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Anti-Federalist Procedure

A. Benjamin Spencer*

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"[T]he new federal government will . . . be disinclined to invade the rights of the individual States, or the prerogatives of their governments."¹

"[T]he Constitution of the United States . . . recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments. . . . Any interference with either, except as [constitutionally] permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence."²

I. Introduction

The understanding expressed by these opening quotes—that the national government was designed to be one of limited powers that would refrain from encroaching upon the sphere of authority reserved for the states—is at the core of the long ascendant legal doctrine of federalism.³ Familiar to all by now, modern-day federalism, generally, is a doctrine that takes constitutional limits on federal power seriously and demands respect for the sovereignty of states, protecting them against wayward impositions on their authority. Although the Constitution has several provisions enshrining federalism principles, the central

1. THE FEDERALIST NO. 46 (James Madison).

2. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78–79 (1938).

3. See THE FEDERALIST NO. 39 (James Madison) ("In this relation, then, the proposed government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects.") (emphasis added).

federalism passage in that document is the Tenth Amendment, which reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."⁴ This clause and others reflecting federalism principles were reinvigorated by the Rehnquist Court, which was renowned for its active embrace of federalism.⁵ The Court's federalist leanings under the late Chief Justice Rehnquist led it to invalidate federal action on several notable occasions on the ground that Congress had exceeded its constitutional authority and intruded upon the sovereignty of the states.⁶ However, this "federalism revolution" as some would call it has not been confined to the courts. A core theme of Republican Party politics since Ronald Reagan assumed the presidency has been the vigorous promotion of new federalism and states' rights.⁷

4. U.S. CONST. amend. X.

5. See Erwin Chemerinsky, Book Review, 41 TRIAL 62, 62 (Feb. 2005) (reviewing THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY*) ("Rehnquist has helped move the Supreme Court in a more conservative direction, especially in reviving federalism as a limit on congressional and federal judicial power . . ."); Stephen G. Calabresi, *Federalism and the Rehnquist Court: A Normative Defense*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 24, 25 (2001) ("Perhaps the most striking feature of the Rehnquist Court's jurisprudence has been the revival over the last 5–10 years of doctrines of constitutional federalism. . . . Not since before the New Deal-era constitutional revolution of 1937 have the states received such protection in the U.S. Supreme Court from allegedly burdensome federal statutes.").

6. See, e.g., *United States v. Morrison*, 529 U.S. 598, 627 (2000) (stating that Congress lacked the constitutional authority to enact 42 U.S.C. § 13981 under either the Commerce Clause or § 5 of the Fourteenth Amendment); *Alden v. Maine*, 527 U.S. 706, 712 (1999) (stating that neither the Supremacy Clause nor any enumerated powers of Congress conferred authority to abrogate States' immunity as was allowed under the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.*); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 647 (1999) (finding that the Patent Remedy Act, 35 U.S.C. §§ 271(h), 296(a), could not abrogate a State's sovereign immunity); *Printz v. United States*, 521 U.S. 898, 918 (1997) (declaring that interim provisions of the Gun Control Act of 1968, 18 U.S.C. § 921, violated the constitutional provision of dual sovereignty and separation of powers); *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (holding that the Religious Freedom Restoration Act of 1991, 42 U.S.C. § 2000bb *et seq.*, was unconstitutional as it applied to the states because it exceeded the power of Congress under § 5 of the Fourteenth Amendment); *United States v. Lopez*, 514 U.S. 549, 561 (1995) (invalidating the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A), because it was beyond the power of Congress under the Commerce Clause).

7. See Ronald Reagan, President's Inaugural Address, 1981 PUB. PAPERS 1, 2 (Jan. 20, 1981) (speaking of his "intention to curb the size and influence of the Federal establishment and to demand recognition of the distinction between the powers granted to the Federal Government and those reserved to the States or to the people."); see also *CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY AND THE HOUSE REPUBLICANS TO CHANGE THE NATION* 125–41 (Ed Gillespie & Bob Schellhas, eds. 1994) (explaining that the philosophy behind the Contract with America was one of devolution of power to the states).

