

Ninth Annual Judicial Symposium

FROM JURISDICTION TO JURISPRUDENCE: Emerging Issues in State and Federal Constitutional Law

Presented by

NATIONAL FOUNDATION
FOR JUDICIAL EXCELLENCE

July 19–20, 2013
Swissôtel Chicago
Chicago, Illinois



PROMOTING EXCELLENCE AFFIRMING JUSTICE

A strong, independent, responsive judiciary adhering to the rule of law is one of the hallmarks of a democratic society. Although every citizen has an interest in the maintenance of an effective judicial system, as an officer of the court, the lawyer's obligation in this regard is of paramount importance.

It was with this in mind that DRI created the National Foundation for Judicial Excellence (NFJE) on October 7, 2004. NFJE is an independent, 501(c)(3) charitable foundation that provides judges with educational programs and other tools to enhance the rule of law and administration of justice.

For eight years, the NFJE has successfully produced a first-rate symposium hosting nearly 400 appellate court judges from 44 states.

Judges' responses to the programs have been universally enthusiastic, and many have expressed appreciation for the high caliber and balanced nature of the program. Comments include:

- This was a fantastic program—intellectually stimulating and thorough.
- The speakers were excellent and the topics were timely. I anticipate next year's symposium.
- Thanks to everyone for a great program. I already look forward to next year's program.
- This is one of the best organized and informative seminars that I have ever attended. Keep up the good work.
- The program and the entire experience were excellent. I encourage the Foundation to continue this long into the future.
- The program was well planned and of high intellectual caliber.
- Bravo! Keep up the good tradition for which you have laid a sound foundation.
- Thank you for providing us with an opportunity to get together and compare notes with judges from other states.

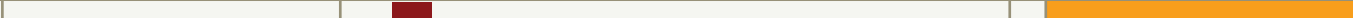


This Year's Symposium

Although ratified more than 200 years ago, the U.S. Constitution continues to touch the daily lives of millions of Americans. Disputes continually arise in the public and in state courts about the meaning and effect of many terms in both the U.S. Constitution and the various state constitutions. Scores of constitutional issues either remain undecided or continue to evolve despite the years since these constitutions were drafted and ratified. A lively debate continues even on the fundamental issue of what methods and tools courts should use to construe constitutional text. At the same time, appellate judges must decide conflicts in contemporary contexts the framers could not foresee.

The 2013 NFJE symposium focuses on these issues in ways intended to help judges sift through the complexity of constitutional adjudication. The symposium aims to provide judges with insight on both the broad principles of constitutional jurisprudence and the practical realities of modern constitutional adjudication. Issues to be addressed include the nuances of federal preemption law, free speech concerns faced by sitting judges, privacy concerns posed by ever-advancing technology, and the most basic question of them all: What techniques, methods, and rules should judges employ to construe the language of the Constitution?

Please join our nationally recognized panel of scholars, constitutional lawyers, and judges as we explore these issues of profound importance to the operation of our democracy.



FROM JURISDICTION TO JURISPRUDENCE: Emerging Issues in State and Federal Constitutional Law

Schedule of Events

Friday, July 19

4:00 – 5:30 p.m. Registration

5:00 – 6:00 p.m. *The Evolving Meaning of Free Speech for Sitting Judges and Practicing Lawyers*
How does the legal profession apply the First Amendment to itself? This presentation will focus on how the First Amendment protects the speech of judges and lawyers in different ways. It will also address the implications of current applications of the First Amendment to the bench and bar for the soul and identity of the profession.
Rodney A. Smolla, President, *Furman University, Greenville, South Carolina*

6:00 – 7:30 p.m. Welcome Reception

7:30 p.m. Dinner on your own

Saturday, July 20

7:30 – 8:15 a.m. Continental Breakfast

8:15 – 8:30 a.m. Welcome and Introductions
H. Mills Gallivan, NFJE President
Leslie C. Packer, 2013 Symposium Program Chair

8:30 – 10:00 a.m. *Making Sense of Federal Preemption*
Many believe that the Supreme Court's decisions on federal preemption of state law—especially in the product liability area—are difficult to reconcile. A renowned legal scholar will highlight recent preemption caselaw developments and share observations about how state appellate judges approach preemption. Litigators representing both the plaintiffs' and defendants' viewpoints then will focus on the Court's recent preemption decisions concerning brand name and generic drugs. The panel will also discuss the presumption against preemption, the scope of implied obstacle preemption, deference to federal agency positions on preemption, and more.
Catherine M. Sharkey, *New York University School of Law, New York, New York*
Timothy A. Thelen, *GlaxoSmithKline, Research Triangle Park, North Carolina*
Allison M. Zieve, *Public Citizen Litigation Group, Washington, District of Columbia*

