Stealth Preemption: The Proposed Federalization of State Court Procedures

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I. INTRODUCTION

Presumably this is the era of devolution, a time of renewed recognition of the role of states as independent political entities. In concert with this recognition of the importance of states' rights, congressional leaders have both extolled the advantages of empowering the states and avoiding the centralization of authority in Washington.1 The Supreme Court, too, has acknowledged the advantages of maintaining states' authority and has continually supported Congress' endorsement of states' rights.2

Despite this professed concern for the interests of states, federal legislators increasingly have proposed and endorsed bills that would regulate the procedures employed by state courts. At first glance, these proposals appear to forgo traditional preemption and allow state courts to resolve disputes under the substantive rules determined by state common law; in reality, however, the respect these proposals give to state courts is highly deceptive. These proposals would actually limit the procedures state courts can use and impose significant financial and political costs on state courts.3 By altering the relationships between state courts and both the federal courts and Congress, these proposed bills would raise grave constitutional questions.

This Article explores both the wisdom and constitutionality of such proposals to federalize state court procedures and focuses significantly on

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* Professor of Law, Northeastern University Law School. Support for this work was provided by Grant Award No. ROI CA67805-01 from the National Institutes of Health/National Cancer Institute. The author wishes to thank Judith Olans Brown, Patricia Davidson, Richard Daynard and Peter Enrich for their helpful review and criticism, Lara Sutherlin and John Pelletier for their research help and Elsie Man for her secretarial support.


2. For a further discussion of the Supreme Court's endorsement of states' rights, see infra notes 201-64 and accompanying text.

3. For a further discussion of the impact of federal proposals on state courts, see infra notes 265-324 and accompanying text.
the 1997 proposed global settlement of tobacco liability claims, a proposal noted for the extent of its regulation of state court procedures. Although this particular proposal now appears defeated, the debate over tobacco regulation continues. It remains critical that any future federal regulation of tobacco, or any other product or service, is analyzed for its effect on state courts.

To begin the analysis, Part II reviews the specific terms of the proposed tobacco settlement as an example of a plan to federalize state tort law. Additionally, Part II gives a brief and necessarily incomplete history of federal control over state courts and considers several other recent proposals to federalize state court procedures. Part III addresses constitutional issues and considers whether Congress has the power to regulate state court procedures. This analysis requires a discussion of congressional power under the Commerce Clause of Article I, as well as the relationship established between the state and federal courts under the Supremacy Clause and Article III. Part III also considers the potential limitations upon federal authority established by the Tenth Amendment.


On June 17, 1998, the Senate, after almost a month of debate, killed the bill. See David E. Rosenbaum, Senate Drops Tobacco Bill with '98 Revival Unlikely; Clinton Lashes Out at C.O.P., N.Y. TIMES, June 18, 1998, at A1 [hereinafter Rosenbaum, Senate Drops Tobacco Bill] (reporting that Senate jettisoned broad smoking legislation). Former Speaker Gingrich, however, promised that the House would again consider a tobacco bill. See David E. Rosenbaum, Gingrich Promises to Offer a New, Simpler Tobacco Bill, N.Y. TIMES, June 19, 1998, at A24 [hereinafter Rosenbaum, Gingrich Promises] (stating that Gingrich plans to put forward "low-budget alternative" to Senate bill). This past fall, however, in the absence of any federal regulation, the tobacco industry reached a settlement with state attorneys general. This settlement does not purport to affect the claims of individuals and classes of plaintiffs that would have been regulated by the original federal proposal. See Barry Meier, Remaining States Approve the Pact on Tobacco Suits, N.Y. TIMES, Nov. 21, 1998, at A1 [hereinafter Meier, Tobacco Suits].

6. For a further discussion of the specific terms of the proposed tobacco settlement, see infra notes 15-35 and accompanying text.

7. For a further discussion of the history of federal control over the state courts and other recent proposals dealing with the issue of federalism, see infra notes 86-69 and accompanying text.

8. For a further discussion of Congress' power to regulate state court procedures, see infra notes 70-339 and accompanying text.

9. For a further discussion of Congress' regulation of state court procedures under the Constitution, see infra notes 70-264 and accompanying text.
and the claim that Congress may regulate state court procedures pursuant to Section 5 of the Fourteenth Amendment, concluding that the settlement's proposal may well have exceeded Congress' constitutional authority.

The analysis does not end with the constitutional discussion. Over the years, the Supreme Court has recognized that "Our Federalism" demands sensitivity to the role and institutional structure of the state courts, even when the federal Constitution does not explicitly limit the federal role. Indeed, the Supreme Court has been particularly hesitant to endorse federal review or usurpation of state judicial procedures. Part IV considers how numerous doctrines grounded in notions of comity caution against the careless federalization of state court procedures. Although these doctrines neither decide the constitutional issue nor speak to the reach of explicit congressional actions, they do present compelling reasons for cautious deliberation before tinkering with the delicate balance of judicial federalism. Finally, Part V concludes that recent proposals to federalize state court procedures are deeply troubling precisely because of their subtlety and complexity. If Congress wishes to federalize an area, it would be far better to do so by enacting substantive federal laws. Stealth preemption, though less visible than substantive preemption, is far more destructive of our political system, precisely because it is so invisible and little understood.

II. PROPOSALS TO FEDERALIZE STATE COURT PROCEDURES

A. The Proposed Tobacco Settlement

In the summer of 1997, tobacco industry representatives and the attorneys general of several states entered into talks designed to resolve outstanding state claims against tobacco companies. As the discussions proceeded, the parties began to consider a global settlement that would have resolved issues far beyond those at stake in the particular litigation in

10. For a further discussion of the limitations over Congress' authority under the Constitution, see infra notes 184-339 and accompanying text.
11. For a further discussion of Congress' authority to limit state court procedures under the Constitution, see infra notes 265-324 and accompanying text.
12. See Younger v. Harris, 401 U.S. 37, 44-45 (1971) (commenting that "Our Federalism" was "born in the early struggling days of our Union" and represents "a system in which there is sensitivity to the legitimate interests of both State and National Governments" and "in which the National Government... always endeavors [to act] in ways that will not unduly interfere with the legitimate activities of the states").
13. For a further discussion of doctrines that caution against the careless federalization of state court procedures, see infra notes 340-86 and accompanying text.
14. For the conclusion of this Article, see infra notes 387-89 and accompanying text.
which the parties were engaged.\textsuperscript{16} Such a settlement, it was understood, could only take effect via federal legislation.\textsuperscript{17}

The fact that the settlement displayed some sensitivity to the interests and concerns of the states is not surprising given the settlement’s genesis in talks initiated by the state attorneys general. Indeed, in some ways, the settlement was a model of “cooperative federalism,” crafting interlocking roles for both state and federal authorities. The proposed settlement acknowledged that tobacco products are “sold, marketed, advertised and distributed in interstate commerce on a nationwide basis, and have a substantial effect on the nation’s economy.”\textsuperscript{18} Accordingly, the proposal envisioned an active federal regulatory rule, most particularly by clarifying, and in some respects limiting, the jurisdiction of the Food and Drug Administration (FDA).\textsuperscript{19} Recognizing the traditional role of the states in the regulation of tobacco products, the proposal called for enforcement of its restrictions on tobacco sales and advertising by both the federal government and the states.\textsuperscript{20} More relevant for current purposes, the proposal would have vested both state and federal courts with concurrent jurisdiction over proceedings to enforce tobacco control laws, except that all proceedings not “exclusively local in nature” would have been removable to federal court.\textsuperscript{21}

\textsuperscript{16} See id. at 867 n.2 (considering settlement that would reach far beyond current litigation).

\textsuperscript{17} See John M. Broder, \textit{Political Costs Are Clouding Tobacco Talks}, \textit{N.Y. Times}, June 20, 1997, at A1 (stating that congressional and presidential approval was needed on tobacco settlement issues regarding restriction of individuals’ right to recover punitive damages and manner in which compensatory payments from cigarette companies should be divided); John Schwartz, \textit{In Tobacco Suits, States Find Strength in Numbers: Mississippi Attorney General Rallies Coalition of Colleagues in Landmark Legal Battle}, \textit{Wash. Post}, May 18, 1997, at A6 (same).

\textsuperscript{18} Tobacco Proposal, supra note 4, at 4.

\textsuperscript{19} See id. at 8-26 (discussing scope of jurisdiction of federal agency under proposed settlement).

\textsuperscript{20} See id. at 26 (discussing effect of proposal regulating tobacco products on traditional role of states in regulating tobacco industry). The proposal, however, would have prohibited the states from enforcing obligations or requirements beyond those imposed by the legislation (except where the legislation does not specifically preempt additional state-law obligations). See Peter D. Enrich & Patricia A. Davidson, \textit{Local and State Powers Under the Proposed Tobacco Settlement}, Working Paper #1 in a Series on Legal Issues in the Proposed Tobacco Settlement (July 31, 1997) (unpublished manuscript, on file with author) [hereinafter Parmet, Working Paper #1].

\textsuperscript{21} See Tobacco Proposal, supra note 4, at 26. For a further discussion of this provision, see Wendy E. Parmet, \textit{Judicial Federalism and the Proposed Tobacco Settlement}, Working Paper #3 in a Series on Legal Issues in the Proposed Tobacco Settlement, Tobacco Control Resource Center, Aug. 6, 1997 [hereinafter Parmet, Working Paper #3]. To the extent that local enforcement actions would have been permitted under the proposal, it would appear to have permitted defendants to remove state enforcement actions brought under state law to federal court. See id. at 2-3. If diversity was lacking in such actions, the basis for federal Article III jurisdiction would not have been immediately apparent. See id. In addition, because the removal provision would have allowed individual defendants to remove a case...
STEALTH PREEMPTION

Despite this apparent recognition of and respect for the traditional role of the states with respect to tort law, a closer examination of the proposal’s civil liability provisions reveals a disturbing attempt to interfere with the ability of state courts to enforce their own laws. The proposal did not attempt to alter significantly the substantive tort standards applicable in actions against tobacco companies or to preempt state tort actions. Although Congress could have taken these more drastic measures under its authority to regulate interstate commerce, the proposal would have interfered with or regulated state court actions in more subtle, or stealth, ways.

Most importantly, the proposal would have prohibited, absent a defendant’s consent, class actions, joinder of parties, aggregation of claims, consolidations, extrapolations or other devices states might use to resolve cases other than individual trials.

Given the expense and complexity of tobacco litigation, this prohibition on the consolidation of claims would undoubtedly have rendered many cases against tobacco companies economically unsustainable. Thus, while ostensibly regulating the applicable procedures, the proposal would inevitably have had a significant effect on the states’ realization of substantive rights. Additional barriers to the realization of those rights would also have resulted from a provision of the proposal stating that a

brought by the state to federal court, there were also possible Eleventh Amendment problems. See id. at 3. Although these judicial federalism problems are not dissimilar to those discussed below, they are beyond the scope of this Article.

For a discussion of the federalism issues raised by some of the other provisions in the proposal, see Parmet, Working Paper #3, supra note 21, at 3, 10.

See Tobacco Proposal, supra note 4, at 39. The proposal would have had a substantive impact by barring punitive damages and limiting all liability under a global cap. See id. Assuming that tobacco may be regulated under the Commerce Clause, this provision raised questions primarily under the Fifth Amendment. The major question, in effect, was whether Congress would violate an individual’s due process rights by limiting punitive damages. See A Review of the Global Tobacco Settlement: Hearing Before the Senate Comm. on the Judiciary, 105th Cong. 158 (1997) (statement of Laurence H. Tribe, Professor of Law, Harvard University Law School) (supporting proposition that Fifth Amendment would not prohibit congressional limitation of punitive damages).

See U.S. CONST. art. I, § 8 (granting Congress power to regulate interstate commerce). Although the Supreme Court has read the Commerce Clause more narrowly in recent years, as evidenced by United States v. Lopez, 514 U.S. 549 (1995), there is little doubt that regulation of the tobacco industry falls within the purview of the Commerce Clause. For a further discussion of the regulation of the tobacco industry under the Commerce Clause, see infra notes 102-04 and accompanying text.


defendant could remove a civil liability case to federal court "upon receipt of application to, or order of, state court providing for trial or other procedure in violation of this provision." Despite maintaining the right of individuals to sue in state court under state tort theories, the proposal sought to dictate the procedural format of such cases and permit defendants to remove actions to federal court when state courts failed to abide by the federal procedural prohibitions. The result of this procedural limitation would have been an extensive federalization of state court procedures applicable to actions decided primarily under state law. Such an innovation in "cooperative federalism" would have disrupted the orderly administration of state court cases, as well as the critical balance our Constitution maintains between federal authority and state sovereignty.

One year later, the original settlement appears to have died. Several modified versions of the original proposal were introduced in the 105th Congress. An initial version of the National Tobacco Policy and Youth Smoking Reduction Act, introduced by Senator McCain, was voted out of the Senate's Commerce Committee. As reported to the floor, the amended bill avoided stealth preemption and opted for a more direct and traditional form of preemption, deeming all tobacco liability actions to be federal actions. The tobacco industry, claiming that the McCain bill violated the original deal and would raise cigarette taxes excessively, withdrew its support. After lengthy debate, the Senate killed the bill. Despite the proposal's apparent demise, Congress may eventually revisit the issue. Whether provisions federalizing state court procedures will appear in future versions of tobacco legislation is still uncertain.

28. See Tobacco Proposal, supra note 4, at 39 (commenting on additional barriers to realization of state substantive rights).

29. For a further discussion of the proposal's impact on state tort actions, see infra notes 317-24 and accompanying text.


32. See id. (discussing initial bill proposed by Senator McCain).


34. See Rosenbaum, Tobacco Strategy, supra note 5, at 5 (commenting on federal nature of tobacco liability actions).

35. See Rosenbaum, Senate Drops Tobacco Bill, supra note 5, at A1 (reporting Senate veto of tobacco bill).
B. **Other Proposals to Federalize State Court Procedures**

Although the proposed tobacco settlement is unusual in the extent of its suggested regulation of state court procedures, it is not without precedent. Congress has long regulated the procedures applicable when state courts adjudicate federal causes of action. The more recent innovation has been the regulation of procedures to be used in state causes of action.

One of the earliest examples of such legislation is the federal Foreign Sovereign Immunities Act. The act sets forth the conditions by which foreign sovereigns will have immunity in actions brought in state and federal courts. The act does not simply create a federal defense for foreign sovereigns, but instead sets forth the procedures by which notice shall be given and service of process and answers filed in all actions against foreign sovereigns in federal and state courts. While the act directly controls the procedures applicable in state courts, the courts have not yet examined whether Congress has the authority to directly impose federal procedures on state courts in this manner.

Further congressional intrusion into state court procedures can be found in the more recent National Childhood Vaccine Injury Act. This act provides a program for compensation of vaccine-related injuries. The main part of the act creates a federal vaccine compensation program. The act also specifies the manner in which civil trials in state

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36. For a further discussion of the proposed tobacco settlement and its impact on state court procedures, see supra notes 15-35 and accompanying text. In contrast to the proposed tobacco settlement, all of the statutes enacted thus far arguably impose federal procedures in close connection to the adjudication of federal issues arising in state law claims. The regulation of state procedures in the tobacco settlement, in contrast, would have occurred in the virtual absence of any federal substantive issue.

37. For a further discussion of Congress' regulation of state court procedures, see infra notes 70-100 and accompanying text.

38. For a further discussion of the regulation of procedures to be used in state causes of action, see infra notes 39-69 and accompanying text.


40. See id. § 1604.

41. See id. § 1608.

42. See Southland Corp. v. Keating, 465 U.S. 1, 31-33 (1984) (suggesting that Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-307 (1994), as interpreted by majority, would impose federal procedures on state courts). The Southland majority, however, found that the FAA "creates a body of federal substantive law." See id. at 12 (noting that substantive law created by FAA was applicable in both state and federal court). From the Southland majority's perspective, the FAA does not federalize state courts' procedures—it merely preempts state actions subject to its purview. See id. at 8-9. For a further discussion of Southland, see infra notes 290-96 and accompanying text.


44. See id. § 300aa-10 ("There is established the National Vaccine Injury Compensation Program . . ., under which compensation may be made for a vaccine-related injury or death.").

45. See id.
courts may proceed against vaccine manufacturers. Presumably such trials would continue to "arise under" state law and rely heavily on state tort law principles for their substantive content.

In some ways, the National Childhood Vaccine Injury Act is representative of several recently considered tort reform proposals that would regulate state court procedures. Like these more recent proposals, the act was designed to respond to a perceived "tort crisis." Supporters of the act claimed that such a "crisis" threatened the economic viability of an industry. Responding to the perception of a liability crisis, Congress created a compensation board and regulated both the substance and some of the procedures that would apply in state courts.

The perception of a tort crisis, especially with respect to "mass torts," has been widespread in the last ten years. In 1991, the tort crisis received public attention when Vice President Dan Quayle's Council on Competitiveness cited the civil justice system as one of the chief impediments to the nation's ability to compete globally. To rectify the situation, the Council proposed a set of judicial reforms. The particular procedural reforms suggested, however, were apparently directed only at the federal courts.

46. See id. § 300aa-23 (setting forth procedures for civil trials).
47. See, e.g., Hurley v. Lederle Labs., 863 F.2d 1173, 1176-78 (5th Cir. 1988) (holding that federal law neither explicitly nor implicitly preempts traditional state products liability law). Federal law does, however, preempt certain aspects of such cases. See, e.g., Shackil v. Lederle Labs., 561 A.2d 511, 527 (N.J. 1989) (holding that act limits state tort claims based on injury arising after effective date of compensation program and creates presumption that vaccine's warning was valid if it complied with FDA requirements).
48. For a further discussion of tort reform proposals that would regulate state court procedures, see infra notes 53-69 and accompanying text.
50. See H.R. REP. No. 99-908, at 6-7 (1986) (summarizing background and need for National Childhood Vaccine Injury Act). In its report, the House Committee on Energy and Commerce commented:

Lawsuits and settlement negotiations . . . [have] been ineffective for the manufacturers of childhood vaccines. This has become especially true as the number of lawsuits . . . has increased . . . . [T]here is little doubt that vaccine manufacturers face great difficulty in obtaining [product liability] insurance . . . . This factor, coupled with the possibility that vaccine-injured persons may recover substantial awards in tort claims, has prompted manufacturers to question their continued participation in the vaccine market.

