

PRINTZ AND TESTA: THE INFRASTRUCTURE OF FEDERAL SUPREMACY

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Professor Martin Redish and Steven Sklaver make an elegant argument that state courts are competent to adjudicate federal claims not because they are in “parity” with federal courts but because of the necessities of enforcing supreme federal law.¹ I find much to agree with in this argument. They argue that the Supremacy Clause² should not be understood to distinguish between the obligations of state court judges and state executive officers, contrary to the Supreme Court’s reasoning in both *New York v. United States*³ and *Printz v. United States*;⁴ the reason state courts can be “commandeered” is not because of references to state “Judges” in the Supremacy Clause but rather because of grants of power to Congress, notably in Article I (and including the Necessary and Proper Clause).⁵ Thus, they argue, state courts must entertain federal causes of action, as in *Testa v. Katt*,⁶ not because state courts are in some sense on a par with the inferior federal courts,⁷ but rather because Congress, having constitutional power to do so, determined that it is necessary to promote the supremacy of federal law for state courts to hear such cases.⁸ With the caveat that these powers must be understood to be effective in light of the Supremacy Clause, I find myself also in much agreement here.⁹

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1. Martin H. Redish & Steven G. Sklaver, *Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism*, 32 IND. L. REV. 71, 73 (1998).

2. U.S. CONST. art. VI.

3. 505 U.S. 144 (1992).

4. 117 S. Ct. 2365 (1997).

5. Redish & Sklaver, *supra* note 1, at 80-90. The “Judges Clause” refers to state judges being “bound” by supreme federal law, notwithstanding contrary state law. U.S. CONST. art. VI, cl. 2.

6. 330 U.S. 386 (1947).

7. Redish & Sklaver, *supra* note 1 at 75-76, 93-95.

8. *Id.* at 95 (referring to “principle of federal dominance”).

9. Redish and Sklaver argue that as a textual matter, the Supremacy Clause is not the source of federal power to impose obligations on state courts to entertain federal causes of action, but is rather the source of the state courts’ obligation to enforce an exercises of that federal power. See Redish & Sklaver, *supra* note 1, at 76, 81-88. For a competing perspective, see Evan Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1022-30 (1995) (arguing that the Supremacy Clause makes federal law supreme “in-state” law imposing affirmative obligations on courts and other state officers). Redish and Sklaver suggest that Article I (along with other enumerations of

While I share Redish and Sklaver's view that affirmative federal obligations can constitutionally be imposed on both state courts and state officials, I do not agree with the implication that the supremacy of federal law implies the wholesale subordinacy of state courts to inferior federal courts. I thus resist some of their proposals, especially for establishing a presumption that state courts follow federal procedures in adjudicating federal claims, and I would express their point about "commandeering" state courts somewhat differently.

State courts have authority to enforce federal law, not because they are constitutionally equal to the inferior federal courts, but because it is necessary for the union that state courts do so and because the supremacy of federal law requires state courts to do so. Yet the language of "commandeering" to describe those state court obligations¹⁰ does not cohere well with the idea expressed in *Testa* that federal law is not "foreign" to the states but is, by virtue of the Supremacy Clause, part of the state's law.¹¹ Moreover, in cases where no lower federal court has jurisdiction, state courts may be constitutionally equivalent to the lower federal courts for purposes of meeting requirements that some court whose action is reviewable by the Supreme Court have jurisdiction. While constitutional equivalency (here, in the sense of adequacy) need not mean constitutional parity, the state courts can be understood to perform these roles not because of federal "commandeering" but because part of the original understanding of the Constitution, reinforced by practice over time, was that state courts would always exist and would exercise jurisdiction in a wide range of

congressional power) is the true location of national power to "commandeer," and note as a benefit of their reading that the Necessary and Proper Clause, U.S. CONST. art. I, § 8, cl. 18, can be construed as a limit on appropriate use of that power. *Id.* at 87. That the Supremacy Clause does not articulate a standard like the Necessary and Proper Clause is, however, no barrier to courts filling in the gaps to make the system work. Conversely, even if the Supremacy Clause is a principal source of authority, the Necessary and Proper Clause would still bear on Congress' powers in providing for federal causes of action concurrently enforceable in the appropriate state court: Neither the text of the Necessary and Proper Clause nor the text of the Supremacy Clause, standing alone, provide complete answers; both must be considered in light of the overall constitutional structure. See CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 3-32 (1969) (advocating drawing inferences of constitutional meaning from constitutional structure, in contrast to proceeding from interpretations of specific constitutional text). The Supremacy Clause's clear contemplation that federal law will be resolved in the state courts might be understood to support the view that Article I powers include authority to create federal causes of action that, under at least some circumstances, state courts must hear.

10. Redish & Sklaver, *supra* note 1, use the term "commandeering" in this fashion throughout much of their argument.

11. *Testa v. Katt*, 330 U.S. 386, 389-90 (1947); accord *Howlett v. Rose*, 496 U.S. 356, 367 (1990) ("Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts . . . [are] a more convenient forum . . . but because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature.").

cases involving federal and state law.¹²

But what if the state courts do not want to entertain a federal claim or believe state law precludes them from doing so? The conventional response to this question lies in the debate over the meaning of *Testa* (and such progeny as *Howlett v. Rose*¹³): Did the state court's obligation to entertain the federal claim in *Testa* arise because the federal government has power to force the state courts to hear matters, or did it arise because state courts are not allowed to discriminate against federal claims that are similar enough to claims they do entertain?¹⁴ But this response is something of a false dichotomy.

States do not have a choice about whether to have a court system—the Constitution requires that they do.¹⁵ All states do have court systems, which entertain a wide variety of claims.¹⁶ *Testa*'s anti-discrimination principle,

12. Several of the Constitution's framers might well have been happy not to have had any inferior federal courts created and to allow state courts to be the initial adjudicators of all federal claims. See, e.g., 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 124 (Max Farrand ed., rev. ed. 1966) [hereinafter RECORDS OF THE FEDERAL CONVENTION] (John Rutledge, of South Carolina, "arguing that the State Tribunals might and ought to be left in all cases to decide in the first instance the right of appeal to the supreme national tribunal being sufficient to secure the national rights & uniformity of Judgm[en]ts"); *id.* at 242-45 (William Patterson's New Jersey Plan failed to provide for any lower federal courts); 2 RECORDS OF THE FEDERAL CONVENTION, *supra*, at 45-46 (L. Martin and Pierce Butler objecting to Congress having power to create inferior tribunals).

13. 496 U.S. 356 (1990).

14. For an earlier argument, advanced by Professor Redish, that the "analogous case" limit on *Testa* was itself incompatible with principles of federal supremacy, see Martin H. Redish & John E. Muench, *Adjudication of Federal Causes of Action in State Court*, 75 MICH. L. REV. 311, 355-59 (1976).

15. See generally Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV L. REV. 2180, 2246-48 (1998); see *infra* notes 38-44 and accompanying text. While the obligation to maintain a judicial system may not be judicially enforceable, *cf.* *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849) (nonjusticiability of claims under Republican Form of Government Clause, U.S. CONST. art. IV, § 4, that particular state government is not legitimate), it is nonetheless an obligation.

16. Even those who argue, as Professor Collins has, that *Testa* may rest on a misunderstanding of original understandings of a lack of federal power to compel the exercise of state court jurisdiction, recognize that under the narrow "discrimination" view of *Testa* the mere existence of courts of general jurisdiction in the states will provide a basis for arguing that they must entertain analogous federal actions. Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 166-70. Collins argues, however, both because of doubts as to the scope and basis of federal power to compel the exercise of state court jurisdiction and because of evidence that some believed there were particular subject areas over which federally created courts needed to exercise exclusive jurisdiction, that *Testa* should not be read to go beyond the anti-discrimination principle. *Id.* I believe that Professor Collins' arguments highlight the competing, coexisting traditions of federalism that inhere in the development of federal courts jurisprudence, and provide further reason to hold back from full endorsement of Redish and Sklaver's logical argument. As noted below, however, I disagree with Professor

coupled with the existence of state courts of wide jurisdiction, will thus provide an arguable basis for overcoming state court refusal to entertain federal claims in most cases.¹⁷

While key aspects of Professor Redish and Mr. Sklaver's argument seem quite convincing to me, I do part company from it in some further respects (as is generally required of commentaries). The Article says, "the fact that state courts are both empowered and obligated to adjudicate and enforce federal law does not manifest historical concern, theoretical concern or respect for the status or abilities of state judiciaries, but rather the unambiguously subordinate position that state judiciaries hold within the federal system."¹⁸ Elaborating the

Collins' assumption (widely shared, I should say, by other jurists) that the states are free not to establish courts. See *infra* notes 38-44 and accompanying text.

17. I do not mean to elide the looming question, sure to arise as a result of *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), whether state courts that do not have jurisdiction over certain claims against the state itself must nonetheless entertain federally created claims against the state, e.g., as an employer under the Fair Labor Standards Act. Compare *Alden v. Maine*, 715 A.2d 172 (Me. 1998) (holding no), with *Jacoby v. Arkansas Dep't of Educ.*, 962 S.W.2d 773 (Ark. 1998) (holding yes). For discussion, see Vicki C. Jackson, *Seminole Tribe, the Eleventh Amendment, and the Potential Evisceration of Ex parte Young*, 72 N.Y.U. L. REV. 495, 505 n.41 (1997) [hereinafter *Potential Evisceration of Ex parte Young*] (noting that all 50 states have at least some jurisdiction over claims against the state sounding in tort or contract, which existing jurisdiction would provide a basis, given an expansive definition of analogous claims, to require the state courts to entertain federally created claims against the State). Many states retain some areas of sovereign immunity. The question whether state courts must entertain federal claims against the state in their own courts would be, on a narrow reading of *Testa*, what are the appropriate "analogous" actions. There is some reason to think, however, that, at least if the federal courts are closed by virtue of the Court's interpretation of the Eleventh Amendment, state courts must entertain actions based on federal law even if such actions are purportedly barred by state sovereign immunity law. See Nicole A. Gordon & Douglas Gross, *Justiciability of Federal Claims in State Courts*, 59 NOTRE DAME L. REV. 1145, 1163-65 & n.76 (1984); *Potential Evisceration of Ex parte Young*, *supra*, at 504-05 & nn.40-41; Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment and State Sovereign Immunity*, 98 YALE L.J. 1, 30-31 & n.130, 38 & nn.157-58 (1988) [hereinafter *State Sovereign Immunity*] (discussing *inter alia*, *General Oil v. Crain*, 209 U.S. 211 (1908)). But see Collins, *supra* note 16, at 164 n.359 (reading *General Oil* to require states to provide their own remedies for unconstitutional state action, not as requiring them to entertain a federal cause of action even if no parallel action exists in state court); Carlos Manuel Vázquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683 (1997) (asserting that only actions against officers can be compelled); Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 149 (1997) (noting that historically, states were not subject to suit in state court without their consent but officers were available as defendants in proceedings contesting the legality of state action).