10:00 – 10:15 a.m. Break

10:15 – 11:15 a.m. *Emerging Technology and Privacy Questions*
As new technologies evolve, courts invariably are asked to resolve the tension between acquiring more information and preserving our right to privacy. Recent trends in constitutional, statutory, and common

law in several contexts, including the First and Fourth Amendments, tracking devices, and the use of civil discovery to uncover anonymous internet users, will be discussed.

Mary Ellen Callahan, *Jenner & Block, Washington, District of Columbia*

Jane E. Kirtley, *University of Minnesota Law School, Minneapolis, Minnesota*

11:15 – 12:00 p.m.

Funding and Judicial Independence

Budget constraints have created a crisis of funding in state courts. This session will explore the current status of our nation's state judiciaries, the dangers to their independence as a result of budget cuts and salary freezes, and what state judiciaries can do to protect their independence despite the critical challenges facing them today.

Hon. Jean Hoefer Toal, Chief Justice, *South Carolina Supreme Court, Columbia, South Carolina*

12:00 – 1:15 p.m.

Luncheon

1:15 – 2:15 p.m.

Judicial Takings: After Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection (2010)

Stop the Beach appears to establish that state decisions that alter preexisting property rights can be challenged under the Takings Clause. Professor Epstein will argue that while the Supreme Court adopted the correct major premise, it failed to apply the Takings Clause correctly. He will provide a preferred analytical approach to aid state courts in future cases.

Richard A. Epstein, *New York University of Law, New York, New York*

2:15 – 2:30 p.m.

Break

2:30 – 3:30 p.m.

How to Read America's Constitutions—State and Federal

Similarities and differences emerge when we place the U.S. Constitution alongside the 50 state constitutions. This presentation will discuss various tools and techniques of constitutional interpretation, focusing on issues involving separation of powers, the Bill of Rights, election law, judicial independence, access to courts, unenumerated rights, and the federal electoral college.

Akhil Reed Amar, *Yale Law School, New Haven, Connecticut*

3:30 – 5:00 p.m.

Speaker Panel

All of our speakers will engage in a lively discussion of topics generated from the audience as well as among themselves.

Moderator: Brooks R. Magratten, *Pierce Atwood LLP, Providence, Rhode Island*

5:00 p.m.

Closing Remarks

H. Mills Gallivan, NFJE President

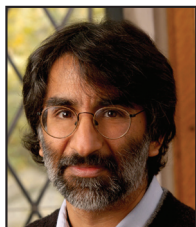
5:00 – 6:30 p.m.

Closing Reception

6:30 p.m.

Dinner on your own

Speakers



Akhil Reed Amar is the Sterling Professor of Law and Political Science at Yale, where he teaches Constitutional Law in both Yale College and Yale Law School. After graduating in 1984 from Yale Law School, he clerked on the First Circuit for Judge Stephen Breyer in 1984–85 and then joined the Yale faculty in 1985. In 1994 he received the Paul Bator Award from the Federalist Society; in 1998 his work on the Bill of Rights earned the ABA Certificate of Merit and the Yale University Press Governors Award; his next book earned the ABA Silver Gavel Award of 2006; and in 2008 he received the DeVane Medal—

Yale’s highest award for teaching excellence. Professor Amar is the author of several books, including his latest, *America’s Unwritten Constitution: The Precedents and Principles We Live By*, which was published by Basic Books in September 2012.



Mary Ellen Callahan is the chair of Jenner & Block’s Privacy and Information Governance Practice. Practicing from the firm’s Washington, D.C., office, she has unique and broad experience with interfacing the protection of privacy, civil rights, and civil liberties with cybersecurity and national security issues. A nationally recognized privacy attorney, she served as Chief Privacy Officer of the U.S. Department of Homeland Security from 2009 until August 2012 under Secretary Janet Napolitano. During her tenure at the Department of Homeland Security, Ms. Callahan also served as Chief Freedom of Information Act

(FOIA) Officer, responsible for centralizing both FOIA and Privacy Act operations to provide policy and programmatic oversight and support implementation across the department. She is a prolific writer and speaker on privacy issues and testified before Congressional committees numerous times in her capacity at DHS.



