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**ISSUES STATE COURTS FACE WHEN
CONSIDERING FEDERAL PREEMPTION
OF STATE COURT PROCEDURES:
AN ANALYSIS FOR STATE JUDGES**

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Executive Summary

In her introduction, Professor Parmet notes that the current controversy over federal regulation of the state courts implicates two of the mainstays of the U.S. legal system: the supremacy of federal law, and the independence of the state courts.

In Section II (“Background Propositions”), she expands on her introduction to explain that the “Madisonian Compromise” demonstrates that the drafters of the United States Constitution assumed the continuation of state courts’ authority. Their authority, however, was qualified by the Constitution’s assertion that federal law would be supreme (the supremacy clause) and that it must be enforced by state judges. Congressional efforts to regulate the procedures applied in state courts, especially for the adjudication of questions of state law, raise the question of how to reconcile the continued independence of state courts with their obligations under the Supremacy Clause.

In section III (“Norms of Construction”), Professor Parmet reminds the reader that state courts cannot enforce a federal statute that is itself unconstitutional. Yet, as Justice Brandeis observed in his concurrence in *Ashwander v. Tennessee Valley Authority*, courts that have available to them more than one ground of decision, including one that does not involve a Constitutional question, may not have to, and, if possible, should not, reach the Constitutional question. One particularly relevant non-Constitutional response is the use of a “plain statement” rule, under which a state court will not interpret a federal statute as regulating state court procedures unless Congress, in the statutory language itself, has made a clear statement of its intent to do so. Another is an interpretation that the federal statute, for the most part, incorporates state law and so creates little conflict between federal and state law.

In section IV (“Facing the Dilemma: Analyzing the Constitutional Issues”), Professor Parmet discusses avenues open to state courts that *must* decide the Constitutional issues raised by federal efforts to regulate state court procedures. The first is to determine whether Congress had authority to make the law in question. That authority must come from somewhere in the Constitution; the Supremacy and State Judges Clauses are not, by themselves, sources of authority. Possible sources of Congressional authority include the Constitution’s commerce clause, the spending clause, or §5 of the Fourteenth Amendment, which can be used to enforce rights granted in §1 of the same Amendment, many of which relate to courtroom procedures. In addition, there may be relevant

limitations upon Congressional authority derived from the Tenth Amendment, which has been read as a limit on Congress's power to commandeer either the legislative or executive branches of state government—the “No-Commandeering Principle.” However, whether that principle limits the power of Congress to require state courts to apply federal procedural requirements in adjudicating state law claims remains uncertain. One reason to believe that the “no-commandeering” principle should apply to state judges notes the general practice of the federal courts to give deference to state procedures, even when the state courts are adjudicating federal claims, and especially when there is a strong state interest in following state court procedure.

Finally, in her conclusion, Professor Parmet asserts that, although recent federal legislation affecting state court procedure raises complex and troubling federalism issues, it may be unlikely that the United States Supreme Court will be able to cut through the complexity with a single, definitive decision agreed to by a clear majority of the Court. Given the complexities of the problem, it may actually be impossible for the Court to do so. Thus state judges may have to expect to be called upon for the foreseeable future to decide on their own the limits of the application of federal law in their courtrooms.

I. Introduction

The growing practice of Congressional regulation of state courts lies at the juncture of two central tenets of American constitutionalism: the supremacy of federal law and the independence of state courts. With only cryptic messages from the Supreme Court to guide them, state judges are increasingly forced to decide whether they must adhere to federal laws that would alter their courtroom practices. Although no definitive answers can be given, this paper suggests a path through the maze.

II. Background Propositions

A. The Madisonian Compromise

To determine whether and under what circumstances Congress can preempt or regulate state court procedures, several fundamental propositions should be kept in mind. The most important is that the Constitution assumes the independent creation and continuing existence of state courts. The so-called Madisonian Compromise ensured that state courts would continue to exist and that they would be available to exercise jurisdiction over state claims as well as matters falling within the “judicial power” of the United States. As a result, Article III defines the federal judicial power without insisting upon the creation of lower federal courts. As Alexander Hamilton stated in Federalist 82:

the State courts will be divested of no part of their primitive jurisdiction further than may relate to an appeal and I am even of the opinion that in every case in which they were not expressly excluded by future acts of the national legislature, they will of course take cognizance of the causes to which those acts may give birth.

B. The Supremacy Clause

As Hamilton’s statement makes clear, the Constitution also supposes the supremacy of federal law and its application in state courts. The State Judges Clause, a part of the Supremacy Clause, states that the “Judges in every State” shall be “bound” by the “Constitution and laws of the United States.”¹ As a result, constitutionally valid federal statutes have to be given effect in state court, as they are every hour of every day.