18. Redish & Sklaver, *supra* note 1, at 73. Redish and Sklaver argue that *Lear v. Adkins*, 395 U.S. 653 (1969), illustrates their position. Redish & Sklaver, *supra* note 1, at 93-95. There the Court held that, notwithstanding exclusive federal jurisdiction over actions to enforce patent laws, state courts hearing actions to enforce a contract could adjudicate a defense that a patent was

implications of this view for a number of areas in “judicial federalism,” they argue, *inter alia*, that Congress has substantial power to require state courts to follow federal procedures,¹⁹ and that even when Congress has not provided guidance, state courts should presumptively follow federal procedures in adjudication of federal claims.²⁰

While I agree that state judiciaries are “subordinate” to the supremacy of valid federal laws, I am not sure why we should conclude from this that they are any more so than the inferior federal courts, whose existence is not guaranteed by the text of the Constitution but is left rather to the discretion of Congress. Subordination to federal law need not imply subordination to federal courts, and legal supremacy of federal law need not imply practical superiority of federal over state procedures for the adjudication of federal claims.²¹

invalid. *Lear*, they argue, demonstrates that state courts’ authority to adjudicate federal law does not reflect positively on state courts’ ability to adjudicate federal law but “merely presumes” that such state court interpretation is “essential to maintaining federal supremacy.” *Id.* at 93. *See also id.* at 95 (“State courts are authorized to adjudicate federal patent law defenses to state law claims, but not out of federal respect for state judicial abilities to adjudicate the law in that area . . . [but rather] because to deny them such authority would seriously threaten maintaining the supremacy of the federal patent laws.”). Yet there is, at least in theory, an alternative solution to state court adjudication of the patent issues that arise in defense of a state contract claim: Congress could authorize removal jurisdiction over this narrow group of “federal question defense” cases. That removal has not been authorized may suggest that there is something more at work than the mere necessities of federal dominance in this jurisdictional pattern.

19. Redish & Sklaver, *supra* note 1, at 100-01, 108-10.

20. *Id.* at 101-08. They also propose that the Anti-Injunction Act, 28 U.S.C. § 2283 (1994) should not be viewed as a longstanding historic example of deference to state court judiciaries, but rather as a limited device designed to prevent federal interference with state court interpretation of state law. *Id.* at 95-97. Interestingly, they note that at the time the Anti-Injunction statute was first enacted, the extent of federal law was more limited than it is today, and that with the growth of federal law exceptions to the Anti-Injunction statute emerged. The doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), precluding federal court injunctions of state court proceedings even in actions brought under 42 U.S.C. § 1983 (an exception to the Anti-Injunction statute), they argue, has been mistakenly defended on grounds of deference to the state courts, though they recognize that “the deference dictated by *Younger* [arguably] could be justified by other considerations. . . .” Redish & Sklaver, *supra* note 1, at 97-99 & n.149. I find their efforts to analyze separately these strands in U.S. judicial federalism intriguing but ultimately not persuasive, to the extent that they imply that respect for the role of state judiciaries (in deciding both state and federal law) should play no role in the design of federal statutes or doctrines.

21. Compare Redish & Sklaver, *supra* note 1, at 95 (“existence of the commandeering power . . . derives from an assumption of federal dominance over state courts,” a principle that “leads to recognition of the . . . needs to have the state courts available in order to serve interests in federal convenience and federal law supremacy maintenance”), with Louise Weinberg, *The Federal-State Conflict of Laws: “Actual” Conflicts*, 70 TEX. L. REV. 1743, 1785 (1992) (observing that “reverse-*Erie*” does not fully capture problem of federal procedure in state courts, because both federal courts and state courts are subject to the procedural rule).

Professor Redish and Mr. Sklaver argue that state courts are not in constitutional parity with the federal courts as adjudicators of federal law.²² Where Congress exercises its authority to create and establish inferior tribunals, this may well be right. The constitutionally guaranteed tenure and salary protections for Article III federal judges promote judicial independence in ways that states may, but need not, provide for their judges. There is thus reason to believe that federal courts have some institutional superiority in judicial independence over the state courts, derived from the structural tenure and salary provisions of Article III.²³ This kind of superiority exists, however, both in diversity cases involving state law issues and in federal question cases; the independence of the federal judiciary was evidently thought to be of potential importance in both categories of cases.²⁴

Akhil Amar and others have developed powerful arguments for why some federal court must have jurisdiction over federal question cases. Amar's argument does not distinguish between the Supreme Court and the lower federal courts for purposes of satisfying this requirement.²⁵ Nonetheless, his argument could be reshaped to support a claim of lower federal court superiority in resolving federal question and admiralty cases—cases within what he regards as the mandatory jurisdiction of the federal judiciary as a whole. One could conclude, as some excellent scholars' work suggests, that in federal question and admiralty cases it was particularly important for a court with the institutional guarantees of independence to have a final look at the case, and that given the enormous growth of caseloads the inferior federal courts must be seen as important proxies to the Supreme Court in fulfilling that requirement. Some of Amar's work may be taken to suggest as much.²⁶

22. Article III provides for diversity-based heads of federal jurisdiction (under which federal courts can decide state law claims) and, as Redish & Sklaver point out, Congress has authorized lower federal courts to hear diversity cases (including on removal from the state courts) since the creation of the federal courts in 1789. See Redish & Sklaver, *supra* note 1, at 93 n.133 and accompanying text; see also Judiciary Act of 1789, § 11, 1 Stat. 79.

23. U.S. CONST. art. III, § 1.

24. See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816) ("The constitution has presumed . . . that state attachments, state prejudices, state jealousies, and state interests might sometimes obstruct, or control, or be supposed to obstruct, or control, the regular administration of justice" in diversity cases.). The Court does note that even stronger reasons "touching the safety, peace and sovereignty of the nation," might justify exclusively federal jurisdiction in, e.g., federal question cases. *Id.* at 347-49.

25. To the contrary, he argues that there is "parity" among all federal Article III judges for purposes of satisfying what he believes are constitutional requirements that some federal Article III decision-maker have jurisdiction to review all cases within the mandatory categories. See Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1536-39, 1559-63 (1990) (discussing parity between inferior federal court judges and Supreme Court Justices).

26. See Akhil Reed Amar, *Parity as a Constitutional Question*, 71 B.U. L. REV. 645, 646 (1991) (questioning whether certiorari jurisdiction is adequate to assure some federal court has

Even assuming some institutional superiority of federal over state courts in the adjudication of federal law, it does not follow that the interests of states in having independent court systems are entitled to no constitutional weight in federal question cases. Between full equivalency of state and federal adjudication, and federal “dominance” of state courts with regard to state court process, lies some middle-ground recognition that state court processes should not be lightly disturbed if they are adequate to promote federal goals, even if not equivalent to what the federal courts would do. To the extent that Redish and Sklaver’s argument could be taken to imply that judicial federalism (in the sense of deference or respect for state court processes) is based only on unfounded notions of parity,²⁷ this would give me considerable pause. For as I explain below, state judiciaries are required to exist by the Constitution, and the Constitution can thus be understood to require some degree of respect for the institutions of state government, just as it establishes the supremacy of federal law.²⁸ Nonfungibility of state and federal courts does not necessarily mean that the federal government can exercise the same power over state courts that it can over interstate commerce.

As noted above, Redish and Sklaver argue from state court nonparity and the supremacy of federal law that there should be a default rule or presumption that state courts should follow federal procedures in adjudicating federal causes of action.²⁹ On this point, which is one of their central proposals, I remain unconvinced. Even if one grants all of Redish and Sklaver’s principal arguments up to this point, I am not sure it follows that we should have a rule that state courts must presumptively use federal procedures to adjudicate federal claims.

final word); Vicki C. Jackson, *Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts—Opposition, Agreement and Hierarchy*, 86 GEO. L.J. 2445, 2474-75 (1998).

27. Redish & Sklaver, *supra* note 1, at 73-74, 92-93. Their argument may not reach so far. *See id.* at 74 n.11 (noting that some occasions might conceivably call for “federal deference to state courts”).

28. *See infra* notes 38-47 and accompanying text.

29. Redish & Sklaver, *supra* note 1, at 105-06. Their argument goes both to Congress’ power—a power I agree is substantial but which I believe is limited by the constitutional requirement that state courts exist as creatures of state governments—and to the power and propriety of federal courts articulating a new presumption in favor of federal procedural requirements in state court. Given limitations of time and space, I focus my comments on the proposed judicial presumption, and do not even address the range of issues, e.g., the implications of the Anti-Injunction statute, that their paper touches on. Note, however, the even larger range of questions one might want to consider in connection with their argument: (1) about congressional power to provide legislatively for procedural rules—in federal and/or in state courts, and for adjudication of federal and/or state claims and/or defenses; (2) about congressionally authorized or mandated judicial rule-making—in federal and/or state courts (for adjudication of federal and/or state claims and/or defenses), or in federal courts, but for application in state and federal courts; and (3) about federal adjudication of issues of procedure in state courts (on direct review of the issue itself, through the inadequate state ground doctrine, on habeas review, or on district court challenges to state court practices or procedures).

Despite its possible appeal, I plan to resist the seduction of such a bright line rule in an area as sensitive, and politically pragmatic, as federalism.

Why? First, a presumption in favor of federal procedures for the adjudication of federal claims is in tension with the proposition that the Constitution requires state governments to exist and to maintain their own judiciaries. Second, adoption of Professor Redish and Mr. Sklaver's proposal is in tension with common law methods of constitutional adjudication and respect for stability and coherence of law, particularly since deference to the processes of the state courts is manifest in a whole variety of doctrines. Third, there are practical difficulties in requiring state courts to be masters of two systems of procedure. The costs of requiring such a transition do not seem warranted absent evidence that state court procedures substantially and systematically interfere with the fulfillment of federal rights. Moreover, Professor Redish and Mr. Sklaver's proposal would sacrifice the benefits of decentralization of procedural developments from which all court systems in theory benefit. Finally, with respect to federal statutory rights, it is not at all clear that one should presume that Congress intended, by permitting or requiring state court adjudication, to override state procedures or to invite the federal courts to do so by adoption of such a presumption. One might assume, consistent with the Court's clear statement rules in other areas, that, unless Congress makes its contrary intention clear (in the language of the statute or from its central purposes), when Congress authorizes resort to the state courts, it assumes state court procedures will control. The Rules Enabling Act³⁰ might be read to suggest that federal courts' control of procedures was limited (constitutional and other federal requirements aside) to the procedures in the federal courts.

I elaborate these points briefly below, and conclude with some comments on the appeal of bright line rules and some general reasons to resist that appeal.

I. NATIONALISM VS. FEDERALISM: SUPREMACY OF FEDERAL LAW AND INDEPENDENCE OF GOVERNMENTS

In Richard Fallon's wonderful article on the ideologies of federal courts law, he identifies competing paradigms reflecting the role and relationship of the federal courts.³¹ What Redish and Sklaver call the "parity" assumption³² informs what Fallon calls the "Federalist" view, a view that emphasizes the limited jurisdiction of the federal courts, and Congress' power to limit the availability or jurisdiction of those courts and to rely instead on the state courts for adjudication.³³ Professor Redish and Mr. Sklaver's argument that the reason for doctrines of deference is not state court parity but federal necessity, fits within what Professor Fallon calls the "nationalist" paradigm, in which the federal

30. 28 U.S.C. §§ 2071-2077 (1994).