Id.
52. See President's Council on Competitiveness, A Plan to Improve America's Civil System of Civil Justice 1-3 (National Legal Center for the Public Interest 1992) [hereinafter Council on Competitiveness] (directing reform proposal at federal procedure, not state procedure).
In 1994, the American Law Institute (ALI) issued its long-awaited report on complex litigation. The report dealt directly with the problems associated with mass torts. The report also noted that federal reform raised serious federalism issues because most complex tort cases do not arise under federal law. Responding to the federalism issue, the report advocated unique federal intervention in state courts' systems. The study suggested that Congress authorize a proposed federal complex litigation panel to designate a state court as a transferee forum to adjudicate consolidated complex cases. The ALI also suggested that to obtain jurisdiction over these complex, multi-state cases, state courts should retain nationwide service of process. Recognizing the potential problems associated with the proposal's federalization of state jurisdiction and procedure, the study noted that "federalism concerns are addressed by predicating consolidation in state court upon the consent of the designated state's judicial authority on a case-by-case basis." The study further suggested that Congress can provide for nationwide service of process under the commerce power as long as it acts within the confines of the Fifth Amendment.

Congress never enacted the ALI's proposals. In the years since the report, however, several bills proposing to regulate state court procedures in state law actions have been introduced. For example, the Product Liability Fairness Act of 1993 would have created a procedure for offers of judgment to be applied in state court products liability actions. A
similar bill, the Common Sense Product Liability Reform Act of 1995, would have created a complex set of procedures for state courts to follow prior to awarding punitive damages in state tort actions. This bill passed both houses of Congress, but was vetoed by President Clinton. Similar attempts to federalize state tort procedure are evident in the Securities Litigation Uniform Standards Act of 1997 ("Securities Reform Act"), which recently passed the Senate, but still has yet to pass the House. Like the tobacco settlement, this bill would have prohibited state courts from entertaining some class actions in litigation brought under state laws in state courts.

These proposals were designed to address different problems and the particular procedures that the proposals affected vary, but common to each proposal was an attempt to regulate how state courts manage the resolution of state law issues. In each case, the drafter decided that there was an issue of national scope that required federal attention. Rather than preempting state substantive law or creating an exclusive federal remedy, however, the drafter instead proposed to leave the state courts as the chief, if not sole, arbiters of the issue and to leave states as the primary source of substantive law. At first glance, the federal role in the regulation of state court procedure appears to have been kept to a minimal level, but while the drafters of these proposals would no doubt claim that they made their choices out of respect for states, further reflection suggests that the particular type of federal intrusion envisioned, although more subtle than outright preemption, may be especially onerous for the states. Moreover, such stealth preemption is of questionable constitutionality.

III. THE CONSTITUTIONALITY OF THE FEDERALIZATION OF STATE COURT PROCEDURES

A. The Testa Doctrine

To a limited degree, Congress has controlled the jurisdiction and procedures employed in state courts since the beginning of the republic. The Federalist Papers noted that Article III itself, in granting Congress control
over the creation of lower federal courts and their jurisdiction, implicitly authorized Congress to rely upon state courts to carry out the federal judicial business. Acting upon that authority, in the early nineteenth century, Congress often gave specific grants of jurisdiction to the state courts and incidentally regulated the procedures that went along with those grants. In 1815, for example, Congress gave state or county courts jurisdiction over disputes involving federal taxes and nullified the operation of any state laws pertaining to service of process in relationship to tax actions brought by the United States in state courts.

This federal practice of relying upon state courts to execute federal judicial business was challenged by the Supreme Court's opinion in Prigg v. Pennsylvania. Prigg reflected a "separate spheres" vision of federalism that was incompatible with the common reliance upon state courts for the enforcement of federal law. Prigg's vision of federalism, however, did not survive the Civil War and Reconstruction and their realignment of federal and state power. In fact, only in the aftermath of the Reconstruction did the Supreme Court clearly articulate the basis for congressional influence over the jurisdiction of the state courts.

In Claflin v. Houseman, the Supreme Court was faced with the question of whether assignees in bankruptcy could sue in state court. Writing for the Court, Justice Bradley noted that the sovereignties are "distinct, 

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70. See The Federalist No. 82, at 4-5 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (maintaining state court authority over substantive law). Alexander Hamilton stated in Federalist No. 82 that:

This might either be construed to signify, that the supreme and subordinate courts of the Union should alone have the power of deciding those causes to which their authority is to extend; or simply to denote . . . that the United States should exercise the judicial power with which they are to be invested, through one supreme tribunal, and a certain number of inferior ones, to be instituted by them. [T]he last admits, the concurrent jurisdiction of the State tribunals; . . . and . . . appears . . . the most natural and defensible construction.


71. See Printz v. United States, 117 S. Ct. 2365, 2370-72 (1997) (detailing some of these enactments that granted jurisdiction to state courts).

72. See Act of Mar. 3, 1815, ch. 101, 5 Stat. 244, 244-45 (providing state or county courts with collection districts for collection of direct tax or internal duties of United States, cognizance of all complaints, suits and prosecutions for taxes, duties, fines, penalties and forfeitures arising and payable under any of acts passed or to be passed and jurisdiction over any sum in controversy attaching to cases under acts or acts to be passed).

73. 41 U.S. (16 Pet.) 539, 563 (1842).

74. 93 U.S. 190 (1876).

75. See id. at 133 (discussing whether assignee in bankruptcy can sue in state court).
and neither can interfere with the proper jurisdiction of the other, . . . but this is no reason why the State courts should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent, and not denied.”

Justice Bradley explained that the “laws of the United States are laws in the several States.”

He noted the Framers’ assumption that state courts would retain their general jurisdiction and would exercise concurrent jurisdiction with federal courts over federal claims, except when Congress explicitly divested them of that jurisdiction.

Justice Bradley concluded by surveying the many times that Congress had in fact relied upon state courts to adjudicate federal claims.

By the start of the twentieth century, Congress began again to rely upon state courts to implement federal regulatory authority. In a series of cases arising under the Federal Employers’ Liability Act (FELA), the Court asserted that the Supremacy Clause demands that state courts of general jurisdiction exercise their jurisdiction for claims brought under FELA. This principle was solidified in 1947 in Testa v. Katt, a case brought by a buyer in a Rhode Island state court under the federal Emergency Price Control Act. The Rhode Island court refused to entertain the federal claim, on the ground that a state need not enforce the penal laws of another sovereign. Writing for the Court, Justice Black rejected

76. Id. at 137.
77. Id. at 136.
78. See id. at 138.
79. See id.
82. 330 U.S. 386 (1947).
83. Pub. L. No. 420, 56 Stat. 23 (repealed 1946). Section 925(e) of the Emergency Price Control Act provided that a buyer of goods above the prescribed ceiling price could sue the seller “in any court of competent jurisdiction” for not more than three times the amount of the overcharge plus costs and reasonable attorneys’ fees. See id. § 925(e). Section 925(c) provided that federal district courts should have jurisdiction of such suits “concurrently with State and Territorial courts.” See id. § 925(c). Such a suit under section 925(e) was required to be brought “in the district or county in which the defendant resides or has a place of business.” Id.
84. See Testa, 330 U.S. at 388. The Rhode Island Supreme Court interpreted section 205(e) to be a penal statute in the international sense and thus not enforceable in state courts. See Testa v. Katt, 47 A.2d 312, 313 (R.I. 1946) (reversing superior court decision on basis of lack of jurisdiction concerning foreign penal laws), rev’d, 330 U.S. 386 (1947).
Rhode Island's argument. Relying heavily upon Claflin and the earlier FELA cases, Justice Black noted that when the state court had general jurisdiction over the type of claim raised, it could not refuse the claim merely because it derives from the federal government.

The Testa doctrine thus solidified the complex and interconnected relationship between the state and federal courts by noting that federal and state jurisdictions are not entirely distinct. The Supremacy Clause speaks explicitly to state judges who maintain implicit general jurisdiction over federal claims. Hence, Congress can require state courts of general jurisdiction to hear federal claims and, furthermore, state courts may not refuse federal claims simply because of their federal derivation.

Testa and similar cases, however, did not consider the ability of Congress to influence the procedures applied in state courts in claims derived from state law. Rather, Testa and its kin only explicated that Congress could rely upon state courts of general jurisdiction to adjudicate federal claims. The question of whether Congress could regulate state court procedures remained open.

B. Article III: The Starting Point

The starting place for any analysis of Congress' ability to regulate the procedures state courts use in state actions must be Article III. Article III derives from a compromise between those Framers who urged the creation of federal trial courts and those who believed that judicial business...
should remain with the states. As a result, the compromise granted Congress the authority to institute lower federal courts, leaving implicit the assumption that state courts would remain open to federal business. This understanding was made explicit by Alexander Hamilton in his famous discussion of the issue in *Federalist No. 82*:

[B]ut I hold that the State courts will be divested of no part of their primitive jurisdiction further than may relate to an appeal; and I am even of opinion that in every case in which they were not expressly excluded by future acts of the national legislature, they will of course take cognizance of the causes to which those acts may give birth. This I infer from the nature of judiciary power and from the general genius of the system.

That state courts would inevitably hear and consider federal claims was also evident from the so-called "judges clause" in the Supremacy Clause. That clause speaks not only to the preeminence of federal law, it also obligates state judges to adhere to that law, notwithstanding state laws. It is this constitutional insistence that state courts hear federal issues and be bound by federal law that underlies both *Clafin* and *Testa*. These cases and their progeny stand for the proposition that in our federal system state courts are obliged to apply and follow constitutionally valid federal law.

These cases do not, however, determine whether a particular federal enactment, which state courts are asked to apply, is otherwise within the scope of congressional authority. Thus, while the *Testa* doctrine makes clear that state courts of general jurisdiction must be open to and cannot discriminate against valid federal laws, the doctrine does not explain when a federal law is otherwise valid. The shortcomings of the *Testa* doctrine are illustrated by the example of a federal law requiring state courts to dismiss civil actions against "any Catholic living in the state." Despite *Testa*, such a federal law, although within the scope of Article III, would not be valid, for it would violate both the First and Fifth Amendments. For the federal regulation of state court procedures to be constitutional, the regulation must be authorized by a valid source of congressional authority and not be otherwise unconstitutional.


92. *The Federalist* No. 82, supra note 70, at 555.

93. *See* U.S. CONST. art. VI, § 2.

94. *See id.* (setting forth preeminence of federal law).

95. For a further discussion of state court obligations to exercise jurisdiction conferred under federal law, see supra notes 70-89 and accompanying text.

96. *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-1, at 297 (2d ed. 1988) (discussing scope of and limitations on congressional power).
Two additional questions are left open by the Testa doctrine. The first is the extent to which Congress may impose costs and hardships on the state courts. In deciding both Testa and its progeny, the Supreme Court has always been clear that state courts of general jurisdiction cannot otherwise discriminate against federal claims; however, the Supreme Court has never decided to what extent state courts must discriminate in favor of federal claims, and not only hear these claims, but also apply procedures that would otherwise burden state courts. Indeed, the Supreme Court has made clear that state courts need not entertain federal claims when they have an "otherwise valid excuse" for so doing. Procedural requirements that would place heavy burdens on state courts, as the tobacco settlement's proposal surely would have done, may well fall outside of Testa's mandate.

Second, there is nothing in the Testa doctrine to suggest that congressional control over state courts may extend to procedures applicable in state law actions. Indeed, the Supreme Court has only considered whether state courts are required to be open to the concurrent jurisdiction of federal claims. But what is to be made of the case, as suggested by the proposed tobacco settlement or the proposed Securities Reform Act, when Congress seeks not to create a federal action, but merely to tinker with the procedures applicable in an otherwise existing state action? Does Testa apply here or would such congressional action violate the states' own sovereignty? In other words, does congressional regulation of state law actions intrude upon the domain of states recognized by the Tenth Amendment and the Guarantee Clause? Each of these questions, critical to the constitutionality of the proposed settlement, is discussed below.

C. The Scope of Congressional Authority

For any congressional regulation of state court procedures to be constitutional, Congress must have the requisite constitutional authority. In the case of the proposed tobacco settlement, Congress would likely have been operating pursuant to its authority to regulate interstate commerce.


98. For a further discussion of the impact of the tobacco proposal on state courts, see infra notes 317-24 and accompanying text.


100. See id. at 823-24 (discussing nonjusticiability in association with Guarantee Clause).

101. See Tribe, supra note 96, § 5-2, at 298 (stating that act of Congress is invalid unless it is affirmatively authorized under Constitution).
There is little doubt that the manufacture and sale of tobacco is an interstate activity that substantially affects the national economy. Similar arguments can also be made to justify congressional authority over securities, vaccines or other products for which Congress has considered regulating state court procedures.

Because Congress can regulate tobacco, securities markets or vaccines, it can undoubtedly legislate substantive standards for such industries and create private causes of action to remedy violations of those substantive standards. Under Article III, Congress could go even further and give the federal courts jurisdiction over such claims. In addition, Congress could use its regulatory powers to preempt state court actions over such industries, vesting exclusive jurisdiction in the federal courts.

Similarly, under the Testa doctrine, Congress could either assume that the state courts would have concurrent jurisdiction over claims arising under such a hypothetical “federal tobacco control law,” or Congress could simply rely upon state courts of general jurisdiction to enforce the federal tobacco control law to the extent that the preexisting jurisdiction of the state courts permitted them to hear such cases. In this sense, through the normal operations of preemption and Testa, Congress could require the state courts to hear federal tobacco claims.

Less clear is to what extent Congress could regulate the procedures that would be followed by a state court when it adjudicated our hypothetical federal tobacco claim. The question of whether state or federal procedures must be applied when state courts adjudicate federal claims is, in essence, the mirror-image of the undeniably moot debate as to the applicability of the Federal Rules of Civil Procedure (“Rules”) to state law claims adjudicated in federal court. In that context, the answer arrived

102. See U.S. CONST. art. I, § 8 (granting Congress power to regulate commerce among several states).

103. See Richard Kluger, Ashes to Ashes: America’s Hundred-Year Cigarette War, the Public Health, and the Unabashed Triumph of Phillip Morris 748 (1997) (stating that in mid 1990s, 45 million consumers spent approximately 55 billion dollars per year on tobacco products).

104. See Gray, supra note 69, at 607 (“There is no question that the federal government has the power under the Commerce Clause to preempt state tort claims.”).

105. See U.S. CONST. art. III, § 2 (stating that Congress has power to determine extent of court jurisdiction).

106. See The Federalist No. 82, supra note 70, at 553-57 (noting that unless Congress vested exclusive jurisdiction in federal courts, normal assumption would be that state courts retained concurrent jurisdiction). But see Douglas v. New York, N.H. & H.R. Co., 279 U.S. 377, 388 (1929) (suggesting that it is not clear that Congress could require state courts that do not otherwise have jurisdiction over tort claims to hear such claims). For a further discussion of state courts’ obligations to exercise jurisdiction conferred under federal law, see supra notes 70-89 and accompanying text.

107. See Hanna v. Plumer, 380 U.S. 460, 463-64 (1965) (discussing whether state or federal procedures must be applied when state courts adjudicate federal claims); Guaranty Trust Co. v. York, 326 U.S. 99, 111-12 (1945) (same); see also
at by the Supreme Court, in *Hanna v. Plummer*,\(^{108}\) is that congressional authority over federal courts extends so far as to permit application of the Rules in federal courts even when the underlying claim arises under state law.\(^{109}\)

Our "reverse-Erie" question, however, has not been answered as decisively.\(^{110}\) The case that most clearly addressed the issue was *Dice v. Akron, Canton & Youngstown Railroad*,\(^{111}\) another case arising under FERA.\(^{112}\) *Dice* was brought in an Ohio court of common pleas.\(^{113}\) The issue was whether federal or Ohio law determined if a judge or a jury should decide if a release was fraudulently obtained.\(^{114}\) Under Ohio law, a judge was permitted to resolve all factual questions of fraud "other than fraud in the factum."\(^{115}\) Federal courts would have left the issue of fraud fully to the jury.

In an opinion by Justice Black, the Supreme Court held that federal law applied.\(^{116}\) The Court noted that it had previously found that the Seventh Amendment's requirement for a jury trial did not apply to state court proceedings under FERA.\(^{117}\) Because Ohio had indeed provided for a jury trial, the Court found that the determination of fraud was "too substantial a part of the rights accorded by the Act to permit it to be classified as a mere 'local rule of procedure' for denial in the manner that Ohio has here used."\(^{118}\)

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109. *See id.* at 473 (recognizing power of Congress to prescribe rules for federal courts even though those rules will inevitably differ from comparable state rules).


111. 342 U.S. 359 (1952).

112. *See id.* at 360.

113. *See id.*

114. *See id.* (regarding injured railroad employee's claim that he was fraudulently induced to settle claim).

115. *See id.* at 362-63 (splitting fraud into fragments to be determined by judge and jury).

116. *See id.* at 363. The Court held that "[i]t follows that the right to trial by jury is too substantial a part of the rights accorded by the Act to permit it to be classified as a mere 'local rule of procedure' for denial in the manner that Ohio has here used." *Id.* (citing Brown v. Western Ry., 338 U.S. 294, 298-99 (1949)).

117. *See id.* (noting previous holding that state may, consistent with federal Constitution, provide for trial of cases under FERA) (citing Minneapolis & St. Louis R.R. v. Bombolis, 241 U.S. 211, 222-23 (1916)).

118. *Id.* (citing Brown, 338 U.S. at 298-99).
The somewhat mysterious rationale for *Dice*, and its fellow FELA cases, has long puzzled commentators. Debate exists over whether the Court meant to imply that federal law governs the procedures applicable for federal actions in state courts—in other words, that the answer to the reverse-*Erie* question is that federal procedures follow federal claims to state courts—or whether the Court simply meant that the issue of whether a federal question went to a jury was too entwined into the nature of the federal right to be considered a mere question of procedure.

Recently, Professor Margaret G. Stewart argued that despite *Dice*, Professor Henry Hart was generally correct when he stated that “[t]he 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.” According to Professor Stewart, the answer to the reverse-*Erie* question is that Congress may impose procedures on states only when the imposition is necessary to prevent the frustration of a congressional remedial purpose. Thus, Congress’ power under Article I does not extend to the regulation of state courts even when they are adjudicating federal issues. When Congress relies upon state courts for the enforcement of federal law, however, it can require that state courts follow such procedures that are “necessary and proper” to prevent the undermining of the federal goal. Hence, the problem in *Dice* was that the particular state rule relied upon by Ohio, which removed the question of fraud from the jury, threatened to undermine the very purpose of FELA.

This interpretation of *Dice* is made plausible by recent Section 1983 cases. In *Felder v. Casey*, the question was whether Wisconsin’s notice-

119. *See Brown*, 338 U.S. at 296 (discussing whether federal or state law controlled in case arising under federal law in state court); *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 354 (1943) (deciding whether federal or state law controlled); *Bombolis*, 241 U.S. at 217 (considering whether federal or state law controlled in case arising under federal law in state court).