The Supremacy Clause also ensures that Congress may, at times, divest state courts of some of their jurisdiction. This occurs most often when Congress regulates in an area, vests the federal courts with jurisdiction over disputes pertaining to those regulations, and preempts state courts from resolving claims in the field. Federal preemption under ERISA of disputes “relating to” employee benefits is such an example of federal divestment of state court jurisdiction.²

Federal power over state courts, however, goes further. In *Testa v. Katt*,³ the Supreme Court held that Congress may require state courts of general jurisdiction to hear federal claims, at least when doing so would not be overly burdensome.⁴ And, in the rather mysterious case of *Dice v. Akron, Canton & Youngstown Railroad*,⁵ the Court suggested that state courts might be required to apply certain federal procedures when they are adjudicating federal causes of action.⁶

¹ U.S. CONST., ART. VI, § 2.

² *E.g.*, *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985).

³ 330 U.S. 386 (1947).

⁴ *Douglas v. New York, N.H. & H.R. Co.*, 279 U.S. 377 (1929).

⁵ 342 U.S. 359 (1952).

⁶ For a discussion on the uncertainties surrounding *Dice*, see Wendy E. Parmet, *Stealth Preemption: The Proposed Federalization of State Court Procedures*, 44 VILLANOVA L. REV. 1, 17-20 (1999).

Federal regulation of state court procedures, even for state causes of action and defenses, also occurs regularly as a result of the Due Process Clause of the fourteenth amendment and the incorporation of most provisions of the federal bill of rights into that Clause.⁷ Thus it is commonplace, and no longer questionable, that the federal Constitution imposes commands and limits upon the way that state trials, especially criminal trials, are conducted.

C. State Sovereignty

Despite Congress's ability to limit the jurisdiction of state courts and to require those courts to hear federal claims, and even to apply federal procedures when they are not overly burdensome, it is far from clear whether Congress can go further and regulate the procedures state courts must use to adjudicate questions of state law, in instances when that law is not preempted. Although the Constitution assumes and demands the supremacy of federal law, it also requires the continued existence and sovereignty of the states. As the Supreme Court has repeatedly made clear in recent years, "Dual sovereignty is a defining feature of our nation's constitutional blueprint."⁸ Arguably, the ability of states to control the procedures applicable to the adjudication of state law issues in their own courts is an aspect of that sovereignty.⁹ Whether this is so is an issue that state judges will find themselves increasingly confronting in the years to come.

⁷ *E.g.* *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁸ *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 2002 U.S. Lexis 3794 (May 28, 2002), *citing* *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

⁹ *See* section IV.C. *infra*.

III. Norms of Construction

A. The *Ashwander* Principle

The State Judges Clause obliges state court judges to apply federal law. That does not mean, however, that state courts must give effect to all federal statutes. As *Marbury v. Madison*¹⁰ taught us, in applying federal law, courts must consider the totality of federal law, including the Constitution, and cannot give force to a federal statute that is in violation of the Constitution. Hence the State Judges Clause requires state (and federal) courts to give effect to preemptive federal legislation only when doing so is not in itself in violation of the Constitution.¹¹

That does not mean, however, that state courts must always determine the constitutionality of a federal statute that purports to preempt state court procedures. As Justice Brandeis famously stated in *Ashwander v. Tennessee Valley Authority*, “if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.”¹² Hence the fact that a party claims that a federal statute preempts a state court procedure does not necessarily mean that the state court must either abide by the federal statute or hold it unconstitutional. The state court can, and should, first consider whether there are other bases for resolving the matter.

Depending upon the situation, there are many different ways in which a state court might apply the *Ashwander* principle to a federal statute that is claimed to regulate state court procedures for state law issues. Perhaps most obviously, the court might determine that the statute simply does

¹⁰ 5 U.S. (1 Cranch) 137 (1803).

¹¹ Martin H. Redish & Steven G. Sklaver, *Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism*, 32 INDIANA L. REV. 71, 72 (1998).

¹² 297 U.S. 288, 347 (1936)(Brandeis, J., concurring).

not apply in the particular factual context. This approach to the problem was utilized by a federal magistrate judge in *In re Transcrypt International Securities Litigation*.¹³ The court in that case was asked to stay state court discovery proceedings pursuant to the Securities Litigation Uniform Standards Act of 1998 (“SLUSA”),¹⁴ which authorizes federal courts to stay state court discovery in “related actions.” While noting that “it may be questioned whether Congress actually does have the power to regulate state procedural law and the state courts’ power to govern the progression of cases on their own dockets, particularly in areas in which Congress has not ‘preempted the field’” the magistrate concluded that “I need not explore this intriguing but perplexing question,” because the state proceeding that the petitioner sought to stay was not, in fact, a “related action.”¹⁵ In effect, mindful of the potential constitutional problem that would arise if he stayed the state proceeding, the magistrate looked carefully at the legislative history and determined that Congress did not intend that private, individual actions in state court be considered “related actions” subject to the statute’s stay provisions. The court followed Justice Brandeis by reading the federal statute narrowly so as to avoid the “perplexing” constitutional question.