31. Richard Fallon, *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1151-64 (1988).

32. Redish & Sklaver, *supra* note 1, at 92.

33. Fallon, *supra* note 31, at 1151-57.

courts are seen as the primary protectors and guardians of federal rights, particularly federal constitutional rights, and as superior to state courts in the adjudication of those rights.³⁴

I am inclined towards a middle ground, agreeing with Professor Redish and Mr. Sklaver that the state courts are not constitutionally assumed to be in parity with the federal courts, but disagreeing with the possible implication that maintaining the state courts as independent centers of adjudication is not of constitutional value. The Constitution of the United States requires *both* the supremacy of valid federal law *and* the existence of both state and federal governments accountable to their respective constituencies.

The supremacy of federal law is perhaps the cardinal structural principle of the federal system. The Constitution as law binds all public officials, federal and state. Valid federal laws, that is, laws enacted pursuant to the Constitution, likewise bind all.³⁵ The supremacy of federal law should not be regarded as one to be grudgingly acknowledged, as Justice O'Connor's opinion for the Court in *New York v. United States*³⁶ might suggest, but rather is a foundational feature of the constitutional structure, the feature that has made and continues to make the United States a union, rather than a federation bound only by treaty.³⁷

But the power to impose federal duties on state officers or to establish rules for state courts is not unlimited. The Constitution not only requires that state governments exist, but requires that state governments maintain courts,³⁸

34. *Id.* at 1158-64.

35. The debate in *Printz* was over the scope of valid federal laws—whether Congress can constitutionally compel state officers to execute federal law. *Printz v. United States*, 117 S. Ct. 2365, 2376 (1997). In an earlier article, I argued that *Printz* was wrong to adopt a categorical rule that the national government could not conscript state officers in this business. *See* Jackson, *supra* note 15, at 2199-2200. I share Professor Redish and Mr. Sklaver's view that the distinction between state courts and state executive officers is not a tenable one, though I place greater weight on constitutional structure and history than on constitutional text in reaching this conclusion.

36. 505 U.S. 144, 159 (1992) (noting Court's prior observation that the "Supremacy Clause gives the Federal Government 'a decided advantage in th[e] delicate balance' the Constitution strikes between state and federal power") (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)); *but cf.* *Idaho v. Coeur d'Alene Tribe of Idaho*, 117 S. Ct. 2028 (1997) (holding that the Eleventh Amendment barred lower federal courts from hearing suit for injunctive and declaratory relief against state officials concerning Indian tribes claim of title, under federal law, to submerged riverbed lands held by the State). In *Coeur d'Alene* it is Justice Kennedy, joined by the Chief Justice, who strongly asserts state court parity and the irrelevance of the Supremacy Clause in allocating jurisdiction between inferior federal courts and state courts, *id.* at 2037, and Justice O'Connor, joined by Justices Scalia and Thomas, who takes a more nationalist position. *Id.* at 2045-46 (O'Connor, J., concurring in part and concurring in the judgment).

37. *See* Weinberg, *supra* note 21, at 1797 (describing presumption in favor of state law until a conflict with federal law arises, and describing the "Supremacy Clause [as] a sleeping giant in our polity").

38. *See* U.S. CONST. art. VI, § 3 (requiring state judicial, as well as executive and legislative officials, to take an oath); *id.* at art. VI, § 2 (Supremacy Clause referencing state court judges); *see*

legislatures³⁹ and an executive.⁴⁰ In other words, state governments must possess the basic structures needed for a multi-purpose government to function with legitimacy in a representative democracy.⁴¹ As Professor Merritt has argued, the Guarantee Clause⁴² can be read to impose duties on states to maintain the kind of government that republicanism requires and to limit the federal government from interfering with states' republican, self-governing authority.⁴³ And courts were essential to the understanding of good principles of republican government at the time of the framing.⁴⁴

also Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 2012-13 (1993) (arguing that states can not abolish their courts).

39. See U.S. CONST. amend. XVII, cl. 1 (mandating popular election of senators by those voters having the "qualifications requisite for electors of the most numerous branch of the State legislatures"); *id.* art. V (identifying involvement of state legislatures in amendment process); *id.* art. IV, § 3, cl. 1 (prohibiting formation of states from the territory of existing states without the consent of the legislatures of the existing state in question); *id.* art. II, § 1, cl. 2 (requiring states to appoint presidential electors "in such Manner as the Legislature thereof may direct"); *id.* art. I, § 8, cl. 17 (requiring the "Consent of the [state] Legislature" for certain federal purchases of property); *id.* art. I, § 2, cl. 1 (requiring that qualifications to vote for federal representatives be the same as those for voting for members of the most numerous branch of the state legislature).

40. See U.S. CONST. amend. XVII (requiring the "executive authority" of state to call special election for Senate vacancies or, if so empowered by state legislature, to make temporary appointments); *id.* art. IV, § 4 (United States to provide protection against "domestic violence" on request of the state legislature or, if need be, "of the Executive"); *id.* art. IV, § 2, cl. 2 (requiring that, on demand of "executive Authority of the State from which he fled," fugitives from justice be returned); *id.* art. I, § 2, cl. 4 (requiring the "Executive Authority" of the states to call elections to fill House vacancies). See generally Jackson, *supra* note 15, at 2246-47.

41. Because I understand the Constitution to require the states to maintain such structures (leaving aside questions of justiciability for the moment), I disagree with those who question whether states have such an obligation. See, e.g., Collins, *supra* note 16, at 191 & nn.427-28 (arguing that the Constitution does not impose a mandate on states to create courts); see also Johnson v. Fankell, 117 S. Ct. 1800, 1805 (1997) (suggesting states are not obligated to create a court to hear particular federal cases); Kenney v. Supreme Lodge of the World, 252 U.S. 411, 414 (1920) (suggesting that "there is truth in the proposition that the Constitution does not require the State to furnish a court").

42. U.S. CONST. art. IV, §4.

43. See Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 22-26 (1988).

44. See THE FEDERALIST NO. 9, at 38 (Alexander Hamilton) (Garry Wills ed., Bantam 1982), (listing the means by which the republican form of government (there, referring to the whole United States) can be sustained, which list includes the division of powers between the departments and "the institution of courts"); THE FEDERALIST NO. 21, at 99-100 (Alexander Hamilton) (Garry Wills ed., Bantam 1982) (noting need to guarantee the state constitutional governments, to prevent tyranny and despotism in a state, both to protect its inhabitants' liberties and to protect neighboring states from the adverse effects of despotic rule in another); THE FEDERALIST NO. 43, at 221 (James Madison) (Garry Wills ed., Bantam 1982) (defending the Guarantee Clause as extending to existing

The structures of state governance, required by the Constitution, must be defined and created in important ways by the separate states.⁴⁵ States and their governments are, in a sense, “interwoven” into the infrastructure of the union.⁴⁶ The foundational principle of the supremacy of federal law, then, is kept from becoming an unduly centralizing dictatorial power in part by the limitations on the federal government’s authority, which are defined by the requirement that state governments remain independently accountable to their constituencies.

State courts, then, are part of the constitutional infrastructure contemplated and required by the Constitution.⁴⁷ They have existed since before the beginning

“republican forms” of government in the states and to the substitution of “other republican forms,” but limiting states so that they “shall not exchange republican for anti-republican Constitutions” and acknowledging that majorities in a State can form an “illicit combination” to threaten the magistracy). Cf. Carlos Manuel Vázquez, *The Constitution as Law of the Land: The Supremacy Clause and Constitutional Remedies* (March 1998) (unpublished manuscript at 48-56, on file with author) (explaining framers and ratifiers views of importance of court sanction in application of law). Although other parts of the Federalist Papers can be read to suggest that a “republican form of government” is one simply that must derive all its powers directly or indirectly from the great body of the people, THE FEDERALIST NO. 39, at 190 (James Madison) (Garry Wills ed., Bantam 1982), the link between the guarantee of republicanism and protecting the liberty of the people from despotism suggests that Alexander Hamilton’s list of the means to preserve a republican form of government could have been understood to apply, at least in its broad outlines, to the state governments as well as the federal.

45. See Merritt, *supra* note 43, at 23-26 (summarizing evidence that at the core of understanding of republican government was the idea that the people control their rulers and have power to decide on, run and change their forms of government).

46. Cf. THE FEDERALIST NO. 43, at 221 (James Madison) (Garry Wills ed., Bantam 1982) (noting that “there are certain parts of the State constitutions which are so interwoven with the Federal Constitution that a violent blow cannot be given to one without communicating the wound to the other”).

47. Professor Collins has argued that “[t]o assume that state courts *would* exist as an underlying premise of the [Madisonian] Compromise does not mean that it was part of the Compromise that they *must* exist.” Collins, *supra* note 16, at 193 n.432. While old expectations of what would happen should not *ipso facto* control, I am not persuaded here that Professor Collins is correct. Note that, in determining the meaning of the Eleventh Amendment, the Court has insisted that expectations of the framers as to the sovereign immunity of the states became part of the Constitution as background “postulates” which control, *see* *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 68 (1996) (citation omitted), even in the teeth of constitutional language that is more consistent with narrower understandings and even where the purportedly broad understanding of state immunity was contested during the Constitution’s ratification process by both supporters and opposers of ratification. *See id.* at 101, 109-149 (Souter J., dissenting); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 252-80 (1985) (Brennan, J., dissenting); *State Sovereign Immunity*, *supra* note 17, at 46-48. If—as I believe is the case with respect to the structures of state government—framers and ratifiers not only widely assumed a certain state of affairs as the “underlying premise” of the Constitution, but wrote and ratified a document whose multiple provisions explicitly refer to their existence, this underlying premise can be spoken of as required

of national life under this Constitution. State courts are created by the state governments and remain accountable to their states. While they are bound to respect the supremacy of federal law, federal law is, generally, bound to respect state courts' existence as creatures of state governments.

The Fourteenth and other post-Civil War Amendments, on any historical account, changed the relationship of the federal government to the state governments. Congress' Section 5 enforcement power contemplated direct federal impositions on the states, who are the parties addressed by the major substantive rules of those amendments: "No state shall make or enforce any law . . . nor shall any State deprive any person of life, liberty or property . . . nor deny to any person within its jurisdiction the equal protection of the laws."⁴⁸ A complete theory of federalism, including judicial federalism, in the United States must fully account for this development—a part of the Constitution oddly missing from the historical exegesis of the major federalism opinions of the last decade,⁴⁹ at least until *City of Boerne v. Flores*.⁵⁰

Does the Fourteenth Amendment contemplate the destruction or subjugation

by the Constitution to the extent that it builds upon it. Where Professor Collins' argument may have more bite is in whether the Constitution assumed that the federal government could compel states to create, for example, state courts. I am inclined to read the Republican Form of Government Clause as authorizing federal interference in the governance of states to achieve the minimal requisites of republicanism, but can take this position without necessarily taking the position that the federal courts, without action from the political branches, could force such change. Consider the example of Reconstruction. One way to think of it is to see this as a fundamentally extra-constitutional moment. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 42, 44-47 (1991) (noting procedural irregularities and dubious legality of adoption of the post-Civil War amendments). Another is to see Reconstruction and the federal military presence in the south as designed not only to secure the freedom of the former slaves but also to secure the functioning of minimally republican forms of government, including civilian courts. Cf. David A. J. Richards, *Revolution and Constitutionalism in America*, in *CONSTITUTIONALISM, IDENTITY, DIFFERENCE AND LEGITIMACY: THEORETICAL PERSPECTIVES* 129-30 (Michael Rosenfeld ed., 1994) (suggesting that under the Guarantee Clause Congress could propose amendments to ensure republican government in the South and "reasonably exclude non-republican Southern states from their constitutional position in the Union until they agreed to and conform[ed] with the amendments"). That the remedy for a complete absence of functioning state civilian courts is federal military tribunals does not mean that states do not have an obligation to provide such courts, and is not necessarily dispositive on the obligations of state courts that do exist.