Interestingly, in the midst of continued political rhetoric in support of federalism⁸ and the Court's stern rejection of recent congressional Commerce Clause legislation on federalism grounds, Congress has pursued legislation, and the Supreme Court has rendered decisions, that impose upon, supplant, or usurp the judicial authority of states and their courts.⁹ In a spate of federal tort reform efforts, Congress has variously sought to regulate state judicial procedure directly by limiting the award of punitive damages in state courts for state law claims, to require the application of Rule 11 of the Federal Rules of Civil Procedure in state court proceedings,¹⁰ and to determine intrastate venue in personal injury actions in state courts.¹¹ Meanwhile, the Court has expanded federal jurisdiction over state law claims through expansive preemption doctrines¹² and expansive interpretations of federal jurisdictional statutes,¹³ which has had the practical effect of depriving states of the ability to adjudicate claims arising under their own laws. Most alarmingly, both Congress and the Court have reached out to review and invalidate the final determinations of state courts on matters traditionally within their sphere of authority, vacating state court punitive damages awards as "excessive,"¹⁴ reversing the order of a recount deemed to be required under state law in a Presidential election,¹⁵ and

8. See, e.g., President George W. Bush, Remarks by the President at National Governors' Association Meeting (Feb. 26, 2001), <http://www.whitehouse.gov/news/releases/2001/02/20010226-8.html> (last visited Dec. 4, 2006) ("The framers of the Constitution did not believe in an all-knowing, all-powerful federal government. They believed that our freedom is best preserved when power is dispersed. That is why they limited and enumerated the federal government's powers, and reserved the remaining functions of government to the states.") (on file with the Washington and Lee Law Review).

9. See generally Anthony J. Bellia, *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947 (2001) (identifying this legislative and judicial trend). As Professor Bellia states: "Congress has turned its attention to regulating the state courts. In recent years, Congress has considered several bills, and enacted a few of them, seeking to regulate interstate commerce by regulating the way state courts conduct litigation." *Id.* at 950. Although Professor Bellia rightly noted that "[t]he next frontier of federalism is the relationship between Congress and the state courts," *id.* at 1001, his critique of the trend was ultimately lukewarm and premature. Much has happened in this area since the time of Professor Bellia's article to suggest that the more strident critique and proposal put forth in this Article is due.

10. Lawsuit Abuse Reduction Act of 2005, H.R. 420, 109th Cong. § 3 (1st Sess. 2005).

11. *Id.* § 4.

12. See *infra* Parts II.A & II.C.2 (discussing implied preemption of state law actions and the usurpation of state jurisdiction through removal under the complete preemption doctrine).

13. See *infra* Parts II.C.1 & II.C.3 (explaining how the broad scope of federal question and supplemental jurisdiction has cabined the jurisdiction of state courts).

14. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996); see *infra* Part II.D.1 (discussing *BMW* in detail).

15. *Bush v. Gore*, 531 U.S. 98, 111 (2000); see *infra* Part II.D.2 (analyzing the overreaching of the Supreme Court in *Bush v. Gore*).

authorizing federal district court review of a right-to-die dispute conclusively resolved by state courts.¹⁶

I refer to each of these federal efforts to control or usurp state court jurisdiction or procedure with respect to state law claims¹⁷ as anti-federalist¹⁸ procedure. That is, anti-federalist procedure, as herein discussed, refers to federally-generated policies or doctrines that limit, control, or eliminate the ability of state courts to adjudicate state law claims in their courts or to devise and impose their own procedures for how such claims are litigated and resolved. Although the particular manifestations of anti-federalist procedure need not be illegitimate exercises of federal power, they often are.

This Article will review some of the more notable instances of anti-federalist procedure, offering a critique and proposing statutory and doctrinal revisions needed to put matters right. Part II presents specific examples of anti-federalist procedure, offering some critique and analysis along the way. A full critique is reserved for Part III, wherein the Article details the significant constitutional difficulties with anti-federalist procedure. In Part IV, I present a vision of what federalism-respecting procedure would look like in the statutory and doctrinal areas discussed in Part II, ultimately recommending fairly drastic alterations of Supreme Court doctrines and a less radical statutory modification.

16. See *Relief of the Parents of Theresa Marie Schiavo*, Pub. L. No. 109-3, § 1, 119 Stat. 15, 15 (2005) (granting the U.S. District Court for the Middle District of Florida jurisdiction to hear any claim brought by the parents of Theresa Marie Schiavo regarding the provision of life support); see also *infra* Part II.D.3 (providing background on the Schiavo case and addressing the impropriety of this legislation).

17. The extent to which Congress may regulate how state courts adjudicate federally-created rights is a more settled matter beyond the scope of this article. Professor Bellia summarizes the law in that area as follows:

Congress may require state courts to enforce federal claims if they are competent to do so; Congress may require state courts to enforce federal procedural rules that are "part and parcel" of a federal right of action; and Congress may, by implication, require state courts to follow federal procedural rules when application of a state procedural rule would unnecessarily burden a federal right.

Bellia, *supra* note 9, at 962.

