March, 1993

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POLITICAL FEDERALISM AND CONGRESSIONAL TRUTH-TELLING

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To live in the last decade of the twentieth century is to live a world preoccupied with federations, those in the process of both creation and destruction. The news media chronicles the bloody disintegration of what was once Yugoslavia, a nation of republics, the tension in Canada caused by the unceasing restlessness of the province of Quebec, and the continuing uncertain political meaning of the new Commonwealth of Independent States.1 On the other hand, the traditionally independent nation-states of Europe continue to move, albeit haltingly, toward greater economic union.2 The proposed North American Free Trade Agreement may signal the beginning of integration between the United States, Canada, and Mexico.3 The People's Republic of China has, by treaty, accepted the notion of “one nation, two economies” in the context of the return of Hong Kong in 1997 and has already in practice granted virtual economic independence to its “enterprises

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1. See, e.g., Steve Erlanger, Ukraine and Arms Accords: Kiev Reluctant to Say 'I Do', N.Y. TIMES, March 31, 1993, at A1 (noting the continuing political uncertainty throughout the former Soviet Union, and its impact on the future of arms negotiations); Charles Trueheart, Separatist's Talk Irks Minorities in Quebec, WASHINGTON POST, Jan. 28, 1993, at A15 (discussing the recent efforts of Quebec's separatist movement to obtain independence for the Canadian province); R.W. Apple, Jr., Diplomacy's Goal in Bosnia Seems Not Bold Action But Avoiding It, N.Y. TIMES, May 23, 1993, § 4, at 14 (discussing the continuing breakup of the former Yugoslavia and the Western allies' inability to address it).


3. See Keith Bradsher, Trade Pact Signed in 3 Capitals, N.Y. TIMES, Dec. 18, 1992, at D1 (reporting the signature by the leaders of Mexico, Canada, and the United States of the North American Free Trade Agreement (NAFTA)).
zones." In these situations, the judicial role in defining relations between parts of the entity and the whole is critical. Where this role has broken down completely, the result has been chaos and confusion. Where it has been accorded acceptance, political relations have proceeded more smoothly. It is an historic irony that the United States, the oldest federal republic in the world, is now one in which, internally, such judicial protection is on the wane.

The federal structure of the United States is a constitutional premise entrenched in its political ideology. But to recognize the legal and political inevitability of the structure is not to determine that the role of the states will remain meaningful. Sovereignty has two prime components: the ability to rule or regulate the conduct of entities within the sovereign borders and the ability to resist rule or regulation by a different sovereign. Since the much-heralded demise of dual federalism in 1937, the states' ability to regulate the conduct of their citizens has been dependent upon Congress's choice not to regulate the same conduct. Since 1985, the states' ability to resist


5. Thus, judicially-defined federalism clearly plays no current role in the territories that used to encompass Yugoslavia and the Union of Soviet Socialist Republics. But in Canada, where the inability of the country's provinces to agree on the constitutional status of Quebec underlies its tensions, the role of the judiciary will significantly affect the political outcome of that conflict. See Peter W. Hogg, Formal Amendment of the Constitution of Canada, LAW & CONTEMP. PROBS., Winter 1992, at 253; Mary E. Williford, Recent Development, Canadian Constitutional Law—Supreme Court of Canada Holds Consent of Quebec Not Necessary for Amendment to Canadian Constitution, 19 TEX. INT'L L.J. 233 (1984). The Treaty of Rome established the Court of Justice of the European Communities to hear cases brought by member states alleging that the executive branch of the European Community exceeded its authority, as well as cases brought to determine whether actions taken by member states in response to Community directives meet the stated requirements. Treaty Establishing the European Economic Community (Treaty of Rome), ratified Jan. 1, 1958, 298 U.N.T.S. 11. Similarly, NAFTA provides for arbitration of disputes between the parties, though the non-binding nature of the mechanism has raised at least academic concern. See Frederick M. Abbott, Integration Without Institutions: The NAFTA Mutation of the EC Model and the Future of the GATT Regime, 40 AM. J. COMP. LAW 917, 944-45 (1992). Finally, for what it is worth, the joint declaration setting out the agreement between the Peoples Republic of China (PRC) and Great Britain refers continually to legal protection of the defined parameters of the Hong Kong Special Administrative Region. A Draft Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Future of Hong Kong, initialed at Peking September 26, 1984, 23 I.L.M. 1366.


7. See, e.g., LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 239-44 (1978) (discussing the principles of federalism as a source of judicially-enforceable limits on congressional power).

8. It is difficult, if not impossible, to hypothesize conduct that, in the aggregate, does not have a substantial effect on interstate commerce, particularly given the United States Supreme Court's deference to such congressional findings. See, e.g., Wickard v. Filburn, 317 U.S. 111,
regulation of their own conduct by Congress has been left almost completely
dependent upon congressional choice.9 Thus, the judiciary no longer claims
any significant role in the protection of states from national authority. Fed-
eralism constraints no longer create certain spheres of activity within the
literal reach of Congress but outside its actual control.10 Similarly, actions
by the states themselves outside the actual though not the literal reach of
Congress's control no longer exist.11 Instead, the United States Supreme

123-29 (1942) (upholding limits on farm crops grown for the farmer's consumption). Profes-
sor Richard Epstein makes this point emphatically, in The Proper Scope of the Commerce
Power, 73 VA. L. REV. 1387, 1451-54 (1987) (arguing for a more restricted interpretation of the
United States Constitution's Commerce Clause U.S. CONST. art. I, § 8, cl. 3, and Necessary
and Proper, id., § 8, cl. 18, Clause).

may not only regulate the states themselves, but it may also subject them to private suits for
money damages, in total derogation of historical notions of sovereign immunity. Pennsylvania

For the first time since 1976, the Supreme Court has recently struck down federal legislation
as beyond the scope of congressional power and violative of the Tenth Amendment. New
York v. United States, 112 S. Ct. 2408 (1992). However, the extent to which New York v.
United States signals the reentry of the judiciary into the federalism arena should not be over-
stated. First, the decision is careful to distinguish Garcia and all previous federalism chal-
enges to national regulation by noting that the statute at issue was directed only to states,
rather than to the regulation of both state and private activity. Id. at 2415-17. Dissenting
from that part of the opinion striking down the “take title” provision, Justice White, joined by
Justices Blackmun and Stevens, noted that it was hard to understand why the difference was
relevant, but that the distinction severely limited the impact of the holding. Id. at 2435
(White, J., concurring in part and dissenting in part). Moreover, the majority, although appar-
ently unsure as to whether the Tenth Amendment provides an external constraint on Congress’s
power under the Commerce Clause, focused on the lack of congressional power either to
“commandeer” state legislative processes by compelling the state itself to regulate radioactive
waste in a certain way or to transfer title to that waste from the producers to the state. Id. at
2428-30 (majority opinion). Thus, rather than acknowledging that the federal statute dealt
with activities that affected interstate commerce, thereby raising the Tenth Amendment as a
shield to protect states from being compelled to legislate or subsidize certain industries, the
Court spoke in terms of lack of Congress’s power under the Commerce Clause itself. Id. at
2423. Finally, even if that lack of authority is the result of a two-step analysis requiring refer-
ence to the Tenth Amendment, the majority was very clear that anything short of a direct
order to legislate is legitimate. Id.; cf. Clarke v. United States, 886 F.2d 404, 406 (D.C. Cir.
(1988), which conditioned federal funding to the District of Columbia on passage by the Dis-
trict of Columbia City Council of specified legislation, violated the Council members’ First
Amendment free speech rights).

10. Although the Supreme Court in South Dakota v. Dole, 483 U.S. 203 (1987), left open
the possibility that Congress could not utilize its Commerce Clause power to impose directly a
national drinking age, the Court relied on the Twenty-First rather than the Tenth Amendment
as the source of the impediment. Id. at 205-06.

11. But see New York v. United States, 112 S. Ct. at 2419. Garcia left open the possibility
that certain kinds of direct regulation of the states, as states, might run afoul of the Constitu-
tion as a result of “possible failings in the national political process.” Garcia, 469 U.S. at 554.
However, the Court did not identify specific examples of such a situation, see id., and none
come to mind.
Court has told the states that their participation in the federal political process, guaranteed by inherent procedural safeguards, assures protection of their sovereign interests and presumably the continuation of a real role in a federation. To be sure, neither the nations of Europe nor the signatories of the North American Free Trade Agreement (NAFTA) would be reassured by such judicial abdication. Neither are some of the states.

If judicial abdication in favor of political process is justifiable, it is only to the extent that the political process in fact permits the states a meaningful role in national decision making. Academics engage in wide-ranging de-

Interestingly, the dissenters in New York v. United States looked to the political process for justification of the challenged legislation. 112 S. Ct. at 2439-40 (White, J., concurring in part and dissenting in part). The legislative scheme not only reflected a joint state-federal compromise that addressed the problem of the increasing amounts of radioactive waste and the decreasing number of disposal sites, but also preserved a role for state choice of means. Id. New York had participated in drafting the compromise and its Representatives and Senators had voted in its favor. Apparently, while “failure” of the process may doom legislation, “successful process” cannot save it.

Of course, the Garcia dissent did threaten a return to the regime of National League of Cities v. Usery, 426 U.S. 833 (1976). Garcia, 469 U.S. at 579-80 (Rehnquist, J., dissenting). In both Garcia and Union Gas the Court split five to four, with Justice Brennan joining the majority opinion in Garcia, 469 U.S. at 529, and writing the majority opinion in Union Gas, 491 U.S. at 5. Justice Brennan’s retirement from the Court, therefore, creates the possibility of reversal for both Garcia and Union Gas. However, such reversal would do little to insulate the states from the political will of Congress. In the years between Usery and Garcia, the Supreme Court found no other congressional act in violation of the Tenth Amendment, and the effect of Union Gas can easily be over-stated as well, since the Eleventh Amendment does not preclude injunctive relief against or compelling the action of state officials, no matter what the prospective monetary cost to the state. In any event, the authority of Congress to regulate what used to be called “local” activity is challenged today only academically, and thus the ability of the states to act as effective governments for their citizens may be protected only politically today, as it has been for fifty years.

12. Garcia, 469 U.S. at 552.

13. See Linda P. Campbell, States Fear More Issues Becoming a Federal Case, CHI. TRIB., July 15, 1990, at 5 (noting that “15 state legislatures have passed resolutions backing constitutional amendments to restore some of their authority,” including one which would “revise the 10th Amendment by requiring the courts to decide exactly what powers are reserved for the states”).

14. Any judicial abdication in favor of legislative choice implicates the doctrine of separation of powers, as well as the scope of various constitutional constraints on legislative action. The current Supreme Court, in numerous contexts other than federalism, has indicated its distaste for setting aside majoritarian choices made by state legislatures. See, e.g., Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791 (1992) (permitting a greater role for state choice in passing abortion legislation); Burnham v. Superior Ct., 495 U.S. 604 (1990) (holding that due process does not preclude a state from asserting personal jurisdiction over a defendant personally served with process by state). That same distaste is evidenced in the cases addressing federalism issues, but the rationale for the failure to intervene is different. In cases such as Burnham and Casey, the Supreme Court concluded that the state legislature was free to act because individuals who disagree with the action have no constitutional right to be free from such action. See Casey, 112 S. Ct. at 2824 (finding the state’s action to be reasonable); Burnham, 495 U.S. at 619 (finding the states jurisdictional requirements to be
bate over the merits of the Supreme Court's assumption that it does.\footnote{15} In no event, of course, does the Supreme Court's envisioned political protection aid a state that advocates a minority position, particularly if that state is not politically influential on a national level.\footnote{16} In any case, assuming that protection of the role of the states in the constitutional plan is to be left to the political process, and further assuming that the process does provide mechanisms through which the states, directly or indirectly, may influence congressional choices, clarity of congressional choice is essential. The Supreme Court itself has recognized this in requiring a "clear statement" of congressional intent in order to regulate the states or subject them to suit.\footnote{17} The traditional justification for this requirement has been that Congress should not be presumed to wish to interfere with state decisions about the allocation of reasonable. By contrast, in cases such as \textit{Garcia}, the Court does not dispute the states' constitutional right to participate in a federation. \textit{Garcia}, 469 U.S. at 552-54. The Court merely asserts that judicial protection of that right is unnecessary because states are capable of protecting themselves through the political process. \textit{Id.} The states, as a result of the constitutional structure, presumably have more "clout" than individual voters when it comes to protecting their rights against majority infringement. \textit{See id.; see also infra} notes 15-17 and accompanying text (discussing the states' role in the federal political process).

\textit{15.} The \textit{Garcia} Court adopted the argument that was posited by Herbert Wechsler in \textit{The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government}, 54 \textit{Colum. L. Rev.} 543 (1954). \textit{See also} Lewis B. Kaden, \textit{Politics, Money and State Sovereignty: The Judicial Role}, 79 \textit{Colum. L. Rev.} 847 (1979) (arguing to the contrary that the expansion of domestic programs and the public sector at large, as well as the shifting of some cost-sharing onto the states, has increased state and local government activity, thereby complicating the system of federalism); D. Bruce La Pierre, \textit{Political Accountability in the National Political Process—The Alternative to Judicial Review of Federalism Issues}, 80 \textit{Nw. U. L. Rev.} 577 (1985) (arguing that the real protection from congressional overreaching in this context is political accountability to the electorate).

In a recent article, Professor Rose argues and celebrates the fact that "our history reflects a tenacious and continuous countercurrent to most efforts to centralize local functions." Carol Rose, \textit{The Ancient Constitution vs. the Federalist Empire: Anti-Federalism from the Attack on “Monarchism” to Modern Localism}, 84 \textit{Nw. U. L. Rev.} 74, 99 (1989). Local governments, she asserts, are distinguished from the federal government both by the realistic voice of the citizen and by the citizen's option to leave. \textit{Id.} at 97. Voice and the "exit option," \textit{id.} at 99, together permit much greater individual influence at the local level than at the national level. Thus, she argues, it is the continuation and survival of her "countercurrent" that demands political protection at the national level. Without such protection, citizen influence even at the local level will be diminished as the exit option becomes less realistic in a homogenized nation. \textit{Id.} at 99-105.

