

# Article

## Federal Regulation of State Court Procedures

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## I. INTRODUCTION

The bounds of federal authority over the way state courts conduct their business have remained undefined for over 200 years. In 1791, James Madison was asked whether a federal law operated to repeal certain state court rules of procedure.<sup>1</sup> His response was that “[t]his question probably involves several very nice points.”<sup>2</sup> If he meant constitutional points, the points remain “very nice” today. In 1999, a federal district court construing a federal law regulating state court procedures mused that “whether Congress actually does have the power to regulate state *procedural* law and state courts’ power to govern the progression of cases on their own dockets” is an “intriguing but perplexing issue.”<sup>3</sup>

In recent years issues of federalism have headlined the Supreme Court’s docket.<sup>4</sup> The issues have called upon the Court not to sand away rough edges, but to define basic spheres of state and federal authority. The expansion of the commerce power in the twentieth century and its exercise in the last decade have raised fundamental issues regarding the balance of power between the federal and state governments. One issue decided in the last decade was whether Congress has authority to “commandeer” state legislatures to enact or enforce federal law. In 1992, in *New York v. United*

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1. In particular, Madison was asked whether the Paris Peace Treaty of 1783, which removed any “legal impediment to the bona fide recovery of debts on either side,” operated to “repeal all acts of limitation, & such as regulate the modes of proving debts” in the states. Letter from James Madison to Edmund Pendleton (Jan. 2, 1791), *in* 13 THE PAPERS OF JAMES MADISON 342-43 (Charles F. Hobson et al. eds., 1981).

2. *Id.* at 343. Whether Madison meant merely points of interpretation of the law or also constitutional points is unclear. For purposes of introduction, I take liberal license to assume the latter.

3. *In re Transcript Int’l Sec. Litig.*, 57 F. Supp. 2d 836, 841 n.2 (D. Neb. 1999).

4. *See, e.g.*, *Reno v. Condon*, 120 S. Ct. 666 (2000) (holding that the Driver’s Privacy Protection Act did not violate the federalism principles of the Tenth Amendment); *Kimel v. Fla. Bd. of Regents*, 120 S. Ct. 631 (2000) (holding that the Age Discrimination in Employment Act was not a valid exercise of Congress’s authority under the Fourteenth Amendment to abrogate the states’ sovereign immunity); *Alden v. Maine*, 527 U.S. 706 (1999) (holding that Congress lacks the power to subject a nonconsenting state to a private suit for damages in the state’s own courts); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (holding that the Trademark Remedy Clarification Act did not validly abrogate the states’ sovereign immunity); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (holding that the Patent and Plant Variety Protection Remedy Classification Act did not validly abrogate the states’ sovereign immunity); *Printz v. United States*, 521 U.S. 898 (1997) (holding that Congress has no authority to compel state executives to enforce a federal regulatory program); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (holding that Congress has no power to abrogate the states’ Eleventh Amendment immunity pursuant to the Indian Commerce Clause); *New York v. United States*, 505 U.S. 144 (1992) (holding that Congress has no authority to compel state legislatures to enact a federal regulatory program). This list excludes examples of recent cases addressing federal preemption of state laws or federal habeas review of state convictions and sentences.

*States*,<sup>5</sup> the Court held 5-4 that Congress lacks such authority, striking down a federal law that required the states to provide for the disposal of radioactive waste generated within their borders.<sup>6</sup> Another issue the Court recently decided was whether Congress has authority to “commandeer” state executives to enforce federal law. In 1997, in *Printz v. United States*,<sup>7</sup> the Court held 5-4 that Congress lacks this authority, striking down a federal law that required local sheriffs to conduct background checks on prospective handgun purchasers.<sup>8</sup> *New York* and *Printz* resolved two of what have been described as the “oldest question[s] of constitutional law.”<sup>9</sup>

If Congress lacks authority to “commandeer” state *legislatures* and state *executives*, what authority does it have to “commandeer” state *judiciaries*? While the Court has been rebuffing Congress’s attempts to use state legislatures and executives to implement federal law, Congress has turned its attention to regulating the state courts. In recent years, Congress has considered several bills, and enacted a few of them, seeking to regulate interstate commerce by regulating the way state courts conduct litigation.<sup>10</sup> The Y2K Act of 1999 (Y2K Act),<sup>11</sup> for example, requires state courts to change the manner in which they adjudicate certain classes of claims, including claims arising under state law. The Universal Tobacco Settlement Act of 1997 would have forbidden state courts to consolidate certain classes of state law claims.<sup>12</sup> Federal laws regulating state court procedures stand at the next frontier of federalism. In hearings on the tobacco bill, Professor Laurence Tribe expressed the opinion that federal regulation of state court procedures raises “serious questions” under the Constitution.<sup>13</sup> Professor

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5. 505 U.S. 144 (1992).

6. *Id.* at 155-88.

7. 521 U.S. 898 (1997).

8. *Id.* at 904-35.

9. *New York*, 505 U.S. at 149; see also H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633 (1993) (analyzing these questions).

10. *E.g.*, Y2K Act of 1999, 15 U.S.C.A. §§ 6601-6617 (West Supp. 2000) (regulating pleading requirements, notice of claim, and burdens of proof in certain classes of state court litigation); Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (codified in scattered sections of 15 U.S.C.) (prohibiting certain actions from proceeding as class actions and authorizing federal courts to stay discovery in state courts in certain cases); Biomaterials Access Assurance Act of 1998, 21 U.S.C.A. §§ 1601-1606 (West 1999) (regulating motions to dismiss and for summary judgment in certain classes of state court litigation); Product Liability Reform Act of 1998, S. 2236, 105th Cong. (1998) (proposing to regulate the statutes of limitation and repose in certain classes of state court litigation); Universal Tobacco Settlement Act of 1997, S. 1415, 105th Cong. § 702(c) (1997) (proposing to regulate the consolidation of claims in certain classes of state court litigation). For a detailed discussion of these provisions, see Perry H. Apelbaum & Samara T. Ryder, *The Third Wave of Federal Tort Reform: Protecting the Public or Pushing the Constitutional Envelope?*, 8 CORNELL J.L. & PUB. POL’Y 591, 620-31 (1999).

11. 15 U.S.C.A. §§ 6601-6617.

12. Universal Tobacco Settlement Act of 1997 § 602(c).

13. *A Review of the Global Tobacco Settlement: Hearing Before the Senate Comm. on the Judiciary*, 105th Cong. 160 (1997) [hereinafter *Hearing*] (statement of Laurence H. Tribe) (“For Congress directly to regulate the procedures used by state courts in adjudicating state law tort

Tribe is not the only scholar to have questioned whether such regulations are constitutional.<sup>14</sup> I seek here an answer to the constitutional question.

In Part II, I describe what I call the new federal regulation of state courts: regulation of the procedures by which states enforce rights of action that they created. I contrast the new federal regulation with federal regulation of the procedures by which state courts enforce rights of action created by federal law. It is well-established that state courts must enforce federal rights of action if their jurisdiction is adequate and appropriate. State courts also must enforce federal procedural rules that are part and parcel of an adjudicated federal claim. Federal regulation of the procedures by which state courts enforce not federal but state rights of action raises distinct constitutional problems.

In Part III, I address the constitutional problems raised by the new federal regulation of state courts. Congress has considered and enacted the new regulation pursuant to its power to regulate interstate commerce. I first address whether a regulation of court procedures qualifies as a regulation of

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claims—to forbid them, for example, from applying their generally applicable class action procedures in cases involving tobacco suits—would raise serious questions under the Tenth Amendment and principles of federalism.”).

14. The new regulation of state courts that I address prescribes procedural rules that state courts must follow in *state* law cases. Several scholars have addressed the different issue of Congress’s power to regulate state courts in *federal* cases. *E.g.*, Vicki C. Jackson, Printz and Testa: *The Infrastructure of Federal Supremacy*, 32 IND. L. REV. 111 (1998); Martin H. Redish & Steven G. Sklaver, *Federal Power To Commandeer State Courts: Implications for the Theory of Judicial Federalism*, 32 IND. L. REV. 71 (1998). One exception to this focus on regulation in federal cases is Louise Weinberg, *The Power of Congress over Courts in Nonfederal Cases*, 1995 BYU L. REV. 731, which suggests that Congress affects the jurisdiction of state courts in various ways—for example, by removal—and argues that “national interest” should govern Congress’s authority to regulate the jurisdiction of state and federal courts. Scholars who have addressed the scope of Congress’s authority to regulate state legislatures and executives have also discussed Congress’s power to regulate state courts in federal cases. *See* Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers To Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1026 (1995); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988); Powell, *supra* note 9; Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 2007-32 (1993).

Some scholars seem to have assumed that Congress lacks the power to regulate state court litigation of state claims. *See, e.g.*, Paul D. Carrington, “*Substance*” and “*Procedure*” in the *Rules Enabling Act*, 1989 DUKE L.J. 281, 294 (“[L]imitations enacted by Congress to govern non-federal civil proceedings in non-federal courts would be unsustainable as not being appropriately substantive under Article I or appropriately procedural under Article III.”); Joan Steinman, *Reverse Removal*, 78 IOWA L. REV. 1029, 1114 (1993) (“[W]ithin the confines imposed by the Due Process Clause, the legislature of a sovereign state is free to regulate the procedures of the state courts as it sees fit.”). Others have questioned whether Congress has the power. *See* Apelbaum & Ryder, *supra* note 10, at 656 (questioning whether Congress “may mandate procedural rules on state courts concerning state causes of action”); Wendy E. Parmet, *Stealth Preemption: The Proposed Federalization of State Court Procedures*, 44 VILL. L. REV. 1 (1999) (questioning whether Congress has authority under the Commerce Clause and the Tenth Amendment to regulate state court procedures in state law cases, and the wisdom of such regulation); Margaret G. Stewart, *Federalism and Supremacy: Control of State Judicial Decision-Making*, 68 CHI.-KENT L. REV. 431 (1992) (questioning whether Congress has authority to regulate state court procedures even in federal cases).

“commerce.” Here, two questions arise: one, whether the regulated activity is sufficiently economic in nature, and, two, whether allowing Congress to regulate state court procedures in some cases means that Congress may regulate state court procedures in all cases. Assuming the new regulation passes Article I scrutiny, it next must be asked whether the Tenth Amendment bars Congress from regulating state court procedures. Does a state have sovereign authority to regulate the procedures by which its courts enforce the rights that it creates?

I argue that the answer to this question may be found in traditional conflict-of-laws principles. Members of the Founding generation described the obligation of state courts to hear federal claims in conflict-of-laws terms. Under the traditional vested-rights approach to conflict of laws, each jurisdiction had sovereign authority to apply its own “procedure” in its own courts. In *Testa v. Katt*,<sup>15</sup> the Court rejected the conflicts analogy in regard to whether state courts must enforce federal rights of action. It was argued in *Testa* that state courts have discretion to refuse to enforce certain kinds of federal actions, just as they have discretion under conflicts principles to refuse to enforce certain kinds of foreign actions. The Court held in *Testa* that state courts have no such discretion. As I argue, however, members of the Founding generation did not invoke the conflicts paradigm so much to describe whether state courts must enforce federal actions, but to describe the modes of proceeding and remedies by which they would enforce them. The conflicts paradigm continues today to describe when state courts must apply federal procedures in adjudicating federal claims. It is therefore appropriate to analyze the constitutional question raised here—whether Congress may regulate state court procedures in state law cases—with reference to conflict-of-laws principles. Under traditional conflicts principles, I argue, Congress has no authority to prescribe procedural rules for state courts to follow in state law cases.

In Part IV, I address the prudential value of this understanding of the Constitution. Exclusive state authority over state court enforcement of state law claims, I argue, serves the functional interests of Congress and the states in state court litigation. A state rule of civil procedure does not operate in isolation. It operates in conjunction with other rules in the state’s procedural code. A state code of procedure, in turn, is designed to enforce the state’s particular body of substantive rights. Injecting isolated rules of procedure into fifty different procedural codes could create myriad procedural and substantive anomalies. Finally, I argue that exclusive state authority over state court enforcement of state law claims serves the

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15. 330 U.S. 386, 388 (1947).

normative federalism values of political accountability, participation, and diversity.<sup>16</sup>

## II. FEDERAL AUTHORITY OVER STATE COURTS AND THE NEW FEDERAL REGULATION

Suppose Congress passed a law providing that, in cases affecting interstate commerce, even in cases arising under state law, state courts must enforce the following rules: Rule 1—An answer or motion to dismiss must be filed within five days after service of a complaint; Rule 2—Discovery must be completed within two weeks after service of a complaint; Rule 3—Summary judgment motions, if any, must be filed within three weeks after service of a complaint; and Rule 4—Trial, if any, shall commence within four weeks after service of a complaint. The statute states that its purpose is to lessen the economic burden of protracted litigation on interstate commerce. Would such a statute be constitutional?

### A. *The New Federal Regulation of State Court Procedures*

The new federal regulation does nothing as stark as this hypothetical law would do. Like the hypothetical law, however, it does change the rules of civil procedure that govern enforcement of certain state law claims in state court. The Y2K Act,<sup>17</sup> for example, is titled “An Act To Establish Certain Procedures for Civil Actions Brought for Damages Relating to [Y2K Failures].”<sup>18</sup> Congress was concerned that many computers would “read dates in the year 2000 and thereafter as if those dates represent the year 1900” or would “fail to process dates after December 31, 1999.”<sup>19</sup> This problem, Congress found, could “prompt a significant volume of litigation, much of it insubstantial.”<sup>20</sup> Accordingly, Congress deemed it “appropriate” to “enact legislation to assure that the year 2000 problems . . . do not unnecessarily disrupt interstate commerce.”<sup>21</sup>

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16. In this Article, I accept the values of “dual sovereignty” federalism that the Court traditionally has articulated. Debate over the normative values of federalism has been extensive, but it is beyond the scope of this Article to enter it. See Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1485 (1994) (describing the “huge” literature on each of the many facets of federalism); see also Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000) (contesting modern normative theories of federalism); John C. Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990s*, 32 IND. L. REV. 27 (1998) (exploring the normative values of federalism).

17. 15 U.S.C.A. §§ 6601-6617 (West Supp. 2000).

18. *Id.*

19. *Id.* § 6601(a)(1)(A).

20. *Id.* § 6601(a)(3)(A).

21. *Id.* § 6601(a)(4).

The Y2K Act applies to civil actions based on Y2K failures commenced not only in federal court, but also in state court.<sup>22</sup> Among the “procedures for civil actions” that the Y2K Act prescribes is a prelitigation notice requirement. The Act requires any prospective plaintiff in a Y2K action to send written notice to each prospective defendant before commencing suit. The defendant then has thirty days to respond and sixty days to remedy the problem. Only after the “remediation period” may the plaintiff sue the defendant.<sup>23</sup> The Y2K Act also contains heightened pleading requirements. A Y2K plaintiff who requests damages must file with the complaint a statement specifying the nature and amount of damages requested and the factual basis for requesting them.<sup>24</sup> A Y2K plaintiff who alleges a material defect in a product or service must file a statement specifying the manifestations of the material defect and facts supporting the conclusion that the defects are material.<sup>25</sup> A Y2K plaintiff asserting a claim requiring proof of state of mind must file a statement specifying facts “giving rise to a strong inference that the defendant acted with the required state of mind.”<sup>26</sup> The Y2K Act also prescribes rules governing class actions. For a claim of product or service defect to proceed as a class action, the defect must be a “material” defect for a majority of class members.<sup>27</sup> In all Y2K class actions, the court must direct notice of the action specifying certain information to all class members.<sup>28</sup> Moreover, the Y2K Act prescribes certain burdens of proof for Y2K actions. To recover punitive damages, for example, a plaintiff must prove the applicable standard for awarding them by clear and convincing evidence.<sup>29</sup> Finally, the Y2K Act requires that state courts follow Federal Rule of Evidence 704 and not exclude expert opinion on the ground that it embraces ultimate issues of fact.<sup>30</sup>

During deliberations on the proposed Y2K Act, both individual senators and the Department of Justice questioned its constitutionality.

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22. The provisions of the Act apply to any “Y2K action,” defined as, *inter alia*, “a civil action commenced in any Federal or State court . . . in which the plaintiff’s alleged harm or injury arises from or is related to an actual or potential Y2K failure.” *Id.* § 6602(1)(A). The Act expressly “supersedes State law to the extent that it establishes a rule of law applicable to a Y2K action that is inconsistent with State law.” *Id.* § 6603(e). Nothing in it, however, “affect[s] the applicability of any State law that provides stricter limits on damages and liabilities, affording greater protection to defendants in Y2K actions, than are provided in this [Act].” *Id.* § 6615.

23. *Id.* § 6606(e)(1).

24. *Id.* § 6607(b).

25. *Id.* § 6607(c).

26. *Id.* § 6607(d).

27. *Id.* § 6614(a).

28. *Id.* § 6614(b).

29. *Id.* § 6604(a).

30. *Id.* § 6616. Rule 704 provides in relevant part that “testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” FED. R. EVID. 704(a).