18. The Anti-Federalists of the founding era were those who argued in favor of states' rights at the Constitutional Convention, while the Federalists defended the strengthened central government devised by the proposed Constitution, meaning that one could easily use the term "anti-federalist" to describe proponents of states' rights today. See, e.g., Michael C. Dorf, *No Federalists Here: Anti-Federalism and Nationalism on the Rehnquist Court*, 31 RUTGERS L.J. 741, 741 (2000) (referring to the Court's defenders of state sovereignty as "Anti-Federalists"). However, in modern parlance federalists are those who subscribe to the new federalism that emphasizes limited federal government and a respect for state sovereignty. Thus, anti-federalist policies, as I describe them, are those that contravene these principles of the new federalism.

II. Anti-Federalist Procedure

A. Implied Preemption of State Law Actions

Perhaps the heartland of anti-federalist procedure is found within implied preemption doctrine. It is in the name of implied preemption that the Court has often found itself barring state law based claims that litigants have sought to assert. *Geier v. American Honda Motor Co.*¹⁹ provides a good example of this phenomenon. Petitioner Alexis Geier was seriously injured in an accident involving a 1987 Honda Accord she was driving.²⁰ Although her vehicle was equipped with manual shoulder and lap belts, which she was wearing, the vehicle was not outfitted with airbags.²¹ Geier sued American Honda Motor Company, the car's manufacturer, and its affiliates under District of Columbia tort law claiming negligent and defective design for failure to install airbags.²²

At issue in the case was whether Geier's suit was permitted in light of the National Traffic and Motor Vehicle Safety Act of 1966 (the Safety Act), which expressly preempted "any safety standard" that is not identical to a federal safety standard applicable to the same aspect of performance."²³ Because the applicable federal safety standard, Federal Motor Vehicle Safety Standard (FMVSS) 208, required auto manufacturers to equip some but not all of their 1987 vehicles with passive restraints (which would include airbags), the district court concluded that Geier's lawsuit sought to establish a safety standard requiring airbags and thus would be a conflicting state standard that would be expressly preempted under the terms of the Act.²⁴ On review, the Court of Appeals had its doubts about the district court's finding of express preemption in light of the Act's saving clause,²⁵ but reached the same result as the district court by reasoning that permitting the lawsuit would pose an obstacle to the objectives of FMVSS 208.²⁶ After its review of the case, the Supreme Court

19. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 874 (2000) (stating that petitioner's claim was preempted even though the Act at issue did not expressly preempt a state law based suit).

20. *Id.* at 865.

21. *Id.*

22. *Id.*

23. *Id.* (quoting 15 U.S.C. § 1392(d) (1988) (recodified at 49 U.S.C. § 30101 *et seq.* (2000))).

24. *Geier*, 529 U.S. at 865.

25. 15 U.S.C. § 1397(k) (1988) (current version at 49 U.S.C. § 30103(e) (2000)) ("Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.").

26. *Geier v. Am. Honda Motor Co.*, 166 F.3d 1236, 1238–43 (D.C. Cir. 1999), *cert*

reached the same result, holding that although the Safety Act did not expressly preempt state law based suits challenging the failure to install airbags, such suits actually conflicted with the objectives of FMVSS 208.²⁷

Justice Stevens, writing for a four-Justice minority, dissented in *Geier*.²⁸ Finding no conflict between FMVSS 208 and the instant state tort suit, Justice Stevens wrote:

It is . . . clear to me that the objectives that the Secretary intended to achieve through the adoption of Federal Motor Vehicle Safety Standard 208 would not be frustrated one whit by allowing state courts to determine whether in 1987 the lifesaving advantages of airbags had become sufficiently obvious that their omission might constitute a design defect in some new cars.²⁹

Also of central importance to Justice Stevens was the Safety Act's saving clause, which provided: "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law."³⁰ In Justice Stevens's view, this clause not only expressly preserved state common law remedies but it also "arguably denie[d] the Secretary [of Transportation] the authority to promulgate standards that would pre-empt common-law remedies."³¹ Given the presence of the savings clause and the silence of FMVSS 208 with respect to its own preemptive force, Justice Stevens felt that the historical presumption against preemption had not been overcome.³²

What we have in *Geier* then is the Court acknowledging that no express preemption is achieved by the statute but nonetheless implying preemption based on its own judgment regarding the conflict between the objectives of the Secretary of Transportation and the allowance of the type of state law claims at issue in that case. But given the Court's own conclusion that Congress had not expressly preempted state common law actions, plus the presence of a saving clause, such a determination by the Court was unwarranted. As Justice Stevens remarked in *Geier*, "the Supremacy Clause does not give unelected federal

granted, 527 U.S. 1063 (1999), *aff'd*, 529 U.S. 861 (2000).

27. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 866 (2000).

28. *Id.* at 886 (Stevens, J., dissenting). Justices Souter, Thomas, and Ginsburg joined in the opinion.

29. *Id.* at 888 (Stevens, J., dissenting).

30. 15 U.S.C. § 1397(k) (1988).

31. *Geier*, 529 U.S. at 899–900 (Stevens, J., dissenting).

32. *See id.* at 905–06 (Stevens, J., dissenting) ("[I]t is evident that Honda has not crossed the high threshold established by our decisions regarding pre-emption of state laws that allegedly frustrate federal purposes.").

judges *carte blanche* to use federal law as a means of imposing their own ideas of tort reform on the States."³³ Respect for the constitutional role of the states as sovereign entities demands that states be ousted of their traditional jurisdiction over common law tort actions only upon the clearest expression of congressional intent or where simultaneous compliance with federal and state law is impossible. The problems with the implied preemption doctrine will be discussed in greater detail in Part III.

B. Federally-Imposed Litigation Reform

Since 1994 when Republicans took over control of the U.S. House of Representatives, litigation reform (more commonly referred to as "tort reform") has been a congressional priority.³⁴ In their "Contract with America" one of the first things Republican Members of Congress pledged to do once they gained majority control was to introduce the Common Sense Legal Reforms Act of 1995, which in their words would consist of "'Loser pays' laws, reasonable limits on punitive damages and reform of product liability laws to stem the endless tide of litigation."³⁵ In addition to these measures, one finds in the text of the proposed bill attached to the Contract with America a separate measure entitled the Private Securities Litigation Reform Act of 1995 (PSLRA).³⁶ The PSLRA ultimately became law,³⁷ as have several other significant reform measures at least nominally intended to improve what proponents see as a broken and abused litigation system.

Because state judicial proceedings represent the lion's share of litigation activity in this country, in order to have any hopes of achieving their objectives of widespread litigation reform, lawmakers have had to target their reforms not only at the federal system, but at state judicial systems as well. Given the separate sovereignty of states and their unquestioned authority to adjudicate state law claims falling within their traditional sphere of control, any federal

33. *Id.* at 894.

34. The changeover in Congress to thin Democratic control after the 2006 mid-term elections will likely spell the end to this focus.

35. CONTRACT WITH AMERICA, <http://www.house.gov/house/Contract/CONTRACT.html> (last visited Dec. 4, 2006) (on file with the Washington and Lee Law Review); see also CONTRACT WITH AMERICA, *supra* note 7, at 11 (providing a more detailed version of the Republicans' Contract with America than what is found online).

36. H.R. 1058, 104th Cong. (1995), available at <http://www.house.gov/house/Contract/Legalrefb.txt>.

37. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995).

effort to direct, limit, or eliminate state court jurisdiction would necessarily be anti-federalist in nature. That is, modern federalism principles ordinarily call for a respect of "dual sovereignty"³⁸ and are wary of infringing on the legitimate authority of states. This section considers several examples of congressional measures—some enacted and others not—that in some way have sought to control or eliminate the ability of state courts to adjudicate or provide remedies for state law claims in the name of achieving nationwide litigation reform.

1. Attempts to Limit State-Imposed Punitive Damages

Throughout the late 1990s congressional Republicans pursued attempts to limit punitive damages awards in the products liability area. The first litigation reform measure introduced by the House majority after taking control from the Democrats was the Common Sense Legal Reforms Act of 1995.³⁹ Most of the bill proposed changes that only would have applied to federal civil litigation. However, section 103 of the bill, entitled "Product Liability Reform," contained product liability rules applicable to product sellers and preempted state laws to the extent such laws covered the same issues comprehended by the proposed liability rules.⁴⁰ In addition to these substantive legal rules, the bill also included punitive damages caps for products liability actions—the greater of "3 times the amount awarded to the claimant for the economic injury on which such claim is based, or \$250,000."⁴¹ This provision of the bill expressly would have covered "any product liability action brought in any State or Federal Court against any manufacturer or seller of a product on any theory for harm caused by the product" and thus would have told states that their courts could not impose punitive damages awards in amounts deemed appropriate.

The bill did not make it out of the House of Representatives. However, another attempt to limit the level of punitive damages that state courts could impose, the Common Sense Product Liability Legal Reform Act of 1996, soon followed.⁴² It passed both houses of Congress but was blocked by

38. *Printz v. United States*, 521 U.S. 898, 918 (1997) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)).