48. U.S. CONST. amend. XIV, § 1.

49. See *New York v. United States*, 505 U.S. 144, 155-59, 161-66 (1992); see also *id.* at 159 ("The actual scope of the Federal Government's authority with respect to the States has changed over the years . . . but the constitutional structure underlying and limiting that authority has not."). For a contrasting willingness to consider enactments pursuant to the Fourteenth Amendment as bearing on understandings of federalism, see *id.* at 209 (White, J., dissenting in part) (noting use of suits under 42 U.S.C. § 1983, enacted pursuant to Fourteenth Amendment, to enforce conditions in statutes enacted under the Spending Clause of Article I).

50. 117 S. Ct. 2157 (1997).

of the states as separate units? Unlikely. It refers to the states as the entities to whom its admonitions are directed.⁵¹ It retains the use of the states as the vehicle by which representatives are to be apportioned.⁵² And it specifically contemplates the continued existence of “Executive and Judicial officers of a State, [and] . . . the Legislature thereof.”⁵³ The Seventeenth Amendment, while providing for direct election of Senators, retained the distribution of two Senators from each state, and assumed the continued existence of state legislatures and of an executive authority of the state.⁵⁴

Does the Fourteenth Amendment contemplate that Congress, through its enforcement powers, can impose added prohibitions, or duties, upon state governments? Undoubtedly. Even *City of Boerne*, which adopts a more restrictive view of congressional power than some of the earlier cases, emphasizes that Congress has broad remedial powers to impose rules on state governments in order to prevent states from violating the provisions of Section 1 of the Fourteenth Amendment.⁵⁵ Whether the federal courts, exercising jurisdiction over claims that states have violated Section 1 of the Fourteenth Amendment without the benefit of statutory guidance from Congress, can impose added prohibitions or duties to vindicate constitutional rights is perhaps more controversial, but that they have some power to do so is well established.⁵⁶

But I should think an extraordinary showing of need, based on the post-Civil War Amendments, should be required before federal law (even if enacted by Congress and *a fortiori* if imposed by a court) could require the “take over” of the state courts in a way that would leave them, in some fundamental way, not functioning as state courts. For many of the values served by the existence of state court systems continue to have salience in a post-Fourteenth Amendment world. The Supreme Court has alluded to the “fundamental constitutional independence of the States and their courts” as a reason not to “enlarge” exceptions to the prohibition on injunctions of state court proceedings “by loose statutory construction.”⁵⁷ In fact, some have argued that the state courts were intended to play a larger role than current doctrine allows them in restraining federal abuses,⁵⁸ a view many scholars agree with.⁵⁹ Although a powerful image

51. U.S. CONST. amend. XIV, § 1. It has been suggested that the Due Process Clause, U.S. CONST. amend. XIV, § 1, might itself be understood to require states to maintain adjudicatory bodies capable of providing such “process.”

52. U.S. CONST. amend. XIV, § 2.

53. U.S. CONST. amend. XIV, § 2.

54. U.S. CONST. amend. XVII.

55. *City of Boerne*, 117 S. Ct. at 2163-64; *see also* *City of Rome v. United States*, 446 U.S. 156 (1980); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

56. *See e.g.*, *Missouri v. Jenkins*, 495 U.S. 33 (1990) (upholding authority of lower federal court to require local government unit to levy taxes to finance needed improvements in schools that had been segregated); *Milliken v. Bradley*, 433 U.S. 267 (1977) (upholding desegregation order requiring expenditures of state funds for various educational improvements).

57. *Atlantic Coast Lines v. Brotherhood of Locomotive Eng’rs*, 398 U.S. 281, 287 (1970).

58. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1509-10

of state courts that lingers from the 1950s and 1960s is of recalcitrance in rejecting the morally reprehensible American racial apartheid, some state courts in recent decades have exercised leadership in a variety of rights-expanding movements both in adjudication,⁶⁰ and in the administration of justice.⁶¹

I agree with Professor Redish and Mr. Sklaver that theories of “dual federalism” are not accurate models to use here, and are inconsistent with the well-established power of the Supreme Court to review state court decisions.⁶² Yet the intellectual failure of the doctrine of “dual federalism” need not mean that there is no federal interest in protecting state institutions of government. A quick comparative look at federal legal systems demonstrates that there are a

(1987).

59. See, e.g., Daniel J. Meltzer, *Congress, Courts and Constitutional Remedies*, 86 GEO. L.J. 2537, 2566-67 (1998) (suggesting that *In re Tarble*, 80 U.S. (13 Wall.) 397 (1871), should not be understood as a sound constitutional decision). See also John Harrison, *Jurisdiction, Congressional Power, and Constitutional Remedies*, 86 GEO. L.J. 2513, 2514 n.4 (1998) (describing himself to similar effect as a “*Tarble* skeptic”).

60. See, e.g., *Evans v. Romer*, 882 P.2d 1335, 1350 (Colo. 1994) (holding unconstitutional, under federal Constitution, a state constitutional amendment, adopted by referendum, prohibiting state from enacting legislation to extend protections against discrimination based on sexual orientation), *aff’d*, *Romer v. Evans*, 517 U.S. 620 (1996); *Baehr v. Levin*, 852 P.2d 44, 67 (Haw. 1993) (finding that marriage statute that did not permit same-sex marriages was presumptively unconstitutional unless on remand the distinction could be justified by a compelling state interest and as narrowly drawn to avoid intrusion on constitutional rights); *Robinson v. Cahill*, 303 A.2d 273, 297-98 (N.J. 1973) (holding that under New Jersey state constitutional right to an efficient public education existing funding arrangements, which involved property taxes, were invalid and had to be equalized).

61. See, e.g., NEW JERSEY SUPREME COURT TASK FORCE ON WOMEN IN THE COURTS, FIRST YEAR REPORT (1984); NEW YORK TASK FORCE ON WOMEN IN THE COURTS REPORT, *reprinted in* 15 FORDHAM URB. L.J. 11 (1986); FLORIDA SUPREME COURT GENDER BIAS STUDY COMMISSION, REPORT, *reprinted in* 42 FLA. L. REV. 803 (1990); COLORADO SUPREME COURT TASK FORCE ON GENDER BIAS IN THE COURTS, REPORT (1991). Indeed, scholars and federal judges have remarked on the important lead taken by the state courts in conducting self-studies of gender or race bias well in advance of the willingness of the federal courts to do so. See Ruth Bader Ginsburg, *Foreword*, 84 GEO. L.J. 1651, 1652 (1996) (noting that “[s]tate courts were the pioneers” in studying gender bias); Vicki C. Jackson, *What Judges Can Learn From Gender Bias Task Force Studies*, 81 JUDICATURE 15, 38-39 (1997) (noting benefits of interactive judicial federalism seen in the spread of task forces); Judith Resnik, “*Naturally*” *Without Gender: Women, Jurisdiction and the Federal Courts*, 66 N.Y.U. L. REV. 1682, 1759-92 (1991); see also SPECIAL COMMITTEE ON GENDER, REPORT TO THE D.C. CIRCUIT TASK FORCE ON GENDER, RACE AND ETHNIC BIAS (1995), *reprinted in* 84 GEO. L.J. 1657, 1671 (1996) (noting that the “first judicially-sponsored inquiry into gender bias in the courts was that of New Jersey,” and that close to 40 court systems have appointed task forces since the New Jersey report).

62. See Redish & Sklaver, *supra* note 1, at 87-88 (attacking the *Printz* Court for inconsistency in espousing dual federalism but recognizing that state courts can be commandeered). For my critique of *Printz*, see Jackson, *supra* note 15, at 2183-2205.

multiplicity of forms of federalism. In Belgium, for example, some powers (e.g., over economic development) are exercised by territorially defined “regions,” while other powers (e.g., over education and culture) are exercised by nongeographic linguistic communities, and still others are exercised by the central government but often in tandem with regional or community governments.⁶³ In Northern Ireland, the recent constitutional changes result in sharing of sovereignty across different national lines.⁶⁴ In Canada, powers are divided between the federal governments and the subnational governments (provinces), but the Supreme Court has the final word on the meaning and nature of provincial law.⁶⁵ Thus, the inadequacy of “dual federalism” to describe the relationships of governments in the United States does not imply that there is no meaningful variety of federalism at work.

The argument for complete federal court superiority in the adjudication of federal claims, particularly under the Constitution of 1789, assumes away one further problem, an “old constitution” problem.⁶⁶ In the Eighteenth and

63. See Alexander Murphy, *Belgium's Regional Divergence: Along the Road to Federation*, in *FEDERALISM: THE MULTIETHNIC CHALLENGE* 73, 85-88 (Graham Smith ed. 1995); ANDRE ALEN & RUSEN ERGEC, *FEDERAL BELGIUM AFTER THE FOURTH STATE REFORM OF 1993* (Ministry of Foreign Affairs, Brussels 1994). Belgium's extension of powers to negotiate and conclude foreign treaties to the Communities and Regions, subject to some review by the King, is quite unusual (indeed, may be unique) in federal nations. See *id.* at 29-30.