Senator Patrick Leahy described the bill as “an arrogant dismissal of the basic constitutional principle of federalism” and predicted that the Supreme Court would “strike down this new law as unconstitutional.”<sup>31</sup> Senator Fritz Hollings described the bill as doing away with the Tenth Amendment to the Constitution.<sup>32</sup> The Department of Justice believed that there was “a serious risk that courts would view [the Y2K Act’s] procedural instructions to State courts as constitutionally impermissible intrusions on State governmental autonomy.”<sup>33</sup>

Another example of the new federal regulation of state court procedures is the proposed Universal Tobacco Settlement Act of 1997.<sup>34</sup> One version of this bill would have prohibited, among other things, state courts from allowing consolidation of actions in tobacco-related cases arising under state law.<sup>35</sup> It was this provision that Professor Tribe commented would have raised “serious” constitutional questions had it been enacted.<sup>36</sup>

The proposed Product Liability Reform Act of 1998 is another example. It would have imposed a national statute of limitations and statute of repose in certain products liability actions arising under state law.<sup>37</sup> As early as 1989, the Office of Legal Counsel of the Department of Justice questioned the constitutional authority of Congress to enact such products liability reform. In a memorandum opinion noting one other federal statute that alters the state limitations period for tort claims brought under state law,<sup>38</sup> the Office stated that federal regulation of state court procedures in state tort cases “may” raise Tenth Amendment questions.<sup>39</sup> The Office thought it “unlikely,” however, that courts would invalidate such regulations under then-current Tenth Amendment precedent.<sup>40</sup>

In the decade following this opinion, the Court addressed Congress’s authority to regulate state legislatures and executives in *New York* and *Printz*. As a collateral matter in those cases, the Court also described

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31. 145 CONG. REC. S8020 (daily ed. July 1, 1999) (statement of Sen. Leahy), 1999 WL 449611.

32. 145 CONG. REC. S4411 (daily ed. Apr. 29, 1999) (statement of Sen. Hollings), 1999 WL 253319.

33. H.R. REP. NO. 106-13, pt. 1 (1999).

34. S. 1415, 105th Cong. (1997).

35. *Id.* § 702(c).

36. *Hearing, supra* note 13 (statement of Laurence H. Tribe).

37. Product Liability Reform Act of 1998, S. 2236, 105th Cong. (1998).

38. Congressional Authority To Require State Courts To Use Certain Procedures in Products Liability Cases, 13 Op. Off. Legal Counsel 372, 376 n.5 (1989) (citing 42 U.S.C. § 9658(a) (1994), which prescribes a federal commencement date for the running of the statute of limitations on certain actions brought under state law for injury resulting from hazardous substances). The specific question the Office was asked to address was whether Congress may require states to submit the determination of punitive damages in products liability cases to judges rather than juries. *Id.* at 372.

39. *Id.*

40. *Id.*

Congress's authority to regulate state courts.<sup>41</sup> In the next Section, I summarize what the Court had to say in *New York* and *Printz* about Congress's authority over state courts. I also set forth the established background constitutional doctrines regarding Congress's authority over state courts when they adjudicate rights of action arising under federal law. Against this background I examine the new federal regulation.

#### B. *New York and Printz on State Courts*

To understand what the Court said in *New York* and *Printz* about state courts, we first must understand what the Court held with respect to state legislatures and executives. In *New York*, the Court addressed whether Congress could require the states either to enact legislation providing for the disposal of radioactive waste generated within their borders or to take title to and possession of such waste.<sup>42</sup> The Court held that Congress could not do so on the ground that the "Federal Government may not compel the States to enact or administer a federal regulatory program."<sup>43</sup> The Constitution, the Court reasoned, "confers upon Congress the power to regulate individuals, not States."<sup>44</sup> The Commerce Clause, in particular, under which the statute had been passed, "authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce."<sup>45</sup> The Court applied the same principle in *Printz*. There, the Court addressed whether Congress could require local law enforcement officers to conduct background checks on prospective handgun purchasers.<sup>46</sup> The Court held that it could not do so, on the ground that "Congress cannot compel the States to enact or enforce a federal regulatory program."<sup>47</sup> Under the system of "dual sovereignty"<sup>48</sup> established in the Constitution, the Court explained, the state and federal

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41. *Printz v. United States*, 521 U.S. 898, 907-09 (1997); *New York v. United States*, 505 U.S. 144, 178-79 (1992).

42. *New York*, 505 U.S. at 149-54.

43. *Id.* at 188.

44. *Id.* at 166.

45. *Id.* The Court made clear that it was not revisiting in *New York* its Tenth Amendment precedents concerning "the authority of Congress to subject state governments to generally applicable laws." *Id.* at 160 (citing *Gregory v. Ashcroft*, 501 U.S. 452 (1991); and *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985)) (other citations omitted).

46. *Printz*, 521 U.S. at 902-04.

47. *Id.* at 935; *cf.* *FERC v. Mississippi*, 456 U.S. 742 (1982) (addressing provisions of the Public Utility Regulatory Policies Act of 1978 that, inter alia, encouraged state administrative bodies to adopt proposed federal regulations designed to combat the energy crisis). In *FERC*, the Court upheld a provision requiring state administrative bodies to use certain procedures in considering whether to adopt the federal standards. *Id.* In *New York* and *Printz*, the Court distinguished *FERC* on the ground that the statute there at issue required state agencies merely to "consider" federal standards. *Printz*, 521 U.S. at 926; *New York*, 505 U.S. at 161-62.

48. *Printz*, 521 U.S. at 918 (citing *Gregory*, 501 U.S. at 457).

governments “exercise concurrent authority over the people.”<sup>49</sup> As *New York* had held, Congress can regulate the people, but not the states’ regulation of the people.<sup>50</sup>

In both *Printz* and *New York*, the Court distinguished federal “commandeering” of state courts from federal “commandeering” of state legislatures and executives. In *New York*, the Court acknowledged “the well established power of Congress to pass laws enforceable in state courts.”<sup>51</sup> This power, the Court explained, “involve[s] no more than an application of the Supremacy Clause’s provision that federal law ‘shall be the supreme Law of the Land,’ enforceable in every State.”<sup>52</sup> “Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal ‘direction’ of state judges is mandated by the text of the Supremacy Clause.”<sup>53</sup> In *Printz*, the Court reiterated that the Constitution “permit[s] imposition of an obligation on state *judges* to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power.”<sup>54</sup> The Court again found that Congress’s power in this regard is “implicit” in the Supremacy Clause. Unlike legislatures and executives, the Court explained, courts “applied the laws of other sovereigns all the time.”<sup>55</sup>

The question *New York* and *Printz* do not explicitly address is what *kinds* of federal prescriptions the Supremacy Clause directs state judges to enforce. The Court has held that Congress generally may require state judges to enforce rights of action arising under federal law. The Court has, however, implied limits on Congress’s power to mandate that state judges follow federal procedures even when enforcing *federal* claims. In the next Section, before analyzing Congress’s authority to regulate state court procedure in state law cases, I describe what the Court has had to say about Congress’s authority to regulate state court procedure in federal cases.

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49. *Id.* at 920; *cf.* *Reno v. Condon*, 120 S. Ct. 666, 672 (2000) (holding that the Driver’s Privacy Protection Act of 1994, which restricted the states’ ability to disclose drivers’ personal information, does not violate federalism principles of the Tenth Amendment because “[i]t does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals”).

50. *Printz*, 521 U.S. at 920.

51. *New York*, 505 U.S. at 178.

52. *Id.*

53. *Id.* at 178-79.

54. *Printz*, 521 U.S. at 907; *see also* *Alden v. Maine*, 527 U.S. 706, 753 (1999) (“The Supremacy Clause does impose specific obligations on state judges.”). The same analysis, the Court explained, would apply to state executive officials to whom the state had transferred adjudicatory functions. *Printz*, 521 U.S. at 929 n.14.

55. *Printz*, 521 U.S. at 907.

### C. *Federal Claims and Federal Procedures*

As described in this Section, Congress generally may require state courts to enforce claims and defenses arising under federal law. In enforcing federal claims, however, state courts must follow federal procedures only under certain conditions.

#### 1. *Federal Claims in State Courts*

The Supreme Court has long held that Congress may require state courts of competent jurisdiction to enforce federal causes of action. The primary authority for this principle is, of course, *Testa v. Katt*.<sup>56</sup> In *Testa*, the Court addressed whether a state court could refuse to enforce a claim arising under the federal Emergency Price Control Act.<sup>57</sup> The Act provided that a person who bought goods at a price above a prescribed ceiling could sue the seller “in any court of competent jurisdiction” for treble damages, and that the state and federal courts had concurrent jurisdiction of such suits.<sup>58</sup> A Rhode Island court declined to enforce a claim arising under the Act on the ground that it was “penal” in the conflict-of-laws sense.<sup>59</sup> (Under conflicts principles, a state may decline to enforce foreign “penal” laws—to wit, laws that are criminal or provide for civil penalties.<sup>60</sup>) The Supreme Court reversed, holding that a state court has no discretion to refuse to enforce a federal claim over which Congress has directed that it shall have concurrent jurisdiction, so long as the state court has “jurisdiction adequate and appropriate . . . to adjudicate” the claim.<sup>61</sup> The Court rejected the argument that state courts may treat federal claims as though they emanated from a foreign sovereign.<sup>62</sup> Thus, insofar as Congress may require state courts to enforce federal claims, it has some authority to “commandeer” them.

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56. 330 U.S. 386 (1947).

57. *Id.* at 387-88.

58. Emergency Price Control Act of 1942, 50 U.S.C. app. § 925(c), (e) (1946) (terminated by Act of July 25, 1946, ch. 671, sec. 3, § 1A(b), 60 Stat. 664, 664).

59. *Testa*, 330 U.S. at 388.

60. *Id.* This is an established principle of conflict of laws. As Chief Justice Marshall stated in 1825, “The Courts of no country execute the penal laws of another . . . .” *The Antelope*, 23 U.S. (10 Wheat.) 66, 123 (1825); see also ROBERT A. LEFLAR, *AMERICAN CONFLICTS LAW* § 49 (3d ed. 1977) (“This statement, made primarily in reference to criminal law, has also been applied to suits on purely private nongovernmental claims having penal elements in them. It was said that if an extrastate private claim is penal rather than purely compensatory in nature, it will not be enforced outside the state which created it.” (footnotes omitted)).

61. *Testa*, 330 U.S. at 394.

62. *Id.* at 389. In the early years of the Union, state courts were the only forum available for enforcement of many federal claims. Not until 1875 did Congress confer general federal question jurisdiction on district courts, Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, which were courts that the Constitution did not even require Congress to create, *Palmore v. United States*, 411 U.S. 389, 401 (1973).

## 2. Federal Procedures in State Courts

In addition, Congress has limited authority to prescribe procedural rules that state courts must follow in enforcing federal rights of action.<sup>63</sup> Congress may require state courts to enforce federal procedural rules that form part of the substance of an asserted federal right. The so-called FELA cases established this principle.

The Federal Employers' Liability Act (FELA),<sup>64</sup> as interpreted by the Supreme Court, sets forth certain rules of "procedure" that govern enforcement of the claims that FELA creates. One such rule of procedure is that in a FELA case the defendant bears the burden of proving contributory negligence.<sup>65</sup> In *Central Vermont Railway v. White*,<sup>66</sup> the Supreme Court addressed a conflict between this rule and a Vermont rule that placed the burden on the plaintiff to disprove contributory negligence. The defendant argued that the Vermont rule controlled because the *lex fori* (the "law of the forum") governs matters of procedure.<sup>67</sup> The Supreme Court agreed with "the general principle that matters respecting the remedy—such as the form of the action, sufficiency of the pleadings, rules of evidence, and the statute

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63. The Constitution itself, of course, requires the states to afford certain basic procedural rights. The Due Process Clause of the Fourteenth Amendment, for example, requires that state courts afford individuals reasonable notice and an opportunity to be heard before depriving them of their property. *See, e.g.,* *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The Equal Protection Clause of the Fourteenth Amendment has been held to require state courts to follow certain procedures in ordering a statewide vote recount. *Bush v. Gore*, 121 S. Ct. 525, 529-33 (2000). Certain provisions of the Bill of Rights, specifically U.S. CONST. amends. IV-VI, VIII, as incorporated by the Due Process Clause, require state courts to observe certain procedures in criminal cases. *Duncan v. Louisiana*, 391 U.S. 145, 147-48 (1968) (summarizing incorporated rights). For a summary of federal constitutional regulations of state court procedures, see Weinberg, *supra* note 14, at 753-55.

Interestingly, the one noncriminal procedural right specified in the Bill of Rights, the Seventh Amendment right to a jury trial in civil cases, has been held not to apply to the states. In *Walker v. Sauvinet*, 92 U.S. 90 (1875), the Court stated that "[t]he States, so far as this amendment is concerned, are left to regulate trials in their own courts in their own way." *Id.* at 92; see *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 432 (1996) ("The Seventh Amendment . . . governs proceedings in federal court, but not in state court . . ."); see also Stewart, *supra* note 14, at 433 ("Given the incorporation of the rest of the Bill of Rights into the Fourteenth Amendment, the states' continuing freedom to define the contours of civil juries for themselves underscores dramatically the systemic independence of state judiciaries.")

64. 45 U.S.C. §§ 51-60 (1994), amended by 45 U.S.C.A. § 54(a) (West Supp. 2000).

65. See *Cent. Vt. Ry. v. White*, 238 U.S. 507, 512 (1915) (explaining that the defendant's burden of proving contributory negligence in FELA cases is a matter of "construction of the statute"). Whether FELA itself places the burden to prove contributory negligence on the defendant is debatable. The extent of the Court's statutory analysis was this:

The Federal courts have enforced that principle even in trials in States which hold that the burden is on the plaintiff. Congress in passing the Federal Employers' Liability Act evidently intended that the Federal statute should be construed in the light of these and other decisions of the Federal courts.

*Id.* (citations omitted). For present purposes, what is germane is that the Court held that FELA imposed this burden.

66. 238 U.S. 507.

67. *Id.* at 511.

of limitations—depend upon the law of the place where the suit is brought.”<sup>68</sup> But, the Court explained, “it is a misnomer to say that the question as to the burden of proof as to contributory negligence is a mere matter of state procedure.”<sup>69</sup> Rather, in the Court’s view, “proof of plaintiff’s freedom from fault is a part of the very substance of his case” under FELA.<sup>70</sup> The Vermont court thus was bound to enforce the federal rule placing the burden of proof on the defendant.<sup>71</sup>

Another procedural right that FELA affords plaintiffs is the right to a jury trial.<sup>72</sup> In *Dice v. Akron, Canton & Youngstown Railroad*,<sup>73</sup> the Court addressed a conflict between this rule and an Ohio rule allowing the judge to resolve certain factual questions of fraud. In accordance with Ohio law, the state judge had decided the issue of fraud himself.<sup>74</sup> The Supreme Court reversed, holding that the Ohio court had to submit the issue of fraud to the jury. A plaintiff’s right to a jury trial on all factual issues, the Court reasoned, was “part and parcel” of the FELA right of action.<sup>75</sup> In other words, the “right to trial by jury” was “too substantial a part of the rights accorded by the Act to permit it to be classified as a mere ‘local rule of

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68. *Id.* (citation omitted).

69. *Id.* at 512.

70. *Id.*

71. *Id.*

72. See *Bailey v. Cent. Vt. Ry.*, 319 U.S. 350, 354 (1943) (explaining that “however inefficient and backward [a jury determination] may be, it is the system which Congress has provided”). Whether FELA actually requires a jury trial on all issues is debatable. The Court’s analysis of the statute was this:

The right to trial by jury is “a basic and fundamental feature of our system of federal jurisprudence.” It is part and parcel of the remedy afforded railroad workers under the Employers Liability Act. . . . To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them.

*Id.* at 354 (quoting *Jacob v. New York City*, 315 U.S. 752, 752 (1942)) (other citation omitted). Again, for present purposes, what is germane is that the Court held that the statute requires a jury trial on all issues. The Court recently reaffirmed this holding in *Johnson v. Fankell*: “Congress had provided in FELA that the jury trial procedure was to be part of claims brought under the Act.” 520 U.S. 911, 921 n.12 (1997) (emphasis added) (citing *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 363 (1952)).

73. 342 U.S. 359.

74. *Id.* at 360-61.

75. *Id.* at 363 (quoting *Bailey*, 319 U.S. at 354). There is some tension between this holding and the Court’s holding thirty-six years earlier in *Minneapolis & St. Louis R.R. v. Bombolis*, 241 U.S. 211 (1916). In *Bombolis*, the Court held that a state court was free to apply in FELA cases a state law permitting nonunanimous jury verdicts in civil cases. The Seventh Amendment, the Court reasoned, does not apply to the states. *Bombolis* might be distinguished from *Dice* on the ground that not until *Bailey* was decided, twenty-seven years after *Bombolis*, did the Court ascertain that the right to a jury trial is “part and parcel” of the FELA right of action. *Bailey*, 319 U.S. at 354. Rather than draw this distinction (which would have required the Court to acknowledge that the meaning of the statute had changed), the *Dice* Court drew the distinction that “[t]he *Bombolis* case might be more in point had Ohio abolished trial by jury in all negligence cases including those arising under the federal Act.” *Dice*, 342 U.S. at 363.

procedure' for denial in the manner that Ohio has here used."<sup>76</sup> Thus, insofar as Congress may require state courts to enforce federal procedural rules that form part of the substance of federal claims, it has authority to "commandeer" them.

