U.S. businesses competing with international competitors prefer uniform national legislation over 50 different sets of rules for doing business in individual states—but does the Constitution's hotly debated and carefully crafted balance of power permit such intrusion by the federal government into virtually all of these areas?

My answer to that question is I doubt it. And I believe that the United States Supreme Court agrees with me. From my point of view, three recent decisions by the court in the last days of the 1998 term provide the most encouraging turn of events in the ongoing states rights battle. These decisions may have the effect of reversing the trends toward increased federal power over the states. The three cases decided in 1999 all dealt with the narrow question of whether Congress could authorize suit against a state under the Interstate Commerce Clause in Section 5 of the 14th Amendment. But if you examine the opinions in these cases, you will soon realize that the court's discussion of the nature and source of governmental power in America goes much further than the facts presented and has the potential to impact the entire debate over states rights.

The three cases are *Alden v. Maine* and two cases involving the Florida pre-paid post-secondary education expense vote. In all of those case I believe you'll find that the message from the high court seems to be pretty clear. Although the states gave up a portion of their sovereignty to the federal government when they ratified the Constitution, it was not as great a portion as the federal government (including the federal courts) have been assuming all along. So what exactly is the scope of Congress' authority to subject the states to national legislation under the 14th Amendment? The courts will have to answer that question in future decisions, so we will have to stay tuned.

What is the prognosis in my view for this judicial realignment of the federal-state balance of power? My own guess is that it would look rather promising from the state's standpoint were it not for the fact that these three groundbreaking decisions in 1999 were handed down by 5-4 votes—not exactly an overwhelming victory for the states—and that fact, coupled with the spirited dissents of Justices Suttor, Buyer, Ginsberg and Stephens and the likelihood that the court's composition will change significantly over the next few years, make it pretty difficult to predict future records by the court on the Federalism question.

Keep in mind that while the court's decisions in the cases I've mentioned can be read as having broad general application, the facts of the cases concern the more narrow question of whether Congress would encroach upon the state's 11th Amendment immu-

nity from suit. One would think that the 10th Amendment which reserves to the states those powers not delegated to the federal government would be a more obvious source of relief for those who argue for stronger states rights. But while it is true that there were a couple of 10th Amendment cases that came down from the Supreme Court during the 1990s that bode well for the states, the 10th Amendment challenges have not provided as much encouragement from the court as have the 11th Amendment cases.

In 1992, the court did strike down Congress' intent to regulate states through provisions of the Low Level Radioactive Waste Amendments of 1985 in a 10th Amendment challenge, *New York v. United States*. And in 1997, it concluded that a portion of the Brady Handgun Violence Prevention Act violated the 10th Amendment in *Prince v. United States*, which was a case brought by a local sheriff in my home state of Montana. Of course, as these 10th Amendment decisions suggest, Congress may properly continue to regulate state conduct by using its spending power to condition the receipt of federal funds or by giving states a choice whether or not to follow Congress' instructions even though one of the choices may result in federal preemption of a state law.

So in conclusion, where are we presently? I believe that you've seen a pronounced demonstration of state and local officials making their intentions known to Congress that in fact they want to see the rightful balance between the states and our national government properly preserved.

I believe that until recently the states have failed to live up to the responsibilities under our constitutional system. States are constitutional partners in our republican form of government. The framers of the Constitution never intended a master-servant relationship between the national government and the individual states. But state leaders over the course of time, in my view, must bear substantial responsibility along with societal trends for losing the ability and the opportunity to fulfill our role in the federal system. When the states did not respond to economic, environmental and human equality concerns, citizens looked to the national government to lead the way.

Today, however, I believe that the states are fulfilling their responsibilities. They're smaller. They're more flexible units and they're outperforming the more centralized bureaucratic tended force in the national government. This is a process that never remains static as I've previously mentioned—this ebb and flow of this balance of power between the national government and the individual states.

My concluding observation would be that we are always best with the most government that serves people at the lowest level possible because it allows for a more personal relationship to exist between a government and the people that own it—and that is a consequence we ought to be looking every point in time for. A dilution of authority constantly residing in the hands of those who serve at the local level allows for them to tailor unique and individual resolutions to difficulties that present themselves at that level and allows for our government to be more sensitive to the needs of the people it serves—and ultimately allows those people to have more confidence in the government that they have.

Thank you.

Professor Tidmarsh

Thank you Governor Racicot.

Our next speaker is a good friend of Notre Dame and of Notre Dame Law School. The Honorable Robert Miller is a United States District judge for the Northern District of Indiana. His chambers are downtown here in South Bend. Judge Miller is a graduate of Northwestern University and although not a graduate of this law school, another fine law school—the University of Indiana's Law School. He began his career as a law clerk to Judge Robert Grant for whom the federal courthouse is now named in South Bend,

and then became a judge of the Superior Court in St. Joseph County. The son himself of a distinguished judge here in Indiana, he was then appointed to the federal bench by President Ronald Reagan in 1986.

My own connections to Judge Miller go back a number of years. He and I happened to co-author a report together on the state of affairs in the Northern District of Indiana's court system. If you ever have the opportunity to co-author something with Judge Miller, I would strongly recommend it because he will do all the work and you will get half the credit. Judge Miller...

Judge Miller

A lot of people—and probably a lot of governors—would wonder what a federal judge is doing talking about states' rights. Down through the years there have been many things said about federal judges and the role of the federal judiciary on the matter of Federalism. I want to expand a little bit on what I have been doing in the past several years professionally as well as being a judge to let you understand how I come to this issue.