64. In 1998 the Republic of Ireland, the United Kingdom and the political parties in Northern Ireland created new constitutional arrangements in an effort to resolve conflict in and over Northern Ireland. Under the peace agreement, approved by public referenda in the Republic of Ireland and the six counties of Northern Ireland on May 22, 1998, several cross-border political bodies are established: a North-South Council is to be composed of ministers from both Northern Ireland and the Republic of Ireland and will exercise joint responsibilities in matters affecting the entire island, such as tourism, transportation and the environment. A consultative body, the Council of the Isles, is also established, to foster discussion among members of the Irish and British Parliaments and the local assemblies in Northern Ireland, Scotland, and Wales. See Warren Hoge, *The Irish Vote*, N.Y. TIMES, May 24, 1998, at A1; Warren Hoge, *Vote for Assembly Realigns Northern Ireland Royalties*, N.Y. TIMES, June 28, 1998, at A6; *An Irish Accord: The Next Steps*, N.Y. TIMES, Apr. 16, 1998, at A5;

65. See Martha Field, *The Differing Federalisms of Canada and the United States*, 55 LAW & CONTEMP. PROBS. 107 (1992).

66. For a collection of essays many of which focus on interpretation of older constitutional texts, see *CONSTITUTIONAL JUSTICE UNDER OLD CONSTITUTIONS* (Eivind Smith ed., 1995). For a sampling of these reflections contained in *CONSTITUTIONAL JUSTICE UNDER OLD CONSTITUTIONS*, see Michel Troper, *The Interpretation of the Declaration of Human Rights By a Constitutional Judge*, at 161, 164-74 (the only “truly objective quality of the Declaration” of the Rights of Man and Citizen of 1789 is that “it is a very old document”; its age could affect interpretation through providing opportunity for a long interpretive tradition, or through requiring divination of the intentions of its authors, or through its bearing on whether to interpret its text as in conflict or not with later sources of law); Henry Paul Monaghan, *The Constitution of the United States and American Constitutional Law*, at 175, 177, 182 (stating that “what is of importance to American

Nineteenth Centuries, the separation between state and federal law was not so sharply felt as it is in the more positivist world of law today.⁶⁷ As noted above, in other federal, constitutional systems today the federal Supreme Court has the last word on the meaning of state or provincial law. The highly positivist view of law expressed in the post-*Erie*⁶⁸ understandings of the division between state and federal law is not the only one possible: State law can be conceived to exist apart from the views expressed by organs of the state government, just as the “true” meaning of the federal Constitution can be conceived as different from what the Supreme Court says. *Erie* was a fairly recent development in constitutional history. It is plausible with respect to the Fourteenth and other post-Civil War Amendments, particularly those addressed specifically to the exercise of state power, that federal courts are the preferred adjudicators; should this mean that federal courts are the preferred adjudicators of other claims of federal laws, e.g., under the labor laws, securities laws, etc.? The answer is by no means obvious.

Federal courts as adjudicators may well be “superior” in the sense of being more independent and impartial in their decision-making than state courts, particularly when compared to state judiciaries where the judges must run for election on a regular basis. The importance of their judicial independence is real, and is constitutionally secured. Strong arguments exist that the Article III federal courts are accordingly constitutionally superior adjudicators to the state courts, which may, but need not, provide for comparable guarantees of judicial independence. But assuming arguendo the superiority of federal adjudication of federal claims, I want now to consider Professor Redish and Mr. Sklaver’s argument in favor of a presumption that federal procedures should control state court adjudication of federal claims.⁶⁹

lawyers and judges is the constitutional law of the United States, not the Constitution of the United States;” and “original understanding simply cannot constitute the sole legitimate canon for constitutional adjudication”); Frank Michelman, *Construing Old Constitutional Texts: Regulation of Use As ‘Taking’ of Property in United States Constitutional Jurisprudence*, at 227, 233 (suggesting that differing ages of takings clause of 1787-89 and Due Process Clause of Fourteenth Amendment could affect interpretation and analysis of regulatory takings claims); Francis Delpérée, *Complementary Sources to Old Constitutional Texts*, at 253, 262 (arguing that constitutions define their own interpreters, contemplating both reinterpretation over time and continuity with tradition).

67. See William Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1521-25 (1984) (noting lack of clarity on nature and source of general common law); cf. Woolhandler, *supra* note 17, at 108-09 (noting that in the 19th century the federal courts’ diversity jurisdiction was an important location for elaborating federal law, far less constrained by the forms of action and procedures of the state courts than has been supposed).

68. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

69. Redish & Sklaver, *supra* note 1, at 99-108. The proposal they advocate is, I believe, for a “strong presumption in favor of the use of federal procedure when a state court is called upon to adjudicate a federal cause of action.” *Id.* at 105. It is not clear whether this is more rigorous than, or similar to, an alternative standard, described earlier in their paper, under which “state courts must

II. WHY NOT A DEFAULT RULE

I make two kinds of arguments here: a utilitarian argument about the costs and benefits of the transition to a new system and of the new system itself; and a quasi-constitutional argument about the status of the state courts in the federal system. I begin with the constitutional argument.

Mandating wholesale use of federal rules of procedure in state court cases based on federal law is in tension with the constitutional requirement that states maintain judiciaries and with the history of the relationship of state and federal courts. Part of being a court system is the ability to participate in determining the procedures by which court business is conducted.⁷⁰ The rules of procedure cover a wide range of concerns, from the relatively minute to important questions of allocating decisional authority between judge and jury. The Supreme Court case law to date provides little support for the idea that when state courts sit to hear federal claims they do so in effect as federal courts.⁷¹ Indeed, Nineteenth

always employ federal procedures in enforcement of a substantive federal cause of action, at least absent the resulting need for a significant restructuring of the state judicial system in order to accommodate the federal procedures.” *Id.* at 101. The proviso for “significant restructuring,” were it adopted, might prove to be similar in the field of procedure to *Testa*’s possible limitation in the field of jurisdiction of the requirement that state courts entertain federal causes of action, at least where state “courts have jurisdiction adequate and appropriate under established local law” to adjudicate similar actions. *Testa v. Katt*, 330 U.S. 386, 394 (1947). The question of whether following a federal procedure would require “significant restructuring” might be relevant both to congressional power to require such a procedure, and to whether a judicially created presumption should be followed. If, for example, Congress sought to require that state judges receive the identical guarantees of salary protection and tenure during good behavior that federal judges have, would this be within Congress’ Article I powers? its Fourteenth Amendment powers? Or would the constitutional requirement that there be state courts bar federal imposition of tenure and salary requirements? *See Merritt*, *supra* note 43, at 40-58 (suggesting that Guarantee Clause, U.S. CONST. art. IV, § 4, should bar federal interference with procedures by which state officials are chosen, their term of office and their qualifications for office).

70. Thus, while Congress has power to provide for rules of procedure for the federal courts, federal courts also “have traditionally exerted strong inherent power” as courts to develop and apply rules relating to the “administration of legal matters.” *Hanna v. Plumer*, 380 U.S. 460, 471-74 (1965) (quoting *Lumbermen’s Mutual Casualty Co. v. Wright*, 322 F. 2d 759, 764 (5th Cir. 1963)); *see also Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991) (upholding federal district court’s inherent power to manage its own proceedings and impose sanctions). Moreover, federal courts exercise considerable influence on congressional changes in federal rules, an influence individual state court systems are more likely to have in their own state legislatures than in Congress.

71. *See Minneapolis & St. Louis R.R. v. Bombolis*, 241 U.S. 211, 221 (1916), *referred to with approval in* *Howlett v. Rose*, 496 U.S. 356, 370-71 n.17 (1990). *Cf. Byrd v. Blue Ridge Coop.*, 356 U.S. 525, 537 (1958) (suggesting that a “countervailing factor” to arguments for applying a state procedural practice in a federal court adjudication of a state substantive claim was that federal courts are “an independent system for administering justice to litigants who properly

Century cases on occasion expressed doubt whether federal law could force state courts to exercise jurisdiction they thought they did not have under their particular states' law,⁷² a conclusion that cases in this century have fairly clearly rejected.⁷³ But greater powers need not necessarily follow from smaller ones.

Federal constitutional law does constrain procedures in state court cases: The Due Process Clause requires certain minimally fair adjudicatory processes in all cases,⁷⁴ and criminal cases are constrained by the various amendments that relate to criminal procedure.⁷⁵ Yet the Constitution's constraints on state judicial process are more relaxed in civil than in criminal cases, since the Seventh Amendment's requirement of jury trials has been held not to apply to the state courts.⁷⁶ While federal statutes or the Constitution may sometimes require that

invoke [their] jurisdiction"). Established under state, not federal, governments, state courts function somewhat as "independent system[s]" for the same purpose, and may likewise have interests generally in being able to follow their own state procedures. *Id.*

72. See Collins, *supra* note 16, at 145-65 (describing early opinions as distinguishing between state court judges obligation to apply federal law in cases they heard and an obligation to assume unwanted jurisdiction).

73. See, e.g., *Testa v. Katt*, 330 U.S. 386 (1947); *General Oil v. Crain*, 209 U.S. 211, 226-28 (1908).

74. U.S. CONST. amend. XIV, § 1.

75. See U.S. CONST. amends. IV, V, VI, VIII.

76. See *Bombolis*, 241 U.S. at 216-17, cited with approval by *Georgia v. McCollum*, 505 U.S. 42, 52 (1992). By contrast, most of the Bill of Rights provisions relating to criminal procedure have been applied to the states. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968) (jury trial); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to appointed counsel for indigents). This might be thought to reflect the relative magnitude of the federal interests in having minimum procedural standards followed by state courts in criminal cases as compared with civil cases.

Note, however, that Redish and Sklaver apparently would not extend their presumption to state causes of action in which federal issues or defenses arise (which would exempt state criminal trials), on the ground that states have a stronger interest in the enforcement of their own substantive law in accordance with their own procedures. Redish & Sklaver, *supra* note 1, at 105 n.180. Yet even if the state's interest in pursuing its own procedures is greatest here, one might also think that it is in state criminal cases where it is most important that federal procedures apply. As Professor Meltzer has pointed out, close to half of all criminal cases appealed to state supreme courts involve questions of federal constitutional law. Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1177 (1986) [hereinafter *State Court Forfeitures*]. Because many of these federal issues arise late in the lower court proceedings, providing for removal to federal court (and thereby assuring federal procedures) seems impracticable. *Id.* at 1178. In cases involving an affirmative federal cause of action over which state and federal courts have concurrent jurisdiction, both plaintiff and defendants can, under existing jurisdictional statutes, generally elect to proceed in federal court. See 28 U.S.C. § 1441(a), (b) (1994) (permitting defendants, regardless of citizenship, to remove any case that could have been filed initially in federal court under federal question jurisdiction). Thus, removal jurisdiction is a more available solution to concerns over state court procedures that interfere with effective enforcement of affirmative federal statutory claims than with respect to state criminal cases, which might argue in favor of a very different approach

particular procedures be used or not,⁷⁷ it is not clear to me why the power to prescribe or preempt particular rules to further the substantive goals of a statute within Congress' power necessarily implies the "greater" power to supplant state procedural law in any federal question case.⁷⁸ The latter would seem more to be

than that proposed by Professor Redish and Mr. Sklaver.

77. For an argument that the inadequate state ground doctrine should be treated as a form of federal common law that should control state court procedure, see *State Court Forfeitures*, *supra* note 76. Meltzer's argument is far more limited than Redish and Sklaver's, emphasizing that federal law would remain "interstitial," establishing a "floor with which states must comply, rather than . . . displac[ing] state law entirely. The states do have the primary lawmaking responsibility for establishing the procedures in their courts." *Id.* at 1132.