*Dice* and *Central Vermont* do not present the full picture of Congress's power to "commandeer" the processes of state courts. The Court has held that not only express federal procedures may preempt state procedures; *implied* federal procedures may do so as well. In *Felder v. Casey*,<sup>77</sup> the Court held that 42 U.S.C. § 1983 preempted Wisconsin's notice-of-claim statute insofar as it applied to § 1983 claims brought in state court. Wisconsin's notice-of-claim statute required plaintiffs asserting claims against the state to notify the state of the claims within 120 days of the alleged injury and wait until the state granted or denied the requested relief before bringing suit.<sup>78</sup> Though the "States retain the authority to prescribe the rules and procedures governing suits in their courts," that authority, the Court explained, "does not extend so far as to permit States to place conditions on the vindication of a federal right."<sup>79</sup> "[I]n both its purpose and effects," the Court found, the Wisconsin notice-of-claim statute conflicted with § 1983.<sup>80</sup> Because enforcement of the Wisconsin statute would "frequently and predictably produce different outcomes in § 1983 litigation based solely on whether the claim is asserted in state or federal court," the Court held that § 1983 preempted it.<sup>81</sup> In effect, the Court found that § 1983 implies as a matter of procedure that a plaintiff may immediately pursue relief in court. The Court relied in part for its holding in *Felder* on *Brown v. Western Railway*.<sup>82</sup> In *Brown*, a Georgia court had dismissed a FELA complaint for failure to state a claim under a local rule that pleading allegations be construed "most strongly against the

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76. *Dice*, 342 U.S. at 363 (quoting *Brown v. W. Ry.*, 338 U.S. 294 (1949)). Justice Frankfurter, joined by three other Justices, dissented from the Court's opinion. Noting that "[s]tates are not compelled to provide the jury required of Federal courts by the Seventh Amendment," he concluded:

[S]imply because there is concurrent jurisdiction in Federal and State courts over actions under the Employer's Liability Act, a state is under no duty to treat actions arising under that Act differently from the way it adjudicates local actions for negligence, so far as the mechanics of litigation, the forms in which law is administered, are concerned.

*Id.* at 365 (Frankfurter, J., concurring for reversal but dissenting from the Court's opinion).

77. 487 U.S. 131 (1988).

78. *Id.* at 136-37.

79. *Id.* at 147.

80. *Id.* at 138.

81. *Id.* Justice O'Connor, joined by Chief Justice Rehnquist, dissented. In their view, § 1983 was not meant to preempt state procedural rules: "Congress has never given the slightest indication that § 1983 was meant to replace state procedural rules with those that apply in the federal courts." *Id.* at 158 (O'Connor, J., dissenting).

82. 338 U.S. 294 (1949).

pleader.”<sup>83</sup> Concluding that this rule operated to “detract from ‘substantive rights’ granted by Congress in FELA cases,” the Court held that “under the facts alleged it was error to dismiss the complaint.”<sup>84</sup> As the Court stated the rule in *Felder*, “[f]ederal law takes state courts as it finds them,” but “only insofar as those courts employ rules that do not ‘impose unnecessary burdens upon rights of recovery authorized by federal laws.’”<sup>85</sup>

Congress’s authority to regulate state courts may thus be summarized as follows: Congress may require state courts to enforce federal claims if they are competent to do so; Congress may require state courts to enforce federal procedural rules that are “part and parcel” of a federal right of action; and Congress may, by implication, require state courts to follow federal procedural rules when application of a state procedural rule would unnecessarily burden a federal right.

By their terms, these rules apply only when state courts adjudicate federally created rights. The new federal regulation prescribes procedures that state courts must follow in enforcing *state*-created rights. In one sense, the new regulation presents the obverse of *Felder*. *Felder* holds that a state court cannot enforce a state notice-of-claim statute in adjudicating federal § 1983 claims. The Y2K Act provides that state courts must enforce a federal notice-of-claim requirement and other procedures in adjudicating certain state-created claims.<sup>86</sup> The rationale supporting federal regulation of state court procedures in federal cases—that federal procedures may constitute part of a federal substantive right and that certain state procedures may impermissibly burden a federal substantive right—does not apply in state cases. The new regulation of state court procedures has nothing to do with federal rights of action. Federal authority to render a procedure part and parcel of a federal claim does not imply authority to prescribe procedures for enforcement of state claims.<sup>87</sup> I return to the *Dice* and *Felder* line of cases later in the next Part. They are not inapposite to the

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83. *Id.* at 295.

84. *Id.* at 296, 299.

85. *Felder*, 487 U.S. at 150 (quoting *Brown*, 338 U.S. at 298-99). In *Johnson v. Fankell*, 520 U.S. 911 (1997), the Court addressed whether § 1983 preempted a state law denying an interlocutory appeal from a denial of qualified immunity. The defendants, relying on *Felder*, argued inter alia that “the state procedure ‘impermissibly burdens’ the federal immunity from suit because it does not adequately protect their right to prevail on the immunity question in advance of trial.” *Id.* at 918 (quoting Brief for Petitioners at 22). The Court rejected this claim on the ground that the right to immediate appellate review of a qualified immunity ruling in federal court has its source in 28 U.S.C. § 1291, not in § 1983. Unlike rights under § 1983, the Court explained, the right to immediate appellate review under § 1291 “is a federal procedural right that simply does not apply in a nonfederal forum.” *Id.* at 921.

86. See *supra* notes 22-30 and accompanying text.

87. It might be argued that the “greater” federal power to prescribe rights of action with attendant procedures includes the “lesser” power to regulate state procedures alone. As I argue in Subsection III.B.6 *infra*, though, this argument would be fallacious because, even assuming Congress had the “greater” power in a given case, the “lesser” power would not be a true subset of the “greater.”



constitutional case against the new regulation that I now turn to present; rather, as I will explain, they support it.

### III. THE FORMAL CASE AGAINST THE NEW FEDERAL REGULATION

It is not difficult to imagine an action in state court arising under state law to which the procedural provisions of the Y2K Act would apply. Suppose a physician purchases software to use in billing patients. The software, it turns out, cannot process dates after December 31, 1999. The physician sues the software company in state court for breach of contract and violation of state fraud statutes.<sup>88</sup> Under the Y2K Act, the physician would have to give the software developer prelitigation notice before suing, with thirty days to respond and sixty days to remedy the problem. If remediation failed, the physician would have to file a specific statement of damages with the complaint. Assume that state law requires mere notice pleading and no notice of claim. Does Congress have the authority to require states to adjudicate claims arising under state law in this way? What if, to use the sensational example on page 953, Congress required state courts to bring state-created rights of action to trial within four weeks after service of a complaint?

Congress's power to prescribe procedural rules for the *federal* courts derives from its power under Articles I and III to constitute inferior federal tribunals, and has been held "necessary and proper" for carrying into execution that power.<sup>89</sup> Congress has no corresponding power in the Constitution to constitute state courts *qua* state courts.<sup>90</sup> Accordingly,

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88. *See, e.g.,* *Yu v. IBM Corp.*, 314 Ill. App. 3d 892 (2000) (finding it unnecessary to address whether the plaintiff's complaint failed to comply with the Y2K Act because the trial court properly dismissed the complaint on state law grounds).

89. *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199 (1988) (holding that "enactments 'rationally capable of classification' as procedural rules are necessary and proper for carrying into execution the power to establish federal courts vested in Congress by Article III, § 1" (quoting *Hanna v. Plumer*, 380 U.S. 460, 472 (1965))); *Burlington N. R.R. v. Woods*, 480 U.S. 1, 5 n.3 (1987) ("Article III of the Constitution, augmented by the Necessary and Proper Clause of Article I, § 8, cl. 18, empowers Congress to establish a system of federal district and appellate courts and, impliedly, to establish procedural Rules governing litigation in these courts."); *Hanna*, 380 U.S. at 472 (declaring that "the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts"); *see also* *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 22 (1825) (explaining that "a power to make laws for carrying into execution all the judgments which the judicial department has power to pronounce, is expressly conferred" by the "necessary and proper" clause).

90. It is a familiar argument, based on the "Madisonian Compromise," that because Article III does not require Congress to create lower federal courts, Congress could compel state courts to hear Article III cases and controversies. *See generally* Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 42-43 (discussing this argument). "Indeed," as Madison wrote, "it is extremely probable that in other instances, particularly in the organization of the judicial power, the officers of the States will be clothed with the correspondent authority of the Union." THE FEDERALIST NO. 45, at 260 (James Madison)

federal authority to regulate state procedural rules must derive from another enumerated power.<sup>91</sup> Congress has relied on the commerce power for the new regulation. The threshold question is whether a regulation of court procedures is a regulation of commerce at all. If it is, the next question is whether the Tenth Amendment reserves the power to regulate state court procedures to the states.<sup>92</sup>

#### A. *The New Regulation and the Commerce Clause*

The Commerce Clause empowers Congress to regulate, among other things, intrastate activities that substantially affect interstate commerce.<sup>93</sup> Whether Congress may regulate state court proceedings as an activity affecting interstate commerce depends on the answers to two questions. First, may Congress regulate an activity that is a subset of a larger class of activities affecting interstate commerce that, in the aggregate, courts and scholars have assumed Congress has no authority to regulate? Second, may Congress regulate litigation—in the abstract, a noneconomic activity—because the underlying dispute concerns an economic activity?

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(Clinton Rossiter ed., 1961). If state courts were “clothed” with the authority of the Union, arguably Congress would have the power to regulate the procedures by which they exercised this authority, because such a power would be necessary and proper for carrying into execution the power to compel state courts to hear federal actions. When state courts adjudicate rights of action arising solely under state law, the argument is inapposite.

91. I do not address here whether Congress would have authority to regulate state court procedures under Section 5 of the Fourteenth Amendment or the Spending Clause. It seems to me that in an appropriate case Congress would have authority to regulate the conduct of state court trials to remedy violations of the Fourteenth Amendment or as a condition to an appropriation. *See* Parmet, *supra* note 14, at 28-32. Moreover, I do not question here Congress’s authority to make laws necessary and proper for carrying into execution the original jurisdiction of the federal courts—for example, its authority to authorize removal of federal cases from the state courts, *see, e.g.,* *Tennessee v. Davis*, 100 U.S. 257 (1879); *Ry. Co. v. Whitton*, 80 U.S. 270 (1871), and its authority to toll state statutes of limitation while federal courts decide whether to take supplemental jurisdiction of state claims in federal cases, *see* 28 U.S.C. § 1367 (1994).

92. In *New York*, the Court described the Tenth Amendment as a tautology: If the Constitution does not delegate a power to Congress in the Commerce Clause, it is reserved to the states under the Tenth Amendment. *New York v. United States*, 505 U.S. 144, 155-56 (1992). In *Reno v. Condon*, however, the Court described the Tenth Amendment as an independent font of sovereignty: Even if Congress has “legislative authority over the subject matter,” a federal statute may violate “the principles of federalism contained in the Tenth Amendment.” *Reno v. Condon*, 120 S. Ct. 666, 671 (2000).

93. The Court has held that Congress may regulate “three broad categories of activity” under the Commerce Clause:

First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress’ commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce . . . .

*United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (citations omitted).

### 1. *The Aggregation Question*

The first question raised by Congress's reliance on the commerce power for regulating state court procedures is one of aggregation. Under *Wickard v. Filburn*, Congress may regulate an activity that, when aggregated with others, substantially affects interstate commerce.<sup>94</sup> Congress enacted the Y2K Act to prevent the aggregation of insubstantial Y2K lawsuits from disrupting interstate commerce.<sup>95</sup> The problem, however, is that the aggregation of Y2K litigation is itself merely a subset of larger aggregations of classes of litigation. If insubstantial Y2K lawsuits burden interstate commerce, so too, one would think, would the aggregation of all insubstantial technology-related lawsuits. And if all insubstantial technology-related lawsuits burden interstate commerce (never mind substantial ones), so too, one would think, would the aggregation of all insubstantial commercial lawsuits. And if all insubstantial commercial lawsuits burden interstate commerce, would not the aggregation of all insubstantial lawsuits, period? Does Congress have authority under the Commerce Clause to enact a code of civil procedure for the state courts in order to reduce the burden of all insubstantial lawsuits on interstate commerce?

The Supreme Court has never addressed the level of specificity that Congress must use under the Commerce Clause when aggregating activities affecting interstate commerce.<sup>96</sup> The Court has, however, used the specter of federal regulation of a larger class of aggregated activities as an argument against the constitutionality of regulation of a subset activity. In striking down the Violence Against Women Act in *United States v. Morrison*, the Court reasoned that "if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part."<sup>97</sup> With respect to the Y2K Act, it would seem that if Congress could

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94. 317 U.S. 111, 127-28 (1942) ("That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.")

95. See *supra* notes 19-21 and accompanying text (describing the stated purposes of the Y2K Act).

96. See John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174 (1998) (addressing the appropriate level of aggregation when comparing an activity to interstate commerce).

97. 120 S. Ct. 1740, 1753 (2000). Interestingly, the Seventh Circuit has justified regulation of subset crimes based on their effect on interstate commerce when aggregated with other crimes. See *United States v. Jones*, 178 F.3d 479, 480 (7th Cir. 1999) (upholding the federal arson statute on the ground that "the sum of many small effects can be a large effect" (quoting *United States v. Hicks*, 106 F.3d 187, 189-90 (7th Cir. 1997))), *rev'd*, 120 S. Ct. 1904 (2000) (finding

regulate the mode of proceeding in Y2K lawsuits to protect interstate commerce, it could regulate the mode of proceeding in “commercial” lawsuits or even all lawsuits. This would represent a sea change in a system that courts and scholars have long described as operating against the background principle that “federal law takes the state courts as it finds them.”<sup>98</sup>

## 2. *The Economic Activity Versus Litigation Question*

Another question that Congress’s reliance on the commerce power raises is one of the nature of the activity regulated. Historically, even the most contested exercises of the commerce power have operated directly upon the primary economic activity of individuals rather than upon how disputes arising from that economic activity are litigated. The National Labor Relations Act,<sup>99</sup> upheld in *NLRB v. Jones & Laughlin Steel Corp.*,<sup>100</sup> prohibited unfair labor practices affecting interstate commerce. The Fair Labor Standards Act,<sup>101</sup> upheld in *United States v. Darby*,<sup>102</sup> fixed minimum wages and maximum hours for employees engaged in the production of goods for interstate commerce. The amendments to the Agricultural Adjustment Act,<sup>103</sup> upheld in *Wickard v. Filburn*,<sup>104</sup> restricted the production of wheat. The Civil Rights Act of 1964,<sup>105</sup> upheld in *Heart of Atlanta Motel v. United States*<sup>106</sup> and in *Katzenbach v. McClung*,<sup>107</sup> prohibited racial discrimination in inns and hotels catering to interstate guests, and in restaurants utilizing interstate supplies. The Consumer Credit Protection Act,<sup>108</sup> upheld in *Perez v. United States*,<sup>109</sup> prohibited extortionate credit transactions. The Surface Mining Control and Reclamation Act,<sup>110</sup> upheld in *Hodel v. Virginia Surface Mining & Reclamation Ass’n*,<sup>111</sup> regulated surface coal mining.

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constitutional doubt with regard to whether Congress has authority to proscribe arson of private residences).

98. Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954) (“The general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.”), *quoted in* *Johnson v. Fankell*, 520 U.S. 911, 919 (1997); *Howlett v. Rose*, 496 U.S. 356, 372 (1990).

99. 29 U.S.C. § 151 (1994).

100. 301 U.S. 1 (1937).

101. 29 U.S.C. § 201 (1994).

102. 312 U.S. 100 (1941).

103. 7 U.S.C. § 1281 (1994).

104. 317 U.S. 111 (1942).

105. 42 U.S.C. § 2000a (1994).

106. 379 U.S. 241 (1964).

107. 379 U.S. 294 (1964).

108. 15 U.S.C. § 1601 (1994).

109. 402 U.S. 146 (1971).

110. 30 U.S.C. § 1201 (1994).

111. 452 U.S. 264 (1981).

In 1995, in *United States v. Lopez*,<sup>112</sup> the Court explained that the “economic” nature of the activity regulated is important to the Commerce Clause analysis. The *Lopez* Court struck down a federal law creating gun-free school zones in part on the ground that it was unrelated to “any sort of economic enterprise” and was not “part of a larger regulation of economic activity.”<sup>113</sup> Last year, in *Morrison*, the Court deemed the economic nature of the activity regulated “central” to the Commerce Clause analysis.<sup>114</sup> The *Morrison* Court struck down the Violence Against Women Act not just because of the aggregation problem, but also because of the noneconomic nature of the activity regulated.<sup>115</sup> The Court did not go so far, however, as to say that regulation of economic activity is a sine qua non of a proper exercise of the commerce power.<sup>116</sup>

The Court has had scant occasion to address whether a regulation of court proceedings, in the abstract a noneconomic activity, qualifies as a regulation of commerce. The closest it has come in recent times to the question was in 1984 in *Southland Corp. v. Keating*.<sup>117</sup> In *Keating*, the Court addressed whether section 2 of the Federal Arbitration Act (FAA)<sup>118</sup> applies in state courts. Section 2 declares that arbitration clauses in contracts affecting interstate commerce are enforceable. The Court held that the FAA does apply in state court, reasoning that Congress has authority to enact “substantive rules” under the Commerce Clause.<sup>119</sup> No fewer than six times did the Court describe the FAA as a “substantive” law requiring parties to honor their contracts.<sup>120</sup> The Court did not explain, however, what

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112. 514 U.S. 549 (1995).

113. *Id.* at 561.

114. *United States v. Morrison*, 120 S. Ct. 1740, 1750 (2000).

115. *Id.* (“*Lopez*’s review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity’s substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor.” (citing *Lopez*, 514 U.S. at 559-60)).

116. *Id.* at 1751 (“While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.” (citation omitted)). In *Jones v. United States*, 120 S. Ct. 1904 (2000), the Court questioned whether Congress has authority to make arson of a private home a federal crime. The legislation struck down in *Lopez*, the Court explained, was “aimed at activity in which neither the actors nor their conduct has a commercial character.” *Id.* at 1911-12 (citations and internal quotation marks omitted). Invoking the doctrine of constitutional doubt, the Court read the statute at issue as inapplicable to arson of a private dwelling. *Id.* at 1912.