B. The Plain Statement Rule

Another possible approach would be the use of a “plain statement” or “clear statement” rule, holding that a federal statute will not be read to regulate state court proceedings for state causes of action unless the statute says so with absolute clarity. Although the Supreme Court has not used this approach to the scenario now under discussion, this technique of statutory construction has been

¹³ 57 F. Supp. 2d 836 (D. Neb. 1999).

¹⁴ 15 U.S.C. 77z-1(b)(4); 78u-4(b)(3)(D).

¹⁵ 57 F. Supp. 2d at 841 n.2.

applied with regularity by the Court when a broad reading of a federal statute would raise difficult and sensitive issues of federalism. For example, the Supreme Court has long stated that it will not infer preemption of a state’s historic police powers absent a clear statement of intent by Congress.¹⁶ Because state judicial procedures help states to implement and effectuate state substantive law,¹⁷ the caution against a rush to find preemption is arguably relevant to federal preemption of state court procedures, especially when those procedures are tied to substantive areas, such as safety, that have traditionally been regarded as part and parcel of the states’ police power.¹⁸

More particularly, the Supreme Court has frequently demanded that Congress provide a clear or plain statement of its intent to enact measures that would arguably interfere with the ability of a state to control its own courts. Perhaps most relevant is *Gregory v. Ashcroft*,¹⁹ which concerned the application of the Age Discrimination in Employment Act to state court judges. Noting that the application of the Act to state court judges would “upset the usual constitutional balance,” Justice O’Connor held that it was ““incumbent upon the federal courts to be certain of Congress’s intent before finding that federal law overrides’ this balance.”²⁰ In recognition of the importance of preserving the delicate balance between the states and Congress, the Court imposed a “plain statement” rule, under which it refused to construe federal legislation as properly overriding the balance unless and until it is absolutely clear that Congress intends to do just that.²¹

¹⁶ Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

¹⁷ Parmet, *supra* note 6, at 52-53.

¹⁸ Medtronic v. Lohr, 518 U.S. 470, 475 (1996).

¹⁹ 501 U.S. 452 (1991).

²⁰ *Id.* at 460 quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985).

²¹ *Id.* at 462.

Ashcroft's plain statement rule has been applied in numerous other situations involving “judicial federalism.” For example, the Court requires that Congress state clearly and unequivocally its intent to abrogate a state’s sovereign immunity.²² Likewise, the Court requires a clear statement from Congress in order to find that a state’s participation in a federal spending program creates enforceable rights against the state.²³

To be sure, the situations in which the clear statement rule has been applied to date are each distinguishable in different ways from the situation in which a federal statute putatively preempts state court procedures. Most obviously, in many of the cases in which the clear statement rule has been used, the Court has worried about the financial obligations imposed upon the states by making them amenable to federal causes of action—a problem that will not be readily evident if Congress federalizes state court procedures. Nevertheless, the primary rationales for the *Ashcroft* rule, respect for state sovereignty and avoidance of difficult constitutional questions, seem relevant in cases in which a federal statute preempts state court procedures without explicitly stating whether the preemption applies to the adjudication of state law issues. In that circumstance, the use of the clear statement rule to hold that federal law does not apply to state law issues unless Congress says so explicitly would seem well within the tradition of *Ashcroft* and constitutional federalism.

C. Federal Incorporation of State Law

In some situations, a state court may be able to avoid federal regulation of state court procedures by reading the federal statute at issue as one that reduces federal/state conflict by relying, for the most part, on state law. Although very different in some respects, the Court’s decision in

²² See 473 U.S. at 242.

²³ *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984).

*Semtek International, Inc. v. Lockheed Martin Corp.*²⁴ provides some support for this approach. *Semtek* concerned a state court’s determination of the claim preclusive effect to be given to a diversity action brought in a federal district court in another state. The respondent contended that Federal Rule of Civil Procedure 41(b) governed the case and should have been followed by the state court below. The Supreme Court disagreed, noting that the application of the Federal Rule to state law actions would “in many cases violate the federalism principle of *Erie Railroad Co. v. Tompkins*.”²⁵ Nevertheless, because the issue involved the preclusive effect of a *federal* court judgment (albeit in a diversity case), the Court concluded that federal common law should apply. However, the content of that common law was to be determined by state law, thereby minimizing any apparent federalism conflict. According to Justice Scalia, this appeared to be “a classic case for adopting, as the federally prescribed rule of decision, the law that would be applied by state courts”²⁶

Likewise, faced with a federal statute that arguably regulates state court proceedings, a state court may, in appropriate cases, find that the federal statute, even if does apply, should be read as relying upon state law to supply the content of key terms. Thus if a federal statute required a state court to apply a “clear and compelling” standard of proof for a particular claim, the state court might determine that the meaning of “clear and compelling” is to be determined by its own state’s law and in such a way that the standard of proof would not be altered from the way it would be even in the absence of the federal statute.