First of all, having been a state judge for 10 years, you can't leave that behind even when you go across the street to another building and have a different paycheck. But beyond that, for the last two years I've had the privilege of serving on the Judicial Conference of the United States which is the policy-making body for the federal courts and speaks for the federal courts on issues such as legislation. We don't speak on all legislation obviously—and I am not here speaking for the Judicial Conference today—but one of the things the Judicial Conference looks at is the impact of federal legislation for post-federal legislation on either roles between federal and state courts. And for six years before serving on the Judicial Conference, I served on the Judicial Conferences Committee on Federal-State Relations. And it was one of our tasks to look at any legislation being proposed to Congress that might impact on the relationship between the federal and state courts—and that has given me an unusual perspective that I want to share with you which is looking at this whole thing from the standpoint of the judiciary.

And from that perspective, I am a little less optimistic of the trends over the last 10 years than is Governor Racicot from his perspective. The trend of at least the last decade or two has been that of bringing federal law—federal legislation—to bear on problems that would a half-century ago never have been imagined to be within the realm of the federal government.

I am not standing before you to tell you that that trend is good or bad. I think it's probably both. There's a lot about it that's good. If you were working from a blank slate, I would say, even more than that is good, but given what I do for a living I think it threatens the institution of which I am a part and suggests that significant change may be required to accommodate it.

There are a total of about 750 federal district and appellate judges all told, who do roughly 5 to 6 percent of all the judging work in this country. So without meaning to suggest that what I do is unimportant, we are a statistical drop in the bucket. We need more judgeships at the federal level, but for many reasons I don't think we can count on adding federal judgeships. I think that causes as many problems as it solves when you reach a certain level. And until this year the trend of federalizing the law has pushed cases into the federal courtrooms—cases that otherwise would be heard in state courts.

In the last twenty-five years Congress has enacted 650 statutes that give federal courts jurisdiction over various claims. If you reduce that to ten years—the last ten years—it's been 431 out of those 650 statutes, which doesn't sound to me as though the trend has reversed. Again, I'm not here to say those cases shouldn't be in federal court-

rooms. Some of them probably should be—maybe a few, maybe all—depending on how you look at it.

On the criminal side, there are drug cases, gun cases, and there are car-jacking cases. On the civil side, there are any number of the sorts of cases that come to my head. The best example to me is the ERISA case—a case brought under the Employee Retirement Income Security Act. Imagine, if you will, a Wal-Mart employee who thinks that his health insurance should have covered his root canal. He goes over to the county court in the county of his residence and files a small claims case representing himself to cover the \$700 or \$800 his root canal was. State law on that issue has been preempted. It is governed entirely by federal law and he can remove that case to my court where he will run up against discovery and due process—but that's the way he can do it.

The caseload in the federal court system has expanded dramatically in the last several years. And at least in part—and I don't find this entirely—but at least in part because of this Federalization of the law. If you look only at the years after 1990 (the area that I choose for two reasons: one, that's the period that I've been watching from the Judicial Conference standpoint and also because we haven't had any new federal judgeships created in those years), but if you look only at the years after 1990, criminal cases are up twenty-five percent and civil cases are up twenty-two percent. I am sure of those numbers. But I could not find (because I was in court most of today) to verify the number that I think I remember, that in the 1990s appellate cases [went] up sixty-five percent, which may well be correct given the increase in the appeal of sentences under the federal sentencing guidelines that really only hit their stride in the 1990s.

When I first got into this I was a little pessimistic about how it could ever change because I think that we as a people do not think in terms of Federalism anymore. It's simply not an important issue to most people. Moreover, I think that in this information age, most of us—and not people who think this is important enough to attend a seminar session such as this on a pretty Friday afternoon—but for most of us news comes (if it comes at all) at a national level through Dan Rather, through Katie Couric, through CNN. In all too many instances, from Jay Leno, from Bill Mahr, from Rush Limbaugh, those are sources of news that people get and a smattering of local news sources have added to that to the point that we know the names of their mothers, we know the names of our senators, our members of Congress—but I'm afraid that far too many of us can't identify our state legislators, or our state senators, or members of our city or county council. So when we become concerned about a matter on which government might help, for example our schools, most of us (I believe) now write our [U.S.] Congressman or one of our [U.S.] Senators rather than our state representatives—whose names are unknown to us—to insist that something be done about it.

In an age when every vote counts a little more because fewer and fewer of us vote, it's hard to imagine any member of Congress writing back to a concerned citizen with the advice to complain to the state legislature or the county council. And I don't say that in criticism of any elected officials or to my perceive presumes that our representatives will be responsive to our concerns and the system carries its own institutional pressure to respond to citizen concerns the best way we can. And so I don't see any strong likelihood in the future of the citizenry demanding a different approach to this legislation, this Federalization of law.

Congress is responding, however, to concerns about the Federalization, and this year I think shows two very interesting developments that bring another dimension to the issue—the recognition that the calendars can't keep simply feeding cases into the federal courtrooms.

But there are also ominous developments from a Federalism standpoint. The first-phase dimension is that there are more people involved in what amounts to Federaliza-

tion. Governor Racicot mentioned one of these trends, but if there was ever a time [when] we talked about who was interested in federalizing—bringing a national solution for a problem—if there was ever a time that we might think about the Civil Rights groups, environmental groups, organized labor, consumer advocacy groups—that time has passed. Businesses have learned (as costly as it may be to lobby) that it is more effective to lobby the national legislature [than] lobbying fifty state legislatures to get laws passed. So when we talk about tort reform [or] product liability reform these days, we're talking about what's happening in Washington rather than, primarily, [what] is happening in states—although certainly there are some activities in those areas.

Again, I'm not here to say that it's wrong-headed. Maybe in today's economy we should have a national product liability law—I leave that to other people. My point is that more people are seeking federal solutions to problems today than they have in the past.