121. *See id.* at 437 (stating that relevant case law reveals concern that unnecessary state rules may frustrate congressional remedial purpose); *see also Joan Steinman, Reverse Removal, 78 IOWA L. REV. 1030, 1115-16 (1993) (arguing that state rules frustrate congressional remedial purpose); Weinberg, *supra* note 90, at 756-57 (discussing power of Congress over state courts).

122. *See Dice*, 342 U.S. at 861 (holding that federal rights affording relief to injured railroad employees under federally declared standard could be defeated if states were permitted to have final say as to what defenses could and could not be properly interposed to suits under FELA).

123. *See id.* (“Application of so harsh a rule to defeat a railroad employee’s claim is wholly incongruous with the general policy of the Act to give railroad employees a right to recover just compensation for injuries negligently inflicted by their employers.”).


of-claim statute could apply in a Section 1983 case brought in state court against the City of Milwaukee and some of its police officers. Writing for the Court, Justice Brennan held that the notice-of-claim statute had to give way to the supremacy of federal law. In reaching that conclusion, Brennan did not deny that "[s]tates may establish the rules of procedure governing litigation in their own courts." What states cannot do, according to Brennan, is use their local procedures to defeat a federal right, and he found that Wisconsin's notice-of-claim statute would do just that. According to the Court, the provision was not a "neutral and uniformly applicable rule of procedure; rather it [wa]s a substantive burden imposed only upon those who seek redress for injuries resulting from the use or misuse of governmental authority." Accordingly, Brennan found that the provision actually discriminated against the exercise of federal rights and thus clearly violated the supreme federal law as set forth in Section 1983.

Professor Stewart's hypothesis is further supported by Howlett v. Rose. In Howlett, the Court was faced with whether Florida's law of sovereign immunity could apply in a Section 1983 action brought in Florida court. Relying upon the Supremacy Clause, a unanimous Supreme Court reaffirmed the Testa doctrine and held that state courts "presumptively have the obligation to apply federal law to a dispute before them and may not deny a federal right in the absence of a valid defense." While finding that the Florida sovereign immunity defense was incompatible with Section 1983 and federal law, the Court noted that "[t]he requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented." The Court found that the general rule, "bottomed deeply in belief in the importance of state control of state judicial proce-

126. See id. at 134 (discussing whether state statute requiring 120-day notification of party prior to bringing suit when party is state, local government entity or officer is applicable when action is based on Section 1983).
127. See id. at 136-40 (holding that because Wisconsin's notice-of-claim statute conflicted in both its purpose and effects with Section 1983's remedial objectives, it was preempted pursuant to Supremacy Clause when Section 1983 action is brought in state court).
128. Id. at 138.
129. See id. (citing Brown v. Western Ry., 338 U.S. 294, 298-99 (1949)).
130. Id. at 141.
131. See id. at 145 (finding that state notice-of-claim statute discriminates against type of claim created by Congress).
133. See id. at 359. The plaintiff filed a complaint naming the county school board and three school officials as defendants. See id. He alleged that an assistant principal illegally searched his car while it was parked on school premises and that his subsequent suspension was improper. See id.
134. Id. at 370.
135. Id. at 372.
dure, is that federal law takes the state courts as it finds them." Thus, the Court reinforced the notion that even when state courts adjudicate federal claims that are valid under Article I, the normal assumption is that state procedures, at least when they are not critical to the validity of the federal claim, will apply.

Of course, all of these cases deal with the ability of Congress to regulate state court procedures employed in the enforcement of federal regulatory schemes. Left undecided was Congress' ability to regulate state court procedures applicable to questions of state law arising in state court actions, as the proposed tobacco settlement would have done. The first question must be whether the fact that Congress, under Article I, can create both federal jurisdiction and a federal cause of action is sufficient to provide Congress with the possibly lesser authority to regulate the procedures employed when a state enforces its own laws.

There can be no definitive answer to the question. Neither the Supreme Court nor the lower courts have fully faced it, nor did the Framers ever opine about the subject. Indeed, until recently, the question had the airy "how many angels can dance on the head of a pin" quality to it that makes federal jurisdiction such an infamous subject among law students.

Still, both the proposed tobacco settlement and the pending Securities Reform Act would have tested the question. In our case, the issue is whether the fact that Article I permits Congress to create a hypothetical tobacco settlement or Securities Reform Act means that Congress can regulate state procedures in state courts for state causes of action.

Two axioms should guide the analysis. The first is that while Article I itself gives Congress the authority to regulate commerce, Article I does not

136. Id. (quoting Hart, supra note 120, at 508).
138. See supra notes 36-69 and accompanying text.
139. See Lebow, supra note 65, at 677-90 (tracing notion of inherent independence of state judicial systems within constitutional structure and concluding that "the Constitution simply does not confer upon Congress the ability to require the states to govern according to Congress' instructions" as considered in context of federal product liability reform); Weinberg, supra note 90, at 732-33 (discussing Congress' power to confer jurisdiction over nonfederal cases upon state courts); see also Linda S. Mullenix, Mass Tort Litigation and the Dilemma of Federalism, 44 DePaul L. Rev. 755, 765-67 (1995) (considering constitutional implications of arguments in support of federalizing mass tort law).
give Congress the authority to regulate state procedures qua state procedures. Indeed, there is nothing in Article I that gives Congress the authority to oversee generally the operation of state courts, nor does Article III provide any authority for congressional control over state court procedures.\textsuperscript{141} Of course, Section 5 of the Fourteenth Amendment may at times do precisely that when such regulation is necessary to ensure either due process of law or equal protection of the laws, but neither Article I nor Article III speaks to state court procedures in and of themselves. Thus, unless the Fourteenth Amendment comes into play, congressional authority must be tied to the commerce power, for as Justice Frankfurter noted in his concurring opinion in Dice, federal regulation of state procedures must be justified by reference to some grant of congressional or at least federal authority in the Constitution.\textsuperscript{142}

The second axiom is that there is no clear magical division between federal cases and state cases. Indeed, the very categorization used thus far is clearly simplistic, and the distinction is useful only for purposes of facilitating discussion. As far back as Osborn v. Bank of the United States,\textsuperscript{143} the Supreme Court realized that, for constitutional purposes, a case may simultaneously arise under the laws of the United States and fall within the jurisdiction of Article III even if Congress has not created the cause of

\begin{footnotesize}
\begin{enumerate}
\item[141.] See Complex Litigation, supra note 53, at 183 ("Congress has no constitutional obligation to provide for federal court jurisdiction over actions within concurrent federal and state court jurisdictional reach, such as diversity cases."). In proposing that interstate mass tort cases be transferred to and consolidated in a state court, the ALI suggested that Article III provides Congress with the authority to vest jurisdiction in and regulate state courts. See id. The ALI’s argument was that because Article III does not compel the creation of federal courts, Congress can rely on state courts and effectively federalize them. See id. The assertion that Article III grants Congress the power to federalize state courts rests upon a quite broad reading of that Article, one that neither the text nor the history of Article III can support. See id. Evidently, even the ALI proposal’s reporters did not feel entirely comfortable with their argument because they also relied upon state consent to justify the constitutionality of their proposal. See id. Additionally, commentators have questioned the constitutionality of this proposal. See Steinman, supra note 121, at 1032 (considering whether ALI’s proposal violates Article III, curtails federal district court jurisdiction or unlawfully delegates Tenth Amendment power to state and federal judicialities, and analyzing “whether the Proposal violates Fifth Amendment equal protection principles by treating complex cases differently than cases not affected by the Proposal”). For a more developed analysis of whether Congress can federalize state courts under Article III when state courts exercise federal Article III jurisdiction, see Prakash, supra note 70, at 2010-11. Prakash concluded that nothing in Article III indicated whether state courts may be commandeered into enforcing federal law as Article III courts. See id.

\item[142.] See generally Dice v. Akron, Canton & Youngstown R., 342 U.S. 359, 365 (1952) (Frankfurter, J., concurring) (noting that state courts are under no duty to adhere to different procedures when adjudicating federal actions than when adjudicating local actions). For a further discussion of Fourteenth Amendment considerations, see infra notes 184-93 and accompanying text.

\item[143.] 22 U.S. (9 Wheat.) 738 (1824).
\end{enumerate}
\end{footnotesize}
More pointedly, the scope of federal preeminence under the Supremacy Clause has never been thought to be limited to federal causes of action. We all know that federal defenses can preempt state laws and can be applied to state actions in state court; indeed, this principle is demonstrated each time a state cause of action is found to be preempted by a federal statute or in violation of the federal Constitution.

In the case of the tobacco settlement, therefore, it is somewhat simplistic to assume that individual liability claims in state court could not raise federal claims. Although the proposed settlement did not attempt to create a federal cause of action or alter the substance of state tort law, the settlement certainly did envision a plethora of federal defenses. For example, a defense could have arisen under the settlement’s provisions pertaining to limitations on damages, as well as under the settlement’s attempted preemption of local tobacco control laws. Moreover, questions of federal constitutional law could arise in any state tobacco control case, as they can in any other state court matter, for under the Supremacy Clause, any issue or ruling of state law may always be scrutinized for its fidelity to the Constitution.

As a result of the implications of the Supremacy Clause and the ever-present possibility that federal issues may arise in state cases, the analysis of...
whether Congress' Article I power allows it to regulate procedures in state courts must be refined. The *Dice* doctrine cannot be mechanically tied to federal causes of action; rather, the doctrine more correctly extends to procedures and procedural rules that pertain to the adjudication of Article I questions. Thus, Congress can create a federal defense and by extension, when the necessity arises due to federal interest, Congress should have the authority to regulate the manner in which state courts hear and decide that defense. 148

Under the proposed tobacco settlement, however, as well as the proposed Securities Reform Act, federal intervention in state court procedure would have exceeded that which could be considered necessary to support the adjudication of the settlement's federal substantive elements. 149 Though a provision requiring all privilege claims to be adjudicated by a federal panel may have supported a federal interest in protecting documents that affect interstate commerce, the proposal's ban on class actions and joinder of claims was not necessary for or related to any of the particular defenses provided by the settlement. 150 Thus, the procedural prohibitions would not have affected the standards of care demanded of tobacco companies, the issues relevant at trial or even the extent of damages due. 151 Of course, in practical terms the procedural regulations may be seen as embodying a congressional decision to discourage plaintiffs' actions by making them prohibitively expensive. 152 But if such deterrence is the federal interest intended to be advanced by federalizing state procedures, the interest is not otherwise articulated by the substantive provisions of the proposal. Hence, the regulation of procedure was divorced from any federal interests explicitly governed by the proposal. By making

148. See Product Liability Reform Act of 1996, H.R. 956, 104th Cong. (1996) (establishing legal standards and procedures for product liability litigation and for other purposes). Without discussing this nuance, one commentator nevertheless argued that the Product Liability Reform Act would be unconstitutional. See Lebow, *supra* note 65, at 679, 690 (stating that "the constitutional failings of the current legislation derive from a scheme that imposes upon sovereign state judicial systems 'legislative regulation' of court procedures and processes" and suggesting alternatives).


150. See Tobacco Proposal, *supra* note 4, at 66 (requiring three-judge panel to decide all privilege or trade secrecy challenges asserted by federal government). The proposal provides that "disputes shall be judged in accordance with the ALI/ABA model rules and/or principles of federal law with respect to privilege." *Id.* at 10. For a further discussion of issues related to this panel, see Parmet, *Working Paper* #3, *supra* note 21, at 9-11.

151. See Christopher B. Mueller & Laird C. Kirkpatrick, Modern Evidence 249 (1995) (stating that "relevance is determined by the issues raised by the parties," and by prohibiting class actions, only evidence pertaining to particular individual claims would be relevant and admissible).

152. For a further discussion of the expense of tobacco-related litigation, see *infra* notes 317-21 and accompanying text.
litigation less efficient, the proposal could be read to promote a federal interest in only a stealth or hidden manner.

Due to its separation from any articulated federal issue, the settlement's prohibition of joinder and class actions in state courts must be justified in one of two ways. The first would be to seek a source of congressional power other than the Commerce Clause, such as the Fourteenth Amendment. The second relies on asserting that Article I permits Congress to adopt a far more restrictive limitation than that included in the proposal; that is, because Congress under Article I has the power to create a wholly federal cause of action regarding tobacco liability, it can adopt the more limited measure of restricting joinder and class actions. In other words, because Congress has the authority to legislate limits on tobacco actions in particular, Congress must have the power to enact more modest procedural intrusions aimed at reducing efficiency and, consequently, discouraging litigation.

To see why this is not necessarily the case, it may be helpful to revisit the analogous, but ultimately reverse, question of whether the Constitution grants Congress the power to create "protective jurisdiction." In that case, the issue is whether the fact that Congress can preempt state law and create a federal cause of action under Article I also permits Congress to vest Article III courts with state law claims dealing with the same subject matter.

The arguments in support of protective jurisdiction are very similar to those in favor of congressional regulation of state court procedures in tobacco litigation. Primarily, proponents point out that if Congress has the far greater power of simply overwhelming state law and creating a fed-

153. See Daynard & Parmet, Working Paper #8, supra note 33, at 1 (stating that "the McCain Committee bill more clearly treats all tort claims against tobacco manufacturers as federal actions" and concluding "the bill would result in an enormous preemption of state law"). The Commerce Committee bill, in fact, would have created a federal cause of action.


155. See Steinman, supra note 121, at 1113 (disagreeing with arguments supporting congressional regulation of state court procedure). Steinman argues convincingly that grave constitutional problems would face this proposal, which is less constitutionally suspect than either the proposed tobacco settlement or the proposed securities laws reform. See id. The ALI proposal at least would have relied upon state consent and would have federalized state procedures only for cases that began in federal court and, hence, were within the bounds of Article III. See id. Both the tobacco and securities proposals, in contrast, would have applied federal procedural requirements in cases for which there was no Article III jurisdiction and in instances where there is no consent of the state.
eral cause of action, why should it not have the lesser power of simply creating federal jurisdiction? After all, proponents suggest, exercise of this lesser power is in many ways more respectful of federalism than would be total federal control of an issue.\textsuperscript{156} By using protective jurisdiction, Congress allows states to continue to set the substantive legal standards in an area. Congress merely provides a "protective haven" for the federal interest in terms of federal jurisdiction, allowing cases concerning a particular field to be regulated in federal courts, where federal procedural rules and independent Article III judges reign.

The problem is, however, that the Supreme Court has never endorsed the concept of protective jurisdiction. Indeed, various justices have given us much reason to believe that there is substantial judicial hostility to the idea. In his famous dissent in \textit{Textile Workers Union v. Lincoln Mills},\textsuperscript{157} Justice Frankfurter exclaimed, "Surely the truly technical restrictions of Article III are not met or respected by a beguiling phrase that the greater power here must necessarily include the lesser . . . . It is obvious that very different considerations apply to cases involving questions of federal law and those turning solely on state law."\textsuperscript{158} He went on to note that the theory of protective jurisdiction disregarded both the text and history of the Constitution and was troubling because it had "as its sole justification a belief in the inadequacy of state tribunals in determining state law."\textsuperscript{159}

The Supreme Court has declined other opportunities to approve the concept of protective jurisdiction. In \textit{Verlinden B.V. v. Central Bank of Nigeria},\textsuperscript{160} a case arising under the Foreign Sovereign Immunities Act, the Court avoided an endorsement of protective jurisdiction by ruling that more traditional Article III jurisdiction existed because the statute at issue set forth "detailed federal law standards."\textsuperscript{161} Although the cause of action remained one created by state law, Article III jurisdiction was not tested because the cause remained one that, in the meaning of \textit{Osborn}, actually arose under federal law.\textsuperscript{162} In addition, in \textit{Mesa v. California},\textsuperscript{163} the Court upheld the application of 28 U.S.C. § 1442(a) (1), the federal removal statute, only because the federal employee-defendant was raising a federal defense.\textsuperscript{164} Removal in cases in which no federal defense would be raised,

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\item 156. \textit{See generally} Steinman, \textit{supra} note 121, at 1040-48 (arguing that intersystem consolidation is "good" and provides more control to litigants).
\item 157. 353 U.S. 448 (1957).
\item 158. \textit{Id.} at 474 (Frankfurter, J., dissenting) (citation omitted).
\item 159. \textit{Id.} at 475 (Frankfurter, J., dissenting).
\item 160. 461 U.S. 480 (1983).
\item 161. \textit{See id.} at 494 (declining to endorse concept of protective jurisdiction).
\item 162. For a further discussion of \textit{Osborn}, see \textit{supra} notes 143-44 and accompanying text.
\item 163. 489 U.S. 121 (1989).
\item 164. \textit{See id.} at 135 (concluding that there is no reason to depart from pre-empting federal defense requirement).
\end{itemize}
the Court suggested, would "unnecessarily present grave constitutional problems." 165 The Court added:

\begin{quote}
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 because we do not recognize any federal interests that are not protected by limiting removal to situations in which a federal defense is alleged. 166
\end{quote}

More recently, the possibility of protective jurisdiction was considered in the unusual case of Gutierrez de Martinez v. Lamagna, 167 which concerned the reviewability of decisions made by the U.S. Attorney to designate the United States as a defendant and to remove cases to federal court under the Westfall Act. 168 Although diversity of citizenship secured jurisdiction in the particular case before the Court, several of the Justices were clearly troubled by the question of whether jurisdiction to review the U.S. Attorney's decision and, in the appropriate case, reinstate the original defendant would exist if the parties were not diverse. 169 Writing for the majority, Justice Ginsberg suggested that a district court could retain jurisdiction under such circumstances because the very issue of whether the U.S. Attorney had made the correct decision would be a nonfrivolous federal question that satisfied Article III. 170 Thus, Justice Ginsberg would have grounded jurisdiction under Osborn. 171

Justice O'Connor, in her concurrence, was more troubled by the Article III issue, but she did not feel the need to resolve it because of the presence of diversity in the instant case. 172 Dissenting for himself and four other Justices, Justice Souter found the U.S. Attorney's actions unreviewable precisely because a contrary result could lead to Article III problems. 173 Hence, five Justices expressed significant qualms over ex-

165. See id. at 137 ("We are not inclined to abandon a long-standing reading of the officer removal statute that clearly preserves its constitutionality and adopt one which raises serious constitutional doubt.").
166. Id. (citation omitted).
169. See Gutierrez, 515 U.S. at 440 (questioning appropriateness of retaining federal jurisdiction absent diversity of parties).
170. See id. at 435 ("[W]e do not think the Article III problem amicus describes is a grave one . . . . [T]here was a nonfrivolous federal question, certified by the local United States Attorney, when the case was removed to federal court.").
171. For a further discussion of Osborn, see supra notes 143-44 and accompanying text.
172. See Gutierrez, 515 U.S. at 437 (O'Connor, J., concurring) ("In my view, we should not resolve [the Article III] question until it is necessary for us to do so.").
173. See id. at 443 (Souter, J., dissenting) (finding U.S. Attorney's actions unreviewable within purview of Article III).
expansive notions of Article III that would place cases in which there was no diversity jurisdiction in federal court once there was no substantive federal issue left in the case.\textsuperscript{174} Moreover, none of the Justices saw protective jurisdiction as a solution.