²⁴ 531 U.S. 497 (2001).

²⁵ *Id.* at 504, *citing* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78-80 (1938).

²⁶ *Id.* at 508.

IV. Facing the Dilemma: Analyzing the Constitutional Issues

A. Source of Authority

Despite *Ashwander*'s admonition, constitutional issues, even delicate ones, cannot always be avoided. In many instances, such as the Y2K Act,²⁷ Congress has made its intent to alter the procedures applicable in state courts absolutely clear. When that occurs, courts may have little choice but to face and analyze the constitutional issues raised by federal regulation of state court procedures.

In analyzing the issue, the first obvious point is that Congress lacks a general police power and must rely upon some provision in the Constitution to authorize its actions. In this regard, it is important to recall that although the State Judges Clause requires state court judges to apply federal law, by itself it is not a source of authority for congressional actions meant to apply in state court.²⁸ To the contrary, the Clause makes clear that state judges must apply “constitutional” federal law, thus state judges must ensure that the federal statutes they follow are themselves properly authorized by another provision of the Constitution.

In determining whether a federal regulation of state court procedures has the requisite constitutional anchoring, it is also important to recall that the Necessary and Proper Clause of Article I, §8, does not, on its own, provide the authority. As the Supreme Court of South Carolina recently reiterated in a case determining that a federal statute tolling the statute of limitations for state court actions was unconstitutional, the Necessary and Proper Clause “is not a self-contained grant of

²⁷ 15 U.S.C. 6602 (2002).

²⁸ Redish & Sklaver, *supra* note 11, at 75.

power. It authorizes Congress only to pass laws that ‘carry [] into Execution’ powers the Constitution elsewhere vests in one or more institutions of the federal government.”²⁹ Thus another, more specific, enumeration of Congressional authority must also be found.

The Commerce Clause. The most obvious, and important, source of Congressional authority for this inquiry is the Commerce Clause of Article I, §8. Because many of the proposals to regulate state court procedures occur with respect to business or consumer class actions, it may appear obvious that Congress has authority under the Commerce Clause, either alone or in conjunction with the Necessary and Proper Clause, to regulate state procedures in such actions. However, that assumption should not go unquestioned. In recent years the Supreme Court has made clear that it will provide meaningful, if not stringent, review of regulations that are authorized on the theory that they “substantially relate” to commerce.³⁰ In doing so, the Court has recalled the importance of federalism and the need to impose limits upon federal actions that intrude upon the states’ police power.

In the case of federal actions that regulate state court procedures, the interesting question arises as to whether Congress’s power to regulate a subject matter (such as the securities markets) extends to the regulation of state court proceedings involving that subject. Does the fact that Congress can regulate the securities market mean that Congress can regulate state actions that pertain to that market? Do we conceptualize the regulation of state court procedures in such actions as simply a step that is “necessary and proper” to fulfill Congress’s power to regulate the securities’

²⁹ Jinks v. Richland County, 2002 S.C. Lexis 60 (April 22, 2002), quoting Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 274 (1993).

³⁰ Morrison v. United States, 529 U.S. 598 (2000); Lopez v. United States, 514 U.S. 549 (1995).

market, or must we ask, with specificity, whether the regulation of state court procedures in such cases by itself “substantially affects” commerce? In the past, the Supreme Court has not demanded great specificity. Therefore it is possible to argue that if Congress has the power under the Commerce Clause to regulate an area of the economy, that power, abetted by the Necessary and Proper Clause, extends to the determination of procedures used to adjudicate claims about the matter regulated. However, as Professor Bellia has written,

The Supreme Court has never addressed the level of specificity that Congress must use under the Commerce Clause when aggregating activities affecting interstate commerce. The Court has, however, used the specter of federal regulation of a large class of aggregated activities as an argument against the constitutionality of regulation of a subset activity.³¹

Given the Court’s recent demands that actions under the Commerce Clause be reviewed with some care,³² it is possible that Congress’s power to regulate a field or activity as one that “substantially affects” interstate commerce does not itself provide the power to regulate state court proceedings that govern that activity.