Richard A. Epstein is the Laurence A. Tisch Professor of Law at New York University School of Law. He is also the James Parker Hall Distinguished Service Professor of Law Emeritus and a senior lecturer at the University of Chicago. Professor Epstein received an LL.D., h.c. from the University of Ghent in 2003. He has been a member of the American Academy of Arts and Sciences since 1985 and has been a senior fellow of the Center for Clinical Medical Ethics at the University of Chicago Division of Biological Sciences since 1983. From 2001 to 2010 he was a director of the John M. Olin Program in Law and

Economics at the University of Chicago. Professor Epstein was a winner of the Bradley Prize in 2011.



H. Mills Gallivan is the senior shareholder of Gallivan White and Boyd, PA, in Greenville, South Carolina. He has over 37 years of experience as an advocate in cases involving personal injury, business, and commercial litigation. He is admitted to practice before all state and federal courts in South Carolina, the U.S. Court of Appeals for the Fourth Circuit, and the Supreme Court of the United States. In 2010 Mr. Gallivan was selected by the South Carolina Defense Trial Attorneys’ Association as the thirteenth recipient of the Robert W. Hemphill Award, in recognition of his lifetime commitment to the legal

profession and his community. He is a senior director of the FDCC, president of the National Foundation for Judicial Excellence, and president of the Upstate South Carolina American Inn of Court.



Professor **Jane E. Kirtley** is the Silha Professor of Media Ethics and Law at the School of Journalism and Mass Communication at the University of Minnesota, where she directs the Silha Center for the Study of Media Ethics and Law and is an affiliated faculty member of the law school. She teaches courses in Contemporary Problems in Freedom of Speech and Press, Mass Communication Law, Internet Law, and Comparative Media Law. She writes and speaks frequently on media law, freedom of information, and privacy in the United States and abroad. Professor Kirtley was the executive director of the Reporters Committee for Freedom of the Press from 1985–1999. Professor Kirtley received her J.D. degree from Vanderbilt University School of Law and her B.S.J and M.S.J. degrees from Northwestern University. She joined the University in 1999.



Brooks R. Magratten is the partner in charge of the Providence, Rhode Island, office of Pierce Atwood LLP. He has more than 25 years experience in insurance, product liability, and commercial litigation. He is the former director from DRI's Northeast Region. Mr. Magratten is an adjunct professor of Federal Practice at the Roger Williams Law School. He chaired the Federal Bench/Bar Committee of the Rhode Island Bar Association, is the president of the Federal Bar Association, Rhode Island Chapter, and is the past president of the Defense Counsel of Rhode Island. He is also an active member of the IADC, FDCC, and the Association of Life Insurance Counsel. Mr. Magratten is a fellow of the Rhode Island Bar Foundation and the former chair of the Health and Disability Insurance Committee of ABA-TIPS.



Leslie C. Packer practices in the areas of civil litigation, focusing on product liability, medical malpractice and commercial litigation. Ms. Packer has been licensed in North Carolina since 1986 and was a founding partner of Ellis & Winters LLP in 2000. Ms. Packer obtained her undergraduate degree from Brown University (A.B., *Magna Cum Laude*, 1982) and her J.D. from the University of North Carolina (with *High Honors*, 1986). Ms. Packer serves on the board of the National Foundation for Judicial Excellence. She was inducted as a fellow of the American College of Trial Lawyers in 2007 and has served on the North Carolina State Committee of the American College since 2008.



Catherine M. Sharkey is one of the nation's leading authorities on federal preemption. She is co-author with Richard Epstein of *Cases and Materials on Torts* (10th ed., 2012) and co-editor with Saul Levmore of *Foundations of Tort Law* (2nd ed., 2009). Ms. Sharkey is an advisor to the ALI Restatement of the Law Third Torts: Liability for Economic Harms. She was a 2011–12 Guggenheim fellow and an academic consultant to the Administrative Conference of the United States.



Rod Smolla is the eleventh president of Furman University, in Greenville, South Carolina, a national liberal arts university founded in 1826. He graduated from Yale College and Duke Law School, where he was first in his class. Mr. Smolla has been a constitutional professor and scholar, and twice a law school dean. He has participated as counsel or co-counsel in litigation matters in state and federal courts throughout the nation, having presented oral argument in numerous state and federal courts, including the Supreme Court of the United States. His book, *Free Speech in an Open Society* (Alfred A. Knopf, 1992) won the William O. Douglas Award as the year's best monograph on freedom of expression. Mr. Smolla is also the author of *Jerry Falwell v. Larry Flynt: The First Amendment on Trial* (St. Martin's Press, 1988) and *Deliberate Intent* (Crown Publishers, 1999).