Further, the theory of protective jurisdiction antedates more recent cases that have shown a heightened judicial sensitivity to federal-state boundaries and the norms of federalism. Indeed, the debate over protective jurisdiction has not yet reflected the significance of the Supreme Court's decision in \textit{United States v. Lopez}.\textsuperscript{175} \textit{Lopez} dealt with the Gun-Free School Zones Act\textsuperscript{176} and showed a new or renewed determination on the part of the Supreme Court to review congressional claims of authority under the Commerce Clause.\textsuperscript{177} The \textit{Lopez} Court recognized that although the commerce power is broad, it is not unlimited, and the Court will not simply defer to any congressional assertion to be acting pursuant to that authority.\textsuperscript{178} Claims that the commerce power inherently extends the scope of federal court jurisdiction must be reconsidered in light of \textit{Lopez} and its insistence on a more limited scope of the Commerce Clause.

Justice O'Connor's opinion in \textit{New York v. United States},\textsuperscript{179} which found that Congress lacked the power under Article I to compel the State of New York to "take title" to low-level radioactive waste, also supports this conclusion.\textsuperscript{180} While the import of that case will be considered more thoroughly below, the relevant point here is the Court's rejection of the theory that because Congress could have thoroughly preempted the field, it surely had the lesser power to work through the states and require them

\textsuperscript{174.} See \textit{id.} (stating that Court's views invite difficult and wholly unnecessary constitutional adjudication about limits of Article III jurisdiction, and are powerful reasons to recognize unreviewability of certification).

\textsuperscript{175.} 514 U.S. 549 (1995).


\textsuperscript{179.} 505 U.S. 144 (1992).

\textsuperscript{180.} See \textit{id.} at 188 ("Whatever the outer limits of [states'] sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program.").
to do Congress' bidding.\footnote{For a further discussion of the significance of New York, see infra notes 246-64 and accompanying text.} According to Justice O'Connor, the greater authority does not necessarily legitimize the lesser.\footnote{See New York, 505 U.S. at 168-72 (rejecting view that permissible congressional preemption of states' authority legitimizes congressional compulsion for states as well).} Moreover, novel schemes that may appear at first glance to be more respectful of the states because they leave them with some role to play may still unconstitutionally exceed Congress' authority under Article I.\footnote{See id. at 162 ("While Congress has substantial powers to govern the nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions").} Although these observations have not yet been made in a case implicating either the theory of protective jurisdiction itself or the ability of Congress to regulate state court procedures in state law actions, they at least suggest that the mere fact that Congress can create a federal tobacco control law, and can either grant the federal courts jurisdiction over claims under such a law or regulate the procedures in state courts when they administer such a law, does not mean that Congress can regulate state court procedures for state law claims. The greater, at least in constitutional law, does not always imply the lesser.

D. Other Sources of Congressional Authority

The most obvious constitutional source for congressional authority over state court procedures in tobacco liability trials, or other state tort trials, is Article I's Commerce Clause. But as suggested above, it is not at all clear that Article I provides such authority, at least when the state procedures at issue are not incidental to federal substantive commands. If the commerce power does not authorize the federalization of state court procedures, some other constitutional foundation would be necessary to ensure the proposal's constitutionality. Only two candidates readily appear: the Fourteenth Amendment and the Spending Clause.

Section 5 of the Fourteenth Amendment provides Congress with the authority to "enforce, by appropriate legislation, the provisions of" the Amendment.\footnote{U.S. CONST. amend. XIV, § 5. Interestingly, the proposed codifications of the settlement did not purport to rest congressional authority upon any constitutional provision other than the Commerce Clause. For instance, the version of tobacco legislation reported to the Senate, Senate Bill 1415, explicitly stated that tobacco is sold, distributed and marketed in interstate commerce. See National Tobacco Policy and Youth Smoking Reduction Act., S. 1415, 105th Cong. § 2(10) (1998) ("[T]he sale, distribution, marketing, advertising and use of tobacco products are activities in and substantially affecting interstate commerce. Such products are sold, marketed, advertised, and distributed in interstate commerce on a nationwide basis, and have a substantial effect on the Nation's economy."). The bill also found that civil actions pertaining to tobacco are "complex, time-consuming, expensive and burdensome for both the litigants and Federal and State
conduct of state court trials. For example, the Supreme Court has made clear that the Amendment's Equal Protection Clause prohibits a prosecutor from using peremptory challenges to exclude jurors on account of their race. Furthermore, the Amendment's Due Process Clause sets limits on a state's exercise of personal jurisdiction. The fact that the Fourteenth Amendment applies to state court procedures suggests that under Section 5, Congress may enact some laws that pertain to state court procedures. It does not mean, however, that any particular federal regulation of state court procedures is justified.

The degree to which Congress may act under the authority of Section 5 has long been a subject of intense debate. Recently, the issue was reconsidered by the Supreme Court in City of Boerne v. Flores, a case arising under the Religious Freedom Restoration Act (RFRA). RFRA was enacted by Congress ostensibly to enforce rights protected under the Free Exercise Clause of the First Amendment. The only problem was that the Supreme Court, in the earlier case of Employment Division, Department of Human Resources v. Smith, did not agree with Congress' assessment as to what constituted protected rights under the Free Exercise Clause.

185. See J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 129 (1994) ("We hold that gender, like race, is an unconstitutional proxy for juror competence and impartiality."); Batson v. Kentucky, 476 U.S. 79, 86 (1986) ("Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure.").

186. See Pennoyer v. Neff, 95 U.S. 714, 736 (1877) (holding that enforcement of judgments may be restricted if in violation of due process of law afforded by Fourteenth Amendment), overruled in part by Shaffer v. Heitner, 433 U.S. 186 (1977). For a further discussion of this issue, see Weinberg, supra note 90, at 753-55. Another obvious example is the Fourteenth Amendment's limitation on the use of illegally seized evidence in state criminal trials. See Mapp v. Ohio, 367 U.S. 643, 654 (1961) ("We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.").

187. See Akil Amar, The Bill of Rights and the Fourteenth Amendment, 101 YALE L.J. 1193, 1256 (1992) (citing congressional regard for Bill of Rights in late nineteenth century as "paradigmatic privileges under Section 5 of the Fourteenth Amendment"); Christopher L. Eisengruber, The Fourteenth Amendment's Constitution, 69 S. CAL. L. REV. 47, 80-82 (1995) (distinguishing Section 5's explicit grant of authority to Congress to enforce Constitution from Section 5's lack of judicial authority granted to enforce Constitution); Alan R. Madry, Private Accountability and the Fourteenth Amendment; State Action, Federalism and Congress, 59 Mo. L. REV. 499, 549-51 (1994) ("Contemporary state action doctrine deals as uneasily with the role of Congress under Section 5 as it does with the applicability of the Fourteenth Amendment to private initiatives.").

188. 117 S. Ct. 2157 (1997).

189. 42 U.S.C. § 2000bb-2000bb-4 (1994). The Religious Freedom Restoration Act (RFRA) restored the compelling interest test, guaranteeing its application in all cases where free exercise of religion is burdened, and it provided a claim or defense to persons whose religious exercise is substantially burdened by government. See id. § 2000bb-1.

The issue in Boerne, therefore, was the degree to which Congress could use Section 5 to protect rights that the Court itself did not believe were guaranteed by Section 1 of the Fourteenth Amendment. In an opinion by Justice Kennedy, the Court concluded that Congress did not have the authority to enact RFRA, because “Congress does not enforce a constitutional right by changing what the right is. It has been given the power ‘to enforce,’ not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be . . . ‘provisions of [the Fourteenth Amendment].’”

The analysis in Boerne suggests that Congress lacks unlimited authority under Section 5 of the Fourteenth Amendment. Instead, Congress can only use Section 5 to remedy violations of rights otherwise established under Section 1. Clearly, Congress could meet that test with respect to some hypothetical regulations of state court procedures. For example, a federal statute prohibiting race-based peremptory challenges should satisfy Boerne’s edict. It seems doubtful, however, that the proposed federalization of state court procedures in state tobacco cases could be justified as a remedy for a constitutional violation. Although it is likely that a federal law that required state court class actions to satisfy due process notice requirements would be within Section 5, it is difficult to see how due process could be said to prohibit the use of any class actions or joinder in a state tobacco or securities case. Thus, because there is no Fourteenth Amendment right to a prohibition of joined claims, class actions or consolidated actions, it would be difficult to justify the proposal’s recommendations as authorized by Section 5 of the Fourteenth Amendment.

One last potential source for congressional authority may exist within Article I’s Spending Clause. In furtherance of its authority to “provide for the common Defense and general Welfare,” Congress may attach con-

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191. See, e.g., Katzenbach v. Morgan, 384 U.S. 641, 658 (1966) (enforcing section of federal Voting Rights Act of 1965, 42 U.S.C. §§ 1971-1974(e) (1994), that is contrary to New York state law establishing English literacy requirement and holding that Section 5 allows its enforcement); Civil Rights Cases, 109 U.S. 3, 23 (1883) (“Under the Fourteenth Amendment, [Congress] has power to counteract and render nugatory all state laws and proceedings which have the effect to abridge any of the privileges or immunities of citizens of the United States, or to deprive them of life, liberty or property without due process of law . . . .”).


193. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 810-13 (1985) (holding that Kansas procedure of sending fully descriptive notices to each class member with explanation of right to “opt-out” satisfies due process because interests of absent class members are sufficiently protected by state when plaintiffs are provided with request for exclusion); see also John C. Coffee, Jr., Rethinking the Class Action: A Policy Primer on Reform, 62 Ind. L.J. 625, 661 (1987) (arguing that recent cases have given class action plaintiffs absolute right to opt-out in all but “true limited fund” cases); Michael A. Perino, Class Action Chaos? The Theory of the Core and an Analysis of Opt-Out Rights in Mass Tort Class Actions, 46 Emory L.J. 85, 143 (1997) (arguing that opt-out rights are powerful bargaining tools that can destroy very existence of class actions).

ditions to states’ behavior in exchange for their receipt of federal money. 195 Although quite broad, this power is “not unlimited.” 196 Most particularly, conditions imposed upon states in return for federal money must be related to the federal interest in the particular national projects or programs financed by the federal purse. 197 This suggests that if Congress wishes to use its spending power to regulate state procedures, it would be wise to do so through grants and appropriations directly aimed at supporting state courts. The federal grants called for in the tobacco settlement, which would have provided financial support for public health initiatives designed to curb tobacco use and provided grants to state health programs to pay for the care of tobacco-related illnesses, would hardly seem sufficiently related to prohibitions on class actions, consolidations and joinders in state courts so as to authorize their prohibition under the Spending Clause. 198 This would especially appear to be so given the significant intrusion into state sovereignty that such a prohibition would cause. 199 Moreover, the Supreme Court requires Congress to speak with great clarity about Spending Clause conditions before the Court will require states to comply with those conditions. 200 Unless the regulation of state court procedures was explicitly and closely tied to the receipt of federal money, so that states would be free to choose to forgo the money in exchange for ignoring the prohibitions, it is unlikely that the Supreme

195. Id. § 8, cl. 1; see New York v. United States, 505 U.S. 144, 171-76 (1992) (upholding obligations placed upon states by Congress to provide for disposal of radioactive waste within their borders by setting forth monetary and access incentives as consistent with constitutional division of power between federal and state governments); Steward Machine Co. v. Advise, 301 U.S. 548, 588 (1938) (validating Title IX of Social Security Act, 49 Stat. 620, 620-48 (1935) (codified as amended in scattered sections of 42 U.S.C.), which provides for proceeds of tax to go to treasury and allows taxpayers 90% credit if contributions were made under state unemployment certified by Federal Social Security Board as satisfying certain conditions). A full discussion of congressional authority under the Spending Clause is beyond the scope of this Article. See generally Albert J. Rosenthal, Conditional Federal Spending and the Constitution, 39 STAN. L. REV. 1103, 1131-35 (1987) (discussing constitutional questions of Congress’ power and capability to impose conditions on federal fund recipients as means of regulating behavior and activities otherwise beyond its control).

196. See South Dakota v. Dole, 483 U.S. 203, 207 (1987) (outlining general limitations on Congress’ spending power and concluding that it must be exercised to serve general public purposes, done unambiguously so states are aware of conditions on receipt of federal funds, must be related to “federal interest in particular national projects or programs” and noting that other constitutional provisions may separately prevent conditional grant of federal funds) (citing Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 & n.13 (1981)).

197. See id. at 207-09 (discussing federal spending authority).

198. For a further discussion of the goals of the proposed tobacco settlement, see Tobacco Proposal, supra note 4, at 36.

199. For a further discussion of the intrusion into state sovereignty, see infra notes 201-64 and accompanying text.

200. See Pennhurst, 451 U.S. at 17 (“[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.”).
Court would find that the Spending Clause authorized the proposed federal regulation of state court procedures.

E. Issues of State Autonomy: The Tenth Amendment

Thus far the discussion has focused on the extent of congressional authority and whether congressional power under either Article I or the Fourteenth Amendment extends so far as to authorize congressional regulation of state court procedures. Missing from the analysis has been a consideration of what role, if any, federalism and solicitude for state interests should play in the consideration of congressional authority. When we consider the nature of congressional authority under Article I, according to Justice O'Connor, we must also consider whether the object to be regulated is "an attribute of state sovereignty reserved by the Tenth Amendment"; if it is, according to the Court, Congress lacks the power under Article I to regulate it.

Judicial attitudes towards the Tenth Amendment and state sovereignty have long been subject to frequent fluctuation. In the early years of our Constitution, Chief Justice Marshall articulated a clear vision of federal dominance. To him, the Tenth Amendment only reserved to the states those powers that Congress lacked. Thus, the sole question in

201. For a further discussion of Congress' Article I, § 8 spending authority, see supra notes 194-97 and accompanying text.

202. New York v. United States, 505 U.S. 144, 156 (1992). These concerns over state sovereignty may well play a lesser role when Congress is acting pursuant to Section 5 of the Fourteenth Amendment. For a discussion of federalism and its effect on state sovereignty, see Caminker, supra note 97, at 1006 n.13. Several cases also discuss the relationship between state sovereignty and federalism. See, e.g., Seminole Tribe v. Florida, 517 U.S. 44, 54-56 (1996) (illustrating Supreme Court's affirmation of Congress' capacity to abrogate state's Eleventh Amendment immunity when it acts under Fourteenth Amendment, even though Congress cannot abrogate Eleventh Amendment when it acts pursuant to Article I); New York, 505 U.S. at 146 (deciding that protections for state sovereignty under Spending Clause are analyzed differently).


204. See generally Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (holding that federal vessel licensing statute preempted New York's steamboat licensing scheme); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 420 (1819) (recognizing limits to government power, yet construing Constitution to permit legislature to exercise its "best judgment" in selecting measures to carry into execution constitutional powers of government).

205. See Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 193 (1819) ("[I]t was neither necessary nor proper to define the powers retained by the States. These powers proceed, not from the people of America, but from the people of the sev-
McCulloch v. Maryland was whether Article I gave Congress the power to create a national bank. If Congress had the authority, there could be no claim that the Tenth Amendment left the matter of banking to the states.

During the New Deal, the Supreme Court endorsed the view that congressional power to regulate the private market under the Commerce Clause was broad and should not be reigned in by notions of "state sovereignty." In United States v. Darby, the Court noted that the Tenth Amendment "states but a truism that all is retained which has not been surrendered." Darby's dismissal of the Tenth Amendment and judicial protection for state sovereignty was never beyond dispute. Although the post-New Deal Supreme Court was willing to accept the realities required of a modern market and find congressional commerce power to be far-reaching, the Court found the notion that all areas of traditional state regulatory authority could come under federal control more than a bit disquieting. After all, federalism, and the dual scheme of governance provided by the federal system, is at the very heart of our constitutional system. Surely, there had to be some limits to the erosion of state authority.

The first post-New Deal case to support the view that the Tenth Amendment limited federal authority was National League of Cities v. Usery. Usery considered the ability of Congress to require states to abide by the minimum wage and overtime provisions of the Fair Labor Standards Act. In a surprising opinion by Justice Rehnquist, the Court, for
the first time since the New Deal, ruled that the Tenth Amendment limited Congress' power under the Commerce Clause.216 More specifically, the Court held that under the Tenth Amendment, Congress lacked the power to regulate "in areas of traditional governmental functions."217 According to Justice Rehnquist, the Tenth Amendment served as a limit or trump on congressional power under Article I.

Usery's revival of the Tenth Amendment and state autonomy was subjected to scathing criticism.218 The critique was eventually adopted by the majority when it overruled Usery in Garcia v. San Antonio Metropolitan Transit Authority.219 Before overruling Usery, however, the Court struggled to apply its precedent and determine what constituted areas of traditional governmental functions. The cases in which the Court applied Usery shed some important light on how the current Court would view an attempt by Congress to regulate state court procedures.220

The difficulty the courts had in applying Usery and determining what constitutes a "traditional state function" led the Court to suspect that the answer may be gleaned more acutely not by looking to the object of the state or federal regulation at issue, but rather at the way in which the federal regulation affected the manner in which the state went about its regu-

216. See Usery, 426 U.S. at 842-43 (expressing view that Tenth Amendment "declares the constitutional policy that Congress may not exercise power in a fashion that impairs the states' integrity or their ability to function effectively in a federal system") (citing Fry v. United States, 421 U.S. 542, 547 (1975)).

217. Id. at 852.

218. See D. Bruce La Pierre, The Political Safeguards of Federalism Redux: Inter-governmental Immunity and the States as Agents of the Nation, 60 Wash. U. L.Q. 779, 782 (1982) (noting that Usery abandoned status quo, which assumed there were only political checks on Congress' power). Usery was viewed as an "open invitation to litigation" because it provided no guidelines as to what constituted the boundaries of state autonomy. See id. at 786; see also Barry Friedman, Valuing Federalism, 82 Minn. L. Rev. 317, 378 (1997) (arguing that federalism, not state autonomy, should be valued more in our society because federal system advances ideals that are important); David S. Gehrig, The Gun-Free School Zones Act: The Shootout Over Legislative Finding, the Commerce Clause, and Federalism, 22 Hastings Const. L.Q. 179, 193 (1994) (supporting Tenth Amendment arguments and contention that state sovereignty can be found).