The second development is that efforts such as these no longer look simply to the substance of law. Sometimes it's just too hard to change the substance of law and sometimes it's easier to change the rules [at] a national level. So this past summer when Congress was gearing up for the possibility of Y2K legislation next year, it left state laws in place. State laws will govern those suits, but what it did was to make it much easier to bring those cases in federal court. It made it much easier to remove those cases to federal court if first filed in state court. In other words, instead of federalizing the substantive law they federalized the forum. And I understand that business interests, the Chamber of Commerce lobby, seeks similar changes for all class action suits. That's what it was modeled after—that portion of the Y2K legislation.

In the meantime as Congress federalizes the substantive law, it more often than in the past recognizes that there are just so many Federal courtrooms into which these cases can be squeezed, so they structure the law in such a way that most cases will be sent to state courts (such as using high amount and controversy requirements) when they create federal rights. And as I understand it, that is the approach taken by the Patient's Right Bill that is likeliest to pass.

So what we are heading toward is a situation in which cases brought under state law are increasingly likely to be in federal court—where no state appellate court will ever decide whether the law is applied properly. And from a state's standpoint, of course, that means that Indiana's voters in might will never get a chance to decide whether I decided Indiana law correctly.

At the same time cases brought under brought under federal law are increasingly likely to wind up in state court—meaning that rights granted to us individually by federal statutes might be understood differently in Indiana than in Michigan or in Illinois.

I see that as a problem. I would like to stand here then and propose a solution. I have none to purpose. But I think it is a significant side effect of the Federalization of the law and one that is rarely noted but which I think needs some attention.

Professor Tidmarsh

Thank you Judge Miller.

Our last speaker is Dr. Michael Greve. Dr. Greve is the Co-Founder and the Executive Director of the Center For Individual Rights which has been involved in numerous important pieces of litigation in the federal, I believe largely, court system on matters such as affirmative action and 1st Amendment rights. Before becoming the Executive Director of the Center for Individual Rights, Dr. Greve served as a Resident Scholar at the Washington Legal Foundation and as a Program Officer at the Smith Richardson Foundation. Dr. Greve is a noted expert in fields such as environmental law, administra-

tive and constitutional law and civil rights law and he has published and lectured widely in all of those areas. Dr. Greve received his Ph.D. in Government from Cornell University. Dr. Greve...

Dr. Greve

Thank you.

Having received the great honor of being invited to this event, I'll return the favor promptly by ignoring the subject. I don't like the phrase "states' rights" not only because of its ugly connotations but also as will become clear for more substantive reasons.

The question I want to address is, does Federalism—real Federalism—have a future? And the answer to that I think is: hopefully, but that if so, Federalism will have to be restored for the most part without and often against the states. I'll use my twenty minutes to explain that somewhat common intuition. I'll be very politico, (a) because contentiousness is my middle name, and (b) because I want to be clear about a point that I think is often missed or misunderstood.

"Federalism" has occurred as a notion of divided sovereignty—dual sovereignty over the same jurisdiction, over the same citizens—and when you encounter a perplexing constrict like that you have to ask yourself why do we have that? You may want to go back to James Madison's remark about the fundamental problem of government: you have to first enable the government to control the governed and then you have to enable or oblige government to control itself. And for the purposes of controlling the government one sovereign is quite enough, thank you very much.

So the only reason for having two sovereigns is to oblige the government to control itself. Government to the founders was a monopoly problem and you solve it or you address it by dividing sovereignty and forcing the pieces—the states in this instance—to compete for their citizens' affections, for their citizens' business, for their citizens' assets. You treat your citizens poorly, they will run away. They will bolt with their feet.

Federalism has been so immersed that real competitive Federalism hangs on the "enumerated powers"—the notion that Congress has only very limited powers, specified powers—because if that weren't so, Congress could simply trump the competition with one central rule. So enumerated powers is the linchpin of Federalism, its heart and soul.

What's the state's position on enumerate powers? Well, they have two default positions, and both cut against Federalism—real Federalism—as I just outlined, and I'll give you an example of this. The case [my] organization currently handles has been docketed or [argued] this year, it's called *United States v. Morrison*. It's an Enumerated Powers case. It concerns the constitutionality of a federal tort provision for the victims of animus based violence, that is violence based in part on an animus that is in turn based on gender. Federal remedy—we think neither Section 5 of the 14th Amendment nor the Commerce Clause authorized Congress to enact that provision. We persuaded the Fourth Circuit Court of Appeals that [this] is the right position. Now we need five more votes for that position.

The reason why I'm mentioning this is to ask where you think the states are [with this issue]—just because I know that case. Why thirty-one states [through] their Attorney's General have argued and have taken the side of the federal government which defends the constitutionality of this enactment—[why] they've taken the position *against* enumerated powers. Why did they?

Well, the first reason is money. The Violence Against Women Act contained \$1.8 billion in payments to, among other things, state entities for sexual awareness training, curing misogyny in state courts, and on and on and on. It's not directly tied to the civil remedies provision, but the notion that underlies the civil remedies—the tort provision—is that the state courts are hopelessly sexist—that's why women have to go to

federal court to get justice—and the money is supposed to cure that sexism while they're litigating in federal courts—[and] that is how it hangs together. This points to the first "states default position" on Enumerated Powers cases, which is: send us the money and [we will go] along.

A much more dramatic example of that is welfare reform. [As] you all know, welfare comes in block grants and that's [a] curious allocation of responsibility. The administration of welfare is now largely a state responsibility. We federalized that business, [but] what we haven't federalized is the revenue side. It's still the federal government that raises the money and that's a curious allocation, this division of power from the revenue. And if welfare as the Welfare Bill says is "state responsibility," why don't the states raise the money? What would happen if that were proposed? Well, you don't have to guess. They would be dead set against it and they were dead set against it when it was proposed under the Reagan administration. Most states under the bill proposed then would have been better off if they had raised their own money because the federal government offered instead (or in return) to assume [the] entire responsibility for Medicaid—but [the states] still didn't want it. Why not?