\textit{16.} The \textit{Garcia} "loophole" addresses defects in the process itself. \textit{See supra} note 11. An individual state's challenge to regulation by Congress apparently must rest on a lack of "plebiscite" consideration or "surreptitious" enactment unless the regulation is applicable only to the particular state. \textit{EEOC v. Vermont}, 904 F.2d 794, 802 (2d Cir. 1990) (stating that "[t]here is no suggestion that Congress surreptitiously enacted any legislation without notice to the State of Vermont"). Interestingly, the need for nonsurreptitious plenary consideration to assure the proper functioning of the political process emphasizes the need for clarity of congressional choice. \textit{See infra} notes 17-20 and accompanying text.

of state funds or services, or to impose upon the states potentially large monetary burdens.\textsuperscript{18} Furthermore, before working such reallocations of power or money, Congress itself should realize the consequences of its actions in order to assure adequate consideration of choice. A variation from this justification focuses not on Congress as decisionmaker, but on the states as decision influencers.\textsuperscript{19} Without clarity of congressional intent, it is difficult, if not impossible, for the states to respond adequately to national regulation at the critical moment when the regulation is still being considered. After its adoption, the states' only recourse against unfavorable regulation is to seek repeal, a more difficult task politically in light of opinions already formed and justifications already adopted.\textsuperscript{20}

This Article will argue that there is a need for clarity in federal regulation in order to make possible the protection of federalism. This clarity ought to influence both the Supreme Court, as a matter of constitutional law, and Congress, as a matter of both law and policy, in their interpretations of congressional power derived from sources other than the grants of substantive regulatory authority under Article I of the United States Constitution. The thesis of this Article is not that the potential sphere of federal governmental power should be reduced, nor that the assertion of that power is questionable, either against the states, or in areas historically left to state control. Rather, the argument is that when federal power is asserted, it should be asserted directly rather than indirectly. In order to assure such direct assertions of power, the ability of Congress to utilize its non-regulatory powers to spend and to create inferior federal courts in order to achieve substantive


\textsuperscript{19} See Michael A. Fitts, Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions, 88 Mich. L. Rev. 917 (1990) (arguing that voter knowledge is not necessarily an unalloyed good). However, Professor Fitts's concern seems motivated in large part by a perceived need to empower institutions, specifically political parties, not to "hide the ball" in its entirety. \textit{Id.} at 934-38.

\textsuperscript{20} Of course, the checkered history of the 55 mile per hour speed limit demonstrates that the task, although difficult, is not impossible. The debate about the speed limit, however, did not focus on which government should regulate; rather, it addressed the substance of the regulation. Notwithstanding editorials in many western states, the public outcry was not in favor of "states rights." See, e.g., \textit{Blood on the Highway}, L.A. Times, Dec. 23, 1987, § 2, at 6 (stating in an editorial that congressional modification of speed limits was in part due to "buckling [under pressure from Western governors]"). The public was in favor of a higher speed limit, a fact nicely demonstrated by the silence which has greeted the higher, but still congressionally "requested," 65 mile per hour rule. See Irvin Molotsky, \textit{20 States Win the Right to Set a 65 M.P.H. Speed}, N.Y. Times, Dec. 29, 1987, at A1 (stating that "with little fanfare," Congress allowed some states to raise certain highway speed limits); see also Air Transp. Ass'n of Am. v. Department of Transp., 900 F.2d 369, 379-80 (D.C. Cir. 1990) (noting a "presumption of [agency] closed-mindedness" after an agency promulgates final rules), \textit{vacated}, 498 U.S. 1077 (1991); National Tour Brokers Ass'n v. United States, 591 F.2d 896, 902 (D.C. Cir. 1978) ("People naturally tend to be more close-minded and defensive once they have made a 'final' determination.").
ends must be reduced in the context of spending and eliminated entirely in the context of creating courts. Only when it is completely clear to both Congress and the states that federal regulation is contemplated to replace state regulation can federalism be meaningfully protected by the political process.

I. CONGRESSIONAL AUTHORITY: NOT ALL POWERS ARE CREATED EQUAL

Most congressional powers reflect the ability of the nation to regulate conduct directly, subject only to the strictures of amendments guaranteeing individual rights.21 When such direct regulation occurs, it is unnecessary for Congress to identify the constitutional power pursuant to which it has acted. If the Supreme Court believes that any one of the enumerated powers supports the legislation, the Constitution is satisfied.22 Presumably, the justification for the rule is a practical one: if Congress mistakenly identified an insufficient power to support its legislation, and the Supreme Court found the law therefore to be unconstitutional, Congress could rectify its error by subsequently repassing the statute under a sufficient constitutional source of authority. When both the insufficient and sufficient grants of authority allegedly support direct regulation of the same conduct, the judicial exercise of invalidating the initial legislation would be futile and would result in an un-

21. While a number of enumerated powers do not literally provide for the establishment by Congress of rules to govern conduct, regulation of conduct relevant to those grants is supported by the necessary and proper clause. See Ex parte Jackson, 96 U.S. 727, 732 (1877) (holding that “t[e]he power possessed by Congress [to establish post offices and postal roads] embraces the regulation of the entire postal system of the country”).

22. See Woods v. Cloyd W. Miller Co., 333 U.S. 138 (1948); see also Katzenbach v. McClung, 379 U.S. 294 (1964). Justice Douglas’s concurrence in Katzenbach disputes the propriety of relying on the Commerce Clause rather than the Fourteenth Amendment to uphold the 1964 Civil Rights Act, both because individual rights should be recognized as deserving greater constitutional protection than that afforded commerce, and because Fourteenth Amendment analysis does not require the Court to consider the effect of local racial discrimination on interstate commerce. Id. at 317-18 (Douglas, J., concurring); see also Heart of Atlanta Motel v. United States, 379 U.S. 241, 279-80 (1964) (Douglas, J., concurring). The author is aware of no other instance in which a Supreme Court Justice has indicated concern about which regulatory power Congress has chosen to use.
necessary expenditure of time by both Congress and the Court. The concerns of political federalism are not implicated in this scenario.

Despite the Supreme Court's flexibility in treatment of congressional sources of legislative authority, there are some congressional powers that are too inherently different to be easily interchangeable with powers that are clearly regulatory. The power to tax and spend is not a power to regulate, a fact long recognized and the cause of occasional judicial and academic debate. Furthermore, while the power to establish tribunals inferior to the Supreme Court is the source of some congressional regulatory authority, this power does not apply to the kind of conduct whose regulation is contemplated by other clauses in Article I, Section 8 of the Constitution. Congress's use of either of these powers to achieve regulatory results that might admittedly be achieved by legislation enacted pursuant to usually the Commerce Clause does implicate concerns of political federalism. By using its tax and spend power to regulate, Congress achieves its regulatory goal indirectly rather than directly, and may consequently blunt the ability of the states or their electorates to object effectively to new assertions of federal control. Similarly, Congress's use of its power to establish inferior courts in

23. Similar logic led the Supreme Court to abandon an inquiry into the motive of Congress in passing legislation that both regulated commerce and had a social impact beyond Congress's power to compel without the commercial nexus. Compare McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (inquiring into Congress's motives for establishing a national bank) with United States v. Darby, 312 U.S. 100 (1941) (upholding minimum wage and hour laws for employees producing goods for interstate commerce). In this context, the problem of futility is compounded by the difficulty of ascertaining the actual motive for the actions of a collective body. Congress occasionally may not specify the power that propels its action. See Woods, 333 U.S. at 144. More frequently, the purpose behind legislation may be gleaned only from legislative history, or that history may conflict with a self-serving preamble.

24. An illustrative hypothesis assumes that the Supreme Court would hold that Congress could not control local housing rents pursuant to its power to declare war on the basis of the belief that the return of servicemen from abroad caused the disruption of local rents. Cf. Woods, 333 U.S. at 144 (stating that "it is plain from the legislative history that Congress was invoking its war power to cope with a current condition of which the war was a direct and immediate cause"). The Court might find, however, that local rents in the aggregate have a substantial impact on interstate commerce and, therefore, may be regulated by Congress under the Commerce Clause. From the point of view of states attempting to protect their own autonomy, the threat of federally-imposed rent control is as obvious and as great, and is to be countered in the same fashion, whether Congress appeals to its war power, see Yakus v. United States, 321 U.S. 414, 425 (1944) (upholding the power of Congress to regulate prices pursuant to its war power), or to the Commerce Clause, see Fry v. United States, 421 U.S. 542, 547-48 (1975) (holding that the Economic Stabilization Act was a valid exercise of Congress's authority to regulate under the Commerce Clause).

25. Cf. U.S. Const. art. I, § 8, cl. 1. This is not to say that regulations, justified under another power, may not be properly attached to an appropriations bill. See United States v. Burton, 888 F.2d 682, 685 (10th Cir. 1989) (stating that "if Congress so intends, it can amend the provisions of a statute through the use of an appropriations act").


order to regulate or affect conduct outside the federal courtroom may make it more difficult for states to protect their political territory. The interpretation of congressional authority derived from these two powers and Congress’s ability to utilize them in lieu of others form the basis for a discussion of congressional authority.

II. PLANTING THE SEEDS FOR CONGRESSIONAL MANIPULATION: INDIRECT CONTROL UNDER THE SPENDING POWER

In the first part of this century, Congress sought to circumvent judicially-imposed restrictions on its efforts to regulate local economic conduct by either purchasing a state’s compliance with its goals, or taxing the state’s non-compliance. However, the Supreme Court initially rejected these efforts, holding that if the congressional goal was beyond Congress’s direct regulatory authority, it could not be achieved indirectly through bribery or penalty. Today, few regulatory goals remain beyond congressional authority, save to the extent that Congress is interested in circumventing individual rights restraints on its power. Thus, contemporary academic literature focuses on the “unconstitutional condition” problem: if Congress cannot force an individual to do or refrain from doing a certain act, may Congress nonetheless impose, as a condition of the individual’s receipt of a federal grant, the doing or not doing of that act? The assumption underlying this discussion is that if Congress could directly force an individual to do or refrain from doing the act, the imposition of the same condition on grant receipts, if

31. The Supreme Court recently explained the restriction in a much more limited fashion. In South Dakota v. Dole, 483 U.S. 203 (1987), Chief Justice Rehnquist, writing for all but Justices Brennan and O’Connor, stated that “the ‘independent constitutional bar’ limitation on the spending power is not... a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly. Instead, ... the power may not be used to induce the States to engage in activities that would themselves be unconstitutional.” Id. at 210. Under this interpretation, there are few situations in which the doctrine will play a role: Congress would not ordinarily wish states, for example, to discriminate; individuals do not act unconstitutionally, and it is not unconstitutional for individuals to waive their constitutional rights.
rationally related to the spending program, raises no constitutional problem.\textsuperscript{34}

To the extent that congressional choice is between direct national regulation of individual conduct and indirect regulation through grants to individuals conditioned upon their compliance with congressional desires, the assumption raises no federalism concerns\textsuperscript{35} and may well work to the benefit of the individuals involved. Use of conditional spending leaves some degree of "choice" to the individual, while regulation does not. Frequently, however, the congressional choice is between (1) direct national regulation of individual conduct and grants to states conditioned upon their imposition of the desired regulation of individual conduct; or (2) direct national regulation of state conduct and grants to states conditioned upon the states' compliance with congressional desires. While theoretically the benefit of choice inherent in Congress's conditional spending approach accrues to the states as well as to individuals, the interaction between state and federal governmental entities does raise issues of federalism in this context. If it is politically more difficult to resist national control over in-state individual activity or the activity of states themselves when that control is exercised under the guise of conditional grants than it is to resist direct imposition of the same control, then the ability of the states to operate in the only arena left to them is diminished by congressional reliance on the spending power.\textsuperscript{36} The fundamental issue is not one of clarity per se as to be effective, statutory conditions must be clearly stated.\textsuperscript{37} Rather, the concern with clarity merely reflects the need for the states to be able to protect themselves effectively from national

\textsuperscript{34} For example, if Congress could, pursuant to the Commerce Clause, impose a nationwide speed limit, it might instead choose to withhold federal grants from those states that fail to impose and enforce the desired speed limit themselves, even if, as a practical matter, the states have been "coerced" to adhere to the condition. "Certainly, Congress may use its Spending Power to encourage states to participate in cooperative and voluntary ventures within the parameters of the Commerce Clause. 'The reach of the Spending Power, within its sphere, is at least as broad as the regulatory powers of Congress.'" Nevada v. Skinner, 884 F.2d 445, 449 (9th Cir. 1989) (quoting Fullilove v. Klutznick, 448 U.S. 448, 475 (1980)), cert. denied, 493 U.S. 1070 (1990).

\textsuperscript{35} Since the federal government does not impose taxes on the states, congressional use of a "penalty" tax when the taxed activity could be prohibited directly also raises no concerns relevant to the thesis of this Article.

\textsuperscript{36} See, e.g., South Dakota v. Dole, 483 U.S. 203, 206 (1987) (discussing the power of Congress to "attach conditions on the receipt of federal funds, and [to] . . . employ [ ] the power to 'further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives'" (quoting Fullilove, 448 U.S. at 474)).

\textsuperscript{37} See Pennhurst State School v. Halderman, 451 U.S. 1, 18 (1981) (holding that Congress did not intend 42 U.S.C. § 6010(1)-(2) (1976) "to require the States to assume the high cost of providing 'appropriate treatment' in the 'least restrictive environment' to their mentally retarded citizens").
control. Anything that decreases that ability cuts against the Supreme Court's assumption that federalism need only be politically guaranteed. 38

Professor Albert Rosenthal identifies one potential difficulty facing states when they object to conditions imposed on federal spending that does not exist when Congress is contemplating direct regulation: the need for states to lobby simultaneously for federal funding but against the imposition of federally-mandated conditions. 39 The states' position on both fronts is weakened, resulting in acceptance of an otherwise highly objectionable condition in order to preserve access to ever more necessary and increasingly unavailable federal money. 40 This difficulty ordinarily arises in the first-identified context of congressional choice between direct and indirect regulation of individual conduct, discussed above. 41 An obvious example of this is Congress's decision to condition state access to highway funding on the states' imposition of a congressionally-chosen speed limit or drinking age. 42 However, the dilemma also arises when Congress chooses to condition the grant of federal funds on compliance by the states themselves. 43 Although insufficient empirical data exist to support the reality of the difficulty of simultaneously seeking federal money while objecting to a federal condition, 44 intuitively it seems inevitable. Moreover, it is unlikely that Congress would independently consider state objections. While national legislation in the past may have been interstitial, operating against the background of the laws of the states, today it is increasingly pervasive as Congress characterizes more and more problems as "nation-wide" or "beyond the ability of any one state to control." Furthermore, if the condition is publicly unpopular, Congress may gain some political advantage by having it imposed by the state rather than the national government. Even if the general population is aware of the actual source of the law, national legislators can shift the focus to the states by claiming that the state was free to refuse the money. Although many

38. See supra notes 8-10 and accompanying text.
39. Albert J. Rosenthal, Conditional Federal Spending as a Regulatory Device, 26 San Diego L. Rev. 277, 280-81 (1989) (stating that further research must be conducted to determine the effectiveness of states' political power "when the issue is conditional spending rather than direct regulation").
40. Rosenthal, supra note 33, at 1141-42; Rosenthal, supra note 39, at 281 (noting that cutbacks in federal funding of state programs may "squeeze" states into difficult decision making situations); cf South Dakota v. Dole, 483 U.S. 203, 211 (1987) ("Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937))).
41. See supra notes 33-36 and accompanying text.
42. See Dole, 483 U.S. at 203; People v. Williams, 222 Cal. Rptr. 527 (1985).
43. See Oklahoma v. Civil Serv. Comm'n, 330 U.S. 127 (1947) (permitting Congress to condition access to federal highway funds upon the state's agreement that employees in jobs funded by federal monies not take an active part in political activities).
44. See Rosenthal, supra note 33, at 1142.
voters may realize the speciousness of this argument, it does serve to muddy the waters and dilute the blame.45

Of course, if the condition is politically unpopular in certain regions, states in those regions may use that unpopularity to their own advantage by casting themselves as unwillingly coerced partners in a national scheme, particularly if the condition is one which the state governments themselves would like to impose.46 This desire to hide behind "Big Brother" may also reduce the willingness of states to combat national encroachment. However, to the extent that a fundamental value of federalism is its resulting protection of regionally diverse responses to similar problems based on the perceived closer ties between state representatives and the electorate, such short-term state interests should be discounted.