220. See id. at 544-46. In rejecting Usery's rule of identifying traditional state functions, the Garcia Court noted several cases as examples of the difficulty a modern-day court would face in establishing what constitutes a traditional government function. See New York v. United States, 326 U.S. 572, 583 (1946) (concluding that distinction between "governmental" and "proprietary" functions was untenable and must be abandoned). Compare Usery, 426 U.S. at 851 (determining that maintenance of public parks and recreation is traditional government function, with Indian Towing Co. v. United States, 350 U.S. 61, 64-68 (1955) (finding taking of private property for public use "novel exercise of legislative power"), and Flint v. Stone Tracy Co., 220 U.S. 107, 172 (1911) (declaring that provision of municipal water supply "is no part of the essential governmental functions of a State"), rev'd sub nom. Brush v. Commissioner, 300 U.S. 352, 370-72 (1937) (rejecting earlier position and deciding that provision of municipal water supply was immune from federal taxation as essential governmental function).
latory business.\textsuperscript{221} The early inklings of this view, which has been called the "autonomy of process principle," appeared in \textit{Federal Energy Regulatory Commission v. Mississippi}.\textsuperscript{222} \textit{Federal Energy Regulatory Commission} involved the Public Utility Regulatory Policies Act of 1978,\textsuperscript{223} a statute which required that state utility regulatory commissions consider adopting federally suggested standards and which established federal procedural requirements for state utility commissions to follow when regulating electrical rates.\textsuperscript{224}

Although the Court ultimately held that the act did not violate the Tenth Amendment, the Court was clearly troubled.\textsuperscript{225} In his majority opinion, Justice Blackmun looked back to \textit{Testa} and noted that under its holding, state courts can be forced to observe federal policy.\textsuperscript{226} As a result, Justice Blackmun believed that state administrative agencies could be similarly compelled.\textsuperscript{227} Justice Blackmun further noted that while the act's procedural provisions appear more intrusive than its other provisions, there is nothing unconstitutional about a requirement that a state administrative body follow certain "procedural minima" as it undertakes to apply the federal law's substantive provisions.\textsuperscript{228} In making this observation, Justice Blackmun was careful to point out that the act's procedural requirements did not "purport to set standards to be followed in all areas of the state commission's endeavors."\textsuperscript{229} In essence, the procedural requirements were limited, as they have always been under the \textit{Dice} doctrine, to procedures applicable to the resolution of federal substantive issues.\textsuperscript{230}

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\textsuperscript{221} See \textit{Garcia}, 469 U.S. at 550-51 (finding great difficulty in identifying principled constitutional limitations on scope of Congress' Commerce Clause powers over states merely by relying on "a priori" definitions of state sovereignty and deciding that boundary of state sovereignty lies within political process of federal government).
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\textsuperscript{222} 456 U.S. 742, 755 (1982); see \textit{Powell}, supra note 213, at 651. As articulated by Justice O'Connor in \textit{New York v. United States}, federalism protects the integrity of state processes rather than being concerned with "creating a substantive realm of state legislative autonomy." \textit{Id.} at 650.
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\textsuperscript{224} See \textit{id.} §§ 2621-2623 (establishing federal procedural requirements for state utility commissions).
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\textsuperscript{225} See \textit{Federal Energy Regulatory Comm'n}, 456 U.S. at 778 (disputing role that Tenth Amendment plays in limiting state sovereignty).
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\textsuperscript{226} See \textit{id.} at 760 ("[S]tate courts have a unique role in enforcing the federal body of law."); \textit{Testa v. Katt}, 330 U.S. 386, 393 (1947) (holding that state courts must enforce claims decided in state courts of general jurisdiction involving federal law).
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\textsuperscript{227} See \textit{Federal Energy Regulatory Comm'n}, 456 U.S. at 761 n.24 (noting that role of modern federal examiner or administrative law judge is "functionally comparable" to that of judge) (citing \textit{Butz v. Economou}, 438 U.S. 478, 518 (1978)).
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\textsuperscript{228} See \textit{id.} at 771 (commenting on states' obligation to enforce federal law).
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\textsuperscript{229} \textit{Id.}
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\textsuperscript{230} For a further discussion of the \textit{Dice} doctrine, see supra notes 111-48 and accompanying text.
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Justice Powell, concurring in part and dissenting in part, voiced even greater reservations about the act's procedural provisions. Justice Powell quoted one commentator's observation that ""[t]he 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." Justice Powell continued by adding, "I know of no other attempt by the Federal Government to supplant state-prescribed procedures that in part define the nature of their administrative agencies." Furthermore, Powell noted that if "Congress may... [supplant state-prescribed procedures], presumably it has the power to preempt state-court rules of civil procedure and judicial review in classes of cases found to affect commerce." To Justice Powell this was clearly unconstitutional. In finding the unconstitutional procedural provisions to be severable from the rest of the act, however, he did not find the entire act unconstitutional.

Justice O'Connor, in her dissent, was even more emphatic. In an opinion that foreshadowed her later analysis in New York, she wrote that "[s]tate legislative and administrative bodies are not field offices of the national bureaucracy. Nor are they think tanks to which Congress may assign problems for extended study. Instead, each State is sovereign within its own domain, governing its citizens and providing for their gen-
eral welfare." To Justice O'Connor, the act's defect was not that Congress had regulated a subject matter outside of federal purview; rather, the problem was the way Congress went about doing so. Instead of directly regulating utilities on its own, Congress conscripted state agencies to carry out the federal mandate, thereby impermissibly impairing the ability of states to function as separate sovereigns. Although Justice O'Connor agreed that Congress could regulate and indeed fully preempt the field of utility regulation, she believed Congress could not achieve its regulatory ends through a process that required state agencies to carry out the federal object.

Justice O'Connor found Congress' "commandeering" of the states troubling for two interrelated reasons. First, commandeering would impose substantial costs on the states. She noted that the act would tax the "limited resources of these commissions ... decreasing their ability to address local regulatory ills." This intrusion could not be justified by the Testa doctrine, which merely required courts of general jurisdiction to treat federal claims evenhandedly. A requirement that state commissions consider matters that would not otherwise be on their agenda and apply federal procedures beyond those that they would otherwise apply far exceeded what Testa authorized.

Second, and more importantly, by requiring state agencies to implement federal law, the act, according to Justice O'Connor, threatened to disrupt the ability of state citizens to hold state officers accountable for their actions. She suggested that Congress' heavy intrusion into the workings of a state administrative agency blurred the lines of authority and

238. Id. at 777 (O'Connor, J., concurring in part).

239. See id. at 787 (O'Connor, J., concurring in part, dissenting in part) (noting that "[t]he states might well prefer that Congress simply impose the standards described in PURPA; this, at least, would leave them free to exercise their power in other areas").

240. See id. (O'Connor, J., concurring in part, dissenting in part) (explaining that because Congress has not preempted regulation of this issue in PURPA, states cannot devote their resources elsewhere). PURPA "drains the inventive energy of state governmental bodies by requiring them to weigh its detained standards, enter written findings, and defend their determinations in state court ... [thus] state utility commissions are less able to pursue local proposals for conserving gas and electric power." Id. (O'Connor, J., concurring in part, dissenting in part).

241. See id. (O'Connor, J., concurring in part, dissenting in part) (stating that state agencies have obligations to follow "congressionally mandated tasks" that inhibit these agencies from fulfilling their goals).

242. Id. at 781 (O'Connor, J., concurring in part, dissenting in part).

243. For a further discussion of Testa, see supra notes 70-89 and accompanying text.

244. See Federal Energy Regulatory Comm'n, 456 U.S. at 787 (O'Connor, J., concurring in part, dissenting in part) (arguing that compelling state agencies to follow federal mandates leads to confusion of responsibility for political representatives).
responsibility that help keep each division of government accountable to its own constituents.\(^{245}\)

These concerns reappeared ten years later in Justice O'Connor's majority opinion in *New York*, which analyzed the constitutionality of the Low-Level Radioactive Waste Policy Amendments Act of 1985,\(^{246}\) requiring states, among other things, either to provide for the disposal of low-level waste or take title to such waste.\(^{247}\) While not specifically overruling *Garcia*, Justice O'Connor's opinion in *New York* reasserted the Court's role in policing the boundaries of federalism.\(^{248}\) Determining whether that role derived from the Tenth Amendment or from limitations implicit within Article I, Justice O'Connor suggested, was besides the point because the two constitutional provisions must be read in tandem.\(^{249}\) What is essential, according to Justice O'Connor, is the realization that "'[t]he States unquestionably do retain a significant measure of sovereign authority . . . to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.'"\(^{250}\)

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247. See *New York* v. United States, 505 U.S. 144, 144 (1992) (detailing requirements of Low-Level Radioactive Waste Policy Amendments Act of 1985). The take-title provision read that if a state or regional compact fails to comply with the statute by January 1, 1993:

>[E]ach State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, shall be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of that State to take possession of the waste . . . .

99 Stat. 1842.

248. See *New York*, 505 U.S. at 187 (outlining Court's role in policing contours of federalism). "Much of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form." *Id.*

249. See id. at 156-57 (discussing Court's role within Tenth Amendment and Article I); see also Powell, *supra* note 213, at 650 (explaining that Tenth Amendment directs determination of whether incident of state sovereignty is protected by limitation on Article I power). Professor Powell suggests that Justice O'Connor does not read the Tenth Amendment as a trump on Article I powers, as did the majority in *Garcia*, but rather as a "rule of construction" directing the Court to construe the Constitution so as to preserve the ability of states to engage independently in their own lawmaking processes. *See id.*

The Court's opinion in New York did not resurrect the analysis supplied in Usery. Instead, Justice O'Connor's opinion more closely echoed her own dissent in Federal Energy Regulatory Commission, where she suggested that the essential inquiry is not whether the federal regulation at issue impinges upon a matter traditionally regulated by a state, but whether the federal regulation impermissibly undermined "an incident of state sovereignty." More precisely, Justice O'Connor interpreted the question before her as whether Congress had the power under Article I to "commandeer" the legislature of the state and require it to enact legislation in accordance with congressional dictates.

Reviewing the history of the Constitutional Convention, Justice O'Connor concluded that the Framers never intended that Congress wield such power. According to Justice O'Connor, when the Framers granted Congress the power to regulate individuals directly and bypass states, a power that Congress had lacked under the Articles of Confederation, the Framers implicitly denied Congress the power to affect individuals by indirectly coercing their state legislatures.

Justice O'Connor stated that allowing Congress to act upon individuals through the states would undermine federalism and weaken the accountability through which citizens can control the actions of both the state and federal legislatures. Hence, Justice O'Connor suggested, while Congress may pre-
empt state laws or directly regulate particular matters in interstate commerce, Congress must respect the ability of states to enact independently their own laws and cannot command states legislatures to legislate in accordance with congressional dictates.\textsuperscript{257}

The "no-commandeering" doctrine of \textit{New York} was recently relied upon and expanded by Justice Scalia in his majority opinion in \textit{Printz v. United States}.\textsuperscript{258} In \textit{Printz}, the Court found the Brady Handgun Violence Prevention Act\textsuperscript{259} unconstitutional insofar as provisions imposed requirements on "chief law enforcement officers" ("CLEOS") to conduct background checks on would-be handgun purchasers.\textsuperscript{260} In an opinion that retain a "choice" when Congress acts pursuant to the Spending Clause, she did not adequately deal with the accountability and blurring of line problems that may nevertheless result from states passing laws to receive federal money. \textit{See id.} Indeed, while it is possible to hypothesize (and all Justice O'Connor's political theories are merely hypotheses) that state voters will be able to discern the correct lines of authority when states choose to accept federal money, she did not consider the more daunting problem of whether Congress itself can be held sufficiently accountable for its actions when it acts by giving states money.

\textit{257.} \textit{See id.} at 188. A related concern for the ability of states to exist as independent sovereign entities was articulated in Justice Thomas's dissenting opinion, with which Justice O'Connor joined, in \textit{United States Term Limits, Inc. v. Thornton}, 514 U.S. 779, 849 (1995) (Thomas, J., dissenting). In arguing that a state constitutional amendment to limit the terms of U.S. Representatives and Senators was constitutional, Justice Thomas relied upon the Tenth Amendment and the belief that the Amendment affirmed that states exist as separate sovereigns and can assert all sovereign powers not explicitly granted to Congress. \textit{See id.} at 848-50 (Thomas, J., dissenting) (stating that states are not mere political subdivisions of United States and that Constitution leaves to states residuary and inviolable sovereignty within terms of Tenth Amendment). The majority disagreed, finding both that Congress has authority to regulate congressional qualifications and that the Tenth Amendment cannot reserve to the states a power to regulate the terms of federal officers because the states did not have any such powers prior to the ratification of the Constitution. \textit{See id.} at 800-80 (taking narrow approach to scope and interpretation of Constitution on states' powers).


\textit{260.} \textit{See Printz}, 117 S. Ct. at 2387-2404 (holding that background check requirement for purchase of handguns imposed unconstitutional obligation on state officials to execute federal law). Justice Stevens, who was joined by Justices Souter, Ginsberg and Breyer, cited both the \textit{Federalist Papers} and the practices of the early republic as strongly supporting the view that the Constitution permits the federal government to commandeers state executives, as opposed to legislative, officials. \textit{See id.} at 2387-2401 (Stevens, J., dissenting). Justice Stevens also rebutted the majority's insistence that strict judicial oversight of federalism is necessary to protect state autonomy and individual rights. \textit{See id.} at 2399 (Stevens, J., dissenting). Justices Souter and Breyer also wrote dissents. \textit{See id.} at 2401-05 (Souter & Breyer, JJ., dissenting). Justice Souter focused on his interpretation of \textit{The Federalist Papers} Nos. 27, 36, 44 and 45, which he believed demonstrated that state officials were obliged to support federal law. \textit{See id.} at 2401, 2403 (Souter, J., dissenting). Justice Breyer, joined by Justice Stevens, focused on the practical benefits of the federal government's relying upon state officials to carry out federal programs. \textit{See id.} at 2402, 2405 (Breyer, J., dissenting).
relied heavily on the history of the Constitution's framing and the early practices under the Constitution, Justice Scalia found that the Constitution prohibited Congress from commandeering state executive officials. 261

Taken together, *New York* and *Printz* can be read to suggest that the federalization of state court procedures applicable to the adjudication of state law issues is problematic. To the extent that such schemes require state legislatures, which in some states enact the procedural rules applicable in the state courts, to alter their rules of civil procedure, those schemes directly violate *New York*'s edict against the commandeering of state legislation. 262 But even if the proposal is merely characterized as a command upon state judges, prohibiting them from exercising certain procedural options, the proposal may still violate the principle established in *New York* and *Printz* that requires Congress to leave state processes autonomous.

The application of the no-commandeering principle to federal laws affecting state court procedures is complicated by the existence of *Testa*. The Court, in both *New York* and *Printz*, had to deal with the fact that *Testa* and its progeny could be interpreted as supporting congressional commandeering of state courts. 263 Moreover, Justice Scalia in *Printz*, while reviewing whether Congress may commandeer state executive officials, considered the fact that the early Congresses required state courts to engage in a variety of federal ministerial activities. 264 The opinions in both cases acknowledge a history of federal intrusion into the state courts and these cases may be read to suggest that the federalism limitations they establish upon the commandeering of state legislatures and executive officials do not necessarily apply to the commandeering of the state courts. Although such an interpretation is possible, there are many reasons to believe that the current Supreme Court would be deeply troubled by the type of federal regulation of state court procedures suggested by the proposed tobacco settlement and other recently proposed bills.

261. *See id.* at 2376 (discussing forced participation of state executive officials in administration of federal programs).

262. *See Charles Allen Wright, Procedural Reform: Its Limitations and Its Future, 1 Ga. L. Rev. 563, 565 (1967)* (commenting on need for legal reform due to new societal developments that call for judicial and legislative adaptations). In some states, the legislature enacts the procedural code applicable in state courts. *See id.* More often, the legislature delegates this power to the courts themselves. *See id.*


264. *See Printz, 117 S. Ct. at 2370-71.* Other commentators have reviewed the early use of state courts to perform federal ministerial activities. *See Caminker, supra* note 97, at 1044 (noting that in these efforts, state courts were required to implement federal laws, and therefore these actions do not provide precedent for federalization of state court procedures applicable to state law claims).
F. State Sovereignty and the State Court Procedures

The Supreme Court's recent forays into federalism must be read in light of a history that is both complex and contradictory. Neither clear lines nor simple rules can be relied upon. This is especially true with respect to judicial federalism. Here the murky questions of federalism become the most opaque. Still, if recent cases suggest anything beyond their own narrow holdings, it is that the current Supreme Court is adamant on protecting some "core" of state sovereignty and that the existence of that core is determined not so much by a search for whether the particular area of the economy regulated was one traditionally regulated by the states, but rather by the Court's understanding of the political theory of federalism and the role that federalism plays in dispersing power and protecting liberty.265 Also critical to some members of the Court are the principles of federalism held by key members of the framing generation.266 As understood by the current Court, the Framers' federalism does not emphasize the nationalizing concerns of the Framers who designed and advocated for a far stronger central government than did their anti-Federalist opponents, but rather emphasizes the Framers' republican concerns with liberty.267

Under this perspective, Federalist No. 10 becomes key to understanding the constitutionally appropriate structure of contemporary federal-state relations.268 States must be protected as separate political entities so

265. See New York, 505 U.S. at 181 (stating that "[s]tate sovereignty is not just an end of itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power'" (quoting Coleman v. Thompson, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)); see also United States Term Limits, Inc. v. Thornton, 514 U.S. 779, 799-800 (1995) (Thomas, J., dissenting) (concluding that states do not have power to impose congressional qualifications additional to those specifically stated in Constitution); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 548 (1985) (demonstrating abandoned process of searching to see if particular area of economy was one traditionally regulated by states). For a critique of the balance of federal and state power, see Caminker, supra note 97, at 1085-88.

266. See Printz, 117 S. Ct. at 2372-73 (discussing enactments of early Congress that prohibited federal government from commandeering state legislatures); see also New York, 505 U.S. at 180-82 (explaining constitutional division between federal and state governments).

267. See Martin H. Redish, Doing It With Mirrors: New York v. United States and Constitutional Limitations on Federal Power to Require State Legislation, 21 HASTINGS CONST. L.Q. 595, 602-03 (1994) (discussing Guarantee Clause, expressly avoided by Justice O'Connor in New York, which "could conceivably be construed to provide some sort of protection of state government integrity against Federal incursion"); see also Powell, supra note 213, at 652-63. For a critique of Justice O'Connor's ruling in New York, see supra notes 179-83 and accompanying text.