78. In *Dice v. Akron, Canton & Youngstown Railroad Co.*, 342 U.S. 359 (1952) the holding that the validity of a release challenged as induced by fraud was a question of fact for the jury, rather than the judge, was supported by the policy of the federal statute to provide more generous protection to injured workers than had resulted under the application of common law rules of substance and procedure. See *id.* at 363 ("[T]o deprive railroad workers of the benefit of a jury trial where there is evidence to support negligence is 'to take away a goodly portion of the relief which Congress has afforded them.'"); cf. Alfred Hill, *Substance and Procedure in State FELA Actions—The Converse of the Erie Problem?*, 17 OHIO ST. L.J. 384, 397 (1956) (discussing reasons to limit *Dice*'s holdings to FELA proceedings). In both *Felder v. Casey*, 487 U.S. 131, 134 (1988) and *Howlett v. Rose*, 496 U.S. 356, 383 (1990), the state court rule that was overridden was found to be inconsistent with the basic purpose of the federal statute (though in *Howlett* the Court also found that the state rule was not a neutral "valid excuse" because it would not have barred state tort suits against the same kind of defendants. *Howlett*, 496 U.S. at 371).

If the underlying substantive law of tort liability for the hazards of tobacco smoking were federalized (and assuming that this action is otherwise constitutional, e.g., is not unconstitutionally retroactive), I am inclined to agree with Redish & Sklaver, *supra* note 1, at 108-10, that Congress would have substantial power to provide for particular procedures "integral" to or "bound up with" the statutory scheme (e.g., limiting multi-party actions) and that these would be enforceable in the state courts. See *Dice*, 342 U.S. at 363 (treating jury trial as "part and parcel" of FELA remedy required in state courts); *Brown v. Western Ry. of Ala.*, 338 U.S. 294, 298-99 (1949) (reversing state court dismissal of FELA complaint based on failure to comply with strict local pleading rule which could "defeat" assertion of federal rights); see also *Felder v. Casey*, 487 U.S. 131, 138 (1988) (finding state notice-of-claim procedure "conflicts in both its purpose and effects with the remedial objective" of § 1983 and could not constitute grounds for state court dismissal); cf. *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 536 (1958) (finding that state procedure was not "integral" to or "bound up with" substantive law and did not apply in federal adjudication of state substantive claim). *Felder* also concluded that enforcement of the notice-of-claim statute in state court § 1983 actions would "frequently and predictably produce different outcomes" than if the same case were filed in federal court, and that such outcome-determinative state law could not be applied by state courts entertaining substantive federal rights. *Felder*, 487 U.S. at 141. For different treatments of the outcome-determinative test for determining when *federal* courts must apply *state procedural* law, see *Byrd*, 356 U.S. at 537 (balancing various factors); *Hanna v. Plumer*, 380 U.S. 460, 466-68 (1965) (linking "outcome determinative" test to goals of avoiding forum shopping and inequitable law administration); *Gasperini v. Center for Humanities*, 518 U.S. 415

an exercise of power to make laws “necessary and proper” for another department to carry out its responsibilities—a power Congress has with respect to the federal courts but not with respect to organs of state government—rather than an exercise of power tailored to an enactment under a specific power such as the Interstate Commerce Clause,⁷⁹ or the Copyright Clause.⁸⁰

If there is some doubt as to Congress’ power to mandate wholesale adoption of, for example, the Federal Rules of Civil Procedure by state courts, even in federal question cases, one might think that *a fortiori* there is reason for federal courts to hesitate to adopt such a wholesale presumption as a matter of federal statutory interpretation or federal common law.⁸¹ Indeed, clear statement rules designed to prevent the judiciary from trenching on traditional powers of the states absent clear congressional direction stand in marked contrast to Professor Redish and Mr. Sklaver’s proposal for federal courts to take such a move on their

(1996). See also Wendy Collins Perdue, *The Sources and Scope of Federal Procedural Common Law: Some Reflections on Erie and Gasperini*, 46 U. KAN. L. REV. 751, 756, 769 (1998) (criticizing *Gasperini* for invoking *Hanna* “twin aims” test without explaining how difference in state and federal standards for new trials would affect litigant behavior).

79. U.S. CONST. art. I, § 8, cl. 3.

80. U.S. CONST. art. I, § 8, cl. 8. A different set of questions might arise were Congress to act under its Fourteenth Amendment power to enforce the guarantee of “due process” by requiring state courts to apply some federal rules of procedure in all cases. Cf. Ellen A. Peters, *Capacity and Respect: A Perspective on the Historic Role of the State Courts in the Federal System*, 73 N.Y.U. L. REV. 1065, 1079 (1988) (noting the importance of the Civil War Amendments for the role of state courts).

81. Consider here Professor Meltzer’s comments:

I do not mean to suggest that state rules ordinarily must yield [when federal rights are litigated in state courts]; one would hope that state procedural systems are free from systematic pathology. . . . The reasons for a presumption that state procedural rules should apply when federal rights are at issue in state courts are straightforward. State rules of practice and procedure serve legitimate purposes of judicial administration in state courts, purposes that ordinarily do not conflict with or impair the vindication of federal rights. Moreover, reliance upon state law avoids the need to apply different rules of practice in state courts for state and federal claims. It is also possible that the operation in different states of different systems of practice and procedure may permit desirable variety and experimentation. For all these reasons, here as elsewhere there must be forceful reasons to justify formulation of a distinctively federal rule.

State Court Forfeitures, *supra* note 76, at 1182.

Meltzer also suggests that the interests of civil litigants in having federal questions litigated are generally less weighty than those of criminal defendants, and that there is therefore more reason to require civil litigants to comply with state court procedures and bar review of their federal claims where those claims have been forfeited under state procedural law. Thus, his article suggests, there are good reasons to retain the presumption that state procedure controls litigation in state courts and that if there is a class of cases in which such a presumption should be less strongly enforced it is in criminal, not civil, cases in the state courts. *Id.* at 1213-14.

own.⁸²

A presumption to apply federal rules in the adjudication of civil claims based on federal law could have a sweeping effect, turning state courts into “junior varsity” versions of federal courts.⁸³ While federal procedures may need to be followed where, under existing case law, they are integral to the substantive purposes of the statute, or where state procedural rules pose a substantial burden on vindication of federal law,⁸⁴ this case-by-case or issue-by-issue determination accords more with the constitutional status of the state courts as a separate judicial system, organized under a different government power, than a blanket rule favoring federal procedures.

Professor Redish and Mr. Sklaver’s approach would also be in tension with the history of the relationship between procedures in state and federal courts. The Process Act of 1789⁸⁵ required that

except . . . [as] otherwise provided [by statutes of the United States], the forms of writs and executions, except their style, and modes of process and rates of fees, except fees to judges, in the circuit and district courts, in suits at common law, shall be the same in each state respectively as are now used or allowed in the supreme courts of the same.⁸⁶

The mandate for the lower federal courts to follow the procedures of their respective state courts was not abandoned until the 1930s, with enactment of the Rules Enabling Act in 1934 and subsequent adoption of the Federal Rules of Civil Procedure in 1938.

The Redish and Sklaver proposal is also inconsistent with a fairly sizable body of law, across such issues as abstention, the Eleventh Amendment, federal habeas corpus availability, and the adequate state procedural ground doctrine.⁸⁷ The most recent edition of Hart & Wechsler says that “in general, state rules of practice presumptively determine the time when, and the mode by which, federal claims must be asserted in the state courts.”⁸⁸ It is possible that this practice has

82. Redish & Sklaver, *supra* note 1, at 101-02. Query how, if state courts adopted wholesale federal practice and procedure in adjudicating federal rights, this would affect “litigant choice” as a value in federal jurisdiction—would it be eliminated? or would the litigant simply be judge shopping?

83. *Cf. Mistretta v. United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting) (characterizing the U.S. Sentencing Commission as an impermissible “junior-varsity Congress”).

84. For a thoughtful effort to identify specific differences in procedural rules that unduly burden adjudication of individual constitutional rights claims in state courts, see Burt Neuborne, *Toward Procedural Parity in Constitutional Litigation*, 22 WM. & MARY L. REV. 724 (1981). *Cf. Johnson v. Fankell*, 117 S. Ct. 1800, 1805, 1806 & n.12 (1997) (indicating that neutral state rule should not be preempted by federal procedural right unrelated to substantive federal statutory purpose).

85. Act of Sept. 29, 1789, 1 Stat. 93.

86. *Id.*

87. *See supra* note 21.

88. RICHARD H. FALLON ET AL., HART & WECHSLER’S FEDERAL COURTS AND THE FEDERAL

been, or has become, wrong; but a convincing demonstration of that should be required before abandoning a presumption that is an integral part of so many federal doctrines. The case for continuity in constitutional, and quasi-constitutional adjudication is a strong one, if only to avoid the inevitable confusions and costs of transitions in doctrinal regimes.

To require state courts to use federal procedures in adjudicating federal claims would impose some burden on both state court judges and lawyers to be familiar with federal rules of procedure. Mastering two systems of procedure is not, of course, impossible,⁸⁹ though the opportunities for litigation over what counts as procedure, and which rules to use when a complaint is amended to add, or drop, a federal claim, all suggest that the appealing simplicity of Professor Redish and Mr. Sklaver's proposal may be more theoretical than actual.⁹⁰ These

SYSTEM 576 (4th ed. 1996). *But cf.* *Felder v. Casey*, 487 U.S. 131, 150 (1988) ("Federal law takes state courts as it finds them only insofar as those courts employ rules that do not 'impose unnecessary burdens upon rights of recovery authorized by federal laws.'"). *Felder* involved a state rule that barred adjudication of plaintiffs' civil rights claims under 42 U.S.C. § 1983 (Supp. II 1996), a statute enacted pursuant to Congress' Fourteenth Amendment powers. It is possible that a different approach to the application of state procedural rules may be warranted in litigation involving those claims than in litigation involving statutes enacted under Article I powers, and that a different approach to procedural rules barring adjudication of affirmative claims than rules affecting defenses to such claims might be similarly supportable, *cf.* *Johnson v. Fankell*, 117 S. Ct. 1800 (1997) (refusing to require states to follow federal procedure of permitting interlocutory appeals of denials of qualified immunity defenses in section 1983 litigation).

89. Indeed, the federal courts relied for many years on separate systems of procedure for "law" and "equity," and in "law" cases were required generally to follow state rules of procedure. The complexities of this system, however, led to creation of the unified Rules of Civil Procedure, in part because of the unnecessary difficulty—and litigation—occasioned by the prior system. *See* Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 462 (1942) (noting that a system of "divided procedure . . . is practically a bar at the outset to a truly simplified procedure"); Daniel J. Coquillette, *Scope and Purpose of Rules*, in JAMES WM MOORE, I MOORE'S FEDERAL PRACTICE §§ 1.02, 1 App. 01[2] (1998).

90. In the last two decades there has been an enormous proliferation of different local rules in the federal courts (through local rule-making, local options on discovery under the Federal Rules of Civil Procedure, and individual district civil management plans required by Congress). This proliferation has been widely criticized. *See, e.g.,* Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375 (1992); Erwin Chemerinsky & Barry Friedman, *The Fragmentation of Federal Rules*, 46 MERCER L. REV. 757 (1995). Many have questioned whether some of the local rules are themselves in conformity with the Federal Rules of Civil Procedure. *See, e.g.,* Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929 (1996); Peter J. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655, 1663 (1995). This fragmentation of the federal procedural rules provides an added reason for caution in presuming that state courts should employ "federal procedures" in adjudicating federal claims. Determining what those procedures are may be difficult, and confidence that those procedures would be superior to those of the state courts for adjudicating substantive federal claims might be in question. *Cf.* Peters, *supra* note 80, at 1083-85 (arguing that state courts are sharing

difficulties may be compounded by the proposal being in the form of a presumption (which would permit litigation over when the presumption is overcome, e.g., do state courts have to follow federal court rules on paper size?).