Well, the first reason is [that] only one leg of the financial transaction here is visible. [I]f you all see what everyone sees—what every government sees—is the money that comes from Washington to the states. What you don't see—what you never see—is that, well, first somebody had to be taxed to send all that money to Washington where there he spends the night on the town. And the second reason is if you force the states or let the states raise their own revenue, why they would have to start their own balance between transfer payments on the one hand and the costs of those transfer payments to a productive economy on the other, [which] they would have to do under conditions of competition with other states—and that kind of competitive environment is the last thing that states want.

[This position] points to the second "states default position" on Federalism which is, when in doubt, nationalize. What do you think would happen if the Violence Against Women Act of the Civil Tort Provision is struck down? Why the activists will show up on the steps of state [legislatures] and governor's mansions and chain themselves to doorknobs, [demanding] the Violence Against Women Act in the state. And [the states] don't really want that because [they] would have to tell them, "no, this is not a very good idea." And you get back to the same point: [state officials want to] put an end to the ordinary run of events—to take responsibility for the trade-offs and send the trade-offs to Washington and [their] constituencies with them.

There are (to that general position) two provisos. One is that the states themselves what to be exempt from the coverage of those laws. If you want an example, [take] the Americans with Disabilities Act: okay, [there] is clear federal preemption, but then the states turn around any say, "no, wait a minute. You can't sue us under that Act for damages because of 11th Amendment immunities." They say the same thing about the ADEA, the Fair Labor of Standards Act, the Family Medical Leave Act, and on and on and on.

So, first the states are for having those laws because, once again, otherwise you have to strike these bargains and think about these laws and reconcile the constituencies at the state level—but then at the back end they say, "No, wait a minute. Exempt us even as you regulate private parties." And the second proviso to "when in doubt nationalize" is: "let there be no preemption."

Governor Racicot talked about the McIntosh-Thompson Bill, [which] is the Bill to prevent implied preemption—that Bill was literally written by the Governors' Association. And the reason why the states want this is that [preemption] is not an issue when

federal standards are more stringent than state standards—the federal standards rule and that's the end of the matter. It becomes an issue only when the federal standards are *less* stringent than what some states might want. So what the states want is to be left free to tinker with status experiments—they do want to be laboratories of democracy, but not under conditions of competition, only under a cartel. They want to have a high federal standard—and then they want to pile on additional regulations, which they couldn't do if the [federal government] hadn't prevented anyone from running less interventionist experiments.

To summarize that very briefly, the basic default positions are: [to] have the [federal government] collect the money and then send it back to the states with no strings attached, resulting in a higher level of collective expenditures than actually anybody wants; and second, [to] have boundless federal regulations that then [exempt] the states with the somewhat paradoxical result that states—to whom or against whom the Fourteenth Amendment actually [addresses]—are free to discriminate, [but] private actors who actually can't be reached under the Fourteenth Amendment, are still subject to those rules. And then, have not federal-state competition but collusion with the federal government, where one round of regulation then serves as the floor for the next round of even more extregent regulation with no stopping point. That in a nutshell is what "states' rights" Federalism is all about and that is why I'm against it.

The default position—the state default position—mind you, doesn't govern all the time. It doesn't govern all states all of the time or even all issues all of the time, but it prevails often enough to constitute sort of a general trend. My point here is not, not that the states are evil parties and their governors are evil. They simply behave rationally. They behave like every competitor in economic markets. Competitors in economic markets also don't want competition. They, too, want cartels.

The Federalism [that] states want is what is in antitrust law known as a "horizontal vertical conspiracy". And in contrast to private firms, the states actually have the means of pulling that off. First, because there are no new market entrants that could derail these cozy arrangements, and second, because the legislature which in the normal market could prohibit these arrangement (that is, the Congress) is a co-conspirator in the Federalism deals.

There's only one institution that doesn't fall under that description, and this is the Supreme Court. If you want to preserve the structural constraints of the Constitution—most notably Federalism—the courts are it. There's just no two ways about that. And I do think the Supreme Court is slowly working up to the fact—or waking up to the fact—that it's the only institution that can restore Federalism.

I also think it's possible to piece together a political coalition that would allow the court to set about that daunting task despite all the obstacles. That's a very difficult and complicated argument, so difficult and complicated that I've written an entire book about it with which you can curl up in the library. That will be good for another day.

I'll just leave you with this. The history of states' rights is this: states' rights have always—always—been involved in defense of parochial collectivist, extortionist teams. Jim Crow is only the most famous and notorious example. States' rights have never been invoked in defense of a government of limited powers. [Although] the biggest nationalizing episode in our history was the New Deal in this century, [t]here was no states' right opposition to the New Deal by the country. [This] illustrates basic principals of political economy that are unlikely to change, I think. So if we manage to solve the difficult problem of restoring real, competitive Federalism, the states most likely won't be the solution—much more likely, they'll be part of the problem.

Thank you.

Professor Tidmarsh

Thank you Dr. Greve, I think you've given everyone in the symposium some things to think about and some things to [which] to respond. Governor Racicot, would you like to take a few minutes to talk about any of the comments that you heard?

Governor Racicot

Well, I'm not altogether certain what Dr. Greve said the final verdict is.

I think he and I are basically sharing that same hope—[the] fact that Federalism is clearly capable of having a future—but I'm not altogether certain that we share the same optimism about the possibilities or which entities within [or] outside of government will drive that Federalism to be a living, breathing, and viable force within our republican form of government.

I think that, quite frankly, your practical understanding, Doctor, of how states run—at least the state that I'm a part of—is significantly misinformed. You have misapprehended how we precede with the dispatch [of] our business in the State of Montana. We're inviting competition to every forum and time. I find the inclusion of opportunities to privatize and compete with private industry to determine whether or not we can be more capable in comparison to other states. So in the State of Montana—and I believe this is quite frankly true in other states as well—we are inclined to compete one with the other and not looking for the cartel, market lead, or collusion to have an advantage as a result of our status.