If the use of the spending power in lieu of direct regulation makes it more difficult for the political process to defend the role of the states, the question of what limitations on its use, if any, should be imposed remains unresolved.47 Today, cooperative programs seem entrenched in the legislative


46. For a slightly different twist, see Federalism and Administrative Structure, 92 Yale L.J. 1342 (1983) (summarizing a paper presented by Professor Robert M. Cover). The summary of Professor Cover's argument states that cooperative programs, in which the federal government funds programs run by the states under federal guidelines, "co-opt . . . potential opposition [by local elites]. They actually increase the patronage exercised by local elites and retain local elite domination over beneficiary groups. As a result, state and local political figures and party organizations are 'bought off,' co-opted from pursuing opposition to national governmental programs." Id. at 1343. But see Susan Rose-Ackerman, Cooperative Federalism and Co-optation, 92 Yale L.J. 1344, 1345 (1983) (disputing Professor Cover's conclusion that such cooperative ventures should be replaced by totally federal programs to ensure that "[s]tate and nation . . . be politically combative").

47. Of course, Congress could theoretically recognize the problem and refuse to cough the equivalent of direct regulation in terms of conditional grants. On the one hand, such a choice might appear logical, since federal attempts to use the spending power in this fashion historically arose when preferred direct regulation was barred by the Supreme Court's narrow interpretation of the Commerce Clause and broad interpretation of the Tenth Amendment. On the other hand, the very reasons that use of the spending power creates concern provide a strong federal political advantage to its choice. See supra note 45 and accompanying text. If the Court remains willing to entrust federalism to the political process, at the least the Court should also be willing to do its part to ensure that the process permits the protection.

Admittedly, the Court has already articulated four separate limitations on Congress's spending power: (1) the expenditure must be intended to promote "the general welfare" within the meaning of the Constitution, Helvering v. Davis, 301 U.S. 619, 640-41 (1937); (2) the condi-
process, and arguing for their prohibition would be unrealistic. However, three relatively modest proposals, only one of which has been accepted by the Supreme Court, would ameliorate to some degree the identified difficulties that states must overcome and might increase corresponding congressional awareness.

A. Improving the Court’s Methodology: Putting Teeth in the “Reasonably Related” Requirement

In South Dakota v. Dole, the Supreme Court considered a challenge to Congress’s conditioning states’ receipt of federal highway funds upon their enactment of legislation imposing a twenty-one-year-old minimum drinking age. Writing for the majority, Chief Justice Rehnquist determined that Congress’s “relatively mild encouragement” of state action was not coercive and was therefore a valid exercise of its spending power. While the central issue addressed by the majority involved the role of the Twenty-First Amendment, Justice O’Connor’s dissent identified an additional issue: whether the condition imposed was reasonably related to the purpose of the spending. As Justice O’Connor noted, the majority’s application of this admittedly constitutional requirement was “cursory and unconvincing,” involving a brief reference to highway safety and the problem of teenagers commuting to states with a lower age limit. Certainly, in the context of direct regulation under the Commerce Clause, the requirement that federal regulation of intrastate activity be “reasonably related” to interstate com-

48. See supra note 40 (discussing the inability of states to challenge conditions placed on federal spending).
49. See supra notes 39-44 and accompanying text.
51. Id. at 205.
52. Id. at 211-12.
53. U.S. Const. amend. XXI, construed in Dole, 483 U.S. at 205-06, 208-12.
54. Dole, 483 U. S. at 213 (O’Connor, J., dissenting).
55. Id. at 213.
56. Id. at 213-14 (criticizing the majority’s finding of a “reasonable relationship” between the condition and Congress’s stated purpose).
merce is an extraordinarily low hurdle that the Supreme Court invariably permits Congress to jump with no difficulty.\textsuperscript{57} However, the hurdle need not be identical when the power exercised is indirect, nor should it be. The difference between spending to promote the general welfare\textsuperscript{58} and regulating to achieve the same goal is critical to the concept of limited federal authority. If unchecked reliance on the spending power enables Congress to do indirectly what it politically could not do directly under the commerce power, federalism has lost its political as well as judicial defense.

The first proposal to limit Congress's use of conditional spending is to distinguish between permissible conditions that specify how federal funds should be spent and impermissible conditions that extend beyond the scope of such specification. In an amicus brief for the Dole case, the National Conference of State Legislatures\textsuperscript{59} made such a proposal,\textsuperscript{60} adopted by Justice O'Connor in her dissent.\textsuperscript{61} The restriction imposed on Congress by this distinction is slight but significant. It permits federal adoption of a host of cooperative programs, while at the same time preventing unrelated bribery. Additionally, the distinction does not preclude the traditional judicial deference to congressional findings of reasonableness.\textsuperscript{62} Rather, the restriction

\begin{enumerate}
\item[57.] See supra note 8 and accompanying text.
\item[58.] U.S. Const. art. III, § 8, cl. 1.
\item[59.] The concern expressed in the brief of the National Conference of State Legislatures in the Dole case underscores the argument that states find it more difficult to combat spending "conditions" than direct regulation. Brief for the Nat'l Conference of State Legislatures, at 12-24 Dole (No. 86-260); see supra notes 39-44 and accompanying text.
\item[60.] See Brief for the Nat'l Conference of State Legislatures, Dole (No. 86-260). As the brief explained:

Congress has the power to spend for the general welfare, it has the power to legislate only for delegated purposes. . . .

The appropriate inquiry, then, is whether the spending requirement or prohibition is a condition on a grant or whether it is regulation. The difference turns on whether the requirement specifies in some way how the money should be spent, so that Congress's intent in making the grant will be effectuated. Congress has no power under the Spending Clause to impose requirements on a grant that go beyond specifying how the money should be spent. A requirement that is not such a specification is not a condition, but a regulation, which is valid only if it falls within one of Congress's delegated regulatory powers.

\textit{Id}. at 19-20; see also infra note 64 and accompanying text (rejecting the assumption of validity if the condition falls within a direct regulatory power).
\item[61.] Justice O'Connor further justified this proposed limit by quoting the Court's opinion in United States v. Butler, 297 U.S. 1 (1936), which struck down the Agricultural Adjustment Act because it extended beyond the scope of Congress's spending power. \textit{Id}. at 78. Justice O'Connor cited the Butler Court's statement that "'[t]here is an obvious difference between a statute stating the conditions upon which moneys shall be expended and one effective only upon assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced.'" South Dakota v. Dole, 483 U.S. 203, 215-16 (1987) (O'Connor, J., dissenting) (quoting \textit{Butler}, 297 U.S. at 73).
\item[62.] See McCulloch v. Maryland, 17 U.S. (4 Wheat) 316 (1819).\end{enumerate}
only identifies the factors that must be reasonably related. Perhaps less judicial deference to such findings of reasonableness would be appropriate, particularly in light of the high degree of deference logically given to a congressional decision that the purpose of the spending will indeed promote the general welfare.\textsuperscript{63} However, the Supreme Court should at least be willing to prevent Congress from trying to achieve regulatory goals such as highway safety by imposing conditions on the receipt of funds unrelated to their expenditure.

B. \textit{Improving the Court's Methodology, Part II: Acknowledging the Difference Between Spending and Regulatory Powers}

A second proposal to limit Congress's use of conditional spending is that the Supreme Court should abandon its assumption that if a condition could constitutionally be imposed as a direct regulation it is an appropriate condition whether or not it is related to how the funds are spent. Since today most direct regulation falls within the scope of the Commerce Clause, it follows that under this assumption most conditions would automatically fall within that same scope and be deemed constitutional. Without abandonment of this assumption, it is difficult to envision many situations, other than that involved in \textit{Dole}, in which Justice O'Connor's suggested restriction\textsuperscript{64} would be of any value. Yet the political realities which make it less likely that conditions will be resisted as effectively as regulations demand that the restriction be a real one.

C. \textit{Upping Congress's Burden to Articulate its Conditions: Valuing Informed State Choice Over Congressional Convenience}

In order to be enforceable, conditions placed upon the receipt of federal funds must be clearly stated as conditions, rather than as goals or aspirations.\textsuperscript{65} Such a requirement is uncontroversial and logically is imperative, as no potential recipient of funds could make a reasoned choice to participate in a federally funded program without knowing the price of participation.\textsuperscript{66}

\textsuperscript{63} It is difficult to see how an appointed judiciary could rationally disagree with elected representatives about the content of anything as amorphous as the "general welfare." See \textit{Dole}, 483 U.S. at 208 (1987) (citing Helvering v. Davis, 301 U.S. 619, 645 (1937)).

\textsuperscript{64} \textit{Dole}, 483 U.S. at 216-17 (O'Connor, J., dissenting); see also supra note 61.


\textsuperscript{66} Cf. \textit{Air Transp. Ass'n of Am. v. Department of Transp.}, 900 F.2d 369, 375 (D.C. Cir. 1990) ("[I]nformed administrative decisionmaking require[s] that agency decisions be made only after affording interested persons' an opportunity to communicate their views to the agency.");\textsuperscript{67} (quoting \textit{Chrysler Corp. v. Brown}, 441 U.S. 281, 316 (1979), \textit{vacated}, 498 U.S. 1077 (1991)); \textit{id.} ("[B]y mandating 'openess, explanation, and participatory democracy' in the rulemaking process, these [notice and comment] procedures assure the legitimacy of administrative norms." (quoting \textit{Weyerhaeuser Co. v. Costle}, 590 F.2d 1011, 1027 (D.C. Cir. 1978))).
Through its rules of statutory interpretation, the Supreme Court should continue to force Congress to speak unequivocally when imposing conditions governing the expenditure of federal funds. However, the Court's approach to interpreting the requirements of a given condition and their applicability to a specific fact pattern has weakened this mandate and diluted Congress's responsibility to articulate the conditions imposed on federal spending. In broad terms, the debate over the Supreme Court's methodology is between the attempt to loosely define an actual or constructive congressional purpose and the narrow, literal focus on the specific wording of a questioned passage. Ordinarily, if congressional purpose is clear but a literal interpretation of the text points to a contrary result, blind obedience to the statutory text may fairly be criticized as wasteful of congressional and judicial resources. Forcing Congress to spell out its conditions in precise detail, however, necessarily requires a definition of the extent to which access to federal monies deprives the recipient of otherwise existing choices. This increases the likelihood of a politically potent objection by a state to the deprivation of such choices and the chance that a potential state recipient will refuse to participate.

The Supreme Court's decision in *Grove City College v. Bell* clearly demonstrates this dilemma. The *Grove City* decision involved whether Title IX of the Education Amendments of 1972 applies to colleges whose students accept federal financial assistance and, if such colleges are subject to Title IX, whether the statute precludes discrimination on the basis of sex within the institution as a whole or only within the program or programs of the institution that "receive" the federal funds. Focusing on the statute's legislative history and purpose, a unanimous Court agreed that the college was a federal fund "recipient" within the meaning of Title IX, even though it received those funds indirectly through student financial aid. The Court split, however, on the question of the scope of the application of Title IX's nondiscrimination requirement. Doing little more than quoting what it

68. Id.
71. Although Justice Stevens concurred, he argued that the second issue was not in dispute. See *Grove City College v. Bell*, 465 U.S. 555, 579-80 (Stevens, J., concurring). Justices Brennan and Marshall, in dissent, noted Justice Stevens's argument approvingly, see id. at 583 n.1 (Brennan, J., dissenting), but did address the merits of the issue.
72. Id. at 569-70 (majority opinion).
73. See id. at 577-78 (Powell, J., concurring).
believed to be dispositive statutory language,74 the majority held that the statute precluded sexual discrimination only in the college’s isolated financial aid program.75 In a vigorous dissent, Justices Brennan and Marshall relied on congressional intent, as revealed in Title IX’s legislative history, to argue that, once an educational institution is found to receive federal funds, the entire institution is subject to the antidiscrimination provisions of Title IX.76 The dissenters obviously better understood congressional purpose, as the second holding in the case was repudiated by Congress in the Civil Rights Restoration Act of 1987.77

It is apparently easy enough to justify the Grove City dissent. In the first place, the majority relied on congressional purpose and legislative history to determine that indirect as well as direct benefit to the college triggered Title IX;78 why not utilize the same indicators of congressional intent in determining the scope of the condition? In the second place, Congress itself confirmed the dissent in unmistakable terms.79 And finally, how could any rational body support discrimination in any educational program? Of course, what is apparent need not be real.