268. See THE FEDERALIST NO. 10, at 56-65 (James Madison) (Jacob E. Cooke ed., 1961) (discussing relationship between state and federal governments). From this perspective, what is critical about Federalist No. 10 is not its emphasis on the values of an expanded republic per se, but rather its emphasis on the importance of countervailing factions and power. See id. Hence, the relationship between the federal government and the states, as envisioned by the current Supreme Court, is
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that they can serve as countervailing sources of power and reservoirs of liberty.\textsuperscript{269} As Justice Blackmun stated, "federalism secures to citizens the liberties that derive from the diffusion of sovereign power."\textsuperscript{270} Thus, although the Court has not endorsed one commentator's suggestion that federalism can be best understood and protected by a renewed focus upon the Guarantee Clause, the Court has integrated some of that Clause's concerns into judicial interpretations of Article I and the Tenth Amendment.\textsuperscript{271} The Court has determined that while the breadth of congressional power to regulate the market is great, neither Article I nor the Tenth Amendment will be read to permit Congress to undermine the ability of the states to act as separate political entities that can determine their own laws and carry out their own policies. Instead, the Court suggests that the ability of the states to survive as separate sources of governmental power—to develop and to implement checks upon the federal authority—requires that the states be able to create and carry out their own policies.\textsuperscript{272} To do so, state officials, including legislative, executive and judicial officials, must remain accountable to their constituents for their policies.\textsuperscript{273} Ultimately, what is critical is whether the sovereign that initiates the regulation is the one that is responsible for, and hence accountable for, its implementation.\textsuperscript{274} According to the Court, if that identity between the sovereign that formulates policy and the sovereign that implements policy is lacking, lines of authority and accountability will be confused.\textsuperscript{275} In addition, both the states and the federal government will lose their ability to survive as separate sources of policy formulation, as well as political power.\textsuperscript{276}

\textsuperscript{269} See New York, 505 U.S. at 181 (discussing "fundamental purpose served by our Government's federal structure"); see also Tom Stacy, \textit{Whose Interest Does Federalism Protect?}, 45 U. KAN. L. REV. 1185, 1187-1207 (1997) (arguing that federalism properly understood does not aim at perfecting liberty).

\textsuperscript{270} Coleman, 501 U.S. at 759 (Blackmun, J., dissenting) (discussing principles of federalism).

\textsuperscript{271} See Merritt, Federalism, supra note 59, at 2, 78 (stating that Guarantee Clause restrains federal government from interfering with state autonomy).

\textsuperscript{272} See Powell, supra note 213, at 686 (stressing need for "initiation" and "immunity" in local governments). Professor Powell has suggested that Justice O'Connor's approach protects "a space for local agendas, local deliberation, and local decision making," which he sees as important to creating or protecting "a tradition of engaged, participatory politics." \textit{Id.} at 688.

\textsuperscript{273} See id. at 641-42 (explaining reasons why lines of political accountability must be clear).

\textsuperscript{274} See id. (separating implementation and regulating functions within sovereignty concept of government).

\textsuperscript{275} See id.

\textsuperscript{276} See id. at 641-50.
The application of this vision to the federal regulation of state courts is necessarily made more complex due to the existence of the judges' clause commanding state judges to follow and apply federal law. As a result, one cannot simply say that state courts cannot be "commandeered" in the sense that they cannot be compelled to apply federal law. Moreover, state judges can be required both to accept jurisdiction over federal claims and to apply federal procedures in regard to the resolution of such claims. This means that the blurring of lines of authority and political accountability, which Justice O'Connor worries about, is to some extent unavoidable when it comes to the judiciary. The fact that it may be impossible to keep state courts as isolated from congressional control as are other branches of state government, however, does not mean that all congressional intrusions are permissible. Nor does it mean that the concerns animating the doctrine have no application to the congressional regulation of state court procedures. To the contrary, it seems inconceivable

277. See Martin v. Hunter's Lessee, 14 U.S. 304, 340 (1816) (stating that state court judges are bound to follow Constitution, laws and treaties of United States). But see Printz v. United States, 117 S. Ct. 2365, 2384 (1997) (declaring that state legislatures are not subject to federal direction). Justice Scalia's attempt in Printz to distinguish the obligations of state judges from state executive officials is not fully convincing. After all, state executive officials are also required to abide by federal law, and when they do not, they may be compelled by a federal court to do so. See Cooper v. Aaron, 358 U.S. 1, 19 (1958) (requiring governor and legislature to integrate Little Rock schools). What is unique about state court judges is that under Testa, federal law may impose affirmative obligations upon them, while it generally only imposes negative prohibitions upon other state officials. See id. Hence, we can say that federal law only limits state officials, it does not commandeer them. But, as is always the case in the law, the distinction here between affirmative obligations and negative prohibitions is quite a shaky one; it is certainly questionable whether one can truly say that federal law only operated in the negative when it required Governor Fortas to integrate the University of Mississippi. See id. For a discussion of the idea that the Supremacy Clause does not permit special treatment for state court judges and that Congress can not commandeer them to a greater degree than it can commandeer state executive officials, see Caminker, supra note 97, at 1041 (discussing whether Congress may commandeer state office to implement federal law).

278. See Testa v. Katt, 330 U.S. 386, 391 (1947) (describing case history that led to state courts' obligation to try federal matters); see also Dice v. Akron, Canton & Youngstown R., 342 U.S. 359, 361-62 (1952) (stating that claim involving federal question "is to be determined by federal rather than state law").

279. See Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 787 (1982) (O'Connor, J., concurring in part, dissenting in part) ("Congressional compulsion of state agencies . . . blurs the lines and political accountability and leaves citizens feeling that their representatives are no longer responsive to local needs."). But see Caminker, supra note 97, at 1042-49 (arguing that originalism cannot firmly support Court's anticommandeering rule governing state executive and legislative activity); Prakash, supra note 70, at 1996-2001, 2013-20 (suggesting Justice O'Connor has drawn wrong lesson). Both Prakash and Caminker argue that the framers would permit Congress to commandeer both state courts and state executive officials to carry out federal law. See Caminker, supra note 97, at 1042-49; Prakash, supra note 70, at 1996-2001, 2013-20. Neither of their arguments, however, would accept congressional regulation of state procedures in state court actions, as the proposal would mandate.
that a Supreme Court, concerned as this one is with preserving the ability of the states to exist as separate political and sovereign institutions, would allow such a dramatic federalization of state courts as would have occurred under the proposed tobacco settlement.

As the existence of Article III demonstrates, the Framers saw courts as fundamental to the existence and realization of sovereignty. In the Framers' view, a true government had judicial power and, necessarily, its own courts could exercise that power. This point was so obvious to the Framers that they scarcely debated whether the United States should have federal courts. According to one historian, "[that] there should be a national judiciary was readily accepted by all." On the very first day that the Constitutional Convention engaged in substantive debate, the Committee of the Whole accepted the resolution that a national government ought to be established consisting of a supreme Legislature, Judiciary and Executive. According to Madison, a few days later the Convention voted unanimously that "a national judiciary be established."

280. See U.S. Const. art. III, § 1; see also The Federalist No. 78, at 521-30 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (examining judiciary department of proposed government). The fact that they believed it essential that the federal government have a court system does not mean that the Framers believed it critical that there be lower federal courts, or that all federal matters be adjudicated in federal courts. See id. Indeed, as was noted above, there is strong reason to believe that the Framers intended that state courts would have concurrent jurisdiction over much of the federal judicial business. See id. I merely wish to emphasize that when envisioning what was necessary for a government to function, the Framers assumed the necessity of a court system with one court answerable to that government acting as a final Supreme Court. The question of whether the Framers intended that there be lower federal courts is, of course, a much-debated question and is well beyond the purview of this Article.

281. Max Farrand, The Framing of the Constitution of the United States 79 (1913); see Jackson Turner Main, The Antifederalists: Critics of the Constitution 19 (1961) (describing Antifederalists' reservations about establishment of federal judiciary). The Antifederalists' opposition did not lie in the belief that a sovereign government could exist without a court system. See id. Rather, they were concerned about the composition of the federal judiciary. See id. More generally, they were concerned that the creation of a fully sovereign federal government would inevitably undermine the sovereignty of the states. See id. at 124.


283. James Madison, The Madison Papers Containing Debates on the Confederation and Constitution 155 (Jonathan Elliot ed., 1859); see Stanley Elkins & Eric McKitrick, The Age of Federalism 64 (1993) (noting that "amount of attention and discussion given to judiciary in the Constitutional Convention was only a fraction of that devoted to the executive and legislative branches"). The Framers were convinced of the need for a federal court system and for a place to appeal disputes between the United States and states, or between the states themselves. See id. But the details were left to a later resolution. See id.
To many of the Framers, one of the major flaws of the Articles of Confederation was the absence of any federal court system. Cataloging the defects of the confederations that had existed throughout history, Hamilton wrote in *Federalist No. 15* that:

Government implies the power of making laws. It is essential to the ideal of a law, that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws will, in fact, amount to nothing more than advice or recommendation. This penalty, whatever it may be, can only be inflicted in two ways: by the agency of the Courts and Ministers of Justice, or by military force; ... in an association where the general authority is confined to the collective bodies of the communities, that compose it, every breach of the laws must involve a state of war; and military execution must become the only instrument of civil obedience. Such a state of things can certainly not deserve the name of government, nor would any prudent man choose to commit his happiness to it.

And later, in his preface to a description of the independence afforded to the federal judiciary in the Constitution, Hamilton wrote, "In unfolding the defects of the existing confederation, the utility and necessity of a federal judicature have been clearly pointed out. It is the less necessary to recapitulate the considerations there urged; as the propriety of the institution in the abstract is not disputed ..." Thus, to the Federalists, it was beyond dispute that sovereign entities had courts. If the United States was to be a nation, it had to have at least a Supreme Court.

If the Framers felt that a judiciary was critical to the sovereignty of the federal government, it is not surprising that they also assumed that courts would be critical to the sovereignty of the states. As was noted before, the Framers assumed that the states would keep their courts and that those courts would retain all of their preexisting jurisdiction, except to the extent that such jurisdiction had been exclusively delegated to the federal government. True, the Supremacy Clause itself implies that state courts

284. See *The Federalist No. 15*, at 95 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (stating that only courts can enforce obedience to law over individuals and only military force can compel obedience of states).

285. *Id.* To Hamilton, this does not "deserve the name of government, nor would any prudent man choose to commit his happiness to it." *Id.* at 96.


287. See *The Federalist No. 80*, at 535 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (arguing that courts are necessary both to give "efficacy to constitutional provisions" by overturning state law in "manifest contravention" of Constitution and provide "uniformity in the interpretation of national laws").

288. See *The Federalist No. 82*, supra note 70, at 553-54 (stating that "the states will retain all pre-existing authorities, which may not be exclusively delegated to the federal head; ... and ... will retain the jurisdiction they now have").
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could not operate precisely as they had prior to the Constitution's ratification; after that event, state courts had to recognize the predominance of federal law and could not discriminate against federal interests in exercising their jurisdiction. Still, the state courts were to remain as state courts, as the states and their respective constitutions and legislatures had created. This suggests that although the state courts are not immune from the influences of federal law, indeed they are bound to observe and apply federal law, there is also a limit on the extent to which Congress and the federal government may intrude upon and undermine the independence of the state courts. Justice O'Connor first suggested this view in her dissent in Southland Corp. v. Keating, where the question before the Court was whether the Federal Arbitration Act (FAA) was applicable in state courts. Finding that the FAA created a substantive rule of law enacted under the commerce power, the majority held that it preempted state law and applied to state courts. In her dissent, in which Chief Justice Rehnquist joined, Justice O'Connor argued that the FAA was intended purely as a procedural law to be applied in federal courts. This conclusion was based in part upon her reading of the FAA's legislative history and in part upon her understanding of federalism and her belief that "absent specific direction from Congress the state courts have always been permitted to apply their own reasonable procedures when enforcing federal rights." Thus, seeing the FAA as creating a procedural limitation, Justice O'Connor hesitated before applying it to state courts.

Equally revealing is Justice O'Connor's majority opinion in Gregory v. Ashcroft. The issue in Ashcroft was whether the Age Discrimination in Employment Act (ADEA) applied to state judges. In addressing that issue, Justice O'Connor reasserted the vision of federalism that she had previously articulated in her dissent in Federal Regulatory Energy Commission

293. See id. at 12-14 (addressing Congress' intent to make FAA enforceable in state courts).
294. See id. at 21-30 (O'Connor, J., dissenting) (arguing that FAA is solely procedural and "general federal law" applies in federal courts).
295. Id. at 25-26.
296. For a discussion of the idea that Justice O'Connor's opinion in Southland demonstrates that she would disapprove of current attempts to federalize state court procedure, see Lebow, supra note 65, at 274.
299. See Ashcroft, 501 U.S. at 455 (stating that issue is whether Missouri's mandatory retirement requirement for judges violated Age Discrimination in Employment Act of 1967 (ADEA)).
and would later develop further in *New York*. She began with the pieties of federalism: "As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." This federalism, she suggested, provides for a "check on abuses of government power." She argued that to preserve this federalism, the Court must not be quick to assume that Congress has chosen to undermine the sovereignty of the states.

Justice O'Connor then explained how a federal law that regulated the qualifications of state court judges could weaken a state's ability to act as a separate political entity. "Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." According to the Justice, "the authority of the people of the States to determine the qualifications of their most important government officials . . . is a power reserved to the States under the Tenth Amendment [which] . . . 'guarantee[s] to every State in this Union a Republican Form of Government.'" Although state control over judicial qualifications might be limited by the Fourteenth Amendment or other constitutional provisions, such limitations should not be lightly inferred. Thus, even if Congress had the power under the Fourteenth Amendment or the Commerce Clause to regulate state judicial qualifications, the Court should not read the statute as having that impact without Congress' explicit directions to do so.

Therefore, *Ashcroft* suggests, without conclusively deciding, that a majority of the current Supreme Court Justices believe that, notwithstanding the Supremacy Clause, the Constitution's concerns for state sovereignty limit the extent to which Congress may regulate state courts. A propo-

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302. Id. at 458.
303. See id. at 460 (stating that "'it is incumbent upon federal courts to be certain of Congress' intent before finding that federal law overrides this balance'" (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985))).
304. See id.
305. Id.
306. Id. at 463 (quoting *Bernal v. Fainter*, 467 U.S. 216, 221 (1984)).
307. See id. (defining scope of state control under Fourteenth Amendment).
308. See id. at 468-69 (stating that Congress did not intend to impose mandatory obligations on states pursuant to Section 5 of Fourteenth Amendment).
309. See id. at 457-64. Because Justice O'Connor decided the issue as a matter of statutory interpretation, she did not have to decide whether a federal statute regulating the qualifications of state court judges would be constitutional. See id. at 477 (White & Stevens, JJ., dissenting in part) (arguing that Justice O'Connor's consideration of federalism contradicted *Garcia*, which renounced job of policing boundaries between states and federal government). Justice Blackmun dissented in the case, in an opinion joined by Justice Marshall. See id. at 486 (Blackmun & Marshall, JJ., dissenting) (stating that statute did apply to state judges and was constitutional). Interestingly, three of the four members of the Court who disagreed
nent of the proposed tobacco settlement or of other attempts to federalize state court procedures may nevertheless argue that Ashcroft is not dispositive. Not only did the Ashcroft Court avoid the constitutional issue, but the Court dealt with judicial qualifications rather than the regulation of state court procedures.\textsuperscript{310} Such a proponent may suggest that the Tenth Amendment is concerned primarily with state officials and the right of the people of a state to choose their officials and that Congress may have more leeway to regulate state court procedures.\textsuperscript{311}

The distinction between state court officials and state court procedures, however, should not be determinative. Imagine for a moment this absurd hypothetical: Congress passes a law requiring state judges to ignore enactments of state legislatures whenever state judges are deciding a case concerning any issue that substantially affects interstate commerce. If the hypothetical law is analyzed only by asking whether Congress has regulated a matter that is within the bounds of Article I, the hypothetical would seem to satisfy the requirement.\textsuperscript{312} If one follows the edict of New York, however, and decides the Article I issue in light of the Tenth Amendment and a concern for state sovereignty, the analysis would be quite different.\textsuperscript{313} Under the New York approach, one would also have to wonder how the hypothetical act would affect the ability of states to set their own laws in accordance with the demands of the Constitution, and to constitute their own courts as entities entrusted to interpret, apply and ultimately compel obedience to constitutionally lawful acts of the state legislature.\textsuperscript{314} From this perspective, one can see that the hypothetical federal law would

with Justice O'Connor's views about federalism were the same Justices who dissented the next term in New York. See New York v. United States, 505 U.S. 144, 188-215 (1992) (reporting that Justices Blackmun, Stevens and White dissented). Of the four justices that dissented in Ashcroft, only Justice Stevens remains on the Court.

\textsuperscript{310.} See Ashcroft, 501 U.S. at 461-63 (stating that Equal Protection Clause analysis will not be applied to states' power to establish state official qualifications because that power lies "firmly within a State's constitutional prerogatives").

\textsuperscript{311.} See id. at 462-63 (discussing "political function" doctrine that has been used to determine application of Equal Protection Clause to qualifications required of state government officials); see also United States Term Limits, Inc. v. Thornton, 514 U.S. 779, 845-926 (1995) (Thomas, J., dissenting) (emphasizing importance of states having control over qualifications of state officials).

\textsuperscript{312.} See United States v. Lopez, 514 U.S. 549, 567 (1995) (reducing degree of deference that Court will accord Congress in determining whether matter "substantially affects" commerce and thus may be regulated by Congress pursuant to Article I).

\textsuperscript{313.} For a further discussion of the edict of New York v. United States, Article I under the Tenth Amendment and states' sovereignty, see supra notes 201-11 and accompanying text.

\textsuperscript{314.} See Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938) ("Congress has no power to declare substantive rules of common law applicable in a State . . . ."); see also Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 635-36 (1874) (limiting Supreme Court's review of state court's decision to federal issues). In essence, the hypothetical law would undermine the teachings of Murdock and Erie, both of which proclaim that states and state courts are the final arbiters of state law. See
erode the lawmaking and law-applying capacity of states as much as, if not far more than, any federal regulation of state judges. Moreover, the hypothetical law would affect the political accountability concerns articulated in New York. In effect, Congress would have prevented state laws from being enforced without clearly accepting the onus for that nonenforcement by more forthrightly preempting state laws. Political and legal chaos would result. Voters concerned about the substance of particular laws would have no idea to what or to whom to turn. And so, while ostensibly engaging in a narrower preemption than one that created substantive federal law, Congress would have undermined the ability of the electorate, both state and federal, to hold their lawmakers accountable. Thus, as Justice O'Connor suggests in New York, innovations in federalism that appear to impose only minor intrusions upon the interests of states may well severely undermine the individual and democratic interests served by federalism.315

The proposed tobacco settlement and similar bills would not have gone as far in subverting the ability of states to enforce their own laws as would the above hypothetical statute. The settlement proposal would not have entirely disrupted the workings of state courts, but, if enacted, would have created many of the same difficulties and, possibly, some additional ones.316

First, the proposal would have imposed significant costs on state courts. For example, the recent class action brought by smokers in Florida for the damages they claimed were caused by smoking may include as many as 100,000-200,000 individuals.317 Even if only a fraction of those

THE FEDERALIST No. 15, supra note 284, at 90 (examining "insufficiency of the present confederation to the preservation of the Union").