When you suggest that governments were not designed to compete—or that they were designed to compete I think is the argument that you said—I would suggest that, in fact, they do compete in terms of trying to put forward appropriate policy designed to address the vast interest of their individual constituents. I don't think there's any doubt that (as I mentioned in my prepared remarks) that state leaders failed over the course of three, maybe even five, decades to properly exert the rightful role of states in our form of government in this nation. I think that's entirely true.

What I was suggesting to you and to others is that there is evidence that, in fact, this authority that often resides with the state[s] is manifesting itself on more frequent occasions than what we had seen in the past, and I believe that welfare reform was an initiative driven by the states. Clearly, you have a criticism that in the hypothetical may possess some persuasive power—in reality, however, I think it's substantially deluded.

If we could totally and completely unravel the tax system as it presently exists and pass the ability for states to raise the revenue to address the welfare reform issues, then quite honestly, your theory—your hypothesis—would be entirely correct. To wait for that to occur, however, I would suggest can't consume another five decades. We had that choice that when we were dealing with the issue of whether [we] were going to deal with the New Deal [welfare] system that we have in place [that has] substantially remained unchanged for a period of fifty years. And we could not accomplish both the unraveling of the tax system that presently exists and reform welfare at the same point in time.

So your recognition of the fact that there is—on one hand, a force coming from the states to reform, [and] on the other hand, an unwillingness for the state[s] to accept the revenue [because] the federal government is going to continue to raise those revenues is quite possibly a valid observation. But my observation would be: would you rather not have welfare reform if you can't accomplish at the same point in time tax reform? And my suggestion to you is that, in fact, you wouldn't want to proceed in that direction. It's better to proceed with some demonstration of Federalism and with some ability to res-

pond to the needs and exigencies of the time, namely through welfare reform, than it is simply to say that if you can't have everything, you're not going to take anything.

And the same is true with issues that surround other efforts to federalize the law. The fact of the matter is that there are some areas, as our lives grow more complex, that rightfully ought to require a national setting of priorities and national involvement in national standards.

I agree that state leaders have failed, however, to strongly object until up to recently. I think that we demonstrated over the course of the last five to six years that states *can* be innovative and capable. I believe that the Supreme Court of the United States, as you mentioned, is that bastion of authority that will protect our motion to Federalism, but I also believe that [Congress] and the states are beginning to recognize this balance of power as it ought to properly be construed.

There's a long way to go, however. We didn't get here overnight and this democracy, this republican form of government, takes some period of time to be steered in different directions. I have found that it's like steering the Queen Mary. You first of all have to slow it down so that when you turn it doesn't tip over, and then after you turn it you have to build enough steam behind it to move it in a different direction. And I think we've slowed the ship down. I think we've turned it around—and now, it's up to individual states and the United States Supreme Court to keep it moving in the right direction.

Judge Miller

Oh this topic I'm just going to scoot my chair back a little bit and turn to the left and watch the discussion.

Dr. Greve

I agree with Governor Racicot that welfare reform is a step in the right direction, no doubt about it. I would defend it—I have publicly defended it on precisely those grounds.

My point was simply this: when it was attempted to bring, to unravel the other part of the equation—the revenue side—the states were dead set against it. They were so dead set against it that, despite the fact that the Progressive Policy Institute still continues to advocate the swap that I outlined, despite the fact that Alice Rivland(?) (Bill Clinton's Budget Director for awhile) continues to advocate it, [the issue] is absolutely [moot] in Congress simply because the very same [state] governments who have been the strongest and most aggressive welfare proponents are dead set against it. So I don't think there's even willingness to go further precisely because of the ferocious competitive tax that any such system would have.

You look at other issues like the Internet tax, okay? It came up. There are actually three [methods] that you can think of arranging Internet taxation. One is the [method] we have currently, which is the moratorium that's been extended. That is to all intents and purposes a federal regulation. You can then [replace] that with letting the states raise those taxes, but that doesn't quite answer the question [of] what counts as the point of sale? What the governors always obviously want to do [is tax]—no matter where your corporation is headquartered, your sale [takes place], even if it takes place over the Internet, [the concern is whether it] will be taxed in our state, right? That way [the states] can capture all the revenue.

The competitive Federalism solution would be to say, "No. It will be taxed at the point of sale which is the corporation's headquarters." If that strikes you as crazy, that is how corporate chartering works. That in turn turns out to be a competitive Federalism solution and would exert a downward push on revenues which is exactly what I want,

which is exactly the Federalism solution I want and I would desire and the state wouldn't go for it.

I'll give you another example. There is nothing revenue related—to take one example outside the revenue context—there's nothing revenue related for the states at all in a minimum wage law of the federal Fair Labor Standards Act, okay? Two of the cases that the states won last term were about—or one of them, sorry—was about the Fair Labor Standards Act. And it turns out states cannot be sued anymore in federal court or even in state court [for] violating the Fair Labor Standards Act. [If] they decide for whatever reason to pay their employees below minimum wage, well, too bad, you can't sue for the only meaningful remedy which is your money.

Does therefore any state [or] any governor advocate that we ought to scrap the entire Fair Labor Standards Act or at least the minimum wage portions and kick the whole thing back to the states such that states that want to have a minimum wage law can have one and states that don't want to have one, well, they don't have one. No, that is not what they would advocate.

So, while I agree that the devolution that we have [had] over the past five, six, seven years has been a step in the right direction.

Professor Tidmarsh

At this point we have an opportunity for those of you in the audience who would like to ask questions of any or all the participants to do so. If you'd like to direct your question to a particular person, [please] address that person directly. Otherwise, if you'd like to have your question more generally answered by all the panelists, please just indicate that.