39. H.R. 10, 104th Cong. (1st Sess. 1995).

40. *Id.* § 103.

41. *Id.*

42. H.R. 956, 104th Cong. (2d Sess. 1996).

President Clinton's veto.⁴³ This legislation would have imposed stricter punitive damages caps than its predecessor—twice the level of compensatory damages or \$250,000—and also would have required claimants to "establish[] by clear and convincing evidence that conduct carried out by the defendant with a conscious, flagrant indifference to the rights or safety of others was the proximate cause of the harm that is the subject of the action in any product liability action."⁴⁴ The bill contained an "Exception for Insufficient Award in Cases of Egregious Conduct"⁴⁵ that empowered judges to disregard these caps if—after the consideration of eight factors spelled out in the proposed statute—the judge determined that the limited award would be "insufficient to punish the egregious conduct of the defendant."⁴⁶

In the wake of President Clinton's veto, Senate Republicans tried their hand at products liability reform the following year by introducing the Product Liability Reform Act of 1997.⁴⁷ Citing a concern that excessive punitive damages "penalties are harmful to business and to consumers of products when price reflects the risk of such penalties,"⁴⁸ section 108 of the bill (entitled "Uniform Standards for Award of Punitive Damages") included a "clear and convincing evidence" standard⁴⁹ similar to the failed bill of the prior Congress. The bill expressly preempted state law and declared its applicability to "any product liability action brought in any State or Federal court on any theory for harm caused by a product."⁵⁰ By mandating the standard of proof necessary to support an award of punitive damages, this legislation would have limited the ability of states to punish tortfeasors and undermined states' own punitive damages policies. However, this bill never made it out of the Senate, although a substantially similar version of the bill was reintroduced in 1998, with similar results.⁵¹

43. See THE LIBRARY OF CONGRESS ON THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d104:HR00956:@@S> (last visited Dec. 4, 2006) (providing the full history of the Common Sense Product Liability Legal Reform Act of 1996) (on file with the Washington and Lee Law Review).

44. H.R. REP. NO. 104-481 § 108(a) (1996) (accompanying H.R. 956).

45. *Id.* § 108(b)(3).

46. *Id.* § 108(b)(3)(A).

47. S. 648, 105th Cong. (1997).

48. S. REP. NO. 105-32, at 6 (1997) (quoting William Fry, Executive Director of HALT, in his testimony before the Subcommittee on Consumer Affairs, Foreign Commerce, and Tourism, Senate Committee on Commerce, Science, and Transportation, Apr. 3, 1995).

49. S. 648, 105th Cong. § 108(a) (1997).

50. *Id.* § 102(a)(1).

51. See S. 2236, 105th Cong. (1998) (proposing "to establish legal standards and procedures for products liability litigation and for other purposes").

2. Securities Litigation Uniform Standards Act

Republicans were much more successful in their efforts at reforming litigation in the securities fraud area. The 104th Congress enacted (over another Presidential veto) the Private Securities Litigation Reform Act of 1995 (PSLRA), which—most importantly—imposed heightened pleading requirements for asserting securities fraud claims.⁵² Because the statute only applied to claims pursued in federal court, Congress quickly found that litigants were migrating covered claims to state courts in order to avoid the strictures of the PSLRA.⁵³ In response to this perceived migration, Congress enacted the Securities Litigation Uniform Standards Act of 1998 (SLUSA), the express goal of which was to prevent litigants from circumventing and thereby undermining the purposes of the PSLRA.⁵⁴ To achieve this goal, SLUSA preempts covered securities class actions, pertaining to the "purchase or sale" of certain securities, brought in state court under state law and makes them removable to federal court.⁵⁵ Further, SLUSA directs that preemption

52. See Pub. L. No. 104-67, § 21D(b)(2), 109 Stat. 737 (1995) (codified at 15 U.S.C. § 78u-4(b)(2) (2000)) (stating that in a private action for money damages the plaintiff must prove the defendant acted with the required intent); see also *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 345 (2005) (describing the Act as imposing, beginning in 1995, stricter pleading requirements in private securities fraud actions that, among other things, require that a complaint "state with particularity facts giving rise to a strong inference that the defendant acted with the required [fraudulent] state of mind").

53. See Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353 § 2(2), 112 Stat. 3227 ("[S]ince enactment of [the PSLRA], considerable evidence has been presented to Congress that a number of securities class action lawsuits have shifted from Federal to State courts.").