In the context of judicial choice between employing a broad interpretation of congressional purpose and a narrow textual interpretation, it may be argued that the Grove City majority erred not in refusing to look to a broad legislative purpose with respect to the second issue—the scope of Title IX’s nondiscrimination requirement—but in looking to such a purpose with respect to the first issue, whether or not the college was a federal fund recipient. Although the antidiscrimination purpose of Title IX was clear, the conditions Congress imposed to achieve this purpose were not. No literal language in the statute addressed the distinction between direct and indirect aid.80 In light of the traditionally local nature of educational institutions and the need to assure states the political wherewithal to resist federal encroachment, perhaps the Court should, as a matter of course, prefer the narrowest interpretive choice and hold that federal financial assistance does not include indirect aid. However, to preclude any indirect aid from triggering

74. Id. at 574 (majority opinion) (“The regulations apply, by their terms, ‘to every recipient and to each education program or activity operated by such recipient which receives or benefits from Federal financial assistance.’” (quoting 34 C.F.R. § 106.11 (1983) (emphasis added by Grove City Court))).
75. Id. at 574-75.
76. Id. at 583-86. The dissenting opinion also relied on post-enactment history. See id. at 592-98 (Brennan, J., dissenting).
78. Grove City, 465 U.S. at 564. “It is not surprising to find, therefore, that the language of § 901(a) contains no hint that Congress perceived a substantive difference between direct institutional assistance and aid received by a school through its students.” Id.
79. § 2, 102 Stat. at 28.
80. Cf. id.
the antidiscrimination provision of Title IX would, as the majority noted, have frustrated congressional purpose by exempting not only institutions whose students alone received aid, but also institutions with students who received aid that was funneled through state agencies, a proposition the plaintiff did not advance and one that would have seriously undercut the statute's coverage.

However, similar undercutting of the statute's coverage occurred when the majority ignored congressional intent and used a literal textual interpretation to support its refusal to extend the antidiscrimination requirement to the institution as a whole. The difference in the majority's approach is justifiable given the different statutory provisions involved: the statutory language "receiving aid" might as easily encompass indirect aid as not, but "each education program or activity . . . which receives or benefits from" federal aid surely must be stretched if not ignored to encompass, on any set of facts, all programs and activities of a benefitting institution. While subsequent congressional action made clear the legislative intent, the demands of political federalism fairly require that such intent be clearly stated. Those demands answer as well the third argument raised in support of the dissent: the issue in this context is not whether Congress could rationally be thought to permit sexual discrimination, but whether Congress could rationally be thought to condition the expenditure of federal funds solely on the activities of that part of an institution benefitting from those funds. Surely it could. Politically perhaps it should. In any event, when the "plain meaning" of

81. Id. at 568 n. 19.
82. Id. at 574.
83. Id. (quoting 34 C.F.R. § 106.4 (1983) (emphasis added by Grove City Court)).
84. § 2, 102 Stat. at 28.
85. If the first limitation on Congress's authority to place conditions on those who accept federal funds is treated seriously, it may be questionable for Congress to insist that an entire institution abide by federal antidiscrimination policy if any of the money received by that institution comes from the federal treasury. Congress certainly can insist that programs which it funds, even indirectly, cannot discriminate on the basis of sex, but to insist that the grant recipient refrain from such discrimination in all aspects of its endeavor does not initially appear reasonably related to the issue placed within the congressional ambit by the spending power, i.e., how federal money is spent. While the goal of nondiscriminatory education is a laudable one—as is that of highway safety, recognized by the Supreme Court in South Dakota v. Dole, 483 U.S. 203 (1987)—the problem is that the goal is not rationally tied to federal spending. Of course, Congress presumably could regulate against such discrimination directly because of its effect on interstate commerce. However, while this would currently satisfy even Justice O'Connor, see id. at 218, the second reform proposal—abolishing the assumption that indirect regulation through conditional spending is constitutional if the goal of the regulation could be achieved through the constitutional means of direct regulation—would preclude reference to regulatory power to sustain spending conditions.

Nonetheless, even in light of those two proposed limitations, Title IX regulation should be able to pass at least the minimal scrutiny currently required by the Court's "rationally or reasonably related" criteria. Money obtained from the federal government to fund a science
statutory language chosen by Congress supports such an interpretation, the Court should look to that language as a prime indicator of congressional purpose. An interpretation based on statutory language should be chosen by the Court rather than one supported only by the "broad remedial purpose" of the statute.

None of the preceding arguments for reform in any way restricts Congress's final power to supplant state regulation when a federal solution to a perceived national problem is sought. However, the combined reform proposals do assure those who are opposed to such solutions a reasonable opportunity to present their opposition based on notions of federalism. If the Supreme Court adopts such reforms, Congress will in some instances be unable and in others be discouraged from using its spending power to regulate indirectly and will employ other, more direct powers as the principal means of national regulation. Ultimately, this forced congressional reliance on direct regulation will help to clarify federal ascendancy previously masked by federal "generosity."

III. THE POWER TO CREATE INFERIOR FEDERAL COURTS

Not all congressional powers are regulatory, and those that are not should be interpreted in light of their limited thrust. Similarly, federal regulatory powers are not all designed to permit identical kinds of regulation.\textsuperscript{86} However, with a single exception,\textsuperscript{87} the list of powers following the authority to tax and spend all share one common characteristic: all permit Congress to regulate the conduct of various groups of people vis-a-vis other groups with respect to certain matters involved in day-to-day living.\textsuperscript{88} In other words, almost all federal regulatory powers permit some degree of federal control over the "substantive" law, the law that defines the rights, duties and obligations members of society owe to one another. It is axiomatic that the combi-

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\item program, for example, inevitably frees up other institutional money to subsidize a sports program. While it is possible that a certain institution could convincingly argue that the federal money provides the sole basis for the existence of the funded program and, therefore, its funding has no impact on any other part of the institution's budget, money is frequently fungible, and Congress could rely on the "class" rationale to justify its condition even in that hypothetical case. \textit{See} Perez v. United States, 402 U.S. 146, 152-54 (1971) (noting that "[w]here the class of activities is regulated and that class is within reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class'")(quoting Maryland v. Wirtz, 392 U.S. 183, 193 (1968), \textit{overruled} by National League of Cities v. Usery, 426 U.S. 833 (1976) (emphasis added by Perez Court)).
\item Each enumerated power is designed to allow the federal government to control a certain activity; the activity arising from the authority to provide and maintain a navy, U.S. Const. art. I, § 8, cl. 13, differs from the activity related to the authority to promote the progress of science by securing copyright protection. \textit{Id.}, cl. 8.
\item \textit{Id.}, cl. 9.
\item \textit{See} Hanna v. Plumer, 380 U.S. 460, 474 (1965) (Harlan, J., concurring).
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nation of these federal powers is less than the total control of all such rights, duties and obligations. The country assumes that some conduct capable of governmental regulation may only be regulated by the states, and the Constitution itself protects certain other conduct from any governmental regulation. The single exception to these substantive powers is the authority of Congress to establish tribunals inferior to the United States Supreme Court and, as an action necessary and proper to the carrying out of that authority, to govern the procedures to be used in resolving disputes by the courts it creates.

Modern Supreme Court opinions relevant to this specific congressional power began with *Erie Railroad v. Tompkins*. At the constitutional heart of the opinion was the notion that adjudicatory authority is separate from regulatory authority and the holding that the latter need not flow from the former. The Court reasoned that, simply because the Constitution permits certain cases to be heard in federal courts not based on subject matter but on the parties involved, the existence of federal jurisdiction does not resolve the question of the existence of federal regulatory authority. Congress, therefore, may not point to its authority to establish inferior federal courts to justify the regulation of parties' conduct outside the courtroom. Congress instead must point to some other Article I power to justify providing "substantive" as opposed to "procedural" law.

The debate over what is encompassed within congressional control of procedure has occupied the Supreme Court and commentators for half a century. Current wisdom states that Congress itself may regulate anything that is "arguably procedural," a standard drawn from *Hanna v. Plumer* and

89. While the current understanding of the scope of the Commerce Clause may, as a practical matter, make that assumption judicially unenforceable, it is nonetheless a political reality that lies at the heart of the arguments put forward in this Article. *See supra* notes 9-10, and accompanying text. It may theoretically be possible for Congress to adopt the Uniform Commercial Code or enact a national inheritance law, but it is not likely. Furthermore, while the Supreme Court's sweeping Commerce Clause language makes it difficult to foresee a judicial negation of any congressional statute, the Court has never indicated that federalism imposes no limit on congressional action; rather, it has only stated that Congress itself must be the judge of those constitutional limitations.


91. 304 U.S. 64 (1938).

92. *Id.* at 79-80.

93. In light of current Commerce Clause jurisprudence, the instances of constitutional incongruity are at best few and far between, although for purposes of this Article that is irrelevant. Nonetheless, from the theoretician's point of view it is frustrating; as my colleague Professor Linda Hirschman once wrote in an unpublished manuscript: "Now that I finally understand *Erie*, it doesn't matter anymore."

94. *Id.* at 79-80.

95. 380 U.S. 460, 476 (1965) (Harlan, J., concurring).
ably defended by Professor John Hart Ely. Professor Ely argues that as long as a congressional enactment can rationally be said to be “one designed to make the process of litigation a fair and efficient mechanism for the resolution of disputes,” it satisfies the constitutional limitations on this power without regard to the state law it displaces. Professor Ely points to the fact that, at least since 1937, no congressional enactment has been struck down based on the nature of the state law it displaced, and argues that, therefore, federal procedural laws may displace state substantive laws. Professor Ely made clear that this argument addresses congressional power, not the power of the Supreme Court to promulgate Federal Rules of Civil Procedure or the power of the federal courts to create procedural common law. Both of those latter powers are more narrowly confined by congressional statutes than is Congress’s Article I power.

The difficulty with the “arguably procedural, ergo constitutional” argument is a function of the very fact on which it rests: depending upon how a balance between competing policies is struck, a law may fairly be characterized as either procedural or substantive. Professor Ely’s example is instructive: in determining whether to grant a spouse testimonial immunity, the decision maker must balance the need for all relevant evidence to achieve a fair verdict against the desire to promote confidentiality, trust and harmony in marital relationships. If the decision maker determines that the procedural interest in verdicts based on complete knowledge outweighs the substantive interest in promoting a certain kind of socially sanctioned relationship, the resulting law admitting spousal testimony would be “arguably procedural.” However, if the reverse balance is struck, the law precluding the testimony would be “substantive” because it would be designed not to foster litigation-related goals but rather to promote the desired conduct outside the courtroom.

97. Id. at 724 (footnotes omitted).
98. Id.
99. Id. at 698.
102. Cf. Air Transp. Ass’n of Am. v. Department of Transp., 900 F.2d 369, 381 (D.C. Cir. 1990) (Silberman, J., dissenting) (“Lines between substance and procedure in various areas of the law are difficult to draw and therefore often perplex scholars and judges.”), vacated, 498 U.S. 1077.
103. Ely, supra note 96, at 739-40.
104. Id. at 738-40.
105. Id. at 723. Another example might involve the award of attorneys’ fees for bad faith litigation practices. See NASCO, Inc. v. Calcasieu Television & Radio, Inc., 894 F.2d 696, 705-06 (5th Cir. 1990) (holding that the inherent power of the federal district court allowed fee-shifting in a diversity suit even though the forum state, in the absence of an authorizing
both procedural and substantive policies, the distinction between the two may not matter unless some other value imposes a constraint. However, the fact that Congress has clear authority to consider procedural policies does not mean that Congress also has clear authority to consider and weigh competing substantive policies. Therefore, unless the Commerce Clause is somehow implicated in marital confidentiality, it is difficult to understand how Congress may legitimately consider the appropriate weight to be given to concerns the Constitution specifically leaves to the states.

Perhaps the answer is that while Congress in the abstract would lack authority to consider what, as a matter of policy, should be fostered in a marriage, it may, in light of the Necessary and Proper Clause, consider and reject those concerns in the context of crafting procedural rules. The analogy would therefore be to Congress’s inability to regulate intrastate commerce in the abstract and its ability to do so in the context of regulating or protecting interstate commerce. However, the analogy is troublesome because of the distinction between substance and procedure and the different methods by which state substantive law is replaced. In the commerce context, the effect that substantive intrastate activity has on substantive federal goals justifies the direct regulation of intrastate activity. By contrast, in the evidentiary privilege context the effect the substantive state policy has on federal procedural goals is thought to justify the indirect negation of state policy. Ordinarily, procedure is assumed to be a tool for the achievement of substantive law and policy rather than an independently valuable system divorced from those laws and policies. Certainly if a procedural goal conflicted with a substantive goal adopted by the same governmental entity, the procedural goal would be abandoned unless the entity had made a conscious choice to change its substantive policy. Thus, it is a problematic assumption that merely because the federal system may regulate its own judicial procedures, it may also displace substantive choices made by a state that the federal system lacks the authority to make itself. True, the federal law speaks to courtroom activity, but technically so too would federal laws concerning whether evidence was sufficient to allow a claim to be submitted to a jury if there was no support for an element necessary to recovery or whether a defense should be stricken as legally insufficient. Although Congress may clearly weigh competing procedural policies as it sees fit under its power to

create inferior federal courts, the limitation Congress has imposed on the Supreme Court’s rulemaking power—that procedural and evidentiary rules must not displace substantive law—should be imposed on Congress as well if Congress lacks the authority to create the substantive law it displaces. Otherwise, the general police power which the constitutional structure sought to keep out of federal hands may creep in through a door thought to be locked by Erie.

An obvious reply to this argument is that because the Commerce Clause door is already wide open, such limitation on congressional authority makes little practical or even theoretical difference. If the only limitation is that Congress must have authority pursuant to other provisions of Article I, Section 8 of the Constitution in order to consider implicated substantive policies, such authority will almost always be present, and the spousal testimony problem is only a law professor’s bizarre hypothetical. However, there does exist an independent restraint on Congress’s ability to consider substantive policies in the context of creating procedural rules: politically protected federalism. Although the difficulties raised by achieving substantive regulatory goals through the use of procedural law are different from those


108. In fact, Rule 501 of the Federal Rules of Evidence obviates even the hypothetical problem by providing that if a claim or defense is to be decided under state law, state law also is to provide the rules of testimonial privilege. The protection thus given state substantive policy, however, is not absolute. If a case involves both federal and state claims, testimony admissible under federal but not state law may be admitted and considered by the jury with respect to both claims. See Hancock v. Hobbs, 967 F.2d 462 (11th Cir. 1992). Furthermore, at least one district court has held, against all logic, that federal law controls the admissibility of evidence relevant only to the state claim if that claim is pendent to a federal question. Doe v. Special Investigations Agency, Inc., 779 F. Supp. 21 (E.D. Pa. 1991).

