Judicial Cooperation in the US: Existing and Proposed Models[1]

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Several of the previous speakers here today and yesterday have spoken about the constitutional impediments to cooperation among courts in the United States. Others have spoken about particular efforts to realize uniformity among state laws, such as the efforts of the American Law Institute. I would like to build on some of these previous discussions and offer my vision of how American courts are currently cooperating and communicating.

The work of ALI, as well as the National Conference of Commissioners on Uniform State Laws, is of an undeniable importance in guiding the development of state laws. This cannot be overstated.

[1] Nicholas Bacarisse, a 2010 graduate of Columbia Law School and law clerk to Chief Justice Jefferson, contributed extensively to these remarks.

These works are aimed largely at uniformity—it's in their titles – the *Uniform* Law Commission; the "*American Law*" Institute. But these titles downplay the federal reality of our governmental structure. The states are sovereign to an important degree; state courts often disagree with each other, and with the federal courts, on the resolution of legal questions. In other words, uniformity isn't always what we are after. The constitutional impediments that have been discussed here have examined areas in which uniformity isn't possible, and I would also say that it isn't always desirable. Thus, I'd like to cast these works, and other cooperative tools, in a somewhat different light.

Differences in legal culture often reflect differences in norms across states. State constitutions and statutes differ from one another, and from the federal constitution, and these differences reflect variations

in those states' histories, problems, and politics. Each state confronts somewhat different challenges, and so each will develop somewhat different solutions. In Texas, for instance, where our legal traditions strongly favor property rights, our Constitution's text requires the prepayment of just compensation in many cases and narrowly defines "public use,"[2] both contrary to the U.S. Constitution.[3] Similarly, our Constitution, drafted amidst the corruption of the Gilded Age, included an explicit Separation of Powers Clause,[4] meant to protect against legislative abuses.[5]

Likewise, differences in how states select the members of their judiciaries may account for differences in state decisional law. In the United States, there is a

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[2] TEX CONST. art. I, § 17.

[3] *See Kelo v. City of New London*, 545 U.S. 469 (2005) (expansive reading of the phrase "public use"); *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1017 (1984) ("The Fifth Amendment does not require that compensation precede the taking.").

[4] TEX. CONST. art. I, § 13.

[5] *See* Harold H. Bruff, *Separation of Powers Under the Texas Constitution*, 68 TEX. L. REV. 1337 (1990) (describing the emergence and interpretation of the Separation of Powers Clause of the Texas Constitution).

large degree of variation in judicial selection methods, and these variations inevitably influence how judges are perceived to resolve cases. Courts frequently decide cases in a countermajoritarian fashion, and, often, this is a good thing — we expect judges to focus on the law, not the outcomes. However, in a state like Texas, where judges are chosen by voters through partisan elections, do the judges consider the political outcomes desired by the electorate alongside the legal arguments made by the parties? We hope not, but ignoring the political reality has consequences. Indeed, we saw this happen recently in Iowa, where judges face retention elections. In the 2010 election, every Justice of the Supreme Court of Iowa who was on the ballot and who had voted to strike down the state's gay marriage ban was defeated, and it seems clear that their losses were based not on their judicial abilities, but, rather, on the ultimate decision they reached.

In South Carolina and Virginia, judges are chosen by the legislature — subject to reelection by those same bodies. Being appointed in these states thus requires that a potential nominee, as well as a sitting judge, establish and maintain good relations with the legislature. Thus, judges in these states may be more reluctant to strike down statutes, and thus offend their electors, than they would be in a state where their power is derived from a different source.

Against this diverse backdrop, of course, we have a federal constitutional system that, as to most issues, prevents a top-down imposition of uniformity. Uniformity requires governments to act in concert, and this is difficult in our federal system, under which each state possesses its own sovereignty.

Thus, cooperation, in my experience, means, simply,

working together. It is the effort of courts from various jurisdictions to decide cases wisely, giving deference where it is due, and develop the law in a way that is coherent while nonetheless respectful of cross-jurisdictional differences.

The primary model of cooperation among state courts, then, is one that has been described as "dialectical,"[6] which involves logical argumentation. Because inter-jurisdictional cooperation is necessarily informal, it takes place through conversations, in the form of judicial opinions. The relationships are horizontal; no state court has supremacy over another, and only the Supreme Court of the United States has supremacy in federal law. A state court writes an opinion, attempting to solve problems and define the boundaries of its authority, and the others respond, offering different solutions or drawing slightly different

[6] *See* Robert M. Cover and T. Alexander Aleinkoff, *Dialectical*

lines.

In this dialectical system, the organizations and modes of cooperation operate as tools to further the dialogue. ALI and the Uniform Law Commission track developments in the various states, analyze those developments, and recommend a jurisprudential ideal.

Federal Courts may certify questions of unsettled state law to the highest courts of the states. This permits state courts, rather than federal ones, to decide those issues in the first instance, minimizing the number of federal cases that contradict or undermine the authority of state courts on the interpretation of local law. This practice, of course, was helped along by the publication of a Uniform Act, and it has been praised by the Supreme Court as having "help[ed] build

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Federalism: Habeas Corpus and the Court, 86 YALE L.J. 1035 (1977).

a cooperative judicial federalism."[7]

Preemption and abstention doctrines operate similarly. These doctrines prevent courts from encroaching on the authority or duplicating the efforts of other courts and keep courts out of whole areas of the law where they lack the authority to operate. A brief look at abstention doctrine, shows the federal-state dialog in process.