This view was recently adopted by the Supreme Court of Washington in *Guillen v. Pierce County*.³³ That case concerned 23 U.S.C. §409 which provides immunity from discovery in state courts for accident data and surveys collected by state agencies. In an opinion very much influenced by concerns for federalism, the Washington Supreme Court held that Congress’s power to regulate interstate commerce and, therefore, the interstate highway system does not extend to the power to regulate the admissibility of evidence, not created pursuant to federal law, in state tort actions. In

³¹ Anthony J. Bellia Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947, 965 (2001).

³² See n. 30 *supra*.

³³ 144 Wn. 696 (2001), *cert. granted* No. 01-1229, 70 USLW 3553 (2002).

effect, the court demanded that §409's discovery-immunity rule itself be subject to a Commerce Clause analysis, a test that §409, untethered from the rest of federal highway regulations, could not survive. Whether this requirement that federal procedural rules be judged on their own for their relationship to interstate commerce may be determined next term, as the Supreme Court has recently granted the petition for certiorari in *Guillen*.

The Spending Clause. A second source of Congressional power worth considering is the Spending Clause.³⁴ Congress has broad power to spend for the public welfare.³⁵ When it does so, it may impose obligations upon the states in return for their receipt of federal money as long as Congress had spoken with clarity, has given the states the ability to exercise a knowing choice, and the conditions on federal grants are related to the particular federal program or project which is the subject of the grant.³⁶ In the past, these requirements have been construed gently, granting Congress broad latitude to make demands upon the states by attaching conditions to federal spending bills. Recently, however, some judges and commentators have begun to question the deferential review applied to Spending Clause litigation.³⁷

In its review of *Guillen*, the Supreme Court will likely consider whether Congress can use its spending power to modify the procedures or rules of evidence applicable in state courts, by

³⁴ U.S. CONST. ART. I, §8.

³⁵ *South Dakota v. Dole*, 483 U.S. 203 (1987).

³⁶ *Id.* at 207; *New York v. United States*, 505 U.S. 144 (1992).

³⁷ *E.g.*, *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 654, 655-657 (1999) (Kennedy, J., dissenting); Lynn Baker, *Conditional Spending and States' Rights*, 574 ANNUALS OF THE AM. ACADEMY OF POLITICAL & SOCIAL SCIENCE 104 (2001); Celestine Richards McConville, *Spending Clause Symposium: Federal Funding Conditions: Bursting Through the Dole Loopholes*, 4 CHAP. L. REV. 163 (2001).

attaching conditions to federal grants.³⁸ In considering whether §409 was authorized by the Spending Clause, the Washington Supreme Court found that by trying to immunize states against production of documents that were not prepared with federal funds, and that would have been prepared even in the absence of federal funds, Congress had exceeded its power. In reaching that decision, the court found that Congress had no legitimate interest in the evidence presented in state court proceedings and that as a result, Congress could not use the money it gave for highway improvements as a “string” to coerce states to alter their rules of evidence, at least with respect to documents not created with the help of the federal money. The Supreme Court’s review of *Guillen* should help shed some light on the extent to which the spending power can be used to authorize federalization of state court procedures.

Fourteenth Amendment. A less obvious source of Congressional authority is §5 of the Fourteenth Amendment. That section provides Congress with the power to enforce the rights granted by §1 of the Fourteenth Amendment. Because many of the rights protected by §1 pertain to courtroom procedures (consider both the exclusionary rule³⁹ and constitutional limitations on jurisdiction⁴⁰), it is plausible to imagine that Congress could, under some circumstances, regulate state judicial procedures pursuant to its §5 enforcement powers. However, the Supreme Court has made clear that congressional power under §5 is only remedial; it does not extend to creating or altering the substance of rights.⁴¹ In addition, when Congress acts under §5, the court must determine

³⁸ 144 Wn. 2d. 696 (2001), *cert. granted* No. 01-1229, 70 U.S.L.W. 3553 (2002).

³⁹ *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁴⁰ *Pennoy v. Neff*, 95 U.S. 714 (1877).

⁴¹ *City of Boerne v. Flores*, 521 U.S. 507 (1997).

whether there is “a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”⁴² Thus, there must be some strong evidence that the problem Congress is addressing really existed, and that the statute sought to be authorized is well attuned to resolving that specific problem.⁴³ This suggests that if and only if Congress can establish that a particular class of state court procedures is *unconstitutional* could Congress use §5 to override those procedures and replace them with a federal procedure that implements and enforces the constitutional rule.⁴⁴ While this scenario is possible, few if any proposals to federalize state court civil procedures aim to remedy practices in state courts that are themselves unconstitutional, thereby justifying Congressional intervention under §5.

B. The Tenth Amendment and the “No-Commandeering” Principle

Even if Congress has a source of authority, that does not end the analysis. Even if a federal statute is otherwise authorized, it is still unconstitutional if it violates some other provision or norm of the constitution. Thus any federal statute altering state court procedures must itself satisfy the Due Process Clause of the Fifth Amendment as well as other constitutional limitations on federal authority (such as the First Amendment).