In a different context, however, the rules of evidence themselves raise the issue. Compare Fed. R. Evid. 408 (preventing a jury from being told of the existence and amount of any settlement agreement between the plaintiff and a prior third-party defendant) with Tritsch v. Boston Edison Co., 293 N.E.2d 264, 267 (Mass. 1973) (holding that a defendant could “show in evidence the amount of money paid or promised to the plaintiff” in order to mitigate damages). In Carota v. Johns Manville Corp., 893 F.2d 448 (1st Cir.), cert. denied sub nom. Carota v. Celotex Corp., 497 U.S. 1004 (1990), a diversity case, the United States Court of Appeals for the First Circuit held state law to be controlling even though the court recognized that the issue fell into a “twilight zone” rationally capable of being classified either as substantive or procedural. Id. at 450. The court reasoned that since the state policy “reflects a view of [settlement] evidence as substantive, because the jury’s hearing of this evidence affects the substantive rights of plaintiffs to damages,” failure to utilize state law would “usurp [ ] from [the Massachusetts Supreme Judicial Court] the power to formulate its own policies and to give force to its own law.” Id. at 451. The Carota opinion is noteworthy because it rejected the usual unhinging judicial acceptance of what the court apparently assumed to be relevant federal rules, and because the court furnished no real justification for its decision other than its desire not to frustrate state substantive policy. Id. But see Humenik v. Celotex Corp., 908 F.2d 962 (3d Cir.), cert. denied, 498 U.S. 983 (1990).
noted in the similar use of the spending power, they are, if anything, more severe. 109

In order to be enforceable, regulatory spending conditions must be clearly stated. The states' inability to resist their imposition successfully is political. 110 This is not the case, however, with substantive changes resulting from procedural laws. A state with a strong policy against the enforcement of forum selection clauses, for example, would hardly perceive its policy to be threatened by a congressional statute permitting the transfer of a case filed in one federal district court to another district court "[f]or the convenience of parties and witnesses, in the interest of justice." 111 Yet judicial interpretation of that federal procedural law has directed a transfer in accordance with such a clause, even though it was unenforceable in the state in which the transferring district court sat. 112 The failure to require a clear statement from Congress also raises problems of judicial interpretation. It is as unclear that Congress considered and intended the federal negation of state policy as it is that the states whose policy was thus negated were aware of the impact of the proposed legislation. 113 Assuming that Congress does have the authority to consider the substantive policies affected by its procedural choices, such consideration needs to be undertaken openly. Either the Supreme Court should insist that the displacement of state substantive policies by a procedural rule must be clearly stated, 114 or it should preclude such

109. See id.
110. See supra notes 39-44 and accompanying text (discussing the political challenge states fare in opposing spending conditions).
113. Similar interpretive difficulties arise in nearly every preemption case. Yet when the congressional act is clearly regulatory, while neither Congress nor the states may have a complete understanding of its impact on state law (Congress because it may well be unaware of precisely what state law there is, and the states because they cannot accurately predict judicial decisions), both Congress and the states are aware of the potential problem. A state with a strong aversion to arbitration would have had the opportunity to lobby against a federal law making agreements to arbitrate enforceable in any contract affecting interstate commerce, a red flag not available under the facts of Stewart.
114. Current Supreme Court doctrine contains the theoretical seed of such a requirement, although its potential for growth suffered a severe set-back in Stewart, 487 U.S. at 22. Ever since Ragan v. Merchants' Transfer & Warehouse Co., 337 U.S. 530 (1949), the Court has insisted that a threshold inquiry must be made as to whether an argued-for federal rule was intended to govern the issue raised. For example, if a rule defining when a claim is commenced is not designed to define when the applicable statute of limitations is tolled, then the conflict is between federal and state common law. See generally Converse v. General Motors Corp., 893 F.2d 513 (2d Cir. 1990) (choosing state law over competing federal common law to grant summary judgment to a defendant served after the statute of limitations had run); Sentry Corp. v. Harris, 802 F.2d 229 (7th Cir. 1986), cert. denied, 481 U.S. 1004 (1987); Walco Corp. v. Burger Chef Sys., Inc., 554 F.2d 1165 (D.C. Cir. 1977); Mitchell A. Lowenthal et al., Spe-
indirect displacement altogether and demand that substantive issues be regulated only by reference to some other enumerated power.115

Three issues currently confronting lower courts clearly illustrate the problem: forum selection clauses, the preclusive effect of judgments, and the interpretation of settlement agreements. Each will be considered, the first quite thoroughly and the others more briefly, in an attempt to clarify what

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115. Failure to do either frustrates a state’s efforts to defend its autonomy and contributes to a lack of judicial and congressional consideration and recognition of federal limitations. An example of this can be found in the context Rule 407 of the Federal Rules of Evidence, which addresses the admissibility of evidence of subsequent remedial measures. Fed. R. Evid. 407 (preventing the use of evidence of subsequent remedial measures to prove negligence). The Advisory Committee notes justify the rule—statutorily adopted without change—on the basis of precluding admission of technically irrelevant evidence, but the Advisory Committee concedes that the “more impressive” rationale for exclusion is a “social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety.” Fed. R. Evid. 407 advisory committee’s note. While the Commerce Clause clearly justifies federal regulation of business safety, see, for example, Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (1970) (codified as amended at 29 U.S.C. §§ 651-678 (1988)), no reference is made by the Advisory Committee to regulatory power, and the notion that all “social policy” is within the realm of federal control is antithetical to the concept of a central government with limited power. Perhaps even more disturbing is the interpretation of Rule 407 by the United States Court of Appeals for the Tenth Circuit, which stated that: “[Rule 407 was] designed to promote state policy in a substantive law area.” Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917, 932 (10th Cir.), cert. denied, 469 U.S. 853 (1984). If the rulemakers recognized the issue of safety as one of state concern, it is disconcerting to think that the rulemakers would attempt substantive federal encouragement. In Moe, the Tenth Circuit found Rule 407 inapplicable when the federal rule was contradictory to the state law, presumably in acknowledgement of the state’s primary authority in the definition of state policy. Id. That result, however, does not reflect a majority of the circuits. See, e.g., Kelly v. Crown Equip. Co., 970 F.2d 1273, 1278 (3d Cir. 1992) (holding that Rule 407 applied in a diversity case because it is “‘arguably procedural’”) (quoting Hanna v. Plumer, 380 U.S. 460, 476 (1965) (Harlan, J., concurring)).
policies are appropriately considered in what context, and to suggest a limit on congressional power necessitated by political federalism.

A. The Use of Forum Selection Clauses

The Supreme Court's decision in *Stewart Organization, Inc. v. Ricoh Corp.*\(^\text{116}\) provides an example of precisely the approach the Supreme Court should not take. In *Stewart*, the plaintiff filed a breach of contract claim against the defendant in a federal district court in Alabama.\(^\text{117}\) The defendant moved to transfer the case under 28 U.S.C. § 1404(a)\(^\text{118}\) to a federal district court in New York in accordance with a forum selection clause admittedly unenforceable in Alabama state courts.\(^\text{119}\) The questions posed by the majority are clearly the correct ones: does § 1404 control the issue of the clause's enforceability and, if so, is § 1404 (thus interpreted) within Congress's power to pass?\(^\text{120}\) Just as clearly, however, the answers to those questions are incorrect.

The majority reasoned that the federal statute was designed to ensure a "flexible and multifaceted analysis . . . [of] motions to transfer within the federal system,"\(^\text{121}\) and that forum selection clauses are therefore one relevant consideration;\(^\text{122}\) state law refusing to enforce them does not make them irrelevant unless the contrary federal law is unconstitutional. Unsurprisingly, the majority\(^\text{123}\) held that "[t]he constitutional authority of Congress to enact § 1404(a) is not subject to serious question."\(^\text{124}\) Relying solely on its classification as a procedural rule in various other contexts and citing


\(^{117}\) The complaint in *Stewart* also included an antitrust claim, but none of the opinions relied on the distinction between 28 U.S.C. § 1331 (1988) and 28 U.S.C. § 1332 (1988). For purposes of analysis, the case was treated as one in which state law provided the rules of decision. *Id.* at 26 n.3.

\(^{118}\) Title 28 U.S.C. § 1404(a) (1988) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

\(^{119}\) *Stewart*, 487 U.S. at 24.

\(^{120}\) *See id.* at 26-27.

\(^{121}\) *Id.* at 31.

\(^{122}\) *Id.* at 29-31. In a concurring opinion joined by Justice O'Connor, Justice Kennedy stated that "the authority and prerogative of the federal courts . . . should be exercised so that a valid forum-selection clause is given controlling weight in all but the most exceptional cases." *Id.* at 33 (Kennedy, J., concurring) (citing *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972)). As their citation to *The Bremen* makes clear, validity refers to contractual validity under federal standards, not contractual or jurisdictional validity under state law. *Id.*

\(^{123}\) The concurring opinion had no comment on congressional power per se. Nor did Justice Scalia's dissent reach this second question. *See id.* at 33 (Scalia, J., dissenting).

\(^{124}\) *Id.* at 32.
Hanna v. Plumer's "arguably procedural, ergo constitutional" test, the Court disposed of the issue in a single paragraph.

Justice Scalia's dissent focused solely on the first issue—the scope of § 1404(a). Initially, he noted that the statutory language requires the Court to consider the likely future course of litigation and argued that, "without adequate textual foundation," the majority required lower federal courts to consider the past activities of the parties in deciding a motion to transfer. More importantly, however, he noted:

§ 1404(a) was enacted against the background that issues of contract, including a contract's validity, are nearly always governed by state law. It is simply contrary to the practice of our system that such an issue should be wrenched from state control in absence of a clear conflict with federal law or explicit statutory provision. . . . Section 1404(a) is simply a venue provision that nowhere mentions contracts or agreements, much less that the validity of certain contracts or agreements will be matters of federal law. It is difficult to believe that state contract law was meant to be pre-empted by this provision that we have said 'should be regarded as a federal judicial housekeeping measure' . . . .

Justice Scalia further compared the general language of § 1404 to the highly specific, preemptory language of the Federal Arbitration Act, and concluded that if Congress wished to displace state law regarding the enforceability of certain kinds of contract clauses, Congress could do so explicitly.

The concern of Justice Scalia's dissent in Stewart was with congressional intent. Yet § 1404's lack of specificity does more than make it difficult to perceive that intent. It also makes it difficult, if not impossible, for states to defend their law of contracts against federal incursions. At the very least,

126. Id. at 476 (Harlan, J., concurring).
127. Stewart, 487 U.S. at 32.
128. See id. at 33 (Scalia, J., dissenting).
129. Id. at 34.
130. Id. at 36-37 (quoting Van Dusen v. Barrrack, 376 U.S. 612, 636-37 (1964), superseded by statute as stated in Ross v. Colorado Outward Bound Sch., Inc., 822 F.2d 1524 (10th Cir. 1987)).
132. Having found § 1404 inapplicable, Justice Scalia went on to argue that since the failure to utilize Alabama law would lead to forum shopping and discrimination against those without a comparable opportunity to shop, the Rules of Decision Act required the district court to follow state law.

Ordinarily, if the state law arguably preempted by federal legislation regulates a field traditionally left to the states, Congress needs to speak clearly to reflect its preemptive intent. See Gregory v. Ashcroft, 111 S. Ct. 2395 (1991); Pacific Gas & Elec. v. State Energy Resources Comm'n, 461 U.S. 190 (1983). Apparently blinded by Hanna, the Stewart majority managed to totally ignore obviously necessary restraints on its own imagination. Stewart, 487 U.S. at 40.
the Court's interpretation of congressional intent should not ascribe to Congress the desire to displace state substantive law unless such desire is express.

Even assuming that the congressional command to enforce forum selection clauses is clearly expressed, there remains a concern with the source of congressional authority to displace contrary state law. The route chosen by Congress in passing the Federal Arbitration Act was, under current constitutional doctrine, clearly proper.\textsuperscript{133} It rests on Congress's regulatory powers over admiralty and interstate commerce,\textsuperscript{134} not on congressional authority to create procedural rules for federal courts. Therefore, the Act governs the enforceability of arbitration clauses in state as well as federal courts, and is a substantive federal law that preempts contrary state law pursuant to the Supremacy Clause.\textsuperscript{135} As written and interpreted in \textit{Stewart}, however, § 1404 rests on the procedural authority of Congress alone. While this "choice" does leave the states free to apply their own policies regarding forum selection clauses in cases brought in their own courts, it raises a serious concern about the scope of federal procedural authority, even when that authority is bolstered by the Necessary and Proper Clause.

In determining whether any forum selection clause should be enforceable, any decisionmaking body must consider at least three competing policies. Historically such clauses were disfavored as a private attempt to "oust[]" a court of jurisdiction otherwise properly taken in a time when courts strongly resisted any attempt to curtail their jurisdiction.\textsuperscript{136} Congress may legiti-


\textsuperscript{134} Prima Paint Co. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967). The extent to which the Act may permit arbitration contrary to competing commercial policies is a matter of congressional intent, but the Court broadly construes agreements to arbitrate, particularly in the international context, even when such agreements arguably run afoul of the enforcement policies embodied in federal antitrust laws. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626-28 (1985); see also Scher v. Alberto-Culver Co., 417 U.S. 506 (1974) (enforcing arbitration clauses arising in an international context against a claim that such clauses violate federal securities laws).


As interpreted, however, the degree of interference with state choices is less than might be expected. In Volt Info. Sciences, Inc. v. Board of Trustees, 489 U.S. 468 (1989), the Supreme Court held that the Federal Arbitration Act created the right to compel arbitration agreed to by the parties; however, it did not preclude the use of state law to interpret the arbitration clause, even when the state law interpreted such clauses to permit a stay of arbitration pending judicial resolution of related disputes between a party to the contract and third parties. \textit{Id.} at 474-77. Justice Brennan dissented, joined by Justice Marshall, and argued that federal law must resolve issues that are necessarily antecedent to the enforcement of a federal law. \textit{Id.} at 488-91 (Brennan, J., dissenting).

mately take into account such a consideration because of its authority to control the jurisdiction of the inferior federal courts it creates within the limits of Article III. Depending upon congressional judgment concerning the sanctity of jurisdictional grants, the clauses could be enforceable or not and the judgment would, in either event, be a procedural one.\textsuperscript{137}

Furthermore, such clauses may be viewed as reflecting the contracting parties' judgment regarding a convenient location for litigation. Certainly there is a strong, valid systemic interest in resolving disputes in a forum where the costs to the parties, witnesses and court itself are as low as possible. This is the clear goal of § 1404\textsuperscript{138} and is obviously only procedural when the competing fora are parts of the same judicial system. To some extent, the majority opinion in \textit{Stewart} supports this interpretation; it refers to the forum selection clause as "represent[ing] the parties' agreement as to the most proper forum" and treats it as a relevant factor in the § 1404 analysis.\textsuperscript{139} There are, however, serious difficulties with concluding that policies supporting convenience underlie a congressional choice to enforce selection clauses.