54. See *id.* § 2(5) ("[I]n order to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of the Private Securities Litigation Reform Act of 1995, it is appropriate to enact national standards for securities class action lawsuits involving nationally traded securities . . ."); see also *Kircher v. Putnam Funds Trust*, 403 F.3d 478, 482 (7th Cir. 2005) ("SLUSA is designed to prevent plaintiffs from migrating to state court in order to evade rules for federal securities litigation in the [PSLRA]."), *vacated*, 126 S. Ct. 2145 (2006).

55. See *Erb v. Alliance Capital Mgmt*, 423 F.3d 647, 648 (7th Cir. 2005) (addressing a class-action, breach-of-contract claim against a mutual fund manager for buying poorly rated securities). The Seventh Circuit explained that:

SLUSA preempts a claim only if it: (i) is brought by a private party; (ii) is brought as a covered class action; (iii) is based on state law; (iv) alleges that the defendant misrepresented or omitted a material fact (or employed a manipulative device or contrivance); and (v) asserts that defendant did so in connection with the purchase or sale of a covered security.

Id. at 651 (citing *Disher v. Citigroup Global Markets, Inc.*, 419 F.3d 649, 653 (7th Cir. 2005)).

decisions respecting covered actions must be made by federal judges rather than state courts.⁵⁶

The effect of this legislation on state court jurisdiction is twofold. First, state courts are no longer able to retain jurisdiction over state law claims they otherwise would have a right to hear. Second, state courts are not permitted to make the preemption determination themselves but must yield the case so that federal judges can decide the issue. There may be sound federal policy reasons for both of these aspects of SLUSA. Congress has a right to pursue a uniform federal policy in the area of securities regulation and thus, permitting state court actions in this field can plausibly be seen to be a threat to that objective. Requiring that federal judges make the preemption determination could be seen as a way to ensure the quality and consistency of such decisions—things that would be important to maintaining the integrity of the SLUSA regime. However, it is worth noting that vesting federal courts with this responsibility has not led to complete uniformity in how courts view the scope of SLUSA's preemptive effect. For example, the circuits were divided over whether claims related solely to the retention of securities, as opposed to their purchase or sale, are preempted by SLUSA⁵⁷ until the split was recently resolved by the Supreme Court.⁵⁸ In any event, though legitimate rationales can be proffered in support of SLUSA's measures affecting state court jurisdiction, it remains the case that Congress chose to strip state courts of their authority to provide remedies for persons asserting various state law claims and of their concurrent jurisdiction over preemption determinations, making SLUSA anti-federalist in tenor.

56. See Securities Litigation Uniform Standards Act, tit. 1, sec. 101(a)(1), § 16(d)(4) (codified as amended at 15 U.S.C. § 77p) ("[I]f the Federal court determines that the action may be maintained in State court pursuant to this subsection, the Federal court shall remand such action to such State court.").

57. Compare *Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 395 F.3d 25, 43 (2d Cir. 2005), *vacated*, 126 S. Ct. 1503 (2006) ("[I]n enacting SLUSA Congress sought only to ensure that class actions brought by plaintiffs who satisfy the *Blue Chip* purchaser-seller rule are subject to the federal securities laws."), with *Disher v. Citigroup Global Markets Inc.*, 419 F.3d 649, 655 (7th Cir. 2005), *vacated*, 126 S. Ct. 2964 (2006) (holding that SLUSA preempted an action even though the investor's complaint referred only to the holding of stocks, not to their 'purchase or sale.'").

58. See *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 126 S. Ct. 1503, 1514–15 (2006) (holding that SLUSA preempts state law class actions alleging that misrepresentations or omissions induced class members to retain or delay selling covered securities).

3. Class Action Fairness Act

Much has been written on the Class Action Fairness Act of 2005 (CAFA)⁵⁹ and thus little more needs to be said here.⁶⁰ Professor Morrison summed up CAFA nicely when he wrote, "Its main thrust is procedural: it would permit defendants to remove from state to federal court most damages class actions, in particular those cases based on state law, which currently can only be litigated in state court."⁶¹ CAFA does this by expanding diversity jurisdiction to cover class actions of 100 or more class members whose claims aggregate to greater than \$5,000,000⁶² and by eliminating various barriers to the removal of such cases to federal court.⁶³ As with previous federal litigation reform measures, CAFA was enacted in response to a perception that lawyers were abusing class actions. Specifically, the Senate Judiciary committee indicated that CAFA was needed to combat the ability of lawyers to "'game' the procedural rules and keep nationwide or multi-state class actions in state courts whose judges have reputations for readily certifying classes and approving settlements"⁶⁴ Ultimately, Congress was not satisfied with the outcomes of class actions heard in state courts, particularly in certain "magnet courts" known for their favorable pro-plaintiff bent, and felt that state judges were simply too lax in their scrutiny of proposed class actions.⁶⁵ Here again,

59. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended at 28 U.S.C. §§ 1711–15, 1453 (2000)).