117. 465 U.S. 1 (1984).

118. 9 U.S.C. § 2 (1994).

119. *Keating*, 465 U.S. at 11.

120. *Id.* at 11 (“The Federal Arbitration Act rests on the authority of Congress to enact substantive rules under the Commerce Clause.”); *id.* (“The Court relied for this holding on Congress’ broad power to fashion substantive rules under the Commerce Clause.”); *id.* at 12 (“[T]he substantive law the Act created was applicable in state and federal courts.”); *id.* (“We thus read the underlying issue of arbitrability to be a question of substantive federal law . . . .”); *id.* at 15 n.9 (“[T]he Federal Arbitration Act creates federal substantive law requiring the parties

distinguishes a “substantive” law from a “procedural” one. Justice O’Connor dissented, characterizing the FAA as establishing a rule of “procedure.”<sup>121</sup> In her view, “Congress *believed* that the FAA established nothing more than a rule of procedure, a rule therefore applicable only in the federal courts.”<sup>122</sup> The “therefore” suggests a view that the commerce power does not include the power to establish free-standing rules of procedure for the states.<sup>123</sup>

On another occasion, albeit in an earlier time, the Court came even closer to the question of whether regulating court procedures qualifies as a regulation of commerce. In 1898, in *Richmond & Allegheny Railroad v. R.A. Patterson Tobacco Co.*,<sup>124</sup> the Court held that a state rule of evidence did not violate the dormant Commerce Clause because it was not a regulation of commerce. At issue in *Richmond* was the constitutionality of a Virginia statute providing that railroads were responsible for the safe carriage of goods to their destination, even if the destination was beyond the railroad’s line, unless the railroad produced a written contract releasing it from such liability.<sup>125</sup> The Richmond & Allegheny Railroad claimed that the statute was unconstitutional as a regulation of interstate commerce by the state.<sup>126</sup> The Court disagreed. It characterized the Virginia statute as “a rule of evidence ordaining the character of proof by which a carrier may show that . . . its liability was limited to its own line.”<sup>127</sup> Though “in a latitudinarian sense any restriction as to the evidence of a contract, relating to interstate commerce, may be said to be a limitation on the contract itself,” the Court explained, “this remote effect, resulting from the lawful exercise by a state of its power to determine the form in which contracts may be proved, does not amount to a regulation of interstate commerce.”<sup>128</sup>

Arguably, if a state rule of evidence is not a regulation of interstate commerce, neither would be the same rule if enacted by Congress. As the Court has held more recently, “[t]he definition of ‘commerce’ is the same when relied on to strike down or restrict state legislation as when relied on

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to honor arbitration agreements . . .” (citation omitted)); *id.* at 16 (stating that Congress “creat[ed] a substantive rule applicable in state as well as federal courts” (footnote omitted)).

121. *Id.* at 25 (O’Connor, J., dissenting).

122. *Id.* at 26.

123. Justice O’Connor described the state of the law as follows: “It is settled that a state court must honor federally created rights and that it may not unreasonably undermine them by invoking contrary local procedure. . . . But absent specific direction from Congress the state courts have always been permitted to apply their own reasonable procedures in enforcing federal rights.” *Id.* at 31.

124. 169 U.S. 311 (1898).

125. *Id.* at 312-13 (quoting the full text of the statute).

126. *Id.* at 313.

127. *Id.*

128. *Id.* at 315.

to support some exertion of federal control or regulation.”<sup>129</sup> Just recently, Congress enacted a statute regulating the form in which certain contracts may be proved. The Electronic Signatures in Global and National Commerce Act<sup>130</sup> regulates whether electronic signatures are good evidence of a contract.<sup>131</sup> If, as *Richmond* holds, regulation of evidence of a contract is not a regulation of commerce, this Act arguably exceeds the commerce power. Indeed, if the dichotomy *Richmond* draws between regulating forms of proof and regulating commerce is still good law, it would be a small step to argue that regulating court procedures generally exceeds the commerce power.

Though the “aggregation” and “economic activity” problems call the constitutionality of the new federal regulation into question, I hesitate to draw a definitive conclusion that either problem renders the regulation unconstitutional. The aggregation specter (Congress generally regulating state court procedures) does seem as plausible as the one in *Morrison* (Congress generally regulating crime). But it also seems as plausible as the specter of Congress generally regulating land use because it can regulate surface coal mining or Congress regulating schools because it can regulate employment. The aggregation problem is one of line-drawing, and, rather than attempt to draw a line resolving the aggregation problem writ large, the Court has proceeded to draw lines case by case.

I also hesitate to conclude that the economic activity problem renders the new regulation unconstitutional. Whether *Richmond* remains good law is questionable. The case was decided in 1897, well before the New Deal expansion of the commerce power and evolution of the “substantial effects” test.<sup>132</sup> If homegrown wheat consumption “substantially affects” interstate commerce, so too, arguably, would a rule liberalizing dismissal or summary judgment in commercial cases. It is fair speculation that the financial impact on interstate commerce of saving commercial parties the expense of trial would exceed that of prohibiting them from consuming homegrown wheat. Last year a jury in Florida directed a tobacco company to pay \$144.8 billion in punitive damages.<sup>133</sup> The attorneys’ fees in that case

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129. *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 574 (1997) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 326 n.2 (1979)).

130. 15 U.S.C.S. § 7001 (LEXIS through PL-103-308, Oct. 13, 2000).

131. *Id.* § 7001(a).

132. Even if *Richmond* has continuing force, the distinction it draws between rules of evidence and regulations of commerce would not seem to apply to state rules of procedure that discriminate against out-of-state residents. In *Bendix Autolite Corp. v. Midwesco Enterprises*, 486 U.S. 888 (1988), the Court held that an Ohio statute tolling the statute of limitations for any period that a person or corporation was not “present” in the state violated the Commerce Clause. The Court reasoned that “the Ohio statute imposes a greater burden on out-of-state companies than it does on Ohio companies, subjecting the activities of foreign and domestic corporations to inconsistent regulations.” *Id.* at 894.

133. Rick Bragg, *Tobacco Lawsuit in Florida Yields Record Damages*, N.Y. TIMES, July 15, 2000, at A1.

alone may have had a more substantial effect on interstate commerce than the consumption of homegrown wheat by Farmer Filburn and his compatriots.<sup>134</sup> With the dawn of the “substantial effects” test, state court procedures may lie among countless other intrastate activities over which the shadow of the commerce power has been cast.<sup>135</sup>

Of course, even with the doctrinal shift, the Court has deemed the economic nature of the regulated activity “central” to its Commerce Clause analysis.<sup>136</sup> The relevant question, however, may not be whether the legislation *directly* regulates economic activity, but whether the *end* of the legislation is the regulation of economic activity.<sup>137</sup> Neither the Y2K Act nor the Gun-Free School Zones Act directly regulates economic activity. The end of the Gun-Free School Zones Act was not to regulate economic activity; it was to keep guns away from schools. The stated end of the Y2K Act, however, is to regulate economic activity—in particular, to ensure that certain litigation does not disrupt economic activity. Its constitutionality thus may depend on whether the Commerce Clause permits only direct regulation of economic activity or regulation of noneconomic activity that has substantial economic effects. Until that question is resolved, Congress’s authority to regulate state court procedures under Article I remains open to question.

#### B. *The New Regulation and the Tenth Amendment*

Even if a federal regulation survives Article I scrutiny, it can be unconstitutional under the Tenth Amendment. In *Reno v. Condon*, the Court acknowledged that the activities regulated in *Printz* and *New York*—background checks on prospective handgun purchasers and provision for the disposal of radioactive waste—substantially affected interstate commerce.<sup>138</sup> It was the means that Congress employed for regulating the

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134. *But see* Jim Chen, *Filburn’s Forgotten Footnote—Of Farm Team Federalism and Its Fate*, 82 MINN. L. REV. 249, 295-305 (1997) (arguing that the “economic impact of many simultaneous, uncoordinated acts by a nation of vertically integrated, diversified wheat producers” was “whopping”).

135. For a contrary view, see Manning Gilbert Warren III, *Federalism and Investor Protection: Constitutional Restraints on Preemption of State Remedies for Securities Fraud*, 60 LAW & CONTEMP. PROBS. 169, 199 (1997), which explains that “judicial results can hardly be described as commercial.”

136. *See supra* notes 112-116 and accompanying text (discussing the importance of the economic nature of the regulated activity in the Court’s Commerce Clause analysis).

137. *Compare* *United States v. Morrison*, 120 S. Ct. 1740, 1750-51 (2000) (emphasizing the importance in Commerce Clause analysis of the economic *nature* of the activity directly regulated), *with* *Filburn*, 317 U.S. at 127-28 (emphasizing the importance in Commerce Clause analysis of the economic *effect* of the activity regulated).

138. *Reno v. Condon*, 528 U.S. 141, 149 (2000) (“In *New York* and *Printz*, we held federal statutes invalid, not because Congress lacked legislative authority over the subject matter, but because those statutes violated the principles of federalism contained in the Tenth Amendment.”). While my analysis bifurcates the Article I and Tenth Amendment questions, as did the Court in



activities that the Court held unconstitutional. Under the Tenth Amendment, a state has exclusive authority over both legislative enactment and executive enforcement of the law.<sup>139</sup> The question for consideration is whether, and the extent to which, a state has exclusive authority over judicial enforcement of the law.

The principles of *New York* and *Printz* are not easily applied to state courts. The dichotomy the Court drew in those cases between regulating individuals and regulating the states' regulation of individuals does not lend itself to application to state courts. It is not hard to see how a law requiring state legislatures to provide for the disposal of radioactive waste regulates the states' regulation of individuals. But it is hard to see on which side of the line a law regulating state court procedures falls. Does a rule requiring a plaintiff to prove a fact by clear and convincing evidence regulate individuals or the states' regulation of individuals? Does a rule requiring a plaintiff to give prospective defendants notice of claim before suing regulate individuals or the states' regulation of individuals? Does a rule stating that a plaintiff must plead damages with specificity regulate individuals or the states' regulation of individuals? The same rule of evidence could be phrased either as "a *court* shall not admit evidence of *X*" or as "a *party* shall not introduce evidence of *X*." Usually, rules of evidence do not say even this much; rather, they use the passive voice ("evidence may be excluded"<sup>140</sup>) or verbs of being ("evidence is admissible"<sup>141</sup>).

Another problem with applying the principles of *New York* and *Printz* to state courts, indeed a more fundamental one, is that the Court distinguished courts from legislatures and executives in those cases. In *New York*, the Court explained that "[f]ederal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause."<sup>142</sup> In *Printz*, the Court explained that the Constitution does "permit imposition of an obligation on state *judges* to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate

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*Reno*, I prefer the Court's description in *New York* of the Article I and Tenth Amendment inquiries as "mirror images of each other." *New York v. United States*, 505 U.S. 144, 156 (1992) ("If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.").

139. In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), the Court rejected the rule that state immunity from federal regulation turns on "traditional governmental functions," and thereby overruled *National League of Cities v. Usery*, 426 U.S. 833 (1976). In *New York* and *Printz*, the Court adopted a rule of state immunity that turns on whether Congress is regulating individuals or the states' regulation of individuals.

140. *E.g.*, FED. R. EVID. 403.

141. *E.g.*, FED. R. EVID. 402.

142. *New York*, 505 U.S. at 178-79.

for the judicial power.”<sup>143</sup> In neither case, however, did the Court have reason to explore the bounds of Congress’s power over state judges, which presumably do exist. I imagine that as plainly as Congress may require state judges to hear federal actions, it may not require them to wear white robes or to take the bench every day at 5:00 A.M. May it require them to send special notices to litigants in state law class actions?

In this Section, I argue that Congress has no authority to regulate state court procedures in state law cases because “procedural law” derives exclusively from state authority. I begin with the text of the Constitution, in particular the Judges Clause. Analyzing the Judges Clause reveals two important points. First, the Judges Clause does not provide Congress with an independent font of authority over state courts; it merely directs state courts to enforce federal laws validly enacted under another congressional power. Contrary to some scholars’ interpretations, *New York* and *Printz* do not hold or imply otherwise. Second, as *Printz* suggests, this obligation of state courts to enforce federal rights of action was long described in conflict-of-laws terms—in terms that state courts enforce federal law as they would the law of other states or foreign nations. Under the vested-rights approach to conflict of laws that predominated until the twentieth century, a state had sovereignty (in the sense of exclusive control) over the “procedure” by which it enforced rights of action properly before it.

But how, it might be asked, can a state’s obligation to enforce federal law be akin to its obligation to enforce foreign law when states may decline to enforce certain foreign rights of action but, as the Court held in *Testa*, must enforce federal rights of action? The conflicts paradigm, I argue, describes state sovereignty not over *what* rights of action state courts must enforce, but over the “procedure” by which they must enforce them. It might next be asked how, if the states have exclusive authority to regulate “procedure,” one explains the *Dice* line of cases, which requires states to enforce certain federal procedures. Paradoxically, I explain, *Dice* had its origins in conflicts principles. In application today, *Dice* requires state courts to enforce federal “procedure” only to the extent that under conflicts principles they would enforce the “procedure” of sister states or foreign countries.

I next consider whether statutes of the earliest Congresses that might be read to support a broader view of congressional power over state courts undermine this understanding of state sovereignty over court procedures. Upon examination of these statutes, I conclude that Congress exerted no more power in enacting them than it did in enacting the statutes at issue in *Dice* and its progeny. In addition, I argue, the conflicts paradigm fits nicely with *Printz* because “procedure” in conflict of laws includes not only the

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143. *Printz v. United States*, 521 U.S. 898, 907 (1997).

rules by which courts form judgments, but the rules by which executives enforce them. Under *Printz*, Congress has no authority to commandeer state executive officials to enforce federal law, whether Congress seeks to do so by explicitly making state officials part of a regulatory scheme or by requiring state officials to execute a judgment on a federal claim in a particular way. Finally, I argue that Congress does not have the power to regulate state court procedures merely because it may have the “greater” power to adopt state causes of action as federal ones.

### 1. *The Judges Clause*

I begin with the text of the Constitution. The Judges Clause (part of the Supremacy Clause) provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and *the Judges in every State shall be bound thereby*, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.<sup>144</sup>

*New York* and *Printz* have renewed debate on the original meaning of the Judges Clause. In those cases, the Supreme Court relied in part on the text of the Judges Clause to exclude courts from the anticommandeering principles that apply to state legislatures and executives. In *New York*, the Court explained that though Congress may not direct state legislatures to enact or enforce federal law, the Judges Clause authorizes Congress to direct that state judges enforce it.<sup>145</sup> In *Printz*, the Court similarly explained that though Congress may not direct state executives to enforce federal law, the Constitution allows Congress to impose certain obligations on state judges to do so.<sup>146</sup>

The question that *New York* and *Printz* have opened for discussion is whether the Judges Clause provides Congress with an independent font of authority to regulate state courts. Scholars have read *New York* and *Printz* to suggest that the Judges Clause creates an affirmative authority in Congress to commandeer judges. They have argued that the Clause does not provide such authority, and therefore should not be relied upon to suggest an absence of authority to commandeer state legislatures and executives. Professor Evan Caminker has criticized *New York* on the ground that, rather than grant Congress power to commandeer state judges, “the Judges Clause

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144. U.S. CONST. art. VI (emphasis added).

145. *New York*, 505 U.S. at 178-79.

146. *Printz*, 521 U.S. at 907.

was intended simply to emphasize the Framers' understanding that state judges would apply federal law to nullify conflicting provisions of state law."<sup>147</sup> Professor Martin Redish and Steven Sklaver have criticized *Printz* on the similar ground that "[t]he State Judges Clause tells a state judge what to do with a constitutionally enacted law, but does not transform a law that otherwise exceeds enumerated federal powers into a constitutionally valid law."<sup>148</sup> They suggest that *Printz* reads the clause to grant the federal government "unlimited power to commandeer state courts, regardless of the severity of the resultant burdens on the courts."<sup>149</sup>

While I agree that the Judges Clause is not an independent font of unlimited federal authority over state courts, I disagree that *New York* and *Printz* imply that it is. It seems unlikely that the *Printz* Court would uphold a federal law requiring state judges to conduct handgun background checks, to take title to radioactive waste, to retire at age seventy,<sup>150</sup> or, for that matter, to serve tea in the Capitol dining room. Rather than say that state courts must enforce any federal law directed at them, the *Printz* Court seems merely to have said that state courts must enforce *validly enacted* federal laws. The *Printz* Court relied on the Judges Clause for the proposition that "the Constitution was originally understood to permit imposition of an obligation on state *judges* to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power."<sup>151</sup> The Court found it "understandable" that courts would be viewed distinctly from legislatures and executives in this regard because, "unlike legislatures and executives, they applied the law of other sovereigns all the time."<sup>152</sup> "The principle underlying so-called 'transitory' causes of action," the Court explained, "was that laws which operated elsewhere created obligations in justice that courts of the forum state would enforce."<sup>153</sup>

This last sentence describes the Judges Clause in traditional conflicts terms. In that regard, it merely restates the vision Alexander Hamilton expressed in *The Federalist No. 82* of the role of state courts in enforcing federal law. To explain why state courts would have concurrent jurisdiction of federal claims, Hamilton observed:

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147. Caminker, *supra* note 14, at 1037 (footnote omitted).