While Professor Redish and Mr. Sklaver note “the inherently limited availability of Supreme Court policing of the state courts’ procedural choices in converse-*Erie* contexts” as a reason to mistrust case-by-case analysis as effective in assuring the supremacy of federal law,⁹¹ their Article does not identify large numbers of unresolved challenges to state courts failures to follow federal procedures in the adjudication of federal claims. It may be that lawyers’ learning that “you take the state courts as you find them,”⁹² for the purposes of adjudicating federal claims, is, notwithstanding important exceptions, so well established, that it does not occur to lawyers who have chosen to litigate in state courts to seek the use of federal procedures. I am not aware of recent evidence of a substantial problem of state court procedures (as compared to those in federal courts) systematically interfering with the enforcement of federal rights⁹³—other than in connection with the inadequate quality of representation afforded to indigent criminal defendants, including those charged with capital crimes.⁹⁴ Yet in the area of criminal procedure the Supreme Court has seemed critical of state courts for overprotecting federal rights of defendants. Absent evidence of problems of substantial magnitude in civil litigation, the transition costs of moving to a whole new system may not be justified by the putative benefits. And, transition costs aside, the costs of implementing the new approach are considerable, both in terms of ongoing litigation about what is covered by the rule and by what such a rule would preclude.

Moreover, there are positive benefits from procedural decentralization.⁹⁵

responsibility for protecting political and civil rights and can better do so if their procedural autonomy is strengthened).

91. Redish & Sklaver at 108.

92. See FALLON ET AL., *supra* note 88, at 576.

93. See, e.g., William W. Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689, 1700-12 (1992) (noting that state and federal procedural rules sometimes differ but that these differences had not impeded coordination of discovery in multi-forum litigations). *Id.* at 1724 (noting that “[O]ne might expect joint state-federal hearings to encounter insuperable problems because of differences in the rules or procedures of the state and federal courts. In fact, such problems have been rare.”). Although Professor Neuborne identified several areas in 1981 in which federal rules were better for constitutional rights claimants, see Neuborne, *supra* note 84, in some jurisdictions civil rights plaintiffs more recently seem to prefer to file in state courts. See, e.g., Wisconsin Dep’t of Corrections v. Schacht, 118 S. Ct. 2047 (1998); Howlett v. Rose, 496 U.S. 356 (1990).

94. See FALLON ET AL., *supra* note 88, at 1457 (explaining interest in proposals for habeas reform in state death penalty cases arising from many factors including “the poor quality of the representation [of death row inmates] often afforded at trial and on direct review” and discussing specific reform proposals).

95. Indeed, in recent years the benefits of decentralized procedures has seemingly played an important role in the federal courts themselves with the proliferation (many would say undue)

Pretrial conferences and process,⁹⁶ unified courts for specialized areas,⁹⁷ pay incentives for encouraging timely decisions,⁹⁸ juror selection to increase the representativeness of the jury,⁹⁹ use of cameras in the courtroom¹⁰⁰—these are all procedural developments in which state courts have played an important role. Some of the experiments (much modified) have over time been found beneficial (like the pretrial conference) and some have been met with more mixed evaluations (such as televising criminal proceedings). While Professor Redish and Mr. Sklaver's approach apparently carves out state criminal cases from the scope of the proposed rule, and would not extend it to cases raising purely state

of local rules that introduce complexities (if not technically disuniformity) to the practice under the Federal Rules of Civil Procedure. For discussion, see, e.g., Mullenix, *supra* note 90.

96. See Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice and Civil Judging*, 49 ALA. L. REV. 133, 160-65 (1997) (describing history of state court innovations in use of pretrial conferences).

97. See D.C. DOMESTIC VIOLENCE PLAN (Nov. 14, 1995) (100-page plan signed by representatives of community groups and relevant officials, including Chief Judge of Superior Court, Chief of Police, and U.S. Attorney, leading to creation of a unified domestic violence court in the District of Columbia); Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges and the Court System* (forthcoming 1999) (manuscript on file with author).

98. See LA. REV. STAT. ANN. 13: §§4207-10 (West 1991 & Supp. 1998) (requiring district court and city court judges to issue judgments within 30 days of the cases being submitted and providing for loss of one-quarter of their salary for each violation of timely decision requirement).

99. See Albert W. Alschuler, *Racial Quotas and the Jury*, 44 DUKE L.J. 704, 711 (1995) (noting that a number of state and local jurisdictions, including Arizona and Hennepin County, Minnesota, were considering different approaches to "affirmative action" in jury or grand jury selection). See also Jeff Barge, *Reformers Target Jury Lists*, A.B.A. J., Jan. 1995, at 26 (describing Arizona judge who empaneled three different juries for one case in order to have a jury that included Hispanic-Americans). Arizona has apparently taken a leading role among state courts in innovating procedures for jury trials in civil cases. See, e.g., ARIZ. R. CIV. P. 39(b)(10) (authorizing jurors to send questions to the judge to be asked of witnesses); ARIZ. R. CIV. P. 39(p) (authorizing jurors to take notes); ARIZ. R. CIV. P. 51(b)(3) (providing for jurors to receive copies of judges' instructions).

100. See Chief Justice Robert N. Wilentz, Speech Before the Middlesex County Bar Association (Nov. 14, 1979), *reprinted in* 49 RUTGERS L. REV. 763 (1997) (discussing New Jersey's experiments with television and still cameras in the courtroom); Susan E. Harding, *Cameras and the Need for Unrestricted Electronic Media Access to Federal Courtrooms*, 69 S. CAL. L. REV. 827 (1996) (summarizing successful experiments in state courts, beginning with Florida in 1970s, and reporting that 47 states now permit some use of cameras in courtrooms, and arguing against federal practices prohibiting cameras in federal courtrooms). It was not until March, 1996 that the U.S. Judicial Conference voted permanently to authorize the federal courts of appeals to permit television, radio and still photography coverage of civil appeals in those courts. See Henry J. Reske, *A Repeat Performance: Judicial Conference Allows Cameras Back in Appeals Courts*, A.B.A. J., May 1996, at 38. The future of television coverage of civil cases in the district courts remains uncertain (although legislative authorization is pending).

law issues, it nonetheless would introduce constraints (including disincentives from limited judicial resources for procedural rules learning and innovation) that could considerably curtail these benefits of decentralization. And it would substantially eliminate the benefits of such state experimentation with procedures in the adjudication of federal civil claims.¹⁰¹

Finally, in light of the pervasiveness of the background rule that “federal law takes the state courts as it finds them”¹⁰²—a background rule reinforced by the Supreme Court’s rigorous support of state procedural rules that bar review of federal claims¹⁰³—one might be concerned about the question of legislative intent.¹⁰⁴ Elsewhere, Professor Redish has written powerfully on the usurpation of legislative authority involved in federal courts declining to exercise jurisdiction within the statutory limits conferred by Congress.¹⁰⁵ Congress is generally presumed to legislate against existing background rules, one of which has been that state courts will adjudicate cases generally in accordance with state procedural rules. Thus, the transition costs in terms of either dishonoring congressional intent, or of figuring out whether application of state procedural rules would be consistent with congressional intent, are substantial under Professor Redish and Mr. Sklaver’s proposed regime.

Moreover the Rules Enabling Act¹⁰⁶—which was the statute that in 1934 propelled the federal courts into wholesale rule-making for civil cases pending before them—arguably could be read by implication to express a congressional judgment that the federal courts should not, generally, make rules for the state courts. The statute in its current form authorizes the Supreme Court to “prescribe

101. For acknowledgment of the benefits to the federal courts of procedural experimentation in state court systems, see COMMISSION ON GENDER & COMMISSION ON RACE & ETHNICITY, REPORT OF THE THIRD CIRCUIT TASK FORCE ON EQUAL TREATMENT IN THE COURTS, *reprinted in* 42 VILL. L. REV. 1355, 1726 (1997) (noting state courts’ programs in improving court interpreter services which “offer valuable assistance and suggestions for federal courts as well”). *See also* Resnik, *supra* note 96 (noting state court contributions to development of pretrial practice). *Cf.* Chemerinsky & Friedman, *supra* note 90, at 789-91 (discussing possible benefits of procedural decentralization and experimentation by the different federal district courts but arguing that those benefits are not being realized with current proliferation of local federal rules that introduce unwarranted complexities into federal practice; favoring experimentation in limited number of districts under central control).

102. *Howlett v. Rose*, 496 U.S. 356, 372 (1990) (Stevens, J., for a unanimous Court), (quoting Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954)).

103. *See, e.g., Wainright v. Sykes*, 433 U.S. 72 (1977).

104. *Cf.* Redish & Muench, *supra* note 14, at 329-39 (arguing that whether state courts can hear federal causes of action depends on Congress’ intent and arguing in favor of a case-by-case approach to deciding whether state courts can exercise concurrent jurisdiction where Congress has not spoken clearly).

105. *See* Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984).

106. 28 U.S.C. §§ 2071-2077 (1994).

general rules of practice and procedure and rules of evidence *for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.*"¹⁰⁷ Federal law also provides that the "Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of *their* business."¹⁰⁸ This language does not appear to extend to an authority to prescribe rules of practice and procedure for cases in the *state* courts. Congress has also prescribed the procedures to be followed by the federal courts in proposing rules, a procedure that relies on U.S. Judicial Conference advisory committees consisting of "members of the bench and the professional bar, and trial and appellate judges," committees dominated by members of the federal bench.¹⁰⁹ In light of the absence of structural provisions for state participation, it seems implausible that the Federal Rules of Civil Procedure (even if they became models for adoption by the states) were intended *ipso facto* to apply in state court adjudications of federal claims.

III. FEDERALISM AND BRIGHT LINES

Professor Redish and Mr. Sklaver's argument for a presumption in favor of requiring federal rules of procedure in state court adjudication of affirmative federal claims implicitly draws on an important strand of constitutional thinking in recent years that has rejected "balancing" tests in favor of the greater certainty of bright lines and categorical rules.¹¹⁰ I want to say a few words here on the "benefits of balancing"—or more precisely, of avoiding "bright line rules" in favor of more contextualized decision-making.¹¹¹

107. *Id.* § 2072(a) (emphasis added).

108. *Id.* § 2071(a) (emphasis added).

109. *Id.* § 2073 (a)(2). See McCabe, *supra* note 90, at 1663-65 (noting that federal judges constitute about 50% of the members of the rules-related Advisory Committees to the Judicial Conference). According to McCabe, of the 77 positions on those committees concerned with rule-making, 38 were held by federal judges, 21 by private attorneys, 7 by law professors, 6 by Department of Justice lawyers, and 5 by state court chief justices. *Id.* at 1665 (Table).

110. Redish & Sklaver, *supra* note 1, at 104-05 (referring to "subjectivity," "vagueness" and "unpredictability" of "ad hoc balancing").