315. See New York v. United States, 505 U.S. 144, 168-69 (1992) (discussing problems state and federal governments may have in regulating states due to confusion over accountability).

316. See generally Proposed Resolution Passes Constitutional Muster, ACS Says, Andrews Tobacco Indus. Litig. Rep., Nov. 28, 1997, at 16761 (discussing constitutional issues that may result from proposal). It could be argued that in the case of the tobacco proposal, at least, the consent of the states to the settlement would vitiate any Tenth Amendment concerns. See Royal C. Gardner, Exporting American Values: Tenth Amendment Principles and International Environmental Assistance, 22 Harv. Envtl. L. Rev. 1, 31 (1998) (discussing effect of states' consent to federal regulations). The proposal, however, would have applied even to those states that were not parties to the settlement. Moreover, it is questionable whether the consent of the Attorney General of a state can waive the interests of the state. In the Eleventh Amendment context, at least, the Supreme Court has required state legislative action to effect a waiver of a state's rights. See, e.g., Edelman v. Jordan, 415 U.S. 651, 663 (1974) (holding that failure of state attorney general to raise sovereign immunity defense does not waive defense); see also New York, 505 U.S. at 180-83 (stating that federalism was designed to protect rights of individuals, not state itself, and support of state officials for law struck down was not sufficient to save it from constitutional invalidation).

317. See Barry Meier, Trial to Begin in Big Law Suit by Smoker in Florida, N.Y. Times, July 6, 1998, at A5 [hereinafter Meier, Big Law Suit] (discussing start of large class action suit in Florida). An earlier class action brought by 60,000 flight
potential plaintiffs chose to pursue litigation and were entitled to relief under the law of a particular state, the inability of the state court to certify a class action, or at least consolidate some cases where it would be otherwise constitutionally permissible to do so, would obviously impose substantial costs on the state court system. Estimates show that lack of consolidation and class actions may cost court systems millions of dollars each year. As a result, most scholars who have studied the problems posed by mass torts have advocated reforms designed to facilitate consolidation and the use of class actions. The proposed tobacco settlement marched in quite the opposite direction. By so doing, it ignored the economic burdens placed upon the states. These burdens may well have been so enormous as to constitute an undue hardship on state courts, which Congress may not be able to impose under even when such costs are incidental to the adjudication of federal claims in state courts.

attendants was settled. See id. (noting that victories against tobacco companies are rare).

318. See Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231, 2234 (1997) (interpreting class actions as being consistent with Article III and Rules Enabling Act, 28 U.S.C. §§ 2071-2074 (1994)). There are constitutional due process limitations on class actions. See Adams v. Robertson, 520 U.S. 85, 86-91 (1997) (discussing due process requirements in class actions). The demands of due process may also impose costs, both political and financial, on state court systems, but they are obviously permissible as the costs necessary for respecting constitutional rights. See Amchem Prods., 117 S. Ct. at 2251 (noting terms of settlement reflect allocation decisions designed to confine compensation and limit defendant liability). The issue raised here is the extent to which Congress may impose burdens on state court systems that exceed those necessary for the protection of constitutional commands. See id. at 2244 (noting procedure “shall not abridge, enlarge or modify any substantive right”); see also John McCain, Watch the Tobacco-Settlement Costs Skyrocket Now, Hous. Chron., June 25, 1998, at 27 (noting how time and expense involved in litigation are considerably greater at state level).

319. See Complex Litigation, supra note 53, at 17 (discussing economic costs of class actions). This is why most scholars who have studied the issue have recommended changes to enhance the use of class actions. See id. (noting that consolidation of complex litigation could save billions of dollars). The proposal thus goes against the grain of most recommendations designed to deal with inefficiencies in the court system. See id. (noting that estimated cost of asbestos litigation alone is over $1 billion).

320. See id. at 16-17. Scholars have cited various defects in the current system, including duplication of litigation, judicial overload, delay of just decisions, enormous cost and inflated attorneys’ fees. See id. (discussing drawbacks of current system); see also D. Hensler, Trends in Tort Litigation: The Story Behind the Statistics 33 (1987) (discussing judicial delay and costs).

321. See Douglas v. New York, N.H. & H.R. Co., 279 U.S. 377, 386 (1929) (discussing interaction of state and federal law). Thus, it must be remembered that the Testa doctrine prohibits state courts from discriminating against federal claims. See id. at 379 (noting that principle of comity “has no application to present action under constitutional form of government”). To avoid this discrimination, states may inevitably have to bear some costs. See Testa v. Katt, 330 U.S. 386, 391-92 (1947) (asserting obligation of states to enforce federal law). But the Supreme Court has never said that states must discriminate in favor of federal claims and bear costs for such claims far in excess of those that would otherwise be expended for state claims. See Douglas, 279 U.S. at 383 (“Because the exercise of
But, the financial costs are the least troubling aspect. Far more critical, from the perspective of the Tenth Amendment, are the potential political costs. By imposing enormous financial costs and inevitable delays and inefficiencies on state courts when they adjudicate issues of state law, the proposal would have undermined the ability of states to adjudicate and enforce their own laws. Had the proposal been enacted, the citizens of a state would have been confused about where the problem lay in their tort system. If the voters were to witness high judicial costs and a clogging of state courts, which could impede the resolution of civil and even criminal matters, should they have blamed the state's tort system or the federally imposed procedural burdens? Given the federal procedural constraints, would voters have been able to access accurately proposals for modification of the state's tort law? In other words, if problems resulted from the federally imposed proposal's inefficiencies, would the political system be able to determine the cause accurately?

Second, the proposal would have undermined the ability of states to determine their own law. Federal law may limit or displace state law because that is the natural consequence of the Supremacy Clause, but, in our constitutional system, states have always been the final arbiters of their own laws. Yet, by imposing such substantial limitations on the ability of state courts to determine state laws, the proposal would not only have added costs, it would have undoubtedly affected the interpretation and evolution of state tort law. For example, limiting class actions would alter the scope of relevance and thus the rules of evidence applicable in state tobacco litigation. The way state courts would rule on the ultimate substantive issues of state tort law would be affected. Again, the impact of the federal limitation would not be clear or direct; as such, the changes might not be readily attributable to the federal government. Instead, the changes would be subtle and indirect, intermeshed in the fabric of state common law. Without explicitly exercising its powers of preemption or jurisdiction would be a burden on interstate commerce, the refusal to exercise jurisdiction is at least reasonable, and, therefore, not a violation . . . of the Constitution.

322. See U.S. Const. art. VI, cl. 2. Article VI of the United States Constitution provides in relevant part:

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.

Id.; see Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938) (stating that no federal common law exists and Congress has no power to declare substantive rules of common law); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 611 (1874) (holding decision of federal question by highest state court to be correct).

323. See Mueller & Kirkpatrick, supra note 151, at 249 ("Relevance is a relational concept and carries meaning only in context. Relevance is determined by the issues raised by the parties, the other evidence introduced, and the applicable substantive law.")
regulation, Congress would have effectively altered the "warp and woof" of state tort law. As a result, the ability of the states to exist as distinct political entities with their own laws, arising out of their own legislative, political and judicial systems, would be undermined. To a Supreme Court that is concerned with state sovereignty, such an unprecedented intrusion may well be found to go too far.324

G. The Possibility of Removal

Possibly to avoid the constitutional problems associated with the regulation of state court procedures, the proposed tobacco settlement and the proposed Securities Reform Act each provided for removal of state tort actions to federal court in instances where the state court did not follow the federally imposed procedural limitations.325 For example, Title VII, section B of the proposed tobacco settlement would have allowed the defendants to remove an action to federal court upon the plaintiff's application to a state court for a class action or joinder.326 Removal would be permitted in similar circumstances under House Bill 1689, the proposed Securities Reform Act.327 The question remains whether these removal provisions would be constitutional and, if so, whether they could extinguish any constitutional infirmity that otherwise pertained to the federal regulation of state court procedures.

The removal proposals were clearly connected to the federal regulation of state court procedures and must be analyzed as such. Nevertheless, even if one could ignore the federalism problems raised by the regulation of state court procedures, constitutional issues would arise with respect to the removal provisions.328 Under the original proposed tobacco settlement, removal could occur merely upon the motion of a plaintiff to consolidate a claim.329 Thus, even if a state court was willing to comply with the federal ban on consolidation and the plaintiff made a motion in a state court that had no procedure to consolidate claims, the defendant could have removed the action. Removal in such a circumstance should raise grave Article III problems because in the absence of diversity, there would

324. For a further discussion of the Supreme Court's position on comity, see infra notes 355-79 and accompanying text.
325. See Tobacco Proposal, supra note 4, at 39 (discussing removal to federal court by defendant); see also Securities Reform Act, H.R. 1689, 105th Cong. (1997).
326. See Tobacco Proposal, supra note 4, at 39 (discussing generally civil liability for past conduct). By deeming all tobacco claims to be federal actions, the bill was able to expand the scope of removal while erasing many of the constitutional problems. See S. 1415, 105th Cong. (1998) (expanding scope of removal); Daynard & Parmet, Working Paper #8, supra note 33, at 1-3 (noting that all civil liability actions against tobacco companies arise under federal law).
328. For a further discussion of federalism and state court procedures, see supra notes 201-64 and accompanying text.
appear to be no true federal issue. In such a case, the basis for Article III jurisdiction, if any exists, must rest on either the possibility that a hypothetical federal issue may arise or the theory of protective jurisdiction. But as was noted earlier, the Supreme Court has never endorsed the concept of protective jurisdiction. Jurisdiction, therefore, must be based merely on the possibility of a hypothetical federal claim. Basing jurisdiction on such a thin reed arguably finds some support in Justice Marshall's dicta in Osborn, but finds little contemporary support.

Even more troubling is the nature of the particular hypothetical issue upon which this Article III jurisdiction must rest. Presumably, the federal issue that would justify Article III jurisdiction would be the question of whether consolidation or a class action, suggested by the plaintiff's motion precipitating the removal, is appropriate. This raises the question of whether the federal limitation on state court procedures is itself constitutional. Hence, the federal issue that would support Article III removal jurisdiction would be the potential unconstitutionality of the federal regulation that the removal was attempting to save. Thus, the drafters, worried that a regulation of state court procedures was unconstitutional, attempted to save the regulation by having the very question of the regulation's constitutionality serve as a foundation for Article III jurisdiction and the divestiture of state court jurisdiction. This boot-strapping is insufficient to save the proposal's regulation of state court procedure.


331. For a further discussion of Article III jurisdiction, see supra notes 141-45 and accompanying text.

332. For a further discussion of protective jurisdiction, see supra notes 154-83 and accompanying text.

333. See Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 755-65 (1824) (exploring generally grounds on which jurisdiction may be maintained); see also Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 420 (1995) (finding sufficient grounds for federal jurisdiction for claim not arising under FTCA though brought against federal employee acting within scope of employment while abroad), cert. denied, 118 S. Ct. 335 (1997). Indeed, the dissent in Gutierrez suggests that several members of the Court clearly would find grave constitutional problems with resting Article III jurisdiction upon such a thin reed. See id. at 441-44 (Souter, J., dissenting) (noting serious problem in requiring federal district court to retain jurisdiction over claim not implicating federal law). The majority justifies its finding, first, because there was diversity in the case before the Court, and second, because it found that the jurisdictional issues themselves presented sufficiently weighty federal issues to justify federal jurisdiction. See id. at 435 (discussing justification of federal jurisdiction). For a further discussion regarding removal and the basis for federal courts' jurisdiction in the proposed tobacco settlement, see supra note 21 and accompanying text.

334. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-79 (1803) (stating that act repugnant to Constitution cannot be sustained as law).

335. For a further discussion of the proposal's insufficient attempt to justify the regulation of state court procedure, see supra notes 20-25 and accompanying text. For a discussion of whether the Supreme Court would allow this federalization of state courts, see supra notes 277-79 and accompanying text.
deed, the boot-strapping is quite reminiscent of the unconstitutional choice struck down in New York.336 In New York, the state was required either to "take-title" to the radioactive waste or enact conforming legislation.337 The majority did not view the act's Hobson's choice as a true choice because Congress could not independently impose either option on the states.338 The combination of unconstitutional options did not provide any sanctuary. So too here, if the regulation of state court procedures found in the proposed tobacco settlement and Securities Reform Act would impermissibly undermine the independence of state courts, then removal provisions that depend upon the constitutionality of that regulation for its jurisdictional footing cannot save the unconstitutional regulation. Although the removal provision could prevent the state courts from having to bear the full cost of the federal regulation, the political accountability and federalism problems would remain, as would the inefficiencies caused by the removal of cases during the course of litigation.339 The possibility of removal predicated on a potentially unconstitutional intrusion on state judicial independence should not resolve the very constitutional problem upon which it rests.

IV. A LOSS OF COMITY

The argument thus far has contended that proposals to federalize state court procedures in state tort actions are unconstitutional. Even if that is not the case, however, the proposals to federalize state court procedures in state tort actions should remain deeply troubling from a federalism perspective. Indeed, our judicial canon is replete with cases that express the values of "comity"340 and that caution the federal courts to respect the integrity and independence of state courts in recognition of the critical role these courts play under "our federalism."341 Although these cases speak mostly to judicial prudence and not to the actual constitutional limits on congressional authority, they nevertheless should cau-

338. See id. at 144 (refuting petitioner's argument that Act imposed this requirement).
339. For a further discussion of accountability, federalism problems and inefficiencies caused by removal, see supra notes 273-76, 325-38 and accompanying text.
tion against either the casual federalization of state court procedures or the questionable removal process attached to such proposals.

Prudential reasons for respecting the independence of state courts are numerous. To Professor Hart and his successors, respect for the independence of state courts is essential because state courts are the final protectors of liberty. Congressional control of federal court jurisdiction inevitably limits the extent to which federal courts can serve as protectors of individual or minority rights. Only state courts, with their independence from Congress, can be ensured to remain open. Given the critical role that state courts will have to play when we need them most, these scholars suggest treating state courts as true and equal partners to the federal courts in the protection of rights so that state courts will be there when all else fails.

Other scholars suggest that state courts deserve respect because of the generative role they can play in the evolution and protection of individual rights. For example, Justice Brennan, who typically endorsed easy access to federal courts and clearly chastised state courts for their frequent constitutional abuses, came later in his career to praise the critical role state courts and state constitutions can play in the protection of rights.

342. For a further discussion of the reasons for protecting the independence of state courts, see infra notes 343-52 and accompanying text.


345. See Hart, supra note 343, at 1401 (discussing general jurisdiction of state courts).

346. See Bator, supra note 343, at 624-29 (discussing state role in formulation of federal policy). This view tends to assume that institutions and state court systems behave as individual human beings would. See id. (discussing importance of state courts’ desire to guard and protect Constitution). Ideally, state judges should consider federal law as part of their own law. See id. at 624. State judges should feel empowered in a manner that makes them feel that they are on par with the federal courts. See id. As a result, state courts will feel “an obligation to ‘guard, enforce, and protect every right granted or secured by the Constitution.’” Id. (quoting Robb v. Connolly, 111 U.S. 624, 637 (1884)).


Envisioning federal constitutional rights as a mere floor, Justice Brennan argued that state courts were best suited to expand the panoply of rights enjoyed by individuals.349

Others, perhaps less idealistically, stress the actual role that state courts play in our legal system.350 Whatever one thinks of the respective division of labor between the state and federal courts, the reality is that

state relations in administration of criminal justice), overruled in part by Wainwright v. Sykes, 433 U.S. 72 (1977); see also Monroe v. Pape, 365 U.S. 167, 180 (1961) (expressing view espoused by Justices Douglas and Brennan that prejudice existed in state law), overruled by Monell v. Department of Soc. Servs., 436 U.S. 658 (1978). The question of whether state or federal courts are more or less protective of constitutional rights is known as the "parity debate." See Michael Wells, Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts, 71 B.U. L. Rev. 609, 609 (1991) [hereinafter Wells, Parity Debate] (noting that parity enters into "virtually every discussion of rules concerning access to federal court for constitutional claims"). On one side of the issue, advocates of federal courts argue for broad jurisdiction over constitutional challenges to state action. See id. (asserting that federal courts are better than state courts at adjudicating these controversies). On the other hand, advocates of state court jurisdiction stress that state courts are capable of enforcing constitutional rights. See id. at 610 (noting that proper judicial balance is critical issue). Resolution of this debate, if any is possible (and it probably is not), is beyond the scope of this Article. See William J. Brennan, Jr., The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights, 61 N.Y.U. L. Rev. 535, 548-50 (1986) (arguing that state courts can and should protect individual rights to greater degree than do federal courts). Justice Brennan noted:

For a decade now, I have felt certain that the Court's contraction of federal rights and remedies on grounds of federalism should be interpreted as a plain invitation to state courts to step into the breach. In the 1960s, the "understandable enthusiasm that championed the application of the Bill of Rights to the states . . . contribute[d] to the disparagement of other rights retained by the people, namely state constitutional rights." Busy interpreting the onslaught of federal constitutional rulings in state criminal cases, the state courts fell silent on the subject of their own constitutions. Now, the diminution of federal scrutiny and protection out of purported deference to the states mandates the assumption of a more responsible state court role. And state courts have taken seriously their obligation as coequal guardians of civil rights and liberties.

Id. at 548 (footnote omitted) (quoting Collins, Reliance on State Constitutions, in Developments in State Constitutional Law 1, 4 (B. McGraw ed., 1985)).

349. See Brennan, supra note 348, at 550 (stating that rebirth of interest in state constitutional law should be greeted enthusiastically).

350. See Erwin Chermerinsky, Federalism Not as Limits, But as Empowerment, 45 U. Kan. L. Rev. 1219, 1234 (1996) [hereinafter Chermerinsky, Federalism] (discussing importance of both state and federal courts in ensuring proper allocation of power between state and federal governments). Professor Chermerinsky made three points. See id. First, throughout American history, and especially now, federalism has been viewed as concerned with limiting federal power to protect state governments. See id. at 1220. Second, federalism should instead be viewed as being concerned with the proper allocation of power between state and federal governments. See id. Third and finally, in determining the proper allocation of power, the goal must be effective government. See id.
most judicial business occurs in state courts.\textsuperscript{351} Far more criminal trials, and certainly far more cases, are adjudicated in the state courts than in the federal courts.\textsuperscript{352} With that in mind, it is imperative that policymakers pause before undermining state court systems by imposing humiliations, inefficiencies and unnecessary costs upon them.