Perhaps the most relevant constitutional limitation on federal authority comes from the Tenth Amendment. In a series of cases over the last decade, the Supreme Court has made it clear that the Tenth Amendment is a critical reminder of the dual sovereignty at the heart of our Constitution. In

⁴² *Id.* at 520.

⁴³ *Id.* at 520-522.

⁴⁴ For a further discussion of the use of §5 to support federalization of state court procedures, see Parmet, *supra* note 6, at 28-30.

order to respect state sovereignty, the Court has read the Tenth Amendment as limiting the ability of Congress to commandeer either the legislative⁴⁵ or executive branches⁴⁶ of state government to carry out and implement federal law.

As it has developed, the no-commandeering rule is principally a limitation upon Congress's power under the Commerce Clause. In *New York v. United States*, where the Court first enunciated the doctrine, the Court held that Congress can entice states to carry out federal commands by offering the states money.⁴⁷ In other words, Congress can effectively commandeer the states when it acts under the Spending Clause. Of course, as was noted above, Congress can only do so when it is legitimately using its power to tax and spend. Whether that power extends so far as to enable Congress to require states to alter their state court procedures for matters not directly related to Congress's spending to states remains, as was discussed above, problematic.

The no-commandeering doctrine also probably does not apply to Congressional acts based on the Fourteenth Amendment. When Congress is enforcing that amendment, it is directly remedying constitutional failures by the states. Obviously, to remedy these violations, Congress can pass laws that speak directly to and indeed commandeer the states.⁴⁸ In fact, Congress can regulate only the states when it acts under §5.⁴⁹

Although the no-commandeering doctrine itself is probably limited to the Commerce Clause, it is still of critical importance. The Commerce Clause, after all, is the great font of Congressional

⁴⁵ *New York v. United States*, 505 U.S. 144 (1992).

⁴⁶ *Printz v. United States*, 521 U.S. 898 (1997).

⁴⁷ 505 U.S. at 167-168.

⁴⁸ *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

⁴⁹ *Morrison*, 529 U.S. at 620-626.

power and many of the proposals to federalize state court procedures appear to be predicated on Congress's ability to regulate interstate commerce.⁵⁰ Therefore, the question must be asked: Does a federal statute that requires a state court to apply federal procedural requirements for state law claims violate the no-commandeering principle?

The answer to that question is uncertain.⁵¹ The strongest reason to believe that the no-commandeering principle does not apply to laws that regulate state courts comes from the fact that in its two no-commandeering cases, *New York v. United States*⁵² and *Printz v. United States*,⁵³ the Supreme Court took pains to distinguish the commandeering of state judges from the commandeering of state legislative and executive branch officials.⁵⁴ Pointing to the State Judges Clause, the Court noted that the Constitution requires state judges to apply federal law and that in cases such as *Testa* this has meant that states courts must provide a forum for federal causes of action.⁵⁵ Moreover, in the early years of the Republic, the Court noted, it was not unusual for Congress to expect state courts to carry out certain federal functions, such as naturalization.⁵⁶ Hence,

⁵⁰ *E.g.*, 15 U.S.C. § 6601(b)(predicating the Y2K Act upon the commerce power).

⁵¹ For the most part, commentators have questioned whether Congress has such power. *See Bellia, supra* note 31 at 949, nn. 13, 14 (citing scholarly analysis of the subject).

⁵² 505 U.S. 144 (1992).

⁵³ 521 U.S. 898 (1997).

⁵⁴ 521 U.S. at 907; 505 U.S. at 177.

⁵⁵ 521 U.S. 898, 928, *citing* *Testa v. Katt*, 330 U.S. 386 (1947).

⁵⁶ 521 U.S. at 906.

one might conclude that the no-commandeering principle is simply inapplicable to the issue of federal regulation of state courts.⁵⁷

On the other hand, there are significant reasons to conclude that the discussions of judicial commandeering in *New York* and *Printz* should not be read so broadly. First, in neither case was the Court deciding the constitutionality of judicial commandeering. It was only explaining why precedent, such as *Testa*, and the past practices discussed above should not be read as inconsistent with the imposition of the commandeering doctrine to state legislatures and executives.⁵⁸ In other words, the discussions of judicial commandeering were dicta designed to bolster the argument that Congress cannot commandeer the other two branches of state government. It was not a holding on the issue of judicial commandeering.