111. Redish & Sklaver characterize the Court's current approach to "converse-*Erie*" questions as inconsistently varying between strong presumptions that state rules control and some degree of "pro-federal" effort to require federal procedural rules to control state court adjudication. See *id.* at 101-02; see also *id.* at 106-07 (describing *Brown v. Western Railway of Alabama*, 338 U.S. 294 (1949) and *Felder v. Casey*, 487 U.S. 131 (1988) as reflecting a high degree of effort to prevent state court procedural rules from hindering effectuation of substantive federal policies). Query, though, whether it would be accurate to say that the Court has approached converse-*Erie* questions with a presumption that state courts control their own procedures, a presumption which has been more or less easily overcome by asserted federal interests, and that Redish & Sklaver want to substitute a different presumption, which, if adopted, might develop along similar lines in ways that would permit it to be more, or less easily, overcome by asserted state interests in avoiding "significant restructuring" of their systems. See *id.* at 101.

The arguments against “balancing” are several:¹¹² first, that the image of balancing conveys a delusional scientific weighing process; second, as Redish and Sklaver suggest, that balancing, multi-factored tests give too much discretion to courts and achieve too little predictability; and finally, that categorical rules, rather than balancing, accord more effective protection to important constitutional rights, such as the right of free speech. Professor Aleinikoff has eloquently argued that balancing metaphors “undermin[e] our usual understanding of constitutional law as an interpretive enterprise[,] . . . transforming constitutional discourse into a general discussion of the reasonableness of governmental conduct.”¹¹³ By contrast, categorical rules more effectively convey the importance of, for example, First Amendment values than do “balancing” tests, by emphasizing the strong presumption in favor of unfettered discourse and by casting permissible restraints as narrow “exceptions.” A further argument is that categorical rules are more likely to constrain results of other decision-makers, notably lower courts, than do balancing tests.¹¹⁴

Taking these objections in turn: I agree that the metaphor of balancing can convey an inaccurate image of scientific weighing. I prefer to think of the “balancing” process that goes on in constitutional adjudication, as in related forms of common law adjudication,¹¹⁵ as involving the application of legal judgment to legal problems. Treating balancing tests as analogous to scientific weighing is not intellectually honest—but neither is the reasoning that is offered in support of some categorical rules. Whether formulating a balancing approach, a “standard,” a multi-factored test or a categorical “rule,” the formulating court is often engaged in both balancing different kinds of claims and the exercise of judgment.

Now, as to the claims of predictability and discretion: In some sense it is right that a strong, clear presumption (here, to use federal procedures in state courts) is more likely to have predictable and constrained results than case by

112. For a still classic treatment, see T. Alexander Aleinikoff, *Constitutional Law In the Age of Balancing*, 96 YALE L.J. 943 (1987). Professor Aleinikoff is careful to distinguish “balancing,” as he critiques it in his article, from the use of multifactored analyses to engage in primarily analogical reasoning. *Id.* at 945. For present purposes, I am primarily concerned to contrast Redish and Sklaver’s arguments in favor of a relatively simple, clear rule with the benefits of a more contextualized case-by-case or issue-by-issue approach. While I greatly admire and generally seek to emulate Professor Aleinikoff’s carefulness, given my limited objective here, I may use the term “balancing” as shorthand here to suggest a wider array of approaches than his use of the term entailed.

113. *Id.* at 987.

114. See Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 520-35 (1988) (discussing formalism as linguistic limit on choice); see also Aleinikoff, *supra* note 112, at 948-63 (emphasizing relationship between formalism and categorical or conceptual approaches in contrast to functional pragmatism underlying balancing methodologies); .

115. See David Strauss, *Common Law Constitutional Adjudication*, 63 U. CHI. L. REV. 877 (1996).

case, or issue by issue analysis. The more factors that a court must evaluate and consider, the more places for the exercise of discretion and judgment. So it would seem.¹¹⁶ Yet I wonder whether it is the doctrinal test, or the stance of judicial deference *vel non* that determines application of the test to the facts. The “compelling interest” standard is, formally, a balancing test; yet it is widely believed to be highly predictive and constraining. But partly this is so because the courts have, generally, been quite limited in what interests they will recognize as compelling enough to overcome the protected right. In other words, there is little judicial deference to government claims of the need to regulate based on the content of speech, for example, or to discriminate based on race. While having a categorical rule may make a real difference, some of what people take to be the difference between balancing and categorical tests has more to do with the stance of deference adopted by the courts to the underlying subject matter.

Third, I agree that use of categorical rules can be more effective than balancing tests in giving rhetorical emphasis to particular constitutional values. Freedom of expression challenges under the First Amendment are often met by competing claims of interest that are not articulated as “rights” of comparable constitutional magnitude. The fundamental character of freedom of expression in maintaining other features of constitutional life may warrant a heavy thumb on the scale, or (in language Professor Aleinikoff might prefer) a more categorical approach to, for example, protection from prior restraints on speech.¹¹⁷

But in the area of judicial federalism it is far less clear to me than it is to Professor Redish and Mr. Sklaver which way fundamental values tilt. Both “litigant choice” and “intersystemic pollination,” two of the seven criteria for the allocation of jurisdiction discussed in Professor Redish’s 1992 article on the subject,¹¹⁸ would favor allowing state court procedural systems, generally, to

116. *But see supra*, note 29, and notes 89-90 and accompanying text (suggesting that Redish & Sklaver’s proposal might raise as many questions as it resolves).

117. *See generally* Aleinikoff, *supra* note 112, at 975-76 (criticizing balancing analysis in *Branzburg v. Hayes*, 408 U.S. 665 (1972), as depreciating First Amendment values). The rule against prior restraints of speech is widely regarded as an important categorical rule of United States law (and quite distinctive from the law of other nations). Yet it is a rule that may still require the exercise of complex judgment in determining what counts as a prohibited prior restraint and whether some exception (for example, where confidential information from government intelligence agencies is at issue) may apply. *Compare* *Snepp v. United States*, 444 U.S. 503, 509 n.3 (1980) (per curiam) (upholding enforcement of former CIA employee’s agreement not to publish information about the agency without obtaining prepublication clearance and rejecting his claim that the agreement was unenforceable prior restraint on protected speech), *with* *New York Times Co. v. United States*, 403 U.S. 713 (1971) (invalidating injunctions against publication of top-secret Defense Department study of Vietnam War obtained from former Pentagon employee because government had not met its burden of overcoming presumption of rule against prior restraints).

118. Martin H. Redish, *Reassessing the Allocation of Judicial Business Between the State and Federal Courts: Federal Jurisdiction and “The Martian Chronicles,”* 78 VA. L. REV. 1769, 1770 (1992).

apply in the adjudication of federal rights: both because having different procedural systems for vindication of federal rights expands the choice of litigants and because having state courts develop procedures for adjudication of federal rights might provide useful information to the federal system as a whole.

Thus, on this issue, I do not see with clarity how the interests in having federal rules of procedure applied in state courts for adjudicating federal claims is so fundamental a value as to warrant, by itself, the choice of a categorical rule.

One of the most compelling arguments against flexible balancing approaches and in favor of more rigid, categorical approaches is the argument developed by Professor Schauer and elaborated by Professor Mark Tushnet¹¹⁹ that the more formalistic approach of the latter may do a better job of constraining mistakes by other decision-makers—here, the state courts. In the absence of evidence of widespread confusion, or wasted time in litigating procedural issues, however, the concern about constraining behavior of the state courts would not seem to me to come strongly into play here.

Several benefits of “balancing,” or rather, for a more contextualized decision whether particular federal procedures should control in state court adjudications, might be advanced, or reaffirmed, here. First, a more contextualized approach provides a better opportunity to identify, and evaluate, the different interests at stake. Where there are competing interests of value, such a balancing process may yield better answers than a more categorical presumption. Second, a “balancing” process seems to me a more intellectually honest way to capture much judicial decision-making that occurs (even in the application of seemingly rigid categorical rules, where judicial judgment and discretion may be exercised at an earlier stage of classification and definition). Third, flexible, contextualized approaches may be more compatible with the insight that legal problems and rules are perceived very differently, and have different meanings and impacts, on different audiences; contextualized approaches may be more open to the multitude of perspectives that may inform decision-making about legal matters including procedure.¹²⁰ Fourth, contextualized balancing approaches can be tailored to offer more visible flexibility. This flexibility has two benefits. First, it affords more apparent doctrinal stability (though perhaps less predictability of results) because its flexibility allows it to be workable across a range of problems and outcomes.¹²¹ Second, where a problem is

119. Schauer, *supra* note 114, at 539-44 (discussing relationship of “ruleness” and predictability of decision); Mark Tushnet, *The Hardest Question in Constitutional Law*, 81 MINN. L. REV. 1 (1996).

120. Cf. Kathleen Sullivan, *The Justice of Rules and Standards*, 106 HARV. L. REV. 22, 56-95 (1998) (discussing different claimed benefits of “rules” versus “standards,” a dichotomy that roughly corresponds to “categorical tests” versus “balancing tests,” and noting in particular the ideological moderation which “standards” and “balancing” approaches permit on sensitive issues).

121. While predictability in legal decision-making is an important rule of law value, it is probably of greatest importance in identifying the rules for planned, primary out of court behavior, in contrast to rules about jurisdiction or procedure. See *Payne v. Tennessee*, 501 U.S. 808, 828-30 (1991); cf. *Hanna v. Plumer*, 380 U.S. 460, 474-75 (1965) (Harlan, J., concurring) (arguing that in

relatively new, and the correct solution somewhat uncertain, a rush to rigid rules seems less prudent than a more cautious, case-by-case approach.

Having said this, I also want to reiterate the caveat about placing too much reliance on the distinction between presumptions and “balancing,” or more contextualized approaches to decision-making. Both categorical rules and balancing tests can be deployed in ways that accord greater, and lesser, deference to the decision-maker whose action is being reviewed. What may be just as, if not more, important than the doctrinal test is the judicial stance, or attitude, towards the importance of the relative interests involved. Professor Redish and Mr. Sklaver’s proposal discounts the values of state procedure in the adjudication of federal claims, and thus offers little reason to defer to state court processes. I am less certain that this is always true, or true often enough to warrant Redish and Sklaver’s presumption, and see more reason to be willing to defer.

CONCLUSION

While federal law is supreme, both the federal and the state governments are in some senses “subordinate sovereigns”—subordinated to the requirements of the Constitution for their behavior, and for their existence. To elevate the federal rules of procedure over those of the states in dealing with federal law is to presume that state courts have no sufficient investment in the proper adjudication of federal claims to warrant operation of normal state rules of procedure. This shift in the balance of judicial autonomy would be a substantial departure from existing practice, and one which has not thus far been justified by evidence of actual problems. Congress nonetheless has substantial power to determine that particular procedures must be employed to vindicate federal rights, which must be followed by state courts in entertaining federal actions. So I end, where I began, more in agreement than disagreement with Professor Redish and Mr. Sklaver’s attention to Congress’ enumerated powers as providing a constitutional basis for requiring state courts to entertain federal causes of action.

determining whether federal courts need to follow state procedures, attention should be given to whether differences in procedures are likely to affect primary behavior).