Question

Governor Racicot, what do you make of the accusation I guess that the states have been complacent in this expansion of federal power because they accept a whole lot of money from the federal government that's spent pursuant spending power in exchange for all of these strings that the federal government tends to attach to these spending programs? [Because] I think that's Dr. Greve's charge—that as long as the federal government is willing to give you money, the states seem to be willing to accept the regulatory strings that come with it. I'm thinking of the IDEA case. The Violence Against Women Act case is another good one. I'd be curious to know whether your Attorney General has supported the federal statute or not. But more generally, just to respond to that spending power-type part.

Governor Racicot

Well, I think that there's a legitimate critique that is involved in that particular issue because quite frankly, if I were in a situation receiving a half a billion dollars a year to address road issues in the state of Montana, I'm obviously in a position of determining and so is our legislation, which has been very conservative over the course of the last six years [regarding] whether [we're] going to accept those funds with those conditions. It's not something that they do with great joy, but when they calculate whether [they] can afford to maintain the largest number of miles of road per capita in the lower forty-eight states, it becomes very plain and evident that they can't without that federal assistance.

Now, I would say in Montana we tend to be a bit independent and as a consequence there may be some terms and conditions that they are willing to accept, that is our legislature and those of us in state government. There are others that were not willing to accept, and in fact, we forfeited federal funds as a result of that. And I guess in my ob-

jections to some of the good doctor's observations are that, quite frankly, the statements that he has made, appear to me to be over generalized and presumptuous on the part of categorizing all of the nation's governors in precisely the same light and for all points in time throughout the course of the history of the republic.

And the fact of the matter is, when we were talking in this country about changing the revenue system along with the welfare system that began during the Reagan years. That was prior to the time that we really saw any significant movement toward Federalism in this country brought about by the governors [in] 1994. We had, I think there [were] seventeen Republican governors and the remainder were Democratic governors. In 1994, that changed significantly and with that came an impulse which, quite frankly, has been approached from a bipartisan point of view to drive home the issue of states' rights.

But it's not perfect. There's no question about that. If we could vindicate to perfection each one of the theoretical ideas that have been espoused here this afternoon, [this] would be the ideal and the best way to proceed. But as a governor, you are faced with practical realities—and the realities are that you can either move Federalism in increments in a sequential fashion, or you can forfeit the ability to do that altogether.

And there are some criticisms from a hypothetical perspective that are legitimate and that's one of them. But the practical reality is still the same as I previously alleged, [which is that] we are making more significant progress than we have made over the course of the last 50 years. This is a changing dynamic. It is critically important to the future of the republic. State leaders have to be responsible and willing to stand up and vindicate states rights and if they don't we're going to see an illusion of a Federalism that just simply won't serve the country very well.

Dr. Greve

I want to express my support for what Governor Racicot just said and as well as my optimism. I'm very heartened by the example the Governor gave of, "No, in some instances we just didn't take the money." There are other examples of that tendency. My home state, the Commonwealth of Virginia, tried to give—or tried to not accept money—under the present Goals 2000 plans that didn't quite work because the legislature just hammered Governor Allen and that was the end of it. I mean, basically, they compelled him to take the money. But it was, of course, stirring. It was actually one federal program where very few states have accepted the money. It's a little program. It's \$15 million for chastity education, okay? So, when the issue becomes important enough—like teenage group sex—they can in fact—I mean, there are examples of states not taking money.

And I think the biggest one out there, the biggest—I apologize for my sarcastic remark, the really serious remark now—the biggest one out there is Title 1 Funding, okay, in education. Title 1 funds constitute approximately 7 percent of the average school district's budget. They then trigger a whole lot of spending obligations [and] regulatory obligations. It's very, very expensive to administer. If we found just one state in the country or even one school district in the country that says, "Thank you very much, keep the money"—that will be huge progress and there's a limited down side. The worst the [federal government] can do to you is send you more money.

Governor Racicot

Now, you know, an editorial comment. I believe what Dr. Greve [was] talking about is abstinence education money, not chastity money. And the use of nomenclature here, Doctor, is critically important. It's a little bit more understandable when you talk about it in terms of "abstinence" as opposed to "chastity".

In the State of Montana, the Goals 2000 money was refused by our state legislature, so we, too, have had some of those instances that have been presented. And frankly, I appreciate a champion like a Dr. Greve, as in this particular discussion—even though I think his theoretical understandings of state government need to be tempered by some practical experience—nonetheless, I am grateful that he is a champion for this particular issue, from his particular perspective.

Question

Governor, watching state government over some years, I get the impression that the main function they have perceived of themselves is to get capitalists to bring their capital or to keep them from taking their capital away. And the way they have conceived of doing that is by offering less favorable labor conditions and by offering taxes that are insufficient to maintain adequate public services. You have capital moving around in search of the least favorable condition for labor and the least effective of tax system, and I think a lot of what has been taken over by the federal government has been taken over because it is impossible for a state to enact a protective tariff that protects its industries against the disappearance of capital. I'm wondering how we can maintain a better system of state government without the tax that encompasses?

Governor Racicot

Well, if I could I agree with your premise I could address your question, but quite frankly, I don't have such a negative view of what states are inclined or competing to do. And the fact of the matter is we *do* compete for the opportunity to create economic vitality in our states, but *not* with a willingness to compromise virtually anything from our human capital to environmental landscape.

If it moves beyond those values that we hold sacred or threatens them, we're simply not going to move in that direction. We want to be competitive. For instance, in the State of Montana we have a form of taxation that none of our neighboring states have [which] taxes [manufacturing] equipment before there's even one dollar of profit, so I have sought to eliminate that form of taxation because we couldn't be competitive with our neighboring states. And if I want to lose schools, if I want to have a chance to have the people of Montana live and work in an environment they love in a state they love and take care of their families and earn a wage that's decent and do work that's worth doing, we have to be able to be competitive and we have to have economic vitality.