148. Redish & Sklaver, *supra* note 14, at 83 (footnote omitted); see also Ellen D. Katz, *State Judges, State Officers, and Federal Commands After Seminole Tribe and Printz*, 1998 WIS. L. REV. 1465, 1504 (arguing that a judicial exception to the anticommandeering rule would be both overinclusive and underinclusive).

149. Redish & Sklaver, *supra* note 14, at 87.

150. *Cf. Gregory v. Ashcroft*, 501 U.S. 452, 463 (stating in dicta that a state's power to determine the qualifications of its "most important government officials" is "a power reserved to the States under the Tenth Amendment and guaranteed them by" the Guarantee Clause).

151. *Printz*, 521 U.S. at 907.

152. *Id.*

153. *Id.* (citation omitted).

The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. Those of Japan, not less than of New York, may furnish the objects of legal discussion to our courts.<sup>154</sup>

Justice Joseph Story also expressed the obligation of state courts to hear federal claims in conflicts language. In *Martin v. Hunter's Lessee*, he explained that “in the exercise of their ordinary jurisdiction, state courts would incidentally take cognisance of cases arising under the constitution, the laws and treaties of the United States.”<sup>155</sup> Hamilton and Story disagreed, however, over whether state courts would have jurisdiction of all federal claims. Hamilton believed that when federal rather than foreign law supplied the rule of decision, “the State courts would have a concurrent jurisdiction” with the federal courts “in *all* cases.”<sup>156</sup> Story, on the other hand, believed that state courts would have concurrent jurisdiction not in *all* federal cases, but only in those where state courts had jurisdiction independent of national authority.<sup>157</sup> By the time of *Printz*, the Court had long since adopted Hamilton's view.<sup>158</sup>

*Printz's* description of the Judges Clause comports with the understanding that the Clause was meant to require state judges to apply federal law where state and federal law conflict. *Printz* merely addressed the antecedent question of how federal questions would come to be heard

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154. THE FEDERALIST No. 82, at 461 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

155. 14 U.S. (1 Wheat.) 304, 342 (1816).

156. THE FEDERALIST No. 82, at 461 (emphasis added). Hamilton later expressed that “the right to employ the agency of the State Courts for executing the laws of the Union” was “liable to question, and has, in fact, been seriously questioned.” Alexander Hamilton, The Examination No. 6 (Jan. 2, 1802), in 25 PAPERS OF ALEXANDER HAMILTON 484, 488 (Harold C. Syrett ed., 1977). This lends support to Professor Michael Collins's thesis regarding what Hamilton believed about federal commandeering of state officers. Collins has argued that Hamilton believed that the Constitution did not prohibit Congress from using state officers to enforce federal law if the states consented, which would have been welcome news to those who opposed consolidation. But, Collins argues, Hamilton did not believe that Congress could conscript state officers from unconsenting states to enforce federal law. Collins, *supra* note 90, at 140-42.

157. In *Hunter's Lessee*, Story described state courts as sovereign even as regards what federal rights they were bound to enforce. “No part of the criminal jurisdiction of the United States can . . . be delegated to the state tribunals.” *Hunter's Lessee*, 14 U.S. (1 Wheat.) at 337. On the one hand, Story believed that state courts could exercise concurrent jurisdiction only “in those cases where, previous to the constitution, state tribunals possessed jurisdiction, independent of national authority.” *Id.* On the other hand, he believed that in cases arising “in the exercise of their ordinary jurisdiction,” state courts were bound to apply federal law under the Supremacy Clause. *Id.* at 340; see also *Howlett v. Rose*, 496 U.S. 356, 369 n.16 (1990) (explaining Story's views). The Court rejected this view in *Testa v. Katt*, 330 U.S. 386, 390-94 (1947). Under the Court's current jurisprudence, state courts must enforce *all* obligations in justice arising under federal law, assuming their jurisdiction is adequate to do so, even if they would not enforce the same obligation had it arisen under the laws of another state or a foreign country.

158. See *Testa*, 330 U.S. at 390-94.

by state courts. For a state court to have occasion to resolve a conflict between state and federal law, it must have before it either a valid federal claim or a defense to a state claim.<sup>159</sup> To say, as the Court did in *Printz*, that federal law imposes mandatory obligations on judges in state courts is not to say that Congress may act outside of its enumerated powers to order state judges to do anything.<sup>160</sup>

## 2. *State Sovereignty over "Procedure"*

If the Judges Clause says only that state judges must enforce constitutionally enacted federal claims and defenses, even when they conflict with state laws, the question remains whether a federal law regulating state court procedures is constitutional. The conflicts language that Hamilton and the *Printz* Court used to describe the obligation of state courts to enforce federal law may seem at first glance self-contradictory: State courts enforce federal rights of action as they would foreign rights of action, but they must enforce all federal rights of action of which they have concurrent jurisdiction. Under conflicts principles, the courts of one jurisdiction would not enforce all rights of action arising under the laws of another. They would not, for example, enforce penal actions (viz., actions that are criminal or for a civil penalty). For this very reason, Professor Caminker has written that it is "ironic" to characterize national law as "extrasovereign" to the state courts.<sup>161</sup> A number of state courts, he points out, used the conflicts excuse to refuse to enforce federal rights of action in the nineteenth and twentieth centuries—and the Supreme Court held that they must enforce such actions. As I argue, however, the fact that the Court has rejected the conflicts approach in analyzing whether state courts must enforce federal actions does not mean the approach is inapposite when the issue is *how* state courts enforce rights of action.

In *Testa v. Katt*,<sup>162</sup> Rhode Island refused to enforce a cause of action under the Emergency Price Control Act on the ground that the Act was a "penal" law—one that imposed a penalty rather than providing for compensation of the plaintiff's injuries.<sup>163</sup> The Court held in *Testa* that

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159. See Collins, *supra* note 90, at 191 n.428.

160. Indeed, if *Printz* does read the Judges Clause to say that Congress has a free-standing power to commandeer state judges, Congress also has a free-standing power to commandeer certain state executives, which would contradict *Printz*'s core holding. The Court explained in *Printz* that Congress has the power to require not only state judges to enforce federal law, but also state executives to whom the state has transferred adjudicatory functions. *Printz v. United States*, 521 U.S. 898, 929 n.14 (1997). If Congress has unlimited power over state executive officials who perform adjudicatory functions, it could require those executive officials to perform *executive* functions. This, the *Printz* Court held, Congress may not do.

161. Caminker, *supra* note 14, at 1050.

162. 330 U.S. 386 (1947).

163. See *supra* notes 58-64 and accompanying text.

Rhode Island was not free to refuse to enforce the federal action: “It cannot be assumed,” the Court explained, “that the responsibilities of a state to enforce the laws of a sister state are identical with its responsibilities to enforce federal laws.”<sup>164</sup> The Court relied for this holding on the 1876 case of *Clafin v. Houseman*, in which the Court held that “rights, whether legal or equitable, acquired under the laws of the United States, may be prosecuted in the United States Courts or in the State Courts, competent to decide rights of the like character and class.”<sup>165</sup> “The change of authority creating the right,” the Court explained, does “not change the nature of the right itself.”<sup>166</sup>

The *Testa* Court thus rejected the conflicts paradigm as regards *what* federal rights state courts must enforce. What rights of action state courts must enforce, however, is only one aspect of state control over them. What procedures are used and remedies are available to enforce those rights of action is an independent aspect of state control. Here, I argue that it is state sovereignty over “procedure” that the conflicts language invoked by the Founders protects. I first explain how traditional conflicts principles were understood to protect the sovereignty of forum states over the “procedures” their courts used to enforce rights of action arising under the laws of other jurisdictions.<sup>167</sup> I next explain how the Court, in holding that state courts must enforce substantive federal rights, has implied that states retain exclusive control over the jurisdiction and procedures of their own courts. Finally, I describe other legal contexts in which the Court has referred to state court procedures as a matter of sovereignty.

Before proceeding, it is worth pausing to note that it is this concern with sovereignty that renders the substance-procedure dichotomy that has evolved under the *Erie* doctrine inapplicable to the question of federal authority over state court procedures. In his landmark article “*Substance*”

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164. *Testa*, 330 U.S. at 389.

165. 93 U.S. 130, 136-37 (1876).

166. *Id.* at 141. *But see* *Huntington v. Attrill*, 146 U.S. 657 (1892). In *Huntington*, the Court addressed one state’s obligation to give full faith and credit to the penal law of another. In dicta, the Court stated that “the courts of a State cannot be compelled to take jurisdiction of a suit to recover a like penalty for a violation of the law of the United States.” *Id.* at 672 (citations omitted). The Court, citing *Clafin*, explained that “[t]he only ground ever suggested for maintaining such suits in a state court is that the laws of the United States are in effect laws of each State.” *Id.* *Huntington* relegated *Clafin* to the status of an aberration. *Testa* treated *Clafin* as controlling precedent and relegated *Huntington* to a footnote. *Testa*, 330 U.S. at 393 n.11.

167. Not surprisingly, the modes of proceeding and forms of execution in the federal courts have been understood to be exclusively a matter of federal control. The first process acts provided that the courts of the United States would follow the form of writ and executions and modes of process used in the state courts where they sat. *See* Act of Sept. 29, 1789, § 2, 1 Stat. 93, 93-94. In *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825), the Court addressed whether the states, by amending their own modes of process, could change the modes of process in the federal courts. The Court held they could not do so. That state legislatures have no authority to regulate proceedings in federal courts was, Chief Justice Marshall thought, “one of those political axioms, an attempt to demonstrate which, would be a waste of argument not to be excused.” *Id.* at 49.

and “*Procedure*” in the *Conflict of Laws*, Professor Walter Cook identified at least eight areas of law that in 1933 drew different distinctions between substance and procedure, including one to determine what law a federal court hearing a state claim would apply.<sup>168</sup> Under what is now known as the *Erie* doctrine, federal courts adjudicating state claims apply state “substance” and federal “procedure.” The *Erie* doctrine, as it has evolved, is concerned with uniformity of outcome between cases tried in federal court and cases tried in state court. The “twin” aims of *Erie* are to discourage forum shopping and to avoid inequitable administration of the laws.<sup>169</sup> These aims are inapposite to the question whether Congress has the power to regulate state court procedures in state law cases. As far as Congress’s authority over the states goes, the concern is with sovereignty. If, as Hamilton and the Court have suggested, state courts enforce federal rights of action in the same manner that they would enforce foreign rights of action, the proper distinction is the one traditionally drawn in conflict of laws, which, appropriately, is concerned with defining exclusive spheres of legislative competence.<sup>170</sup>

The substance-procedure dichotomy in conflict of laws was traditionally understood to protect the sovereignty of a forum state over “procedure.” Under conflict-of-laws principles that predate the Founding of the Union,<sup>171</sup> it is axiomatic that a forum state may apply its own procedural law to all rights of action that it enforces. Chief Justice John Marshall explained in 1806 that “[n]o man can sue in the courts of any

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168. Walter W. Cook, “*Substance*” and “*Procedure*” in the *Conflict of Laws*, 42 YALE L.J. 333, 341-43 (1933). Dichotomies between “substance” and “procedure,” he observed, were involved in determining whether a law was unconstitutional as applied retrospectively; whether a law violated the Ex Post Facto Clause; whether a law violated the Contract Clause; whether a law by its terms operated retrospectively; what law a state court adjudicating a federal claim would apply; what law a federal court adjudicating a state claim would apply; what law a federal court adjudicating a state equitable right would apply; and what law a forum state applying the law of a foreign state would apply. See also Edgar H. Ailes, *Substance and Procedure in the Conflict of Laws*, 39 MICH. L. REV. 392, 401-08 (1941) (describing what is meant by “substance” and “procedure” in conflict of laws).

169. See *Sun Oil Co. v. Wortman*, 486 U.S. 717, 726-27 (1988) (“In the context of our *Erie* jurisprudence, that purpose is to establish (within the limits of applicable federal law, including the prescribed Rules of Federal Procedure) substantial uniformity of predictable outcome between cases tried in a federal court and cases tried in the courts of the State in which the federal court sits.” (citations omitted)); see also *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 428 (1996) (explaining that application of the outcome-determinative test must be guided by the “twin aims” of “discouragement of forum-shopping and avoidance of inequitable administration of the laws”). What may be “substance” for *Erie* purposes may be “procedure” for conflicts purposes. See Joseph P. Bauer, *The Erie Doctrine Revisited: How a Conflicts Perspective Can Aid the Analysis*, 74 NOTRE DAME L. REV. 1235, 1266-70 (1999) (providing examples).

170. See *Sun Oil*, 486 U.S. at 727 (explaining that the purpose of the dichotomy between “substance” and “procedure” in choice of law “is quite simply to give both the forum State and other interested States the legislative jurisdiction to which they are entitled”).

171. Professor Douglas Laycock presents evidence of the Founders’ understanding of choice of law in *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 306-10 (1992).



country, whatever his rights may be, unless in conformity with the rules prescribed by the laws of that country.”<sup>172</sup> In state-state conflicts cases the Court has never veered from this principle.<sup>173</sup> Very early in the Union’s history, the Court described the “procedure” to be applied when one state enforces the laws of another as a matter within the sovereign control of the forum state. In 1831, in *Hawkins v. Barney’s Lessee*,<sup>174</sup> the Court stated:

It is not to be questioned, that laws limiting the time of bringing suit, constitute a part of the *lex fori* of every country: they are laws for administering justice; one of the most sacred and important of sovereign rights and duties: and a restriction which must materially affect both legislative and judicial independence.<sup>175</sup>

As a matter of state law, interest analysis has largely displaced the vested-rights approach to conflict of laws. The Court, however, has continued to describe the conflicts substance-procedure dichotomy, where relevant to constitutional law, as defining spheres of legislative jurisdiction. In 1988, in *Sun Oil Co. v. Wortman*,<sup>176</sup> the Court interpreted the Full Faith and Credit Clause against background principles of international conflicts law as they would have been understood at the time of the Founding.<sup>177</sup> Holding that a state may apply its own statute of limitations to claims arising under the laws of another state, the Court explained that the purpose of the substance-procedure dichotomy in conflicts law is “quite simply to give both the forum State and other interested States the legislative jurisdiction to which they are entitled.”<sup>178</sup>

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172. *Dixon’s Ex’rs v. Ramsay’s Ex’rs*, 7 U.S. (3 Cranch) 319, 324 (1806); see also JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 556, at 468 (Boston, Hilliard, Gray & Co. 1834) (“It is universally admitted and established, that the forms of remedies, and the modes of proceeding, and the execution of judgments, are to be regulated solely and exclusively by the laws of the place, where the action is instituted . . .”).

173. See, e.g., *Sun Oil*, 486 U.S. at 728 (“[M]atters generally treated as procedural under conflicts law [are] . . . generally regarded as within the forum State’s legislative jurisdiction.”); *N. Pac. R.R. v. Babcock*, 154 U.S. 190, 197 (1894) (“[A]ll that pertains merely to the *remedy* will be controlled by the law of the state where the action is brought.”); *Willard v. Wood*, 135 U.S. 309, 313 (1890) (“[T]he form of his remedy, whether it must be in covenant or assumpsit, at law or in equity, is governed by the *lex fori* . . . where the action was brought.”); *Pritchard v. Norton*, 106 U.S. 124, 129 (1882) (“The principle is, that whatever relates merely to the remedy and constitutes part of the procedure is determined by the law of the forum, for matters of process must be uniform in the courts of the same country . . .”); *Townsend v. Jemison*, 50 U.S. (9 How.) 407, 414 (1850) (“The rule is, that the statute of limitations of the country in which the suit is brought may be pleaded to bar a recovery upon a contract made out of its political jurisdiction, and that the limitation of the *lex loci contractus* cannot be.”).

174. 30 U.S. (5 Pet.) 457 (1831).

175. *Id.* at 466.

176. 486 U.S. 717.

177. *Id.* at 723.

178. *Id.* at 727.

If a state court enforces federal law in the same manner as it would the law of another state or a foreign government, it follows that a state has exclusive control over court “procedure” even as against the federal government. Though the Court has never expressly held that this is so, it has repeatedly implied that there exists a realm of exclusive state power over court procedures even against the federal government. In *Clafflin v. Houseman*,<sup>179</sup> the Court held that federal rights of action are enforceable in state court, so long as the state court is “competent to decide rights of the like character and class.”<sup>180</sup> In *Mondou v. New York*,<sup>181</sup> the Court likewise held that rights of action arising under FELA are enforceable in the state courts. It expressly noted, however, that Congress had not attempted in FELA “to enlarge or regulate the jurisdiction of state courts or to control or affect their modes of procedure,”<sup>182</sup> as if to do so would be unconstitutional. In *Minneapolis & St. Louis Railroad v. Bombolis*,<sup>183</sup> the Court drew an express distinction between state sovereignty as regards *whether* state courts must enforce federal rights of action and state sovereignty as regards *how* state courts must enforce federal rights of action. On the one hand, “it would be a violation of duty under the Constitution for the court to refuse to enforce the right arising from the law of the United States because of conceptions of impolicy.”<sup>184</sup> On the other hand,

that ruling in no sense implied that the duty which was declared to exist on the part of the state court depended upon the conception that for the purpose of enforcing the right the state court was to be treated as a Federal court deriving its authority not from the State creating it, but from the United States.<sup>185</sup>

In ruling in *Testa* that the Rhode Island courts had to enforce a penal federal law, the Court noted that the state court had “jurisdiction adequate and appropriate under established local law to adjudicate this action.”<sup>186</sup> The Court thereby implied that had the jurisdiction of Rhode Island courts been different—that is, had Rhode Island courts lacked adequate and appropriate jurisdiction to address this type of question—the question presented would have been quite different. Each of these cases suggests that Congress may not regulate the jurisdiction of the state courts or control their procedures.