Of course, recognition of the importance of state courts should not be read to negate the critical role that federal courts have played in our constitutional system. In many areas, but particularly in the battle against race discrimination, federal courts have played a dominant role.\textsuperscript{353} There can also be no doubt that the Constitution permits, and prudence recommends, concentrating federal statutory litigation before federal courts, thereby permitting the development of judicial expertise and uniformity of interpretation.\textsuperscript{354} In the absence of a clear federal interest, however, our legal tradition cautions against unnecessary federal interference with the legitimate functioning of state courts.\textsuperscript{355} Doctrines as diverse as the

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\item \textsuperscript{351} See Judith S. Kaye, "Year in Review" Shows Court of Appeals Continuing Its Great Traditions, 42 N.Y.L. Sch. L. Rev. 331, 331 (1998) (noting that state courts determine roughly 98% of nation's litigation).
\item \textsuperscript{352} See generally Administrative Office of the United States Courts, Federal Court Management Statistics, Examining the Work of State Courts (1995 Supp.) (providing statistical overview of state and federal district court caseloads). For example, in 1995, 281,681 cases were filed in the federal district courts, as compared to 33,405,566 cases filed in state trial courts. See id. at 138, 167.
\item \textsuperscript{354} See Neal Miller, An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction, 41 Am. U. L. Rev. 369, 371 (1992) (studying forum choices under federal jurisdiction empirically). There are different rationales used to support federal court jurisdiction in cases involving litigants from different states or predicated upon federal law. See id. at 372. Diversity jurisdiction is thought to reflect a concern for out of state commercial litigants' fear of local court bias. See id. Federal question jurisdiction has been used historically to enforce constitutional rights. See id. at 372-73. A second rationale for federal question jurisdiction is the "need for uniform interpretation and application of federal law and . . . the development of a federal common law for federal legislation." Id. at 373.
\item \textsuperscript{355} See Younger v. Harris, 401 U.S. 37, 53-54 (1971) (stating that federal courts will not enjoin pending state criminal prosecutions except under extraordinary circumstances). It should also be noted, however, that there is a counter tradition, supported by the Reconstruction Amendments and their implementing legislation, which permits significant federal oversight or interference in the procedures of state courts. See, e.g., Fay v. Noia, 372 U.S. 391, 398-99 (1963) (holding
abstention doctrine,\textsuperscript{366} the "adequate and independent state ground doctrine,"\textsuperscript{357} the judicially created exhaustion rule\textsuperscript{358} and procedural default rules applicable to habeas corpus\textsuperscript{359} reflect this reluctance to divest the state courts of jurisdiction.\textsuperscript{360} Indeed, what is striking about these doctrines is their genesis and evolution in cases raising clear federal interests. Thus, in \textit{Younger v. Harris},\textsuperscript{361} for example, the Court emphasized the importance of comity despite the presence of an arguably significant First that federal judge may not deny habeas corpus to person who bypasses state procedure and forfeits state court remedies), \textit{overruled in part} by \textit{Wainwright v. Sykes}, 433 U.S. 72 (1977); Monroe \textit{v. Pape}, 365 U.S. 167, 183 (1960) (noting that federal remedies are supplementary to state remedies), \textit{overruled by Monell v. Department of Soc. Servs.}, 436 U.S. 658 (1978). This federal involvement, however, has been predicated on the need to ensure the vindication of federal rights, particularly federal constitutional rights. For a further discussion of federal involvement to ensure vindication of federal rights, see supra notes 184-200 and accompanying text. This justification cannot support the proposal's suggested federalization of state court procedures, as these procedures are relevant to the adjudication of state common law, not federal constitutional, claims. \textit{See Tobacco Proposal, supra} note 4, at 2 (empowering federal government to set national standards).

\textsuperscript{356.} See, e.g., Hicks v. Miranda, 422 U.S. 332, 342-48 (1975) (finding proper federal jurisdiction); \textit{Younger}, 401 U.S. at 43-54 (finding that federal courts will not enjoin state criminal prosecutions except under extraordinary circumstances); Railroad Comm'n Pullman v. Pullman Co., 312 U.S. 496, 498 (1941) (holding that issue of unconstitutional discrimination should be withheld pending outcome of state court proceeding).


\textsuperscript{358.} \textit{See Ex parte Royall}, 117 U.S. 241, 255 (1886) (holding that although federal court could exercise habeas corpus to detriment of state, power should not be exercised before state trial).

\textsuperscript{359.} \textit{See Wainwright}, 433 U.S. at 90-91 (holding that absent showing of prejudice, federal habeas corpus action is barred).

\textsuperscript{360.} \textit{See Anti-terrorism and Effective Death Penalty Act of 1996}, 28 U.S.C. §§ 2244(a)-2244(b) (Supp. 1997) (noting example of recent statutory trends that reflect federal reluctance to divest state courts of jurisdiction). Of course, where there are strong federal substantive interests, the balance is quite different. \textit{See} Aviam Soifer & H.C. Macgill, \textit{The Younger Doctrine: Reconstructing Reconstruction}, 55 TEX. L. REV. 1141, 1142 (1977) (stating that restrictions on availability of federal equitable relief in sensitive areas remain unaffected). Thus, the Reconstruction era law enlarged the jurisdiction of the federal courts, presumably at the expense of the state courts, to protect the vital federal interests embedded in the Reconstruction Amendments. \textit{See id.} (noting that today federal courts protect rights in sensitive areas, such as segregation and legislative malapportionment). What is interesting about the doctrines cited above in the text is that they herald the importance of comity even where there are substantive federal interests at stake. For a further discussion of the importance of comity, \textit{see supra} notes 340-52 and accompanying text. Presumably, when Congress federalizes a state court procedure without asserting any substantive federal interest, the need for comity is all the greater.

\textsuperscript{361.} 401 U.S. 37 (1971).
Amendment claim. Surely comity warrants even greater attention in the absence of any recognizable federal interest.

A closer review of these various doctrines demonstrates that recent proposals to federalize state court procedures would offend notions of comity in several critical ways. First, by confusing the lines of political authority, these proposals would interfere with the ability of the states to hold their judges accountable. Even if such a dilution of accountability does not violate the Constitution, it still would undermine respect for the state judicial process. The importance of that respect was articulated in Justice O'Connor's opinion in Michigan v. Long. In Long, the Supreme Court found appellate jurisdiction over a state court opinion that arguably rested on an adequate and independent state law ground precisely because the Supreme Court felt that requiring state courts to clarify the basis for their opinions "will provide state judges with a clearer opportunity to develop state jurisprudence unimpeded by federal interference, and yet will preserve the integrity of federal law." Therefore, the Court believed that respect for state courts required a clarification of the source of judicial decisions. Only with accountability ensured could an independent state jurisprudence flourish.

Second, recent proposals to federalize state court procedures would also gravely interfere with the orderly administration of state courts. When deciding to review a case, traditionally the Supreme Court has been reluctant to overlook state procedural defaults. This is true even when the defaults would prevent adjudication of otherwise meritorious federal constitutional claims. Federal courts have long recognized that state courts

362. See id. (forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances).
363. For a further discussion of how these proposals offend the principles of comity, see supra notes 364-71 and accompanying text.
364. For a further discussion of the impact of such proposals on states' ability to hold their judges accountable, see supra notes 273-76 and accompanying text.
366. Id. at 1041.
367. See id. at 1041-42 (discussing necessity of adequate and independent state law grounds). The Long Court noted that it would not review judgments of state courts that rest on "adequate and independent state grounds." Id. at 1041. The Court elaborated that the jurisdictional concern is that "we not render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." Id. at 1042.
368. See id. at 1041 (commenting that state courts must be free from unnecessary federal interpretation of state constitutions).
369. See Ford v. Georgia, 498 U.S. 411, 412 (1991) (holding state regulation not adequate and independent so as to bar federal judicial review); see also Michal v. Louisiana, 350 U.S. 91, 93 (1955) (finding that state criminal code did not present insurmountable barrier to making federal claim). The Supreme Court has, on occasion, overlooked such defaults where it believes that the state procedural rule created an undue burden on the vindication of federal rights. See Ford, 498 U.S. at 411 (discussing state procedural rule in context of equal protection under Four-
should have liberty, within the bounds of due process, in setting the procedures to be applied in their own criminal proceedings. \(^{370}\) If deference to state court procedures is justified, even when it bars consideration of a federal constitutional defense in a capital case, surely a similar deference is due to state procedures in a state common law case where there is no certainty that there will be any federal substantive issue whatsoever. \(^{371}\)

The importance of comity to the state courts has also been stressed in situations, such as those arising under the *Younger* doctrine, in which parties have asked lower federal courts to enjoin, review or at least second-guess the workings of state courts. \(^{372}\) For example, in *Pennzoil Co. v. Texaco, Inc.* \(^{373}\) Texaco was faced with a huge judgment from a Texas state court. \(^{374}\) Rather than complying with Texas procedure and posting an appeals bond, Texaco filed an action under Section 1983 in the federal district court in New York. \(^{375}\) The Court derided Texaco's attempt to bypass the state and ask the federal court to intervene and, in effect, review the procedural requirements of a state. \(^{376}\) The Court stated that federalism mandates that federal courts refrain from acting not only when the pending state proceedings are criminal, "but also when certain civil proceedings are pending if the State's interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government." \(^{377}\)

\(^{370}\) See *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 8 (1992) (noting that requirement that prisoners meet heightened "cause and prejudice" standard before federal courts can review state court criminal proceedings will appropriately accommodate concerns of finality, comity, judicial economy and channeling of claims into most appropriate forum).

\(^{371}\) See *Coleman v. Thompson*, 501 U.S. 722, 729-57 (1991) (holding that claims presented for first time in state habeas corpus proceedings are not subject to review in federal habeas corpus proceedings).

\(^{372}\) See 28 U.S.C. § 2283 (1994) (stating that federal court may not grant injunction to state proceedings in state court except as authorized by Congress or to protect or effectuate its judgments); see also *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 287 (1970) ("Proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court.").

\(^{373}\) 481 U.S. 1 (1987).

\(^{374}\) See id. at 4, 5 (detailing history of *Texaco* litigation).

\(^{375}\) See id. at 6, 7 (discussing background of *Texaco*).

\(^{376}\) See id. at 10-18 (discussing *Texaco*'s filing of Section 1983 action).

\(^{377}\) Id. at 11. To be sure, *Younger* does not apply whenever there is an ongoing state proceeding. *See* Colorado River Water Conservation Dist. v. United States,
Similar concerns about the propriety of lower federal courts reviewing the actions of state courts are evidenced in the *Rooker-Feldman* doctrine.\(^{378}\) This doctrine suggests that lower federal court review of state court judgments interferes not only with federal-state relations, but with the Supreme Court's power to review state court judgments under 28 U.S.C. § 1257.\(^{379}\)

The removal provisions set forth in the proposed tobacco settlement would have violated this "normal" ordering. Under the proposal, a defendant could have removed an action to federal court if the state court granted or considered a motion to join claims or certify a class action.\(^{380}\) Even assuming that such a state court ruling would be erroneous under federal law and that the section's procedural prohibition falls within the realm of Congress' powers, this provision would have disturbed the normal ordering.

424 U.S. 800, 817-21 (1976) (discussing contemporaneous exercise of concurrent jurisdiction by state and federal courts). *Younger* requires that the state interest be important and the state proceeding provide an opportunity for review of federal claims. *See* Philip Morris, Inc. v. Blumenthal, 123 F.3d 103, 105-06 (2d Cir. 1997) (setting standard for important state interest), *cert. denied*, 118 S. Ct. 2340 (1998). In determining whether the important state interest has been met, the court considers whether the state action concerns the central sovereign functions of state government such that "exercise of the federal judicial power would disregard the comity between the States and the National Government." *Id.* at 106. The *Younger* limitations, however, presume the existence of a federal claim. *See id.* (considering underlying nature of state proceeding on which federal lawsuit would impinge). In the absence of a federal claim, a federal defense or diversity, it is difficult to understand why there should be any limitations on the need for comity.


379. *See* E.B. v. Verniero, 119 F.3d 1077, 1090 (3d Cir. 1997) (discussing rationale of *Rooker-Feldman* doctrine), *cert. denied*, 118 S. Ct. 1039 (1998). Of course, habeas corpus can be seen as an exception to this prerogative, as the lower federal courts in a petition under 28 U.S.C. § 2254 in effect review the proceedings of the state courts. *See* 28 U.S.C. § 2254 (1994) (allowing federal district court to entertain application for writ of habeas corpus from prisoner in custody pursuant to state court judgment under certain circumstances). Traditionally, habeas corpus was available only after a petitioner exhausted all of his or her state court remedies. *See* Rose v. Lundy, 455 U.S. 509, 510 (1982) (announcing "total exhaustion rule," which requires habeas corpus petitioners to exhaust fully all claims at state court level), *superseded by statute*, 28 U.S.C. § 2254(c) (1994). Under the proposal, there would be no similar exhaustion requirement. *See* Tobacco Proposal, *supra* note 4, at 39 (omitting requirement of exhaustion prior to defendant's ability to remove to federal court). More importantly, the removal and de facto collateral review of state court procedures would occur despite the lack of any substantive interest, a point that distinguishes the proposal's removal provision from the review available under 28 U.S.C. § 2254(a). *See id.* (limiting review to claims that petitioner is held "in custody in violation of the Constitution or laws or treaties of the United States").

mal relationship between the federal district and state trial courts.\textsuperscript{381} By allowing for removal upon the issuance of the state court’s ruling, the proposal would effectively place the federal district courts in the position of sitting in review of the state trial court’s disposition of the motion.

An even more extreme version of this removal scheme appeared in Senator Hatch’s proposed codification of the tobacco settlement.\textsuperscript{382} Section 262(b)(2) of the bill would have allowed any defendant, in any tobacco tort action, to remove any such action to federal court at any time during the litigation if the defendant “reasonably contends” that the case was “being conducted in a manner inconsistent with the terms of chapter 1 of subtitle C . . . .”\textsuperscript{383} The federal trial court was then obliged to determine whether the state court had violated the procedural demands of the federal act.\textsuperscript{384} If the federal district court found that the state court violated the federal requirements, the court could have dismissed the action or issued orders requiring conformity.\textsuperscript{385} If the federal district court found any violation, it could have either remanded the case or retained jurisdiction if it was “necessary to serve the interests of justice.”\textsuperscript{386} In either case, the federal district court would have caused the state courts needless disruption. More importantly, it would have placed the lower federal courts in the position properly held by the Supreme Court—to sit in review of state court judges. It is difficult to imagine a more direct and disruptive interference with the state courts and a clearer displacement of the role assigned to the Supreme Court.

V. CONCLUSION

Fidelity to federalism has always been fickle. Few proponents of either state autonomy or nationalization have been thoroughly consistent

\textsuperscript{381} For a further discussion of the relationship between the federal and state courts, see supra notes 342-62 and accompanying text. Professor Wells has argued the opposite, claiming that removal helps state courts by reducing their caseload and is not any more disruptive than settlement. See Michael Wells, The Role of Comity in the Law of Federal Courts, 60 N.C. L. Rev. 59, 83-86 (1981) [hereinafter Wells, Comity] (noting subtlety of allocation problem).

\textsuperscript{382} See Placing Restraints on Tobacco’s Endangerment of Children and Teens Act, S. 1530, 105th Cong. (1997) (codifying proposed tobacco settlement).


\textsuperscript{384} See H.R. 1530, 105th Cong. § 262(e) (1997) (discussing removal and procedural demands of Senate Bill 1530).

\textsuperscript{385} See id. (discussing remedies available to federal district courts under Senate Bill 1530).

\textsuperscript{386} Id.
Most individuals, whether they are scholars, judges or politicians, have altered their positions on federalization when an issue important enough, or politically expedient enough, counsels for their conversion.\textsuperscript{388}

Though fidelity to federalism might not be prevalent, or even wise, respect for our federal system suggests that one pause before adopting radical alterations to the relationship between the states and federal government. More importantly, an appreciation for the role that the relationship between the states' and federal government plays in preserving democratic government suggests that deviations from the usual delineation should be well considered.

It is in this regard that the proposals for federalizing state court procedures in tobacco and other tort litigation are most troubling. There have been endless discussions regarding whether or not Congress should federalize consumer product laws. Although the soundness of any such move is open to debate, few would contend that congressional preemption of state tort law seen in the tobacco proposal touches the boundaries of Congress' Article I power.\textsuperscript{389}

The proposals at issue do not call for a clear preemption of state substantive law or a limitation on state actions. Rather, these proposals appear, at first glance, to affect only state judicial procedures and to leave the bulk of tort law to the states. The authors of these proposals can thus call themselves "federalists" and can declare that the states remain the font of consumer products' law.

\textsuperscript{387} See Powell, supra note 213, at 670 (discussing textual enumeration of federal powers). Professor Powell noted:

The whole history of the Court's use of limiting textual construction between the beginning of extensive congressional legislation and the New Deal repudiation of the enterprise was marked by rapid swings between generous and pinched readings of congressional powers. Even a sympathetic observer might well conclude that decisions about the proper scope and employment of federal powers are so inherently legislative and policy-driven that even a good-faith judicial attempt to make them inevitably collapses the judicial function into Congress'.

\textit{Id.} For a further discussion of the inconsistencies that the 104th Congress exhibited on this point, see Gray, supra note 69, at 559, 560 n.2 (noting Court's "schizophrenic" approach toward proper balance between state and federal powers).

\textsuperscript{388} For a general discussion of the development of federalism, see Kermit Hall, \textit{Federalism: A Nation of States—Major Historical Interpretations Introduction} (Kermit Hall ed., 1987). The Framers themselves were not absolutist in their positions on the subject. See id. at ix (providing background on historical federalism). Rather than supporting autonomous states or a monolithic federal government, they created a complex system that gave some powers to the federal government and left some powers to the states. See id. at x.

\textsuperscript{389} See United States v. Lopez, 514 U.S. 549, 584-85 (1995) (Thomas, J., concurring) (advocating limitations on Commerce Clause powers). It is possible that Justice Thomas, who appears to take a very narrow view of Congress' Article I powers, might find that Congress lacks such a power. See id. (discussing scope of Congress' powers).
It is only by looking deeper, at the proposals' more technical provisions, that one can begin to see how they might interfere with the states' abilities to enforce and make their own laws. The proposals do covertly what their drafters deny they do overtly. This "stealth preemption" is not only disingenuous, it is far more disruptive of federal-state relations than are the traditional forms of preemption. By federalizing state court procedures, in technical and obscure ways, these proposals slyly federalize tort law without inviting or even permitting public recognition or consideration of what is occurring. If such stealth preemption is constitutional, it warrants careful consideration and public debate as to its impact on our federal system.