Second, and more importantly, the examples relied upon, and past precedent more broadly, derived from cases when state courts were obligated to adjudicate or carry out federal law for the enforcement of federal claims or interests. In effect, these cases, like *Testa* and *Dice*, stand only for the proposition that, as a result of the Madisonian Compromise and the State Judges Clause, state courts cannot discriminate against federal claims and must apply federal law when doing so is “necessary and proper” for the effectuation of those claims. They say absolutely nothing about whether Congress can commandeer state courts with respect to *state* law claims or issues—a far greater intrusion into a state’s sovereignty, and a practice that does not seem to follow a fortiori from the State Judges Clause.

⁵⁷ This would not mean, however, that federalism considerations should not guide the prior determination of whether Congress actually is acting pursuant to an enumerated source of authority.

⁵⁸ See, Redish & Skiaver, *supra* note 11, at 77.

This reading of *Printz* gained significant support from the Supreme Court’s decision in *Alden v. Maine*.⁵⁹ The question before the Court in *Alden* was whether Congress can abrogate state sovereign immunity for federal claims in state court. In finding that Congress lacks that power, even though the Eleventh Amendment itself is silent on the point, the Court considered the argument that the *Printz* discussion of the State Judges Clause implied that Congress may commandeer state courts. According to the Court, that argument “would imply that Congress may in some cases act only through instrumentalities of the States.”⁶⁰ But, the Court insisted, the Supremacy Clause does not give Congress any such power. Congress may require state courts to follow federal law, as they were required to do in *Testa*, and as the federal courts must also do, but Congress may not impose unique obligations upon the state courts—which is precisely what it attempted when it tried to abrogate sovereign immunity for state court actions and what it does when it creates federal procedures for state court actions. Indeed, if Congress could impose unique obligations upon state courts, the Court stated in *Alden*, it would

blur not only the distinct responsibilities of the State and National Governments but also the separate duties of the judicial and political branches of the state governments, displacing “state decisions that ‘go to the heart of representative government.’”⁶¹

C. Federal Deference to State Law and State Court Procedures

The Court’s opinion in *Alden* not only casts doubt upon the argument that the State Judges Clause creates an exception to the no-commandeering rule, it also follows *Ashcroft* and even *Semtek*,

⁵⁹ 527 U.S. 706, 753 (1999). See also A.C. Pritchard, *Constitutional Federalism, Individual Liberty, and the Securities Litigation Uniform Standards Act of 1998*, 78 WASH. U. L.Q. 435, 475 (2000).

⁶⁰ 527 U.S. at 753.

⁶¹ *Id.*, citing *Gregory*, 501 U.S. at 461.

in suggesting the importance of the ability of States to regulate their own courts. Numerous other cases, going as far back as *Tarble's Case*,⁶² make the same point. A relatively recent case to do so was *Johnson v. Fankell*,⁶³ in which the petitioner argued that a state court must follow the federal rule and permit interlocutory appeals of denials of qualified immunity in §1983 civil rights cases. The Supreme Court disagreed, noting that “No one disputes the general and unassailable proposition . . . that States may establish the rule of procedure governing litigation in their own courts.”⁶⁴ Thus even when *federal claims* are being adjudicated in state court, the normal rule is to defer to state procedures. The idea that such comity is owed to state courts is expressed pervasively throughout our jurisprudence.⁶⁵ It seems logical, therefore, that even more weight would be given to state procedures when the claim adjudicated is one based on state law. On the other hand, the typical case does not test Congress’s power to override state procedures.

In addition, it is important to recall that even when the Court has required state courts to adjudicate federal claims, it has insisted that state courts need not abide by Congress’s requirement if they have a valid excuse.⁶⁶ While the contours of the valid excuse doctrine are hazy,⁶⁷ in light of the Tenth Amendment it seems possible that a state may well be able to claim that it has a significant

⁶² 80 U.S. 397 (1871).

⁶³ 520 U.S. 911 (1997).

⁶⁴ *Id.* at 922

⁶⁵ *See e.g.*, *Coleman v. Thompson*, 501 U.S. 722, 724 (1991)(holding that claims defaulted in state court cannot be raised on federal petition for habeas corpus unless the prisoner can demonstrate cause and prejudice, because of “the important interest in finality served by state procedural rules and the significant harm to the States that results from the failure of federal courts to respect them.”).

⁶⁶ *Douglas v. New York, N.H. & H.R. Co.*, 279 U.S. 377, 388 (1929).

⁶⁷ Louise Weinberg, *Symposium—Federal State Conflicts Law—The Federal-State Conflict of Laws: “Actual” Conflicts*, 70 TEX. L. REV. 1743, 1773-77 (1992).

enough interest in the way it adjudicates its own claims so as to constitute a “valid excuse” for ignoring the demands of the federal statute. This might be especially so either when the federal statute places a significant burden on the state’s judicial system or when the federal statute substantially impedes the state’s ability to carry out its own legal policies.