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179. 93 U.S. 130 (1876).

180. *Id.* at 137.

181. 223 U.S. 1 (1912).

182. *Id.* at 56.

183. 241 U.S. 211 (1916).

184. *Id.* at 222.

185. *Id.*

186. *Testa v. Katt*, 330 U.S. 386, 394 (1947).

Finally, the Court has used sovereignty language to describe the states' authority over court procedures in other legal contexts.<sup>187</sup> In *Tarble's Case*,<sup>188</sup> the Court addressed whether state courts have authority to issue writs of habeas corpus discharging persons from federal custody. In holding that they lack such authority, the Court explained that neither the federal nor the state governments "can interfere" in the "mode of enforcement" of each other's respective laws.<sup>189</sup> Insofar as "sovereign" means having exclusive authority to control a subject area,<sup>190</sup> this dictum suggests that federal and state governments are sovereign over how their respective laws shall be enforced.<sup>191</sup>

Another context in which the Court has described procedural regulations in terms of sovereignty has been in analyzing whether state procedural rules violate the Constitution. In *Hardware Dealers Mutual Fire Insurance Co. v. Glidden Co.*,<sup>192</sup> the Court held that a state statute requiring arbitration in certain insurance disputes did not violate due process. In so holding, the Court explained that "the procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control."<sup>193</sup> In *Bronson v. Kinzie*,<sup>194</sup> the Court used the language of sovereignty to describe why state laws that change available remedies on

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187. Professor Jefferson Powell and Benjamin Priester recently explored the ways the Court has used the word "sovereignty" in different contexts. H. Jefferson Powell & Benjamin J. Priester, *Convenient Shorthand: The Supreme Court and the Language of State Sovereignty*, 71 U. COLO. L. REV. 645 (2000). The relevant usage for purposes of analysis here is having exclusive control to regulate a subject area as against the federal government.

188. 80 U.S. (13 Wall.) 397 (1871).

189. *Id.* at 407-08. The Court explained:

In their laws, and mode of enforcement, neither is responsible to the other. How their respective laws shall be enacted; how they shall be carried into execution; and in what tribunals, or by what officers; and how much discretion, or whether any at all shall be vested in their officers, are matters subject to their own control, and in the regulation of which neither can interfere with the other.

*Id.*

190. Powell & Priester, *supra* note 187, at 652.

191. The Court did explain, however, that the federal courts may interfere with state law enforcement to preserve federal supremacy when federal and state law conflict—in the Court's words, "so far as such intrusion may be necessary on the part of the National government to preserve its rightful supremacy in cases of conflict of authority." *Tarble's Case*, 80 U.S. (13 Wall.) at 407. It has become established, for example, that federal courts may issue writs of habeas corpus to persons in state custody. See *Fay v. Noia*, 372 U.S. 391, 409-10 (1963) (describing the extension of federal habeas to persons in state custody). That federal courts may interfere with state custody in this way does not disprove that states have exclusive authority over the adjudication of state law claims that do not conflict with federal substantive rights. In *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), Chief Justice Marshall had cautioned against federal use of the writ of *habeas corpus ad respondendum* to discharge persons confined by process of the state courts. He explained that "[t]he state courts are not, in any sense of the word, inferior courts . . . because they emanate from a different authority, and are the creatures of a distinct government." *Id.* at 97.

192. 284 U.S. 151 (1931).

193. *Id.* at 158.

194. 42 U.S. (1 How.) 311 (1843).

existing contracts do not impair the obligation of contracts: “[U]ndoubtedly, a state may regulate at pleasure the modes of proceeding in its courts . . . Regulations of this description have always been considered, in every civilized community, as properly belonging to the remedy, to be exercised or not by every sovereignty, according to its own views of policy and humanity.”<sup>195</sup> In context, the language of these cases says nothing about the states’ authority over court procedure as against federal legislation. It merely explains why certain state procedures did not violate the Constitution. The language of both cases is, however, a strong rhetorical flourish for that purpose.<sup>196</sup>

Another context in which the Court has used sovereignty language to describe procedural regulations is with respect to the “adequate and independent state ground” doctrine. To justify its holding in *Wolfe v. North Carolina*<sup>197</sup> that it cannot review state court judgments that are independently and adequately supported on state law grounds, the Court explained that “it rests” with each state to prescribe the rules of practice to be applied in its courts.<sup>198</sup> In context, this language too says nothing about a state’s authority over court procedure as against federal legislation. It merely explains why a state procedural rule suffices as a basis of decision to preclude Supreme Court review of a state judgment. For its purpose, however, it arguably is also a strong rhetorical flourish.

Most recently, in *Howlett v. Rose*,<sup>199</sup> the Court addressed whether a state law sovereign immunity defense is available in an action under 42 U.S.C. § 1983. In dicta, the Court explained that “[t]he Supremacy Clause makes those laws [passed pursuant to the Constitution] ‘the supreme Law of the Land,’ and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure.”<sup>200</sup> Not only do the states “have great latitude to establish the structure and jurisdiction of their own courts”; they also “may apply their own neutral procedural rules to federal claims, unless those rules are pre-empted by

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195. *Id.* at 315.

196. See Powell & Priester, *supra* note 187, at 657 (describing the Court’s use of sovereignty language as a rhetorical flourish).

197. 364 U.S. 177 (1960).

198. *Id.* at 195. The Court explained:

Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law.

*Id.* (citations omitted); cf. *Howlett v. Rose*, 496 U.S. 356, 369-70 n.16 (1990) (“The adequate-state-ground doctrine accords respect to state courts as decisionmakers by honoring their modes of procedure.”).

199. 496 U.S. 356.

200. *Id.* at 367.

federal law.”<sup>201</sup> *Howlett* speaks of state control over procedure, but recognizes that federal law may preempt it in certain circumstances. Under the *Dice* and *Felder* line of cases, federal law may preempt state procedures that conflict with a federal procedure that is part and parcel of a federal claim, or state procedures that unnecessarily burden a federal right. If federal law may preempt state procedures in these circumstances, how can it be said that regulating court procedures is an exclusive “state sovereign right and duty”? I address this question next.

### 3. When “Procedure” Is Substance

At first glance, applying conflict-of-laws principles to determine what is “procedure” may seem inconsistent with *Dice* and *Felder*. After all, traditional conflicts principles recognize “procedure” as a matter for exclusive regulation by the forum state, while *Dice* and *Felder* allow some federal control of state procedures.

Paradoxically, *Central Vermont*, which laid the foundation for *Dice*, recited *conflict-of-laws* principles to support its holding that the state court was bound to apply the federal “procedure.” In *Central Vermont*, recall, the Court addressed whether in a FELA action Vermont could apply its own law placing the burden to disprove contributory negligence on the plaintiff. FELA placed the burden to prove contributory negligence on the defendant. The Court explained that “[t]here can, of course, be no doubt of the general principle that matters respecting the remedy—such as the form of the action, sufficiency of the pleadings, rules of evidence, and the statute of limitations—depend upon the law of the place where the suit is brought.”<sup>202</sup> The Court went on, however, to recite the familiar conflicts principle that when a procedure pertains not merely to the remedy, but is a part of the substance of the right itself, the law of the jurisdiction under which the right arose controls.<sup>203</sup> Under FELA, the burden of proof as to contributory negligence was no “mere matter of state procedure,” but “a part of the very substance” of the plaintiff’s case. Thus, the Court held, the state had to enforce the federal law. Under the reasoning of *Central Vermont*, had the

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201. *Id.* at 372 (citations omitted); *see also* *Johnson v. Fankell*, 520 U.S. 911, 919 (1997) (“The States thus have great latitude to establish the structure and jurisdiction of their own courts.” (quoting *Howlett*, 496 U.S. at 372)).

202. *Cent. Vt. Ry. v. White*, 238 U.S. 507, 511 (1914) (citation omitted).

203. *Id.* *See generally* 2 FRANCIS WHARTON, A TREATISE ON THE CONFLICT OF LAWS 1433-34 (George H. Parmele ed., Lawyers’ Co-operative 3d ed. 1905) (1872) (“[A] matter that is ordinarily regarded as pertaining to the remedy, and therefore governed by the *lex fori*, may become incorporated as a part of the contract or cause of action; so that to apply the law of the forum with reference to the point would amount to a modification of the rights of the parties as fixed by the substantive law.” (citations omitted)).

FELA right arisen under the laws of Great Britain, the state court would have enforced the attendant British burden of proof.

The central holding of *Dice*—that state courts must enforce federal procedural rules that are “part and parcel” of a federal claim—can be construed as nothing more than a familiar rule of conflict of laws.<sup>204</sup> This is evident in its more recent application. In 1988, in *Monessen Southwestern Railway v. Morgan*,<sup>205</sup> the Court addressed whether a state court adjudicating a federal FELA case could award prejudgment interest. The state court had awarded prejudgment interest under state law on the ground that it was a matter of “procedure.” The Court reversed on the ground that “prejudgment interest constitutes too substantial a part of the defendant’s potential liability under the FELA for this Court to accept a State’s classification of a provision [awarding interest] as a mere ‘local rule of procedure.’”<sup>206</sup> Conflicts principles did not figure expressly in the Court’s analysis, but they are subsumed in the *Dice* “part and parcel” rule. As a matter of conflicts law, the measure of damages (as opposed to the method of assessing damages), including prejudgment interest, is governed by the law under which the right of action arose<sup>207</sup>—in *Monessen*, by federal law.

To be sure, the conflict-of-laws origins of *Central Vermont* are not apparent in all cases involving whether a state court must apply a particular federal procedure in adjudicating a federal claim. One year after it decided *Central Vermont*, the Court held, in *Atlantic Coast Line Railroad v. Burnette*,<sup>208</sup> that the statute of limitations set forth in FELA bound a state court hearing a FELA claim. The Court did recite in *Burnette* the conflict-of-laws principle that a forum state will apply the limitations period of the foreign state under which the right of action arose if it limits not merely the remedy but the underlying right itself.<sup>209</sup> It also relied, however, on the separate ground “that the act of Congress is paramount,”<sup>210</sup> at least suggesting some other basis of federal authority. In *Brown v. Western Railway*,<sup>211</sup> the Court held that a state court should not have applied in a FELA case a local pleading rule that allegations be construed against the

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204. I argue here that so-called reverse-*Erie* jurisprudence—that is, cases involving whether a state court may apply state procedures in adjudicating a federal claim—had its genesis in conflict-of-laws principles. For an analysis of how conflict-of-laws principles might inform *Erie* analysis, see Bauer, *supra* note 169.

205. 486 U.S. 330 (1988).

206. *Id.* at 336.

207. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 171 (1971) [hereinafter RESTATEMENT].

208. 239 U.S. 199 (1915).

209. *Id.* at 201 (citing *Davis v. Mills*, 194 U.S. 451, 454 (1904) (“But, as the source of the obligation is the foreign law, the defendant, generally speaking, is entitled to the benefit of whatever conditions and limitations the foreign law creates.”)).

210. *Id.*

211. 338 U.S. 294 (1938).

pleader.<sup>212</sup> The local rule, the Court reasoned, imposed an “unnecessary burden” on the federal right.<sup>213</sup> In dissent, Justice Frankfurter generally spoke in conflicts language: “If a litigant chooses to enforce a Federal right in a State court, he cannot be heard to object if he is treated exactly as are plaintiffs who press like claims arising under State law with regard to the form in which the claim must be stated . . . .”<sup>214</sup>

Upon closer examination, however, even the *Brown* “unnecessary burden” line of cases is not wholly incompatible with conflicts principles. In *Felder v. Casey*,<sup>215</sup> the Court held that § 1983 preempted a state notice-of-claim statute that would have required the plaintiff to wait an indefinite period of time before bringing suit. The reason was that the state notice-of-claim requirement placed an undue burden on the federal right.<sup>216</sup> In effect, the Court held that an implied part of the substantive relief granted by § 1983 is a right to immediate suit—to wit, a right to be free from lengthy notice-of-claim periods.<sup>217</sup> Had Congress expressly said in § 1983 what the Court said—that part of the right conferred by § 1983 is the right to sue state officials without providing the state with a notice of claim—there is no question that state courts would be bound to follow the federal rule under conflicts principles. Indeed, in some ways *Felder* is no different from *Dice* and *Central Vermont*. In both of those cases, the Court characterized FEOLA as expressly conferring procedural rights when, to be fair, the Court merely inferred them.<sup>218</sup> Arguably, all that the Court did differently in *Felder* was not to treat the question expressly as one of statutory interpretation.<sup>219</sup>

#### 4. *Early Statutes and Judicial Sovereignty*

Having argued that under the appropriate analytic framework—involving traditional conflict-of-laws principles—states are sovereign over court procedures, I now examine whether statutes of the first Congresses regulating state courts call my argument into question. In both *Testa* and *Printz*, statutes of the first Congresses regulating state courts figured prominently in the analysis of federal authority over state actors. Several

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212. *Id.* at 296.

213. *Id.* at 298.

214. *Id.* at 300 (Frankfurter, J., dissenting).

215. 487 U.S. 131 (1988).

216. *See id.* at 152-53.

217. The Court concluded: “The state notice-of-claim statute is more than a mere rule of procedure: as we discussed above, the statute is a substantive condition on the right to sue governmental officials and entities . . . .” *Id.* at 152. Thus, an implied part of the right to sue under § 1983 is the right to be free from such conditions.

218. *See supra* notes 65, 72 and accompanying text.

219. *Felder* does contain some *Erie*-type language as well. It found that application of the Wisconsin statute would “frequently and predictably produce different *outcomes* in § 1983 litigation based solely on whether the claim is asserted in state or federal court . . . .” 487 U.S. at 138.

early statutes prescribed procedures and remedies that state courts were to follow in enforcing not state law rights, but federal rights. Accordingly, they seem consistent with both the proposition that state courts generally must enforce federal rights of action and the proposition that the states must follow only those federal procedures that form part of the substance of federal rights.

As for whether state courts must enforce federal rights of action, early Congresses required state courts to enforce not only important federal civil laws, but federal crimes and other “penal” laws as well.<sup>220</sup> That early Congresses would require state courts to enforce “penal” laws suggests that they did not view state courts as having exclusive authority to determine *what* federal rights they would enforce.

As for whether state courts must enforce federally prescribed procedures, early Congresses did impose on state courts obligations to perform procedural and remedial tasks. None of these statutes, however, directed state judges to employ procedures or order remedies independent of substantive rights arising under federal law.<sup>221</sup> Three statutes enacted by early Congresses required state courts to record citizenship applications,<sup>222</sup> transmit naturalization records to the Secretary of State,<sup>223</sup> and register aliens seeking citizenship.<sup>224</sup> Assuming these statutes applied to nonconsenting states,<sup>225</sup> each recording rule was part of the substance of an underlying substantive right to citizenship. The Act of March 26, 1790, gave aliens the right to citizenship upon satisfying specified conditions; the state court, if satisfied that the alien had proved the conditions were met, was to record the citizenship application and proceedings thereon.<sup>226</sup> The right to have one’s citizenship a matter of public record would seem to form part of the substance of the right to be adjudged a citizen. The Act of June 18, 1798, placed additional conditions on the right of citizenship; the state

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220. *Testa v. Katt*, 330 U.S. 386, 389-90 & nn.4-5 (1946); *see also* Charles Warren, *Federal Criminal Laws and the State Courts*, 38 HARV. L. REV. 545, 550-55, 570-73 (1925) (describing early federal legislation vesting jurisdiction in state courts to enforce federal criminal and penal civil laws).

221. The dissent in *Printz* characterized several of these statutes as imposing executive functions on state judges. *Printz v. United States*, 521 U.S. 898, 949-51 (1997) (Stevens, J., dissenting); *see also* Caminker, *supra* note 14, at 1044-45 (characterizing these statutes as directing judicial officers to perform executive functions). If this characterization were true, it would demonstrate that early Congresses may have understood the Constitution to authorize Congress to compel state judges, whether in a judicial or executive capacity, to enforce *federal* law in a certain way. It would not demonstrate that Congress understood itself to have the power to compel state judges or executives to enforce *state* law in a certain way.

222. Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103.

223. Act of June 18, 1798, ch. 54, § 2, 1 Stat. 567.

224. Act of Apr. 14, 1802, ch. 28, § 2, 2 Stat. 154.

225. *See Printz*, 521 U.S. at 906 (“It may well be, however, that these requirements applied only in States that authorized their courts to conduct naturalization proceedings.” (citations omitted)).

226. Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103.



court to which application had been made was to transmit the application and other naturalization records to the Secretary of State.<sup>227</sup> Again, the procedure would seem to be part of the federal right to be adjudged a citizen. The Act of April 14, 1802, further refined the requirements for citizenship: It required the state court to issue to an alien applying for citizenship a certificate of registry, which the alien would later use as evidence of the alien's time of arrival in the United States.<sup>228</sup> This procedure, too, would seem to be part and parcel of the right to be adjudged a citizen.