60. See, e.g., Alan B. Morrison, *Removing Class Actions to Federal Court: A Better Way to Handle the Problem of Overlapping Class Actions*, 57 STAN. L. REV. 1521, 1535–42 (2005) (discussing the procedural implications of the Class Action Fairness Act of 2005 which permits defendants to remove from state to federal court most class actions—in particular, cases based on state law which until this point could only be litigated in state court).

61. *Id.* at 1522.

62. See Class Action Fairness Act of 2005, Pub. L. 109-2, § 4(a)(2), 110 Stat. 4, 9–12 (amending 28 U.S.C. § 1332, which outlines provisions for federal district court jurisdiction of interstate class actions).

63. See *id.* § 5(b) (codified as amended at 28 U.S.C. § 1453) (setting provisions for the removal of interstate class actions to federal district court). The statute states:

A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(b) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

Id.

64. S. REP. NO. 109-14, at 4 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 5. Additionally, the report states: "This Committee believes that the current diversity and removal standards as applied in interstate class actions have facilitated a parade of abuses." *Id.* at 6.

65. See *id.* at 14 ("[S]ome state court judges are less careful than their federal court

we find Congress indulging its anti-federalist impulses to impose on the judicial authority of states based on its dissatisfaction with the results that state courts were producing when they adjudicated state law claims over which they properly had jurisdiction.

4. *Lawsuit Abuse Reduction Act*

This past Congress considered legislation entitled the Lawsuit Abuse Reduction Act (LARA),⁶⁶ a bill that sought to enhance attorney accountability by strengthening the available sanctions regimes in both federal and state courts. Specifically, LARA would have amended Rule 11 of the Federal Rules of Civil Procedure to make the impositions of sanctions mandatory upon a finding of a violation, added compensation as an express objective of sanctions in addition to deterrence, and eliminated the safe harbor that prevents litigants from going directly to the court with their Rule 11 allegations until they have given their opponent the opportunity to withdraw the offending filing.⁶⁷ LARA would also, among other things, have mandated a one-year suspension for attorneys found to have violated Rule 11 three or more times.⁶⁸ More important for our purposes are the various anti-federalist aspects of the bill. First, the bill would have made Rule 11 applicable in state court proceedings where the judge determines that "the action substantially affects interstate commerce."⁶⁹ Second, LARA purported to determine venue for personal injury actions brought in state courts, limiting proper venue to those states—and to those counties within those states—where the claimant resides now or at the time of the injury, where the claimant was injured, where the defendant resides, or where the defendant's principal place of business is located.⁷⁰ Notably, this provision of the bill did not limit control over intrastate venue to cases affecting interstate commerce. Finally, the bill prevented courts from ordering the concealment of unlawful conduct in the context of Rule 11 proceedings,⁷¹ a provision that presumably would apply to state courts in instances where LARA declared Rule 11 to apply.⁷²

counterparts about applying the procedural requirements that govern class actions.").

66. Lawsuit Abuse Reduction Act of 2005, H.R. 420, 109th Cong. (1st Sess. 2005).

67. *Id.* § 2.

68. *Id.* § 6.

69. *Id.* § 3.

70. Lawsuit Abuse Reduction Act of 2005, H.R. 420, 109th Cong. § 9 (1st Sess. 2005).

71. *Id.* § 9.

72. *See id.* § 3 (stating standards for determining the applicability of Rule 11 to state cases

The patent anti-federalist aspects of this legislation likely explain why LARA failed to become law during the 109th Congress.⁷³ It is doubtful that Congress has the authority to require state judges to apply the Federal Rules of Civil Procedure in their courts simply because the action would impact interstate commerce. More dubious still is the notion that Congress can lay venue for personal injury actions brought in state courts, particularly in the absence of any connection to matters affecting interstate commerce. A full critique of all of these congressional efforts will occur in Part II, but it is worth mentioning here the thread that connects each of them: When Congress has disapproved of the results that state courts produce when adjudicating state law claims, it has sought to usurp state judicial authority either by constraining the discretion of state judges and juries directly or by taking cases away from them entirely.

C. Usurpation of State Jurisdiction

Federal efforts to interfere with state court authority over state law claims have not been limited to the area of litigation reform, nor have such efforts been exclusively at the hands of Congress. The Supreme Court has made a substantial contribution to anti-federalist usurpations of state judicial authority through its broad interpretation of federal subject matter jurisdiction. Just as the complete diversity requirement⁷⁴ and the well-pleaded complaint rule⁷⁵ have

affecting interstate commerce).