The possible impact of federal procedures on the development or interpretation of state law highlights a particularly troubling implication of the federalization of state court procedures. It goes without saying that state courts are the final arbiter of the meaning of state law.⁶⁸ While Congress, when it acts pursuant to a lawful grant of authority, can preempt state law, neither it nor the federal courts can definitively interpret or shape state law. That is the job of the states.

Yet, there can be little doubt that procedure affects substance and that alterations of the rules of procedure can change the course and content of state substantive law.⁶⁹ For example, a federal rule altering the pleading requirements for a state tort action might well have the indirect (or maybe intended) effect of barring a class of claims that are otherwise permissible under state law. As a result, the substance of the state’s law would be effectively changed without any action on the part of the state legislature or state courts.

The impact would be the same as if the federal government had demanded that the state legislature redefine the standard of liability, or if the federal courts had redefined the standard, under state law. But that is precisely what *New York v. United States* and *Erie Railroad Co. v. Tompkins* each prevent in their respective spheres.

⁶⁸ *Arizonans for Official English*, 520 U.S. 43 (1997); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); *Murdoch v. Memphis*, 87 U.S. 590 (1874).

⁶⁹ Parmet, *supra* note 6, at 52-53. See also Mark Spiegel, *The Rule 11 Studies and Civil Rights Cases: An Inquiry Into the Neutrality of Procedural Rules*, 32 CONN. L. REV. 155, 184 (1000).

Paradoxically, the intimate relationship between state procedure and state substantive law may point not only to why federalization of state procedures may violate state sovereignty, but also to why it may fall within Congress's constitutional powers. Even with the Supreme Court's renewed attention to federalism and the limits of federal authority, there is little doubt that Congress has broad preemptive power. The *substantive impact* of many of the efforts to federalize state court procedures undoubtedly falls within that scope. For example, Congress can remove the regulation and adjudication of securities claims from the states altogether. And, Congress could probably change the liability rules for all securities claims. Logically one might think that this broader power would necessarily include the lesser power to simply impose federal procedures on state claims related to those subject matters. However, in matters of federalism that is not necessarily true.⁷⁰ Form often matters and in this case it may matter precisely because the federalization of state court procedures permits one sovereign (the federal government) to alter the course of another sovereign's law, blurring the lines of political responsibility and accountability that lie so close to the heart of federalism. As Justice O'Connor stated in *New York*,

Where the Federal Government compels states to regulate, the accountability of both state and federal officials is diminished. [If the states enact a policy contrary to the federal one it can] always be preempted under the Supremacy Clause if it is contrary to the national view, but in such a case it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular.⁷¹

⁷⁰ *New York v. United States*, 505 U.S. at 168-69, 188.

⁷¹ 505 U.S. at 168.

That accountability does not exist if federal officials change state court procedures, altering the impact of state law without taking responsibility for imposing federal substantive standards.⁷²

On the other hand, the very fact that the federalization of state court procedures may have a substantive impact means that it is almost impossible to distinguish federal statutes that commandeer state procedures from federal laws that simply alter the substantive rules. To take again the example given above, if a federal statute altering the standard of proof in a securities case has a substantive impact, how is it all that different from a federal statute that preempts state substantive laws in securities cases? It is precisely because it is often difficult to untangle substance from procedure that federal laws that regulate state courts are both especially troubling as a matter of federalism and especially hard to distinguish from common, “garden variety” preemption. In effect, because procedure affects substance, Congress may claim that federalization of state procedures must be sustained as indistinguishable from substantive federal regulations within the scope of Article III.

V. Conclusion

The recent proclivity of Congress to consider and enact laws affecting the procedures to be applied in state courts on state law issues raises complex and troubling issues of federalism. With the grant of certiorari in *Guillen* we can be hopeful that the Supreme Court will give us some guidance on this issue next term. But a definitive resolution of all of the issues raised is unlikely. Indeed, it is possible that *Guillen* itself will end up being decided, per *Ashwander*, on other non-

⁷² For this reason, I have elsewhere referred to this practice as “stealth preemption.” See Parmet, *supra* note 6.

constitutional grounds.⁷³ But even if it is decided on constitutional grounds, we may not get a clear majority decision and even if we do, it is unlikely that a single case can or will answer all of the issues that arise in this complex and sensitive area of the law. Indeed, it is unlikely that any single ruling or principle can apply to the myriad forms that federal regulation of state procedures may take. Thus it is likely that state courts will continue to have to do their duty under the Supremacy Clause and decide for themselves the extent to which federal laws apply to state procedures and the extent to which they may do so constitutionally.

⁷³ One question is whether the state court correctly read the state statute. The respondent below argued that the statute was not as broad as the state court found it to be. Second, there is a major question of standing in the case. Its resolution may determine whether the Supreme Court ever gets to the merits of the case.