Other early federal statutes unrelated to naturalization also prescribed procedural rules for state courts that were part of the substance of underlying federal rights. The Act of July 20, 1790, gave seamen bound to a voyage the right against the captain to have the ship declared unseaworthy. In adjudicating such a claim, the state court was required to appoint "three persons in the neighborhood . . . most skilful in maritime affairs" to make report to the court on the seaworthiness of the vessel.<sup>229</sup> This procedure was part of the crew's federal right to have the vessel adjudged unseaworthy. The Act of February 12, 1793, gave slave owners the right to seize or arrest fugitive slaves. State courts were required, upon adjudging that the person seized was in fact a fugitive slave, to issue a certificate authorizing the slave owner to reclaim the fugitive slave.<sup>230</sup> Again, the procedure was part of a federal right to reclaim fugitive slaves. The Act of April 7, 1798, required state courts to take proof of claims for land of Canadian refugees who aided the United States during the Revolutionary War.<sup>231</sup> This statute appears to have done nothing more than require state courts to exercise their concurrent jurisdiction over federal claims. Finally, the Act of July 6, 1798, authorized the President to order removal of alien enemies from the United States during times of war. The statute required state courts to adjudge whether a person was removable as an alien enemy, and, if so, to order the alien removed.<sup>232</sup> Under this statute, state courts were required to do nothing more than adjudicate a federal claim and order the remedy that was part and parcel of the claim. As none of these statutes prescribed procedural or remedial rules that state courts had to follow independent of substantive federal rights, they are not evidence that early Congresses understood themselves to have the power to pass statutes doing so.

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227. Act of June 18, 1798, ch. 54, § 2, 1 Stat. 567.

228. Act of Apr. 14, 1802, ch. 28, § 2, 2 Stat. 154, 154-55.

229. Act of July 20, 1790, ch. 29, § 3, 1 Stat. 132.

230. Act of Feb. 12, 1793, ch. 7, § 1, 1 Stat. 302.

231. Act of Apr. 7, 1798, ch. 26, § 3, 1 Stat. 547, 548.

232. Act of July 6, 1798, ch. 66, § 2, 1 Stat. 577, 577-78.

### 5. *The Melding of Judicial and Executive Sovereignty*

Not only are the statutes discussed in *Printz* consistent with the conclusion that “procedural” law, properly understood, is the exclusive province of the states; the holding of *Printz*, as I now argue, is also consistent with and, indeed, lends additional support for the conclusion. The line between that which is “judicial” and that which is “executive” is not always easy to draw. What a court does can be viewed on a continuum—from substance to procedure to remedy to execution. The statute at issue in *Testa* gave a person who bought goods at a price above a prescribed ceiling the right to sue the seller. The right of action is a law of substance, which the state court is bound to enforce. Suppose the statute provided that plaintiff-buyers bear the burden of proving that they paid more than the ceiling price. In the abstract, a burden of proof is a matter of procedure, unless it is so bound up in the right of action created by the statute as to form part of the substance of the right.<sup>233</sup> If it forms part of the substance of the right, the state court is bound to enforce it. Suppose further that the statute provided that buyers of goods at a price higher than the ceiling price may recover three times the amount of the overcharge. The measure of damages, as opposed to the methods for assessing them, is traditionally considered so bound up in the substance of the right of action as to form part of it.<sup>234</sup> Thus, the damages provision also would be enforceable in state court. Suppose, finally, that the statute provided that if defendant-sellers cannot or refuse to pay a judgment for treble damages, the local sheriff will seize their assets and sell them to satisfy the judgment. This law is one of *execution*, traditionally considered a matter of procedure within the legislative jurisdiction of the forum state.<sup>235</sup> Under the holding of *Printz*—that Congress has no power to compel state executive officials to enforce federal regulations—Congress arguably has no more authority to order local sheriffs to execute a foreclosure to satisfy a federal judgment than it does to order them to perform background checks on handgun purchasers. In either case, Congress would be compelling a state executive official to enforce a federal law.

The Court suggested long before *Printz* the constitutional problem with federal use of state executives to enforce judgments on federal claims. In 1825, in *Wayman v. Southard*,<sup>236</sup> the Court addressed certain aspects of the Conformity Act, which conformed the processes and executions of the

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233. See RESTATEMENT, *supra* note 207, § 133.

234. Limitations on damages and heads of damages are typically considered substantive rather than procedural. See RESTATEMENT, *supra* note 207, § 171 cmt. a; *cf.* *Gasperini v. Ctr. for Humanities*, 518 U.S. 415, 428 (1996) (noting that “a statutory cap on damages would supply substantive law for *Erie* purposes”).

235. See RESTATEMENT, *supra* note 207, § 131.

236. 23 U.S. (10 Wheat.) 1 (1825).

federal courts to those of the state courts. Chief Justice Marshall “doubted” whether the Conformity Act generally required “the agency of State officers” to execute judgments issued by federal courts.<sup>237</sup> Indeed, as he saw it, “[t]he laws of the Union may permit such agency, but it is by no means clear that they can compel it.”<sup>238</sup> The same principles that preclude Congress from conscripting state executives to enforce judgments on federal claims entered in federal court should preclude Congress from conscripting state officers to enforce in a particular way judgments on federal claims entered in state court: Congress has no authority to conscript state executives into federal service. In conflicts terms, execution of judgments is a matter of “procedure”—a matter that lies within the exclusive province of each state to control.

Traditionally, it has been not just the manner of execution of judgments that lies within the exclusive control of a forum state, but the available remedies and modes of proceeding as well. The conflict-of-laws principles that the Court has used to describe a state court’s obligation to enforce federal law capture this realm of sovereignty. If Congress has no authority to prescribe general procedures for states to follow in adjudicating federal claims (viz., procedures not part of the substance of any particular federal claim), a fortiori Congress has no authority to prescribe procedures for states to follow in adjudicating state law claims.

#### 6. *The “Greater” Power over “Substance”*

It may be asked why, if Congress has the power to create a right of action and tack onto it procedures and remedies enforceable in state court, it may not regulate state court procedure alone. After all, it has been suggested that rather than regulate procedure alone, Congress could exercise its Article I powers to adopt state rights of action as federal rights of action, and render certain procedures and remedies part and parcel thereof.<sup>239</sup> For example, rather than merely prescribe procedures for state law Y2K actions, Congress might adopt all state tort and contract actions based on Y2K failures as federal actions, and then prescribe federal procedures as part of the substance of such actions. Would not this—requiring the states to enforce a federal right of action plus procedures—be more of an intrusion into their sovereignty than requiring them to enforce procedures alone? In other words, does not the “greater” power to require state courts to enforce federal rights of action and attendant procedures

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237. *Id.* at 39.

238. *Id.* at 39-40.

239. Redish & Sklaver, *supra* note 14, at 109.

include the “lesser” power to require state courts to enforce federal procedures alone?

The argument that the greater includes the lesser is often invoked in the law of the federal courts.<sup>240</sup> In this context, the argument that the greater includes the lesser would suffer from the fallacy of composition and division.<sup>241</sup> For a greater power to include a lesser power, the lesser power must be a subset power of the greater. As one scholar has put it, that sodium chloride (table salt) is harmless does not mean that either sodium or chlorine is harmless.<sup>242</sup> It is one thing to say that Congress may create a federal action with attendant federal procedures; it is quite another to say that Congress may regulate state procedures alone. The so-called “lesser” power does not share all relevant characteristics of the “greater.” Were Congress to adopt state rights of action as federal rights of action and add attendant procedures, federal courts presumably would have jurisdiction of the adopted claims. Where Congress merely regulates state court procedures, it is not at all clear that federal courts have jurisdiction over the state rights of action subject to the procedures. The Y2K Act, for example, does not confer federal jurisdiction over all state claims for Y2K failures subject to the new procedures. Nor is it clear that Congress could do so. There is a strong argument that federal procedural regulation would not suffice to support Article III federal court jurisdiction of a state law claim.<sup>243</sup> The “greater” power arguably is not to adopt state claims as federal claims, but merely to prescribe procedures for their enforcement in state court, thereby placing the burden of enforcing the regulation on the states. Controlling the enforcement of state rights in state courts may well be a greater power than controlling their enforcement in federal courts because the latter would demand the use of federal resources. Indeed, under the Tenth Amendment, the “greater” power to preempt state law does not include the “lesser” power to commandeering state legislatures or executives. As the Court explained in *Printz*, federal power would be “augmented immeasurably” if the federal government could use state officials to enforce the law “at no cost to itself.”<sup>244</sup>

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240. See generally LARRY W. YACKLE, *FEDERAL COURTS* 8 (1999) (describing the “greater power” syllogism as it has been invoked in the law of the federal courts).

241. See Michael Herz, *Justice Byron White and the Argument That the Greater Includes the Lesser*, 1994 BYU L. REV. 227 (1994) (describing the fallacies).

242. *Id.* at 243-44.

243. See Georgene Vairo, *Judicial v. Congressional Federalism: The Implications of the New Federalism Decisions on Mass Tort Cases and Other Complex Litigation*, 33 LOY. L.A. L. REV. 1559, 1615-19 (2000).

244. *Printz v. United States*, 521 U.S. 898, 922 (1997). Another cost, though not as significant, that the exercise of the “lesser” power to regulate state procedures alone would save the federal government is the cost of Supreme Court review. Exercise of the “lesser” power alone would shield the Court from having to review substantive state law issues arising out of state court litigation, as the Court does not resolve issues of state law. See *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1874).

The argument that the greater includes the lesser in this instance would not merely be fallacious; it also would assume that Congress has the greater power. The Y2K Act prescribes procedural rules that state courts must follow in all state tort and contract disputes resulting from Y2K failures. It is not at all clear that, under the Commerce Clause, Congress could adopt *all* state contract and tort law as federal law in Y2K cases. For Congress simply to say that all state tort and contract claims relating to Y2K failures are hereby federal claims would present an immediate aggregation problem.<sup>245</sup> Does Congress have authority to adopt a mega-set of state tort and contract actions that includes subsets of actions that do not themselves substantially affect interstate commerce? Could a homeowner have a federal case against the kid next door who failed to mow the homeowner's lawn because the kid's pocket planner had a Y2K glitch in its scheduling program? Even if a statute might be formulated to avoid this problem, should the courts be straining to draft a law that Congress did not enact in order to justify a law that Congress did enact?

Justice Frankfurter strenuously argued against courts doing so when he condemned the theory of so-called protective jurisdiction. The theory of protective jurisdiction argues that where Congress has the constitutional power to prescribe federal rules of decision, it may, without doing so, give the federal courts jurisdiction over state law claims in order to protect federal interests.<sup>246</sup> The Court has never adopted the theory.<sup>247</sup> Justice Frankfurter rejected the greater-includes-the-lesser argument that has been made in support of the theory of protective jurisdiction on the ground that courts should not argumentatively legislate for Congress when Congress has chosen not to prescribe a rule of decision.<sup>248</sup> In other words, courts should not imagine a "greater" power that Congress might have exercised (prescribing a rule of decision) in order to justify a "lesser" power that Congress did exercise (giving federal courts jurisdiction over state claims).

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245. See generally *supra* notes 96-98 and accompanying text (explaining the aggregation problem in Commerce Clause analysis).

246. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 473 (1957) (Frankfurter, J., dissenting) ("Called 'protective jurisdiction,' the suggestion is that in any case for which Congress has the constitutional power to prescribe federal rules of decision and thus confer 'true' federal question jurisdiction, it may, without so doing, enact a jurisdictional statute, which will provide a federal forum for the application of state statute and decisional law."). On protective jurisdiction generally, see George D. Brown, *Beyond Pennhurst—Protective Jurisdiction, the Eleventh Amendment, and the Power of Congress To Enlarge Federal Jurisdiction in Response to the Burger Court*, 71 VA. L. REV. 343 (1985); and William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983).

247. *Mesa v. California*, 489 U.S. 121, 137 (1989) ("We have, in the past, not found the need to adopt a theory of 'protective jurisdiction' to support Art. III 'arising under' jurisdiction, and we do not see any need for doing so here . . ." (citation omitted)); see also *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 491 n.17 (1983) ("[W]e need not consider petitioner's alternative argument that the Act is constitutional as an aspect of so-called 'protective jurisdiction.'").

248. *Textile Workers Union*, 353 U.S. at 473-84 (Frankfurter, J., dissenting).

If Congress chooses not to adopt state law as federal law (assuming it could do so in a given instance), courts must respect that decision.<sup>249</sup> In the Y2K Act, for example, Congress chose to regulate the procedures for enforcing state rights of action in state courts. That Congress might have adopted some subset of state rights of action as federal rights of action does not justify the procedural regulation that Congress *in fact* enacted.

### 7. *From Form to Function*

This analysis leads to the conclusion that the states have exclusive authority to regulate that which traditionally has been deemed “procedure” when one jurisdiction enforces a right of action arising under the laws of another. In our system, it is commonplace to say that a state is sovereign over a state institution in one respect but not in another. State legislatures and executives are sovereign insofar as Congress cannot compel them to enforce federal law, but they are not sovereign insofar as they must pay the federal minimum wage. It is no less extraordinary to say that states are sovereign insofar as they have exclusive authority to regulate the procedure of their courts, but that they are not sovereign insofar as they must enforce rights of action arising under federal law.

In the next Part, I address the prudential value of this division of power between the states and the federal government. As a matter of constitutional analysis, the Court in *New York* was not concerned with “[t]he benefits of this federal structure.”<sup>250</sup> It stated that its “task would be the same even if one could prove that federalism secured no advantages to anyone.”<sup>251</sup> If irrelevant to the Court’s task, the prudential question is central to Congress’s. Should Congress be regulating state court procedures in state law cases, assuming it has the constitutional authority to do so? In the next Part, I examine whether exclusive state regulation of state court procedures serves the functional needs of a federal republic, and, more broadly, comports with normative values of federalism.

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249. Before Congress adopted, for example, state Y2K actions as federal actions, it would have to decide whether to freeze them as of the date of adoption, or adopt them as they might evolve in the future. *See* *United States v. Sharpnack*, 355 U.S. 286 (1958) (sustaining the assimilation of state criminal law for federal enclaves as it would evolve in the future); *see also* William Cohen, *Congressional Power To Validate Unconstitutional State Actions: A Forgotten Solution to an Old Enigma*, 35 STAN. L. REV. 387, 401-05 (1983) (discussing Congress’s power to adopt state law). Congress might have good reason not to freeze state law in time. It might have good reason not to make federal law what state law *might be* in the future. Or, as a political matter, it might not have the votes to do either.

250. *New York v. United States*, 505 U.S. 144, 157 (1992).

251. *Id.*

## IV. THE PRUDENTIAL CASE AGAINST THE NEW FEDERAL REGULATION

As a matter of prudence, there are good reasons why each jurisdiction should control the procedures by which the rights of action arising under its laws are enforced. Codes of civil procedure hang together as a whole. Nullifying one rule of procedure has consequences, unintended and unpredictable, on the operation of other rules. Moreover, codes of civil procedure are designed to facilitate enforcement of a particular body of substantive law. Rights of action are created against a background of procedural rules. Indeed, certain procedural rules can be so intertwined with a right of action that they form part of the substance of the right itself. If Congress nullifies a procedural rule that happens in one state to be part of the substance of a right of action, a new right of action results that no governing authority intended. When one jurisdiction dictates procedural rules for another (or for fifty others), inadvertent laws may result that, I conclude in this Part, are inconsistent with the normative values of federalism.

A. *Functional Analysis of Congress's Power over State Courts*

Procedural rules do not operate in isolation. They are woven together as a tapestry. Take one code of civil practice—the New York Civil Practice Law and Rules (CPLR). Engrafting the Y2K Act upon the CPLR produces consequences that it is hard to imagine Congress intended.

One provision of the Y2K Act requires plaintiffs in Y2K actions to file with their complaints a specific statement regarding the amount and factual basis for damages requested.<sup>252</sup> In New York, a plaintiff may commence an action without a complaint<sup>253</sup> and, in certain actions, may serve a motion for summary judgment in lieu of a complaint.<sup>254</sup> The Y2K Act, which Congress intended to streamline litigation, presumably preempts these streamlined means of commencing civil actions. In New York, plaintiffs commencing medical malpractice actions are prohibited from stating the amount of damages sought.<sup>255</sup> There was a concern in New York that plaintiffs routinely asserted inflated damages numbers in malpractice complaints, unfairly damaging reputations of upstate physicians.<sup>256</sup> The Y2K Act, which Congress intended to protect defendants, presumably preempts this provision in malpractice actions related to Y2K failures. Finally, in New York, an expert generally may not offer an opinion on an ultimate issue of

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252. 15 U.S.C.A. § 6607 (West Supp. 2000).

253. N.Y. C.P.L.R. § 3031 (McKinney 1991).

254. *Id.* § 3213.

255. *Id.* § 3017.

256. *Id.* cmt. C3017:10.

fact.<sup>257</sup> The Y2K Act allows parties to Y2K actions to introduce expert testimony on ultimate issues of fact.<sup>258</sup> Expert discovery in New York courts, however, is more limited than it is in federal courts.<sup>259</sup> Presumably, the Y2K Act would allow an expert to testify on an ultimate issue even if state law operated to limit expert discovery.

These examples illustrate that when Congress pulls one thread from a state code of procedure, the code may unravel in other regards. Joseph Story made just this point in his treatise *Conflict of Laws* in explaining why a forum state has exclusive authority to regulate the modes of proceeding in its courts. Story believed that there would be “utter confusion” if the processes and remedies of one jurisdiction were engrafted upon those of another. Indeed, he believed that applying the procedures of one jurisdiction in the courts of another would cause litigation to “become immeasurably complicated, if not absolutely interminable.”<sup>260</sup>

Of course, state courts do enforce federal procedures that are part of the substance of federal claims. It might be asked why a federal procedure governing enforcement of a state claim is any more cause for concern than a federal procedure governing enforcement of a federal claim in state court. The latter too will interact with state rules of procedure. The answer is that when a plaintiff files a federal claim in state court, the court arguably could decline to exercise jurisdiction if the attendant federal procedures were incompatible with the state procedures with which they would interact. Under the conflict-of-laws principles that underlie *Dice*, a forum state will not entertain a suit to enforce a right of action created by another if it cannot provide appropriate relief.<sup>261</sup> Commentary to the *Restatement (Second) of Conflict of Laws* explains that a court is not required “to devise a type of proceeding unknown to its local law in order to give a remedy on a foreign cause of action.”<sup>262</sup> If conflicts principles apply to state

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257. *E.g.*, *Franco v. Muro*, 638 N.Y.S.2d 690, 691 (App. Div. 1996).