First, at the time of contract negotiation, the contours of future litigation cannot be known to the parties. Without knowing where the dispute arose, what the dispute is about, and what evidence is likely to be relevant, it is hard to imagine a reasoned determination about convenient locale except to the extent that "convenience" is equated with "at my home." Second, the parties, even if they could predict their future disagreement, are unlikely to take into account any convenience beyond their own. As does the literal language of § 1404, the identified procedural policy would logically rely on the court as the decisionmaker best equipped to balance the competing interests of the parties, witnesses, and system.

The history of the \textit{Stewart} case on remand is instructive. The United States District Court for the Northern District of Alabama, using a traditional § 1404 analysis, refused to transfer the case to the Southern District of New York, finding that since neither Alabama nor New York was demonstrably more convenient than the other, the presumption in favor of the

\textsuperscript{137} Focusing on "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them," \textit{Colorado River Water Conservation Dist. v. United States}, 424 U.S. 800, 817 (1976), would lead to the unenforceability of forum selection clauses, while focusing on assorted but distinguishable abstention doctrines could result in enforceability for competing policy reasons. See infra notes 136-49 and accompanying text (discussing the enforceability of forum selection clauses for competing policy reasons).

\textsuperscript{138} \textit{Van Dusen v. Barrack}, 376 U.S. 612, 616 (1964) (stating the purpose of § 1404), \textit{superseded by statute on other grounds as stated in Ross v. Colorado Outward Bound Sch., Inc.}, 822 F.2d 1524 (10th Cir. 1987).

\textsuperscript{139} \textit{Stewart Org., Inc. v. Ricoh Corp.}, 487 U.S. 22, 31 (1988).
plaintiff’s choice had not been overcome. The United States Court of Appeals for the Eleventh Circuit reversed, reasoning that the existence of a valid forum selection clause shifted the burden of persuasion to the party attempting to circumvent the clause, a burden that party could meet only upon a showing of exceptional circumstances. In determining that deference to the plaintiff’s alternative choice was inappropriate, the Eleventh Circuit noted that “[s]uch deference . . . would only encourage parties to violate their contractual obligations, the integrity of which are vital to our judicial system.” And there’s the rub. The policy competing with the historical procedural concern of protecting the existence of subject matter jurisdiction is not a procedural policy directing litigation to the most convenient forum as pre-determined by the parties. Rather, it is a substantive choice about the sanctity of contractual obligation, untied by § 1404 to any regulatory power of Congress.  


141. In re Ricoh Corp., 870 F.2d 570 (11th Cir. 1989). In a similar situation, the United States Court of Appeals for the Seventh Circuit reached an opposite conclusion. Heller Fin., Inc. v. Midwhey Powder Co., 883 F.2d 1286 (7th Cir. 1989). The Seventh Circuit held that § 1404 did not compel the transfer of a case in accordance with a forum selection clause when such a transfer would serve neither the interests of justice nor the convenience of witnesses, although the court did agree that the clause was dispositive with respect to arguments regarding the convenience of the parties. Id. at 1293; see also Red Bull Assocs. v. Best W. Int’l, 862 F.2d 963, 967 (2d Cir. 1988) (refusing to transfer a racial discrimination claim in accordance with a forum selection clause because to do so would inhibit enforcement of civil rights laws by local “‘private attorney[s] general’”).

142. Ricoh, 870 F.2d at 573-74. Such exceptional circumstances apparently do not include contrary public policy in the forum in which suit was instituted, although the Supreme Court in The Bremen stated that such a policy would preclude enforcement. The Bremen v. Zapata, Off-Shore Co., 407 U.S. 1, 15-16 (1972). No such federal policy, of course, was found in The Bremen, where the Court noted that the claim arose in international rather than U.S. waters. Id. at 15. In the absence of admiralty or interstate commerce ties, the policy precluding enforcement, the ouster of jurisdiction, was specifically rejected. The remaining issue left open by the Court—whether contrary state policy would preclude enforcement—was ultimately addressed in Stewart. The initial Court of Appeals opinion in Stewart held that state policies were irrelevant. Stewart Org., Inc. v. Ricoh Corp., 779 F.2d 643, 649 (11th Cir.), vacated, 785 F.2d 896 (11th Cir. 1986) (en banc), aff’d, 487 U.S. 22 (1988). However, a subsequent en banc opinion held that the clause would not be enforceable if it contravened a strong state policy, but found that the state’s concern was limited to protecting the jurisdiction of its own courts. Stewart Org. Inc. v. Ricoh Corp., 810 F.2d 1066, 1069-70 (11th Cir. 1987) (en banc), aff’d, 487 U.S. 22 (1988).

143. Ricoh, 870 F.2d at 573 (emphasis added) (citations omitted).

144. Opinions by the Supreme Court and the United States Court of Appeals for the Eleventh Circuit have looked to the importance of contractual obligation in dealing with such clauses. One judge noted:

The enforceability of contract provisions is typically an issue of substance which a federal court sitting in its diversity jurisdiction must decide according to state law. The correctness of venue in the federal court system is, on the other hand, a procedural matter that is governed by federal statutes and rules of procedure.
That the enforceability of forum selection clauses is a function of contract law rather than a device to ensure procedural convenience is clearly revealed by the way in which federal courts determine the validity of such clauses. Traditional notions of contract law require that the clause govern unless there was fraud, undue influence, or the presence of overweening bargaining power.\textsuperscript{145} Therefore, if the clause is determined to have been freely and fairly negotiated between parties of similar stature, it is valid.\textsuperscript{146} Considerations of convenience play no role in the analysis.\textsuperscript{147} Interestingly, the court

\textit{Stewart}, 779 F.2d at 651 (Godbold, C.J., dissenting). Another judge stated: "I find it self-evident that the interests of justice would best be served by respecting a valid contract." \textit{Stewart}, 810 F.2d at 1074 (Tjoflat, J., concurring). When the case reached the Supreme Court, Justice Kennedy noted that "enforcement of valid forum-selection clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system." \textit{Stewart}, 487 U.S. at 33 (Kennedy, J., concurring).

145. \textit{The Bremen}, 407 U.S. at 12; see also ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 6, at 10 (2d ed. 1982). The Supreme Court justified its decision to abandon the traditional jurisdictional concern by reference to the international "expansion of American business and industry," \textit{The Bremen}, 407 U.S. at 9, and "ancient concepts of freedom of contract," \textit{id.} at 11. Although arising in admiralty, the determination of the validity of any forum selection clause under federal law is made in accordance with \textit{The Bremen's} standard.

146. \textit{Ricoch}, 870 F.2d at 573.

147. It is true that the Eleventh Circuit, in determining on remand the validity of the forum selection clause involved in \textit{Stewart}, did refer to the "reasonableness" of the choice in light of the defendant's incorporation in the chosen forum. \textit{Id.} However, no consideration was given to what weight that factor might have in a balanced analysis of convenience. Certainly, alone it makes New York no more "reasonable" than Alabama, the plaintiff's home state.

Furthermore, the governing standard from \textit{The Bremen} explicitly recognizes that the contractual choice of forum may create serious inconveniences for the contracting parties, and the parties may address such issues prior to contracting. \textit{The Bremen}, 407 U.S. at 17. While the \textit{Bremen} Court acknowledged that a contractual choice to resolve an essentially local dispute in an alien forum might indicate a contract of adhesion, the facts of the case demonstrate the difficulty of such an argument. \textit{Id.} at 2-8. The disputed contract involved parties from Texas and Germany and dealt with the towing of a Texas drilling rig from Louisiana to Italy. \textit{Id.} at 2-3. The rig was damaged in the Gulf of Mexico (international waters) and towed to Florida, where suit was brought in federal district court. \textit{Id.} at 3-4. The forum stipulated by the contract was London and the Supreme Court enforced the contractual requirement. \textit{Id.} at 2, 20. Lack of contact with the chosen forum is therefore not determinative. Given the facts of the case, the result is not overly troubling. It is likely that both parties bargained extensively. The Texas party did not challenge the clause, \textit{id.} at 3, and since English law was less favorable to it than was the law of the United States, it seems probable that the Texas party perceived some off-setting advantage, possibly the likelihood of litigation in a German court in the absence of contrary contractual selection. More troublesome, however, is the Court's analogous reliance on \textit{National Equipment Rental, Ltd. v. Szukhent}, 375 U.S. 311 (1964), for the proposition that a contractual provision appointing a citizen within a particular forum to act as a contracting party's agent for service of process may support the forum's exercise of personal jurisdiction over the contacting party in the absence of constitutionally required contacts between the contracting party and the forum state. \textit{The Bremen}, 407 U.S. at 10-11. As a general proposition, the statement is inarguably true. However, as suggested by the four dissenting Justices, the facts in \textit{Szukhent} certainly raise at least an inference that the provision was one of adhesion. \textit{Szukhent} involved a corporate lessor of equipment suing individual non-resident
also does not ordinarily consider whether, absent such a clause, the chosen forum would be one that could assert personal jurisdiction over the defendant\textsuperscript{148} or one that could convincingly deny a motion to transfer under § 1404. Apparently, enforcement of the parties’ choice of forum is appropriate in the same universe of circumstances as enforcement of their choice of purchase price.\textsuperscript{149}

Before turning to the constitutionality of congressional action relating to forum selection clauses under its power to create inferior federal courts, it should be noted that Stewart left unresolved the issue of forum selection clause enforceability in situations not governed by § 1404. Absent a federal question, clauses that specify a foreign tribunal would clearly seem to be governed by state law. Whatever the limits on congressional authority, Con-

\footnotesize{lessees in the forum state of the corporate home, based on a printed form contract appointing an “agent” in the forum state unknown to the lessee and possibly related to the lessor. Szuk-\textit{hent,} 375 U.S. at 313-14. In situations where the parties are unequal in terms of bargaining power, if the Court would nonetheless uphold an exclusive forum selection clause, the \textit{Szuk-\textit{hent}} difficulty is exacerbated.}

\textsuperscript{148} But see Bryant Elec. Co. v. City of Fredericksburg, 762 F.2d 1192 (4th Cir. 1985) (refuting the plaintiff’s argument that the \textit{Bremen} standard applied by the state justified not enforcing the clause, and noting that the selection of the defendant’s home state, which could exercise general jurisdiction, was therefore presumptively reasonable); \textit{cf.} Seward v. Devine, 888 F.2d 957 (2d Cir. 1989) (holding that in determining whether the forum selected by the controlling clause was to be interpreted as the sole forum in which litigation was to proceed, a non-exclusive interpretation would render the clause meaningless since the defendant was subject to general jurisdiction in the forum state); Sterling Forest Assocs. v. Barnett-Range Corp., 840 F.2d 249 (4th Cir. 1988) (same).

\textsuperscript{149} For an insightful critique of this approach, see Linda S. Mullenix, \textit{Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court,} 57 FORDHAM L. REV. 291 (1988).

The mix-and-matching of procedural and substantive policies, however, should not be assumed necessarily to guarantee the victory of substance over procedure. While the “sanctity of contract” outweighs the “ouster of jurisdiction,” the former is in turn outweighed by procedural policies against interlocutory appeals. Thus, if a district court refuses to dismiss a case based on compliance with a forum selection clause, the frustrated defendant could no more maintain an immediate appeal than if the grounds of dismissal were purely procedural. Lauro Lines s.r.l. v. Chasser, 490 U.S. 495, 499 (1989). The majority opinion in \textit{Lauro} focused on the requirement that in order to permit interlocutory review, the lower court’s decision must be effectively unreviewable on appeal from a final judgment. \textit{Id.} at 498. Because the right at issue is exemption from trial only within a specified forum, the requirement is not met. \textit{Id.} at 500. Confronted with the argument that \textit{The Bremen} evidences the contrary view that trial is only available within the specified forum, the \textit{Lauro} majority held that the policy went to the merits of the right, not to its “precise contours.” \textit{Id.} at 501. Frankly, I do not understand their reponse. Perhaps Justice Scalia’s concurring opinion posed the issue more starkly: how “important” are the competing policies. \textit{Id.} at 502-03 (Scalia, J., concurring). In opting for a bar against interlocutory appeals, however, Justice Scalia assumes that the policies supporting immediate review are the same as those that would support similar review from alleged statutory or treaty jurisdictional rights. \textit{Id.} at 503. Since interlocutory appeals are not allowed in those instances, none should be allowed when the right springs from private contract. The sanctity of contractual obligation, however, remains unresolved.
gress has statutorily restrained the district courts by commanding that in non-federal question claims, district courts must use state law as "rules of decision." As interpreted by the Supreme Court, if the difference between state and proposed federal common law would lead parties to shop for the federal forum, state law is to be followed as a "rule[ ] of decision." If a state would not enforce the clause but the federal court would, obviously the party wishing to litigate abroad would choose, presumably through removal, the federal forum.