But we will not seek to attract it at any cost and as a matter of fact we don't provide incentives to companies that come to the State of Montana because we believe that we ought to pay attention to those that are already there and to try and grow those from inside rather than just simply relying upon some attractive tax package that would attract capital into the State of Montana. We have been criticized for that on occasion because we have a low amount of personal income on average in comparison with the rest of the United States of America. But we probably have a high degree of happiness in comparison to the rest of the United States of America. So I don't think that I would agree with your premise about what states do in that respect. I would, however, agree with what I think the point is that you're trying to make and you can correct me if I'm wrong.

There have been instances in our history where the federal government needed to intervene because states have failed to lead—and civil rights is one of those areas. I think states failed miserably to lead in the area of the vindication of the civil rights of the citizens of this country, and of course, the United States Supreme Court began that process with *Brown v. Board of Education*, I believe in about 1954, if I'm not mistaken. And that was followed thereafter by some fairly aggressive Congressional legis-

lation and then the states began to recognize their responsibilities. And I think that was a miserable failure on the part of the states.

So there have been instances in our history where there has been stimulus provided and it's been needed and necessary. And that's really the beauty of this constitutional system we share. It's flexible enough to adhere to principle while at the same point in time responding to the morass of our people as we become more sophisticated and grow more complex in our existence. So there have been instances where a national intervention I think has been appropriate.

Question

Governor Racicot, as there is [an] increase in globalization, and you have even individuals like Governor Bush pushing on their platforms as extending things like NAFTA, does [this] hamstring farmers in areas like Sydney and eastern Montana? [And if so], how then are states going to be able to reassert themselves on that type of federalist level in view of international trade?

Governor Racicot

Well, I think NAFTA is similar in terms to the nature of the national obligation to the coinage of currency. I mean, the fact of the matter is we have to have a national policy if we're going to participate within a planetary economy and there's no way that we can avoid participating in a planetary economy if we want to be successful. So even though you might have an initial instinct to want to protect—as Pat Buchanan typically does—you're going to be overrun with international dynamics that do not allow for you to simply put your head in the sand and say that you're going to continue to conduct business as you have in the past.

In Montana, for instance, we can't continue to just grow the same things and complain about price. That's not going to bring prosperity to the people of Montana. What we've got to do is pierce new markets—and to pierce new markets, we've got to be assured of a level playing field—and to be assured of a level playing field, we have to have the same conditions for baling in the United States of America that we expect to prevail in Asia. And that's why you have to, if you have a view toward the lower rung, look toward NAFTA in favorable terms because that's the only forum—the only regulatory system—that will allow for there to be the possibility for competition on a level playing field. And I believe that the people in the United States of America can compete with anyone, anywhere, but we can't just simply pass protective laws and expect that we're going to be protected. It's not going to happen, particularly with how we've converted to electronic commerce over the course of the last decade.

Dr. Greve

I just want to add a little to that and for once I won't be political because I have no very good answer for the question. The problem you raise will play itself out in the law sooner or later with increased intensity. You can see this in areas like endangered species and some other environmental issue where the presumption to date has been, "well, Congress can legislate absolutely anything and everything on the Congress floor, so good night." Even if some fly, the New Dehli sands fly, never crossed the county line (never mind a state line), Congress can still reach us under its commerce laws, okay?

Now, after *Lopez* and with *United States v. Morrison* on the horizon, that isn't [any] longer so clear. And I've seen a number of cases now where the United States government has defended particular actions under the Endangered Species Act under the Treaty Clause and has said, "No, no, no, never mind the Commerce Clause, we signed in the National Treaty to preserve species—any species—the ozone layer, what have you,

anything that's connected with anything and everything else, and so therefore we can reach this local fly," okay?

The big case that is out there to be tested is *Missouri v. Holland*, a 1928 case. And what is on the collision course here is the American government's increased involvement in international treaties [on] the one hand and the increased recognition of domestic constitutional limits to what our national government can do on the other. And that is one of the big, big trends that will play itself out in the federal law over the next decade and beyond.

Question

This question is directed to anyone that would like to address it, all three of you. The Death With Dignity Act went into effect in Oregon after a lot of fighting last year and it allows for assisted suicide and now there's talk in Congress to essentially make that act ineffective, and I just want to know from any of your perspectives what you think about Congress' latest movement in the current debate. Even within Oregon people who don't agree with the law what to see it upheld, or not see Congress strike it down, effectively strike it down, because of the Federalism concern.

Governor Racicot

I think that the Doctor and I would probably agree—I hope we would. The fact of the matter is if you're going to be a purist with Federalism issues, this should not be a topic before Congress unless it touches arguably and demonstratively some right of the people that endanger themselves in the pursuit of the Constitution, which I haven't seen defined as of yet.

Dr. Greve

I was tempted to bring up *Abzola* earlier. There is certain stringency in the fact that the Attorney General of Oregon sided with the federal government on the Violence Against Women Act is now making a big fuss about Congressional intervention in this Right To Die issue despite the fact that there, there is actually and interstate commerce predicate which is the sale of federally, or the use and prescription of federally regulated drugs, okay? That's the sort of hook that Congress has found. I happen to think it's an awful hook, but that's neither here nor there. There's more interstate commerce there than in domestic violence, right? The more general remark this leads to is that I think to the extent that, so Federalism will advance in future years in a constitutional jurisprudence, it's more likely to come in on social issues, you know, from abortion to homosexual rights, than an economic area. I think that's fairly safe to say. We may half end up with some sort arrangement where there's fairly robust Federalism on morale issues and nobody wants to touch *Wickerd v. Filburn* and that is still constitutional scripture and we're not going to touch the economics. I think that would be unstable, but that could happen, and it could last quite a while. It's one way to draw the line.