Timothy A. Thelen is assistant general counsel of GlaxoSmithKline. He joined the company in 1995 and manages a diverse range of litigation, including product liability, commercial, government investigation, and antitrust matters. Before GSK, Mr. Thelen was with Womble Carlyle Sandridge & Rice. His undergraduate and law degrees are from the University of Notre Dame. He is a past chair of the Pharmaceutical and Device Subcommittee of the ABA's Products Liability Committee, and is a qualified mediator.



Chief Justice Jean Hoefler Toal began her service as an associate justice on the Supreme Court of South Carolina in 1988. After being installed as chief justice in 2000, she was re-elected again in 2004 and installed as chief justice for a 10-year term. She received her B.A. in philosophy in 1965 from Agnes Scott College and her J.D. in 1968 from the University of South Carolina School of Law. She is a member of the Order of the Coif, Mortar Board, and Phi Beta Kappa. Chief Justice Toal practiced law for 20 years prior to her election to the South Carolina Supreme Court, first as an associate with the Haynsworth Law Firm in Greenville, and then as an associate and partner with Belser, Baker, Barwick, Ravenel, Toal & Bender in Columbia. During her years on the supreme court, Chief Justice Toal has written opinions addressing a full range of issues, both criminal and civil.



Allison M. Zieve is director of Public Citizen Litigation Group and general counsel of Public Citizen. Her litigation practice includes administrative law, consumer law, federal preemption, and First Amendment issues. Among the preemption cases litigated by Ms. Zieve are *Riegel v. Medtronic, Inc.* (U.S. 2008) and *Warner-Lambert Co. v. Kent* (U.S. 2008). She serves as a public member of the Administrative Conference of the United States and as a board member of the Food and Drug Law Institute.



Swissôtel Chicago: It's Happening in Chicago

There is no place more captivating than Chicago in the summer. The weather is ideal, the city's beautiful lakefront is a flurry of activity and there is an abundance of cultural, sporting, entertainment, and dining offerings.

Located in the confluence of the Chicago River and Lake Michigan, The Swissôtel Chicago offers fabulous panoramic views of the city's lakefront. It is close to many Chicago attractions, including Navy Pier, Millennium Park and The Magnificent Mile.

Other nearby attractions include Willis Tower, the Art Institute of Chicago, the Theatre District, and the Museum Campus featuring the Field Museum of Natural History, the John G. Shedd Aquarium, and the Adler Planetarium.

Registration

To register:

Phone 312.698.6280

Fax 312.795.0748

Online www.nfje.net

Contact Information

First Name _____ Middle Initial _____ Last Name _____

Preferred Name _____ Title _____

Court _____

Street (Business) _____ Suite _____

City _____ State _____ Zip Code _____

Telephone (Business) _____ Fax _____ E-mail (required) _____

Will a spouse or guest be traveling with you? Yes No

If yes, please indicate his/her name.

Hotel and Travel Arrangements

This program has limited attendance. Registration is on a first-come, first-served basis. Once NFJE receives your completed registration form, you will be sent an e-mail confirmation with instructions about making your hotel and travel reservations. Please note: If you do not receive an email confirmation within 48 hours, you will need to contact the NFJE directly. Please be advised you will need to secure your hotel reservations on or before June 19, 2013.

NFJE will pay for the cost of a classic room for the nights of Friday, July 19 and Saturday, July 20, 2013, as well as transportation costs (air, rail, ground) costs not to exceed \$500. When making your travel arrangements, please plan to arrive by 3:00 p.m., Friday, July 19. *If you would like to extend your stay at the hotel, you are welcome to do so at your own expense.*

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323 East Wacker Drive
Chicago, IL 60601
Phone: 312.565.0565
Fax: 312.565.0540
www.swissotelchicago.com

Cancellations

If you must cancel your attendance, please do so at least three weeks prior to the event so a judge on the waiting list may attend. All cancellations must be received in writing via fax (312.252.0593) or email (tcaldwell@dri.org).

The Annual Judicial Symposium is a tuition-free program for state appellate court judges.

Transportation and hotel accommodations are provided at NFJE's expense.



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