Abstention refers to a federal court's relinquishment of jurisdiction when necessary to avoid needless conflict with a state's administration of its own laws. For instance, under *Burford*[8] and *Thibodaux*[9] abstention, federal courts are permitted in diversity cases to abstain from deciding an issue where state courts have particular expertise in a complex area of state law.

[7] *Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207 (1960).
[8] *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).
[9] *La. Power & Light Co. v. Thibodaux*, 360 U.S. 25 (1959).

Thus, the authority of federal courts to operate in certain areas is contingent upon state court and legislative judgments about their own legal systems and expertise. Thus, as state legal systems change, so, too, would the boundaries of abstention doctrine.

Same with choice of law doctrines, which, confusing as they can sometimes be, are meant to achieve justice by applying the right body of substantive law to a case, not simply the law of the forum state. The United States Constitution defines the ultimate limits of choice of law provisions,[10] but within those limits, it is courts and legislatures that make the rules—rules which will determine the rights and responsibilities of actors in and from other jurisdictions. Courts, then, must attempt to operate fairly in this area, taking into account the rules and laws of other states, in

[10] *See, e.g.*, *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930) (holding that the U.S. Constitution prohibited Texas from applying its rule regarding the invalidation of contracts to a contract that was wholly unrelated to Texas except that the plaintiff was a Texas resident).

order to ensure that those other courts will reciprocate and respect their law. Cooperation, here, makes it more difficult for parties to forum shop or escape the legal authority of a state, and this cooperation has emerged as the result of inter-jurisdictional dialogue.

The United States Supreme Court, even when it decides cases solely under federal law, is itself a tool that brings about cooperation. Many state statutes are modeled after federal statutes, and so Supreme Court interpretations of statutes like Title VII of the Civil Rights Act or the Federal Arbitration Act often greatly influence state court interpretations of those laws' local counterparts. State courts, in such circumstances, are free to go a different direction, but they will always think hard before deciding to disagree with the Supreme Court.

But to my mind, perhaps the most important tool for judicial cooperation, and one which eases the utilization of all of these other tools, is the wide availability of statutory and decisional law across jurisdictions, especially via the Internet.

For much of American legal history, a state judge would have ready access to the law of his or her state, and perhaps also decisions from the Supreme Court of the United States and some other federal courts. Divining the law of other states, however, was elusive. For that, a judge turned to the American Law Reports or similar summaries and could not always count on their accuracy, or their descriptions of the reasoning. In an amusing passage from a federal court opinion in 1940, a district judge relied on a Mississippi Supreme Court opinion he found in the ALR, disclaiming that

> I do not have this case before me and of course do not know that it holds as the text states,

> but assuming it does, it is good authority on the question presented here.[11]

This is probably not the best way to run a judiciary. Now, however, when I research and write an opinion, it is as easy to find decisions from New York or California (or any other state) as it is to find Texas law. It is all equally — and easily — available.

Because of this, we can more easily track differences and similarities between legal systems, and we can know more readily whether we are adopting a rule that takes us out of sync with other states.

In a way, this promotes uniformity, or at least makes sure that jurisdictional differences are well-considered, because every choice not to follow the common path will be a knowing one. Moreover, I have noticed a general reluctance among judges to buck

[11] *Rowe v. Chesapeake Mineral Co.*, 61 F.Supp. 773, 775 (E.D. Ky. 1945).

national trends, at least where there is not a strong contrary tradition in that judge's state. This is similar to state courts' treatment of non-authoritative Supreme Court precedent: it will usually be followed, except where there is a particularly good reason to do otherwise.

When the Texas Supreme Court has decided to dissent from the 5th Circuit or from the majority trend among the states, we have therefore made an extra effort to show that our decision to dissent is intentional and, in some sense, "better" than the alternative. For example, Texas is one of only a few states that bars malpractice suits against estate-planning attorneys by estate beneficiaries. In a recent case on this issue, we acknowledged our minority status but explained that we believed that our rule would better "ensure that estate planners 'zealously represented' their

clients."[12] In another recent case, where we disagreed with a Fifth Circuit "*Erie* guess" as to the interpretation of a Texas statute, we thoroughly explained the reasoning of the federal court before demonstrating precisely how it had misstated Texas law.[13]

In cases like these, litigants themselves are vital as a tool for inter-court communication. Many litigants have cross-jurisdictional interests, whether they relate to products liability law or to civil rights or anything else, and so they will, at their best, act as messengers, bringing to the attention of the courts the areas where a court is out of sync, or where the rules of a different jurisdiction might make more sense. This is frequently done in briefing before the Supreme

[12] *Terk v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780, 783 (Tex. 2006) (quoting *Barcelo v. Elliott*, 923 S.W.2d 575, 578 (Tex. 1996)).

[13] *Sw. Bell Tel., L.P. v. Harris Cnty. Toll Rd. Auth.*, 282 S.W.3d 59, 61 (Tex. 2009) (citing *CenterPoint Energy Houston Elec. LLC v. Harris Cnty. Toll Rd. Auth.*, 436 F.3d 541, 549-50 (5th Cir. 2006)).

Court of Texas, and it is appreciated. Indeed, I would prefer that the parties not only cite the rules of jurisdictions, Uniform Acts, or Restatements, but would expound on why one path is better than another, especially in the unique context of our state.

The ease of informational flow in the modern era makes inter-jurisdictional dialogue of this sort much easier than it has ever been before, and for that reason I am tempted to say that, given the constraints imposed by our system, our efforts at cooperation have been largely successful, and they should only become more so. The frequent consideration by judges of the law from other jurisdictions can only have a positive impact on the development of our legal culture.