Prior to Stewart and its reliance on § 1404, at least two federal circuit courts of appeals considered the enforceability of clauses specifying a state forum to be a question of state law. Logically, outside the context of

152. To the extent that the Supreme Court's concern with forum shopping is that not all parties have the opportunity to select a federal forum, specifically those whose dispute is either not with completely diverse opponents or not worth more than $50,000, that concern is exacerbated in the present context. No reasonable plaintiff confronted with a foreign forum-selection clause would file suit in a court sure to dismiss her complaint. But see Sibaja v. Dow Chem. Co., 757 F.2d 1215 (11th Cir.) (affirming the dismissal of a foreign plaintiff's complaint due to the federal doctrine of forum non conveniens, although under Florida law such dismissal would be improper because one of the parties was a state resident), cert. denied, 474 U.S. 948 (1985). Defendents, not plaintiffs, will forum shop. But only defendants who qualify for diversity jurisdiction, are not from the forum state, or are not joined with other defendants from the forum state, may engage in removal. It is unlikely that a local defendant would wish to enforce a foreign forum-selection clause; it does not, however, seem improbable that a foreign defendant joined with a local defendant would wish to do so. Today, of course, most states enforce at least some foreign forum-selection clauses, although Alabama, Florida, Georgia, Missouri, and Texas apparently do not. See Redwing Carriers, Inc. v. Foster, 382 So.2d 554 (Ala. 1980); Zurich Ins. Co. v. Allen, 436 So.2d 1094 (Fla. Dist. Ct. App. 1983), review denied, 446 So.2d 100 (Fla. 1984); Cartridge Rental Network v. Video Entertainment, Inc., 209 S.E.2d 132 (Ga. Ct. App. 1974); State ex rel. Gooseneck Trailer Mfg. v. Barker, 619 S.W.2d 928 (Mo. Ct. App. 1981); Dowling v. NADW Mktg., 631 S.W.2d 726 (Tex. 1982). If the state enforces the same clauses that the federal court would enforce, the choice of state or federal law becomes one of purely academic interest. See, e.g., Coastal Steel v. Tilghman Wheelabator Ltd., 709 F.2d 190 (3d Cir.), cert. denied, 464 U.S. 938 (1983). The problem remains significant because the tests employed by the courts are not uniform.
§ 1404 state law would presumably still be thought to govern.\textsuperscript{155} The United States Court of Appeals for the Ninth Circuit, however, explicitly held in \textit{Manetti-Farrow, Inc. v. Gucci America, Inc.}\textsuperscript{156} that federal law controls. The court stated:

We conclude that the federal procedural issues raised by form selection clauses significantly outweigh the state interests, and the federal rule announced in \textit{The Bremen} controls enforcement of forum clauses in diversity cases. Moreover, because enforcement of a forum clause necessarily entails interpretation of the clause before it can be enforced, federal law also applies to interpretation of forum selection clauses.\textsuperscript{157}

Two other circuits seem to assume such control.\textsuperscript{158}

The Ninth Circuit's opinion initially appears at least to focus on procedural rather than contractual policies. It acknowledges the role played in its determination to use federal common law by the desire to avoid forum shopping, relies on the fact that this goal must be balanced against others,\textsuperscript{159} and concludes that a federal \textit{procedural} interest in uniform venue rules outweighs an undefined state interest.\textsuperscript{160} Nowhere does the court, however, consider the balance between an interest in uniformity and the interest in avoiding forum shopping. Since the use of federal common law as opposed

\textsuperscript{155} See supra notes 113-32 and accompanying text (discussing the application of § 1404 in \textit{Stewart Org., Inc. v. Ricoh Corp.}, 487 U.S. 22 (1988)).

\textsuperscript{156} 685 F.2d 509 (9th Cir. 1988).

\textsuperscript{157} Id. at 513 (citation omitted). The \textit{Manetti-Farrow} court canvassed various opinions from the United States circuit courts of appeals on forum-selection clauses as of 1988. Id. at 512-13.


\textsuperscript{159} The court cited \textit{Byrd v. Blue Ridge Rural Elec. Coop.}, 356 U.S. 525 (1958), for the proposition that the federal interest in utilizing federal law is to be balanced against the state interest in the use of state law. \textit{Manetti-Farrow}, 858 F.2d at 513. Although common, this reading of \textit{Byrd} is simply wrong. In \textit{Byrd}, the Supreme Court focused on the interest of South Carolina in having a judge rather than a jury decide whether the plaintiff was a statutory employee of the defendant in deciding whether state law was "bound up with [state-created] rights and obligations in such a way that its application in the federal court is required." \textit{Byrd}, 356 U.S. at 535. Concluding that the choice of decisionmaker was historically fortuitous, the \textit{Byrd} Court considered separately whether the procedural (as opposed to constitutional) concern of \textit{Erie} to avoid forum-shopping mandated the use of state law. Id. at 536-37. The Court resolved the question by applying a balancing test, but balanced conflicting \textit{federal} procedural policies: the desire to avoid forum shopping against an "essential characteristic" of an "independent system of administering justice," specifically the distribution of "trial functions between judge and jury." Id. at 537. Nowhere did the Court attempt to balance state and federal interests.

\textsuperscript{160} \textit{Manetti-Farrow}, 858 F.2d at 513.
to state law would always promote uniformity, it is difficult to understand just when state law would be followed. More troublesome, however, is the Ninth Circuit's relatively uncritical acceptance of uniformity of venue rules as an unquestionably legitimate systemic goal.\textsuperscript{161} The trouble lies on two levels.

First, the court relies on the opinion of the United States Court of Appeals for the Eleventh Circuit in \textit{Stewart v. Ricoh Corp.}\textsuperscript{162} \textit{Stewart}, in turn, relied on the existence of statutory venue provisions and federal rules regarding waiver of the defense, as well as the effect of a dismissal for improper venue in subsequent litigation between the parties, to conclude that "Congress considered this a question appropriately governed by federal legal standards."\textsuperscript{163} The logic that led the Ninth and Eleventh Circuits to conclude that making systemic choices in the absence of party choices necessarily implies a desire to regulate the effect of those party choices is elusive at best. Both courts seem to imply that Congress intended to preempt all state laws touching on venue. Otherwise, the Rules of Decision Act\textsuperscript{164} would arguably preclude the creation of federal common law, but the courts failed to apply any preemption analysis and, even if they did so, such analysis does not lead to the courts' conclusion.\textsuperscript{165} Second, assuming that Congress did intend that all questions affecting venue in the federal system be decided pursuant to a uniform body of federal law, the source of authority supporting that intent raises issues of power and federalism. Unquestionably, in the absence of involvement by the parties, Congress may, under its Article I authority, directly allocate or permit the courts to fashion common law to allocate the judicial business of the federal system among various inferior courts in any rational manner it chooses. However, equally unquestionable is the fact that a desire for uniformity alone is not sufficient to uphold federal lawmaking. No matter how strongly the federal system desires uniform results in all tort cases within its subject matter jurisdiction, for example, to achieve that result there must be a supporting grant of authority within Article I of the

\textsuperscript{161} \textit{Id.}
\textsuperscript{162} 810 F.2d 1066 (11th Cir. 1987), aff'd, 487 U.S. 22 (1988).
\textsuperscript{163} \textit{Id.} at 1068.
\textsuperscript{165} \textit{See generally Gerald Gunther, Constitutional Law} 291-305 (12th ed. 1991) (discussing the preemption of state authority, trends in preemption cases, and consent to state laws). It is difficult to characterize the assorted venue provisions as a pervasive federal regulatory scheme. The federal interest in the private parties' choice of the forum for litigation hardly seems "dominant" and, in any event, may be misplaced in the procedural context. \textit{See supra} note 130 and accompanying text (discussing Justice Scalia's disagreement with federal preemption in the area of forum selection). There is no necessary or even implicit inconsistency between the use of the federal provisions, which nowhere deal with the instant situation, and state law regarding the enforceability of forum-selection clauses.
Constitution. The goal of uniformity justifies the choice of generic federal venue statutes over adoption of state laws, but the ability to choose at all depends on the ability to create inferior federal courts. Once the parties attempt to control the choice of forum through private agreements, other considerations beyond procedural regulation are brought into play. Thus, as in Stewart, the question arises of whether and how Congress may take into account substantive policies in crafting apparently procedural rules.

For more than fifty-five years, it has been accepted that in attempting to achieve procedural goals, Congress may consider and reject substantive policies that cut against those goals.\textsuperscript{166} This is problematic unless Congress has an independent grant of authority to judge the substantive policies and is questionable because of its impact on the political ability of states to resist incursions into areas traditionally left to local governance.\textsuperscript{167} The forum selection clause fact pattern, however, raises precisely the opposite problem. Neither Congress nor the Supreme Court concluded that the systemic interest in determining whether and in what cases litigation may proceed requires that if jurisdiction and venue are properly invoked, a court may not be "ousted" of that jurisdiction by a private contractual agreement, even though substantive policies of contractual obligation are thereby rejected. Instead, the Supreme Court—and, according to the Court, Congress—has concluded that the importance of enforcing valid contractual agreements is paramount, a determination enforced under the rubric of a "procedural" choice, albeit a substantive determination nonetheless. Even if it is necessary and proper to reject a substantive policy competing with a procedural goal in regulating inferior federal courts, it does not follow that it is necessary and proper to consider and accept such a substantive policy to supplant a procedural goal in regulating inferior federal courts. The achievement of substantive policy is not a subset of subject matter jurisdiction; it is a result of regulatory authority vested in Congress by other constitutional clauses and as such, should be grounded there. To do so assures that both Congress and the states realize the impact of the choice, and such realization may lead to legislative rejection of the substantive choice.

If the state choice displaced by the federal enforcement of forum selection clauses is a procedural one, the federalism concern underlying the argument thus far may be muted. The state's concern is thought to be the protection of its courts' jurisdiction and may simply not be implicated if the jurisdictional ouster affects federal court jurisdiction.\textsuperscript{168} It is, however, conceivable

\textsuperscript{166} See supra notes 98-109 and accompanying text.
\textsuperscript{167} See supra notes 39-44 and accompanying text.
\textsuperscript{168} The identical argument convinced the Eleventh Circuit in Stewart that no strong state public policy would be offended by the enforcement of the clause. Stewart Org., Inc. v. Ricoh, 810 F.2d 1066, 1069-70 (11th Cir. 1987), aff'd, 487 U.S. 22 (1988). See generally Allan R.
that the refusal to enforce such clauses is a reflection of a state desire to keep local courts open for suits brought there by local residents. Such a desire would undoubtedly also be classified as procedural. In order to cast it as substantive, the state would need to argue that local courts are biased in favor of local plaintiffs, thus effectively reducing their burden of proof. Such an argument is unlikely to be made. But the justification of assumed convenience could be bolstered by considerations of procedural fairness: a local resident whose tax dollars support the court system and whose vote may elect its judges is entitled to claim the services of that system and those judges when jurisdictional rules permit. In such an instance, the state’s interest in resisting displacement of its procedural choice parallels its interest in maintaining substantive choices and supports the conclusion that, if displacement is to occur, it should at least be achieved openly.

However, the use of federal law in this context is not limited to the general question of whether any forum selection clauses should be enforced. Federal law also determines how such clauses should be interpreted and which clauses should be enforceable. If, as is the norm, a state agrees with the proposition that not all such clauses are void as against public policy, it retains an interest in the use of its substantive contract law. It is in this situation that the use of contrary federal law, allegedly grounded in Congress’s control over the procedure of federal courts, is most offensive. Congress is imposing substantive choices under a procedural guise that contradicts substantive choices consciously made as such by the state. Surely even a federalism necessitating only political protection need not countenance that intrusion. If Congress wishes to impose its own choice in this situation, it must do so truthfully, pursuant to its power under the Commerce Clause. It should not be permitted by the courts to impose such a choice on states either under the rubric of § 1404 or as a misperceived species of “interstitial” procedural common law.

Stein, Erie and Court Access, 100 Yale L.J. 1935 (1991) (arguing that federalism requires consideration of the impact of federal rules regarding access to federal courts on state regulatory policies).

B. Preclusion Doctrines

The preclusive effect federal courts give to state court judgments is governed by statute, and is determined by reference to the preclusive effect the judgment would have under the preclusion law of the state which rendered it. However, the preclusive effect to be given federal court judgments is a matter of controversy when the judgment whose effect is to be determined was rendered in a case arising under state law. Some federal circuit courts use federal common law, while others use state law. A circuit court may first look to the precise issue to be decided before choosing. Leading commentators are similarly divided. In the context of political federalism, the question arises as to whether Congress could, under its authority to create inferior federal courts, establish rules of preclusion to be used by federal courts when such courts must determine the effect of any

170. Title 28 U.S.C. § 1738 (1982) states, in relevant part: "Such Acts, records and judicial proceedings [of any state] ... shall have the same full faith and credit in every court within the United States ... as they have by law or usage in the courts of such State ... from which they are taken." Article IV of the United States Constitution addresses the preclusive effect state court judgments are to be given by other states and is not implicated when the second case is being heard by a federal court. U.S. CONST. art. IV, § 1


172. In non-diversity cases, the Supreme Court has held that uniform federal preclusion rules apply. See United States v. Mendoza, 464 U.S. 154, 158 (1984); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 (1979). Professor Burbank provides a justification for the use in this situation of federal common law while criticizing the Court for its lacunious decisions. Burbank, supra note 190, at 762-78.


prior judgment in the forum court or the effect of prior federal forum judgments in subsequent state court litigation.

While the number of paradigm situations raised by the first inquiry alone suggests that the answers might be staggeringly complex, in fact, today's complexity is in choosing appropriate policies, not in determining the federal authority to choose. Under current doctrine, authority in both situations is unassailable. Preclusion rules serve vital procedural interests not only in the system that renders the judgment but also in the system where the judgment is sought to be used. The central concern is with the fair and efficient use of judicial resources. Laws reflecting a policy judgment as to whether limited federal judicial resources should or should not be expended when litigants have already engaged in a related battle may be characterized as procedural, as are laws reflecting a desire to make initial use of the federal system more efficient by encouraging or discouraging joinder of claims.177 However, the further question of what effect such laws would have on state policies also needs to be asked in order to determine whether reliance on procedural power is truly sufficient.

If the state court rendered the judgment whose effect is to be determined, the state system ordinarily has an overriding interest in determining what Professor Steven Burbank has called the "preconditions to preclusion": the validity and finality of its judgments.178 The most basic concepts of sovereignty demand that the judgment neither be given life by a different sovereign nor be totally disregarded by a different sovereign against the will of the rendering state.179 The other situation in which federal courts refer to state law when they ordinarily utilize federal law to determine the preclusive effect of prior judgments involves defining legal terms considered to have relevance above and beyond their use in the preclusion context.180 Privity is a prime example.181 If the federal preclusion rules make privity relevant, the

177. See supra notes 73-75 and accompanying text (discussing judicial restrictions on the scope of Title IX's non-discrimination mandate).

178. Burbank, supra note 171, at 764. To some extent, however, the validity of a state judgment is a function of federal law. The Due Process Clause of the Fourteenth Amendment restrains the states' ability to assert personal jurisdiction, U.S. Const. amend. XIV, and the Constitution also precludes states from discriminating against claims that arise under the laws of other states or the federal law. See Testa v. Katt, 330 U.S. 386, 393 (1947). Furthermore, by vesting exclusive jurisdiction in federal courts, Congress may deprive state courts of jurisdiction to hear claims arising under federal law. However, what constitutes a final judgment on the merits and the validity of jurisdictional assertions under state law are also necessary preconditions to preclusion.

179. RESTATEMENT (SECOND) OF JUDGMENTS § 81 cmt. a (1982).

180. Prior federal court judgments based on state law claims are the only ones in which this option is currently available. See supra notes 172-76 and accompanying text.