258. 15 U.S.C.A. § 6616 (West Supp. 2000).

259. *Compare* N.Y. C.P.L.R. § 3101(d) (requiring disclosure of summary of expert opinion and limiting opportunity to depose experts in certain cases), *with* FED. R. CIV. P. 26(a)(2), (b)(4) (requiring disclosure of report prepared by an expert and allowing depositions of any person identified as an expert).

260. STORY, *supra* note 172, § 557, at 469. In his words:

[T]here would be an utter confusion in all judicial proceedings by attempting to engraft, upon the remedies of one country, those of all other countries, whose subjects should be parties or interested therein. No tribunal on earth, however learned, could hope, by any degree of diligence, to master the laws and processes and remedies and the qualifications and limitations belonging to them. A whole life might be passed in obtaining little more than a few unconnected elements; and litigation would thus become immeasurably complicated, as well as almost without end.

*Id.*

261. RESTATEMENT, *supra* note 207, § 85; *see also* *Slater v. Mexican Nat'l R.R.*, 194 U.S. 120, 129 (1904) (holding dismissal appropriate where remedies available under local law are not an adequate substitute).

262. RESTATEMENT, *supra* note 207, § 85 cmt. a.



enforcement of federal rights, a state court could decline to exercise jurisdiction if federal law would require it to create procedures unknown to local law. *Claflin* and *Testa* require state courts to enforce federal rights of action only if the courts would be “competent” to adjudicate like rights under local law.<sup>263</sup> It is arguable that *Testa* and *Claflin* permit a state court to decline jurisdiction of a federal claim that would require the state to create procedures unknown to local law. When state courts hear rights of action arising under state law, they would have no discretion to decline to exercise jurisdiction on the ground that federal procedures were incompatible with local law.

Engrafting the procedural rules of one jurisdiction onto those of another would cause not only procedural anomalies, but substantive ones as well. As the Court recognized in *Dice*, and as has long been recognized in conflict of laws, procedural laws may form part of a substantive right of action. That is why state courts are bound to apply federal procedural rules that are part and parcel of a federal claim. Courts have deemed, for example, a plaintiff’s burden to prove by a preponderance of the evidence the standard for awarding punitive damages under the Americans with Disabilities Act (ADA) part and parcel of the right to recover them, and thus enforceable in state court.<sup>264</sup> Just as a federal procedure may form part of a federal right of recovery, so too may a state procedure form part of a state right of recovery. Under Louisiana law, as under the ADA, a plaintiff’s burden of proof to recover punitive damages is by a preponderance of the evidence.<sup>265</sup> Under Colorado law, on the other hand, a plaintiff’s burden of proof to recover punitive damages is beyond a reasonable doubt.<sup>266</sup> It is just as plausible that these burdens qualify substantive rights to recover punitive damages as it is that the federal burden qualifies substantive rights under the ADA. In the Y2K Act, Congress prescribed that the burden of proof to recover punitive damages in Y2K actions in state courts is by clear and convincing evidence.<sup>267</sup> A state may have allowed a plaintiff to recover punitive damages upon a mere preponderance, however, because the elements to be proven are relatively strict. Conversely, a state may have required a plaintiff to prove punitives beyond a reasonable doubt because the elements to be proven are relatively lax. If the state’s burden of proof formed part of the right to recover punitive damages, the federal “procedure” has redefined the substance of the state right.

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263. See *supra* notes 179-186 and accompanying text (explaining limits implied in *Claflin* and *Testa* on Congress’s authority to regulate state court jurisdiction and procedures).

264. See, e.g., *Cnty. Hosp. v. Fail*, 969 P.2d 667, 678-81 (Colo. 1998).

265. See, e.g., *Rivera v. United Gas Pipeline Co.*, 697 So. 2d 327, 335 (La. App. 1997).

266. See, e.g., *Boulder Meadows v. Saville*, 2 P.3d 131, 139 (Colo. Ct. App. 2000).

267. 15 U.S.C.A. § 6604(a) (West Supp. 2000).

It is a fair presumption that states tailor their procedural codes to comport with the substance of the rights they are meant to enforce. It would be quite a feat for Congress to design one abstract procedure that neatly fit the fifty substantive regimes to which it would be applied. Again, it is hard to improve upon the words of Joseph Story to describe the problems with engrafting the procedures of one jurisdiction onto those of another. Story observed that the appropriate mode of proceeding for enforcing a right depends upon the structure of a jurisdiction's particular jurisprudence. The modes of proceeding that would be well-adapted to enforcing the rights of one jurisdiction might be "wholly unfit" for enforcing those of another. For this reason, Story thought that "[i]t would be absolutely impracticable to apply the process and modes of proceeding of the one nation to the other."<sup>268</sup>

Of course, the argument that a law is bad because it will produce unintended consequences is made all the time.<sup>269</sup> It might be asked why it is any worse for Congress to change the substance of a state right by engrafting a procedure onto it than it is for Congress to do so by engrafting a substantive defense onto it. If Congress may substantively render a particular class of defendants immune from tort liability under state law, why may it not merely procedurally heighten the plaintiff's burden of proof to recover against such defendants? One answer is that individuals presumptively do not rely on procedure in entering into legal relations. It is for this reason that procedural rules generally apply retroactively,<sup>270</sup> whereas substantive rules generally apply only prospectively. Of course, what is procedure for purposes of retroactivity differs from what is procedure for purposes of what law emanating from another jurisdiction a forum state must enforce.<sup>271</sup> But the reliance rationale applies in both

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268. STORY, *supra* note 172, § 557, at 468-69. In his words:

The business of the administration of justice by any nation is, in a peculiar and emphatic sense, a part of its public right and duty. Each nation is at liberty to adopt such a course of proceeding, as best comports with its convenience and interests, and the interests of its own subjects, for whom its laws are particularly designed. The different kinds of remedies, and the modes of proceeding best adapted to enforce rights and guard against wrongs, must materially depend upon the structure of its own jurisprudence. What would be well adapted to the jurisprudence, customary or positive, of one nation, for rights, which it recognised, or for duties, which it enforced, might be wholly unfit for that of another nation, either as having gross defects, or steering wide of the appropriate remedial justice. . . . The jurisprudence of one nation may be very refined and artificial, with a multitude of intricate and perplexed proceedings; that of another may be rude, uninformed, and harsh, consisting of an undigested mass of usages. It would be absolutely impracticable to apply the process and modes of proceeding of the one to the other.

*Id.* at 468-69.

269. Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1390 (1994) ("It is a familiar point that government regulation that is amply justified in principle may go terribly wrong in practice.").

270. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 (1994).

271. *Cook*, *supra* note 168, at 341-43.

contexts. As the *Restatement* explains, one justification for allowing a forum state to apply its own law of procedure is that individuals usually do not give a thought to matters of procedure before they enter into legal transactions.<sup>272</sup> Professor Parmet has described federal preemption of state procedural rules as “stealth preemption.” In her view, federal regulations of state court procedure “covertly” operate to “slyly federalize tort law without inviting or even permitting public recognition or consideration of what is occurring.”<sup>273</sup> If we accept the normative values traditionally offered in favor of federalism, there is a unique absence of accountability for the unintended consequences of such laws, as is there a unique hurdle to changing them.

#### B. *The New Regulation and the Normative Values of Federalism*

As explained at the outset, there is extensive debate over the normative values traditionally offered in favor of federalism.<sup>274</sup> It is beyond the scope of this Article to enter it. I do note, however, some of the primary criticisms of these values and, where appropriate, consider them in light of the new regulation.

One value traditionally offered in favor of federalism is that it promotes political accountability. In *New York*, the Court objected to legislative commandeering on the ground that “if the decision turns out to be detrimental or unpopular . . . it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.”<sup>275</sup> If a state creates a right of action enforceable through attendant part and parcel procedures, and Congress changes only the attendant procedures, it is not that the states will be wrongly held accountable for something Congress did; it is that neither government will be accountable for the resulting right of action because neither government

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272. RESTATEMENT, *supra* note 207, § 122 cmt. a. It explains:

Parties do not usually give thought to matters of judicial administration before they enter into legal transactions. They do not usually place reliance on the applicability of the rules of a particular state to issues that would arise only if litigation should become necessary. Accordingly, the parties have no expectations as to such eventualities, and there is no danger of unfairly disappointing their hopes by applying the forum’s rules in such matters.

*Id.*

273. Parmet, *supra* note 14, at 65.

274. These values have been restated in different ways; I state them as Professor Caminker has done. Caminker, *supra* note 14, at 1074-81; *see also* George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 339-43 (1994) (explaining the normative values of subsidiarity: accountability, liberty, flexibility, preservation of identities, diversity, and respect for internal divisions of component states).

275. *New York v. United States*, 505 U.S. 144, 168-69 (1992).

created it. Which government should unhappy consumers blame because it now is more difficult to recover punitive damages in Y2K actions? The state is not to blame, for the state had assigned the plaintiff an easier burden of proof. Congress is not to blame, for the state could have eased the required elements for recovery.<sup>276</sup>

Political accountability as a normative value of federalism has been attacked on empirical grounds. In a complex government system, the argument goes, it always takes careful “proximate cause” analysis to determine which government is responsible for a particular burden.<sup>277</sup> As Professor Hills has put it, political accountability arguments “overlook the complexity inherent in any system of federalism that always has the potential to confuse voters and thereby undermine political accountability.”<sup>278</sup> Indeed, it would take some sophistication for a voter who believed that minimum-wage laws have the unintended consequence of reducing employment<sup>279</sup> to trace even that burden to the federal government.

The question is whether even a sophisticated voter could determine which government is the proximate cause of the burden required to recover punitive damages in Y2K actions in a particular state. The federal law may be the cause closest in time to the resulting burden, but it is not necessarily the primary cause. To be sure, concerned citizens could lobby Congress to ease the burden of proof, but they also could lobby the state to ease the elements that must be proven. It is not as if the federal and state governments are both responsible for the burden, as they might be where they jointly administer a regulatory scheme.<sup>280</sup> It is as if neither is responsible because the elements and the burden were enacted without regard for each other.

Another traditional value offered in favor of federalism is that it promotes political participation. It is argued that, as an intrinsic good, federalism enables individuals to participate personally in the democratic process at the local level, and, by organizing at the state level, to have greater influence at the federal level.<sup>281</sup> When a federal law has a different effect in each of the fifty states in which it operates, organizing at the local

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276. Within constitutional limits, of course.

277. See generally Caminker, *supra* note 14, at 1061-63; Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813, 826 (1998) (arguing that voter confusion is endemic to our federal system).

278. Hills, *supra* note 277, at 828.

279. Sunstein, *supra* note 269, at 1390.

280. Hills, *supra* note 277, at 826-27 (explaining shared responsibility when federal and state governments jointly administer a regulatory scheme).

281. See generally Caminker, *supra* note 14, at 1077 (describing the argument that political participation is a value of federalism); Merritt, *supra* note 14, at 5-8 (arguing that political participation is a value of federalism).

level to change the law faces unique hurdles. A federal law with an anticipated effect—say, producing clean air—may impact states differently as a matter of degree. But organized citizens of one state likely will identify organized citizens of another state with similar interests. A federal law that could potentially produce fifty different effects depending on its interplay with fifty different procedural schemes may impact states differently in kind. Requiring clear and convincing evidence to prove punitive damages will make it harder to recover in those states that previously required proof by a preponderance of the evidence but easier to recover in those states that previously required proof beyond a reasonable doubt.<sup>282</sup> Intuitively, it seems that it would be more difficult for state organizations to band together for a common purpose when a law has opposite or incongruent effects in different states than it would be when a law has similar effects.

Political participation as a normative value of federalism has been criticized in part on the ground that participation generally is a middle- and upper-middle-class activity and is as likely to burden lower-class citizens as to help them.<sup>283</sup> In this regard, the recent federal regulations of state court procedure have been unquestionably “pro-business.” The Y2K Act protects businesses from lawsuits by individuals; the Tobacco Settlement Act would have insulated “big tobacco” from class action suits; and the Product Liability Reform Act would have made it more difficult for consumers to recover from businesses for product defects. All of this legislation was introduced in response to state procedures perceived to be overly favorable to plaintiffs.<sup>284</sup>

Another traditional value offered in favor of federalism is that it promotes policy diversification and decentralization. Federalism, it is argued, serves “the diverse needs of a heterogenous society,”<sup>285</sup> and promotes experimentation with different programs.<sup>286</sup> Protecting state court procedures from federal regulation serves policy diversification, first,

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282. It is worth noting that the Y2K Act likely does not preempt state law requiring proof beyond a reasonable doubt for punitive damages. “Nothing in this chapter shall be construed to affect the applicability of any State law that provides stricter limits on damages and liabilities, affording greater protection to defendants in Y2K actions, than are provided in this chapter.” 15 U.S.C.A. § 6615 (West Supp. 2000).

283. See Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. Rev. 903, 914 (1994).

284. Cf. THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 174-75 (Ralph Ketcham ed., 1986) (summarizing the objections of George Mason to the Constitution). Mason complained that

[t]he Judiciary of the United States is so constructed and extended, as to absorb and destroy the judiciaries of the several States; thereby rendering law as tedious, intricate and expensive, and justice as unattainable, by a great part of the community, as in England, and enabling the rich to oppress and ruin the poor.

*Id.* at 174.

285. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

286. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

because it allows states to maintain a policy at all. As Story emphasized, a jurisdiction's procedural laws are generally adapted to enforce its substantive rights. If Congress may change state court procedural rules, a state may find that it does not in fact maintain a policy that it thought it maintained because a procedural rule that formed part of the substance of the right is no more. To be sure, federal substantive claims and defenses also preempt state policies. Substantive preemption is so apparent that it warrants no citation. Procedural preemption is not so. When Congress preempts state procedural law, the substantive policy consequences are not at all apparent. "Stealth preemption" does not terminate local experiments to serve the national interest; it silently contaminates them.

Policy diversification as a normative value of federalism has been attacked on the ground that federalism protects the autonomy of states, not the autonomy of local governments.<sup>287</sup> It is at the local level, the argument goes, that any true benefits from policy diversity would materialize.<sup>288</sup> It may be true that policy diversity at the local level is better than policy diversity at the state level, but this does not prove that the federal government is better suited to protect local diversity than state government. Nor does it prove that policy diversity at the state level is the same as or worse than national uniformity. Lest we lose sight of the forest for the trees, the Y2K threat was, for the most part, a bust. The federal government, believing there would be a flood of Y2K litigation, obstructed the ability of individuals to sue for Y2K failures under state law. The states, apparently not as concerned about the problem, or seeking to provide incentives for businesses to upgrade before the date change, left open the usual avenues for relief. Before January 1, 2000, one policy may have seemed superior. Now that January 1, 2000, has passed, the other may seem superior. National uniformity eliminated diversity at the state level that would have protected the few individuals harmed by Y2K failures from the few businesses that failed to upgrade their systems properly.

A final traditional value offered in favor of federalism is that it protects liberty from tyranny. As Professor Merritt has put it, "[t]he federal government, with its broad constitutional authority, its army of administrative agencies, and its vast financial resources, possesses almost unlimited power to regulate the lives of its citizens."<sup>289</sup> It has been argued that it is not the sovereignty of the states that restrains tyranny, but the constitutional limitations on the authority of Congress.<sup>290</sup> Regardless of whether we say that the commerce power does not include the power to regulate state court procedures or that state court procedures are immune

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287. Rubin & Feeley, *supra* note 283, at 919-20.

288. *See id.*

289. Merritt, *supra* note 14, at 4-5.

290. Caminker, *supra* note 14, at 1075.

from federal regulation under the Tenth Amendment, state sovereignty provides a valuable check on federal authority. One definition of “tyranny” is “[a]rbitrary or despotic government.”<sup>291</sup> Regulating the procedural rules of another jurisdiction is like pulling a thread from a sock. One cannot anticipate whether the thread will cleanly detach or whether the sock will start to unravel. Federal regulations that pose a high probability of inadvertent consequences in their interaction with state laws are, at worst, arbitrary in application and, at best, better left to the states.

#### V. CONCLUSION

The next frontier of federalism is the relationship between Congress and the state courts. Though federal rights of action are not considered “extrasovereign” to state courts, the states should have exclusive authority to regulate state court procedures for enforcing rights of action arising under their own laws. What constitutes “procedure” should be determined in accord with the long-established dichotomy between substance and procedure in conflict of laws. The origin of state courts’ obligation to enforce federal procedures in adjudicating rights of action arising under federal law lies in conflict-of-laws principles. In conflict of laws, “procedure” is nothing more than a label for a category of law traditionally deemed to rest within the exclusive sovereign authority of the forum state. Only by drawing this formal distinction between substance and procedure do we respect that substance and procedure can be inseparable components of a right of action. To inject novel procedures into a sea of rights of action is to invite myriad unintended consequences not only for the enforcement of rights of action but for their very definition. The power to create rights of action should include the power to specify a fitting means of judicial enforcement.

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291. BLACK’S LAW DICTIONARY 1519 (6th ed. 1990).