Governor Racicot

You know, and the reality is too, that the practicalities are that you have to play the game, if you want to vindicate principles sometimes the only game in town is the one that has to be played. For instance, if you feel strongly in opposition to the Oregon statute or the arrangement there to allow for assisted suicide, which I do, and you may disagree with where the forum is that's providing it, you none the less seek to vindicate a principle from a practical perspective that you believe ought to be vindicated and so from a hypothetical abstract you might say, well, this is not a federal issue, but from a

practical perspective, if you want to vindicate the principles that you think are important, you may seize the venue that's available. And sometimes you have to make that judgment. Are you going to play the game in the arena where it's being played, or are you going to forsake the opportunity to influence a fundamental principle that you think should be vindicated? Now I will choose, I can tell the con, vindicating the principle and that's partly what I think Dr. Greve is critiquing and from an abstract point of view he's precisely correct. From a practical point of view, determining dynamics that influence our daily lives, I think I'm correct.

Question

This question is for Judge Miller. This might be of theoretical nature and more on a personal level. You mentioned the worker at the local Wal-Mart and ERISA and when ERISA came into being it was heralded as this great piece of legislation for the common man, the worker. And what it has done is removed any hope of him getting change basically, because once it's in the federal court he has to be able to do discovery (can't understand) and they never come out with anything. When you sit on the bench on a case like that and you see how federal preemption affects a local issue, how do you respond to that? How do you react to that internally? What do you visualize as maybe an avenue for change or is it needed? Or is it something you just walk away from?

Judge Miller

With what I do for a living, trying to figure out how the law should be changed is not something I get into cause otherwise I'm afraid I start trying to shape it in that direction which I think is the legislatures job and not mine. I truly do see cases removed from small claims court. ERISA cases, and I know that means the plaintiff's going to have to go out and hire a lawyer. I marvel sometimes at how the defendant can justify the expense. I disagree with you to the extent that the plaintiff is going to lose. There are fee shifting provisions under ERISA. We have that in many cases in which the plaintiff has been found within right, that this was something that should have been covered. I'm talking about the medical cases.

But sometimes I do marvel that somehow this has turned into a federal case, I guess that's just about the only way to put it, where you've got people doing their 10 depositions and their 25 interrogatories, everything that the rules allow, when really we're trying to figure out whether their medical expense should have been covered. In a way then, this is experimental and it seems like there should be some other way of getting a consensus as to what's experimental than to put a record in front me, and of course, then I have to decide between the two standards of review which alone could be (muffled). How they wrote the plan. It seems like you wind up focusing on things that if we were starting over, we probably wouldn't make his outcome determinative as they are, such as how much discretion is even in the plan, that sort of thing.

Question

As federal judges do you have avenues where you can address those concerns to legislature?

Judge Miller

If it's done, it's done individually. What the federal judiciary tries to do is to take the position that the policy making is up to you. It's just, if you're going to do it, why don't you put in a statute of limitations? Why don't you tell us what kind of interplay there is with these other laws? This is what you would be creating with the Violence Against Women Act, for example. When that was coming down the pike we were trying to tell

them, look, if you do this it will 50,000 federal cases. If you do that it will be a smaller number. You make the choice. That's what people get elected for and we weren't elected. So I think as a branch of government we have tried to be very careful about not saying, but from a policy standpoint you really shouldn't do that. But we tried to do was to be sure they know you're going to transfer 100,000 cases from the state courts somewhere into the federal system. So they can ... but that's something they usually see.

Dr. Greve

To just add a little to this. There is one thing judges have ... I'm going to make two points. One is that I wholeheartedly share Judge Miller's sense that Congress is heaping ever new causes of action onto the federal courts, okay. I also think and I don't think Judge Miller or Governor Racicot will disagree with me that to a large extent this is the federal courts own doing, okay. Say what he will, believe what he will about sexual harassment law, nobody believes that anybody but the federal court created that crumpled cloth and that's 15,000 cases a year. That's not trivia, okay. Say what you will about the religion cases where Congress has played no role whatsoever, okay. There are hundreds of cases and they're complicated cases that go to the question precisely how close the manger has to be to the Virgin Mary at Christmas. That isn't something Congress (muffled) the legislature. Right in there, a lots of examples like that. What has happened, and this is one of the most salutary things for Federalism in the federal courts over the past years, is that the federal courts have become very, very, very reluctant to exercise jurisdiction, federal jurisdiction, that has arguably been conferred upon them. They require a very, very clear statement by Congress that, no, you must exercise that, and if they don't have that, okay, then they'd rather abstain. And it's hugely important for Federalism. It's sort of an undercurrent. It's not visible to the public at all, but it's usually ... it's very, very good for the state. It's very good for Federalism. It's very good for the federal courts because the normal idea of commandeering that the states have when they feel commandeered about by outside the Feds. Governor Racicot should speak to this, but my impression is from speaking to state officials is not the commandeering of a New York state ... when Congress challenged directly state officials what to do. It's private lawsuits under Section 1983 or under some federal entitlement statute and that, boom, then blanket the whole state, so it's a very hopeful judicial reaction, there has been a very hopeful sign I think.

Professor Tidmarsh

With that perhaps we should conclude the formal presentation. Perhaps our speakers might be willing to talk informally with some of you afterwards. On behalf of the Journal of Legislation and the other student organizations that have sponsored this forum,¹ I'd like to thank our three speakers, Governor Racicot, Judge Miller and Dr. Greve, for a wonderful, informative and thought-provoking symposium.

Thank you.

1. The Journal of Legislation is grateful to the Federalist Society of Notre Dame Law School and Student Government of the University of Notre Dame who co-sponsored the Symposium.