181. See Federal Ins. Co. v. Gates Learjet Corp., 823 F.2d 383, 386 (10th Cir. 1987) (stating that "where the question is whether there is privity between the parties in different diversity suits, a federal court must apply state rules of privity").
issue of whether such reference is required appears to depend on whether the state
definition of privity in the context of preclusion is the same as its definition
of privity in areas of substantive concern,\textsuperscript{182} and whether the use of a
federal definition in the preclusion decision would negate the state's ability
to achieve its other ends. If it would, Congress should be forced to rely on
some other regulatory power to displace the state choice.

However, beyond these two possible and relatively narrow constraints on
congressional power looms a larger concern: the potential substantive as well
as procedural goals of preclusion rules. Even if judicial resources were
unlimited, it is difficult to understand how prior judgments could have no
preclusive effect. Finality of judgment is considered an independent good
from the point of view of both the system and the litigants. The authority of
a court's judgment would be eviscerated and the judicial system undermined
if no relitigation of anything between any parties was barred. Though each
successive judgment could theoretically be enforced, such enforcement
would waste judicial resources if it failed, at the very least, to preclude en-
forcement of the opposite judgment between the same parties. This systemic
goal is comfortably within Congress's power to achieve for the courts it cre-
ates. To the extent that the preclusion rules displace a different state method
designed to achieve the same goal, no problem arises. However, finality also
serves to guarantee repose for litigants, a goal that could only be properly
pursued by the system governing the primary activity with which the first
judgment was concerned.\textsuperscript{183} The fact that this is not a policy Congress may
pursue if the first judgment involved a claim arising under state law does not
invalidate the other procedural goals appropriate for congressional consid-

\textsuperscript{182} If they are not, then only the goals of the state respecting preclusion would be ham-
pered by use of a federal definition. See infra notes 185-86 and accompanying text (discussing
whether the federal trumping of those goals is inappropriate).

\textsuperscript{183} Burbank, supra note 171, at 792. The author has some concern with defining litigant
repose as substantive in the relevant sense, although she agrees that if it is indeed substantive,
it must flow from the substantive conclusion of the first litigation as some sort of "prize."
Presumably, the goal is seen as non-procedural, and therefore substantive, because it is not
concerned with litigation activity but with the out-of-courtroom aftermath. Unlike other sub-
stantive goals, however, it is not designed to govern primary activity or to foster certain kinds
of relationships.

An analogous issue arose when the United States Court of Appeals for the Fourth Circuit
interpreted 28 U.S.C. § 1961(a) (as amended in 1982) to require that the United States Treas-
ury Bill rate, rather than state law, govern the rate at which post-judgment interest in all civil
cases is calculated. Forest Sales Corp. v. Bedingfield, 881 F.2d 111 (4th Cir. 1989). Recogniz-
ing that the measure of damages is usually considered substantive, the court differentiated
post-judgment interest as procedural because it arises after the dispute triggered litigation, is
not part of planning out-of-court business activity, and confirms no right in and of itself but
rather follows and operates on the substance of determined rights. Id. at 113. If repose is not
substantive in the relevant sense, congressional power truly is as broad as today's doctrine
would permit.
ation. However, if the state purpose is to achieve such repose, it is arguable that a court may not properly set aside the state's attempt by referring solely to procedural authority. It makes no difference whether the first judgment was rendered in a state or federal court, because in either event federal procedural law supplants state substantive choice.

Admittedly, the assault on state sovereignty is less severe in the preclusion context than it is in the context of forum selection clauses. In the context of preclusion rules, Congress is achieving a procedural end through the use of its power to regulate federal procedure—albeit at the expense of a state substantive goal—rather than achieving a substantive goal through the guise of a procedural rule. Yet in so doing, Congress is considering and rejecting policy choices outside its authority to regulate. At the very least, such consideration and rejection should be explicit in order to be effective.

A separate, but related issue to the question of congressional authority to craft preclusion rules to be used by federal courts is the issue of congressional authority to define the preclusive effect of judgments rendered by federal courts in subsequent state court litigation. In this latter context, general congressional power cannot be thought to derive from its procedural regulatory authority, because the focus of that authority is only on the federal courts. Thus, if the federal judgment was rendered on a claim arising under state law, Congress may only insist that its use in a subsequent state proceeding respect the federal definitions of validity and finality. If, however, the federal judgment was rendered with respect to a claim arising under federal law, the scope of congressional authority is more problematic.

184. See supra notes 114-15 and 133-35 and accompanying text.
185. See supra note 143-44 and accompanying text.
186. The decision that explicit federal law should be allowed to displace the alleged state substantive choice is much less problematic than the testimonial privilege hypothetical. See supra note 103 and accompanying text. In the first place, it is doubtful that either the federal or state system is primarily or even secondarily motivated by notions of repose when it crafts preclusion rules. We do not live in a world of unlimited judicial resources, and it would seem that these rules instead reflect the judgment of a proper balance between the costs of repetitive litigation on the one hand and the dangers of factually and legally complicated mega-suits on the other. A related point is the extent to which choices that conflict in this context really do so because of disagreements over what is necessary to protect the substantive rights of the parties. Preclusion rules certainly do that, but it would seem to be a common minimum requirement of any rational system. Any set of preclusionary rules will result in repose, although in differing degrees, and in protection of the substantive rights reflected by the initial judgment. The choice, after all, is not between state preclusion and no preclusion. It is apparent, however, that if such replacement is to be tolerated, the Supreme Court should insist that Congress consider and acknowledge the implications of its decision in order to allow the states to defend their independence meaningfully.
187. See supra note 143-44 and accompanying text.
Neither the Supremacy Clause\(^\text{188}\) nor grants of substantive regulatory authority justify congressional imposition of federal procedures on state courts exercising jurisdiction over federal claims.\(^\text{189}\) The Supremacy Clause itself provides no independent federal grant of power; it merely sets out a hierarchy of otherwise constitutionally proper laws.\(^\text{190}\) Furthermore, the authority to regulate and the authority to enforce judicially such regulation are distinct, a proposition reflected in the constitutional structure which underlies the Court's decision in *Erie Railroad v. Tompkins*.\(^\text{191}\) It follows that to the extent preclusionary rules, which a federal court would use to determine the effect of a prior federal decision on a federal claim, are based on procedural concerns, Congress could not compel a state court to follow them. Indeed, it is difficult to imagine why Congress would wish to do so because, by definition, the rules are geared to the protection of systemic federal interests. On the other hand, if the rules are designed to insure repose, they find their source in the substantive grant of authority underlying the primary claim, and, should Congress choose to do so, it may impose them on the states. Similarly, if procedural rules involve the definition of legal terms with substantive relevance in other contexts that would be adversely affected if a different definition were used here, Congress could insist upon their use in the state litigation. The freedom of Congress to govern preclusion, whether in federal or state courts, depends upon the substantive law source of the decided claim and the goals that the creating system sought to serve by its choice of preclusion rules applicable to that claim.

\section*{C. Settlement Agreements}

The third paradigm of *Erie Railroad v. Tompkins*\(^\text{192}\) involves the interpretation of private settlement agreements regarding suits filed in federal court.

\begin{itemize}
\item \textit{188.} U.S. CONST. art. VI.
\item \textit{190.} U.S. CONST. art. VI.
\item \textit{191.} 304 U.S. 64 (1938). Article I, section 8, clause 9 of the United States Constitution specifically grants Congress the authority to create courts inferior to the Supreme Court. U.S. CONST. art. I, § 8, cl. 9. The document does not assume, however, and nor did the members of the Constitutional Convention believe, that federal judicial enforcement would be “necessary and proper” to the execution of delegated regulatory powers. This distinction is currently reflected in the refusal of the Supreme Court to permit Congress to establish Article I courts to hear any case arising under federal law. See Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851-52 (1986) (examining the grant of power to the Commodity Futures Trading Commission against developed standards of judicial authority under the Constitution); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 83-84 (1982) (holding that Congress's action of vesting authority in Article I courts "suggest unwarranted encroachments upon the judicial power of the United States, which our Constitution reserves for Art. III courts").
\item \textit{192.} 304 U.S. 64 (1938).
\end{itemize}
There is general agreement that these contracts should be considered under state law if the claim arose under state law\textsuperscript{193} and under federal law if the claim arose under federal law.\textsuperscript{194} The logic of this decision is apparently thought to be obvious. In terms of congressional power it does not seem to be so.

Merely because a contract refers to the effect of ending litigation in federal court, it does not thereby become a document whose interpretation implicates the procedural interests of the system.\textsuperscript{195} To suggest, as one court has, that docket control and the assurance of fair dealing between parties before the court justifies the use of federal law is to misconceive what procedural interests are all about.\textsuperscript{196} A desire to cut back on litigation is not a procedural interest that permits the federal system to create substantive law. No procedural interest can do that. The desire to assure fair dealing between the parties, on the other hand, is a substantive goal shared by all cases arising


\textsuperscript{195} One sort of "settlement agreement" does implicate those interests but it does not purport actually to "end" the litigation between the "settling" parties. So-called "Mary Carter agreements" permit the "settling" defendant to retain a financial interest in the plaintiff's recovery against other defendants while at the same time remaining a party at trial. BLACK'S LAW DICTIONARY 974 (6th ed. 1990). Texas recently joined a handful of other states in declaring such agreements void as against public policy because of their perceived adverse impact on the trial process. Elbaor v. Smith, 845 S.W.2d 240, 250 (Tex. 1992). Such procedural interests exist in the federal system as well. Nonetheless, if the contract would be considered valid under otherwise applicable state law, reliance on that procedural interest should be insufficient to displace substantive principles of contract. And if the contract would be void under state law, no general federal common law regarding the sanctity of contractual obligations can be created to revive it.

\textsuperscript{196} Auer, 830 F.2d at 538. The specific suit raised the prior agreement as a defense; so-called "docket control" is presumably thought relevant because a broader reading of the contract will preclude more litigation in the federal forum. While this may be true, so too might many other contract interpretations as well as rules of preclusion. See id.
under contract law and can not even masquerade in the guise of a procedural effort. On the other hand, if the contract is incorporated into a valid and enforceable federal judgment, the question of when that judgment may be set aside, assuming the contract's enforceability under state law, may raise generic questions about the finality of federal judgments.\footnote{See supra note 178 and accompanying text. This distinction between the validity of the contract and the setting aside of a judgment was drawn explicitly in White Farm Equipment Co. v. Kupcho, 792 F.2d 526, 529 (5th Cir. 1986) ("Federal courts have the inherent power to enforce settlement agreements entered into by the parties litigant in a pending case, to determine compliance with procedural prerequisites, and to determine when, if ever, a party may repudiate a contractually binding settlement agreement.").} Yet it is difficult to see how the distinction could make a difference. Even assuming a hypothetical case in which federal procedure would permit setting aside a judgment based on a valid contract, the contractual rights of the parties could still be enforced in a separate proceeding. The contract has created new substantive rights and duties between the parties, and the courts must look to substantive law to interpret them.

Any case raising this type of issue necessitates consideration of two claims: the claim settled by the agreement and the currently pending claim, in which the agreement either is sought to be enforced or is being raised as a defense. Initially, it would seem appropriate that state law should govern the agreement's interpretation if the settled claim arose under state law and vice versa. To be sure, if the settled claim were federal, Congress could develop laws to govern the settlement agreement as a species of regulation necessary and proper to the execution of the law under which the claim arose.\footnote{U.S. CONST. art. I, § 8, cl. 18} But the existence of any real federal interest in doing so depends on the issue raised by the agreement, not on the law giving rise to the original claim. Thus, if the agreement purports to settle a federal claim but is based upon a party's unilateral mistake of fact, substantive policies such as public interest in the enforcement of the underlying claim might well support use of federal law to permit recession.\footnote{In Gamewell Manufacturing v. HVAC Supply, Inc. 715 F.2d 112 (4th Cir. 1983), the United States Court of Appeals for the Fourth Circuit noted the possibility of precisely this argument in a case brought to enforce a settlement agreement involving a patent infringement claim. Id. at 114-15. Unfortunately, it cheerfully held that the issue of the need for uniformity did not have to be so narrowly considered. Id. at 115. Instead, relying on undefined "procedural interests," the court held that "the standards by which [litigation initiated in federal courts] may be settled . . . are preeminently a matter for resolution by federal common law principles, independently derived." Id.} On the other hand, if the issue involves the scope of a waiver as it affects bringing a state law claim, it is difficult to see what substantive federal policies are implicated.\footnote{For a discussion of the role of rules of preclusion in this context, see supra notes 178-184 and accompanying text.} A parallel issue-dependent substantive federal interest exists if the settled claim arose...
under state law. For example, if an agreement includes a waiver of a potential claim under Title VII of the 1964 Civil Rights Act,\(^{201}\) the ability of the plaintiff to execute such a waiver in the first place and the conditions under which she may do so raise issues of substantive federal concern.\(^{202}\) Thus, the inquiry should focus on the impact of the contract on federal interests in the federal claims affected by the agreement.

The above argument would clearly justify congressional regulation not only of any settlement agreement reached with respect to a federal claim, but also with respect to any settlement agreement purporting to affect the parties' rights under federal law. However, contract interpretation is ordinarily thought of as a function of state law. If the independent role of the state is to be suppressed, it must be suppressed clearly and in reliance on something other than procedural interests. Furthermore, the role of the courts in the creation of such substantive but interstitial common law is troublesome because it relies so frequently on the wrong considerations. At the very least, the focus must change to issues of substantive law.

IV. Conclusion

The unthinking acceptance by both Congress and the courts of congressional substantive regulation through Congress's spending and procedural powers continues to make it increasingly difficult for states to defend their interest in governing local activity and, therefore, undermines the ideological balance struck between federal and state interests by political federalism. While it is not necessary to deny that such local activity may properly be subject to national rule because of its national impact, it is necessary to emphasize that the imposition of such rule must be clearly acknowledged as justified by some grant of authority similar to the Commerce Clause. To require less is to hobble the states in any attempt to protect their sovereignty—a result as unfair under the logic of Garcia v. San Antonio Metropolitan Transit Authority,\(^{203}\) as it is politically unwise.


\(^{202}\) See, e.g., Davies v. Grossmont Union High Sch. Dist., 930 F.2d 1390, 1396 (9th Cir.) (using federal common law to resolve the constitutionality of a waiver of the right to run for public office within a court-approved settlement agreement), cert. denied, 111 S. Ct. 2892 (1991). Since any such federal law would derive from Congress's substantive regulatory authority, Congress could, and presumably would, compel the states to follow the same law if the contract became relevant in a state court case.

\(^{203}\) 469 U.S. 528 (1985); see supra notes 9, 11, 15 and accompanying text.