73. See THE LIBRARY OF CONGRESS ON THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR00420:@@X> (last visited Dec. 4, 2006) (providing the full history of H.R. 420) (on file with the Washington and Lee Law Review). Although the House approved the measure last fall, the Senate has taken no further action on the bill. *Id.* In light of the change in party control of both houses of Congress after the 2006 midterm elections, it is unlikely that LARA will be taken up in the 110th Congress.

74. See *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806) (holding that in a case with multiple plaintiffs and multiple defendants, the presence in the action of a single plaintiff from the same State as a single defendant deprives the district court of original diversity jurisdiction over the entire action).

75. The Court in *Taylor v. Anderson*, 234 U.S. 74, 75–76 (1914) noted:

[W]hether a case is one arising under the Constitution or a law or treaty of the United States, in the sense of the jurisdictional statute[,] . . . must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose.

See also *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 9–10 (1983) (stating that under the well-pleaded complaint rule a defendant may not remove a case to federal court where there is no diversity of citizenship unless the plaintiff's complaint

limited the scope of federal jurisdiction, certain of the Court's decisions regarding the scope of federal question jurisdiction, removal jurisdiction, and supplemental jurisdiction have gone in the other direction. At each turn, the Court has interpreted the relevant statutes broadly in ways that unduly impose on the ability of state courts to retain cases traditionally within their jurisdiction. This subpart reviews the Court's decisions in these areas.

1. *Expansive Federal Question Jurisdiction*

The original jurisdiction of federal district courts extends to "all civil actions arising under the Constitution, laws, or treaties of the United States."⁷⁶ In addition to conferring jurisdiction over claims pleading causes of action created by federal law, the Court has long interpreted the federal question statute to grant jurisdiction over state law claims when "it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims."⁷⁷ In *Merrell Dow Pharmaceuticals, Inc. v. Thompson*,⁷⁸ the Court explained that the existence of a "substantial, disputed" federal issue would not suffice to confer federal question jurisdiction over state law actions when Congress has precluded federal private remedies for the federal statute at issue.⁷⁹

However, recently in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*,⁸⁰ the Court definitively rejected the idea that the absence of a federal private right of action in federal statutes implicated in state law claims precluded federal jurisdiction over those claims.⁸¹ The Court recast *Merrell Dow* as a decision not fixated on whether Congress had provided for a private right of action but rather as a decision that "treat[ed] the absence of a federal private right of action as evidence relevant to, but not dispositive of, the

establishes federal question jurisdiction without regard to defenses implicating federal law).

76. 28 U.S.C. § 1331 (2000).

77. *Franchise Tax Bd.*, 463 U.S. at 13.

78. *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804 (1986).

79. *Id.* at 814. As the Court states:

We simply conclude that the congressional determination that there should be no federal remedy for the violation of this federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently "substantial" to confer federal-question jurisdiction.

Id.

80. *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005).

81. *Id.* at 318–19.

'sensitive judgments about congressional intent' that § 1331 requires."⁸² In *Merrell Dow*, said the *Grable & Sons* Court, a conclusion that federal jurisdiction was available for state law claims based on violations of federal law would have undermined Congress's determination that there be no federal private right of action for such violations and would have flooded the federal courts with an enormous amount of cases.⁸³ However, in *Grable & Sons* the Court said there was no such threat. *Grable & Sons* involved a state quiet title action in which the claimant asserted superior title based on a claimed deficiency in the notice given by the Internal Revenue Service when it seized and sold Grable's property.⁸⁴ Because "it is the rare state quiet title action that involves contested issues of federal law," said the Court, "jurisdiction over actions like Grable's would not materially affect, or threaten to affect, the normal currents of litigation."⁸⁵ Based on this finding, the Court concluded,

Given the absence of threatening structural consequences and the clear interest the Government, its buyers, and its delinquents have in the availability of a federal forum, there is no good reason to shirk from federal jurisdiction over the dispositive and contested federal issue at the heart of the state-law title claim.⁸⁶

Ultimately, *Grable & Sons* backtracks substantially from the position set forth in *Merrell Dow*. The *Merrell Dow* Court said unequivocally, "the congressional determination that there should be no federal remedy for the violation of this federal statute *is tantamount to* a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently 'substantial' to confer federal-question jurisdiction."⁸⁷ After *Grable & Sons*, that is no longer the case. Rather, such a congressional

82. *Id.* at 318 (quoting *Merrell Dow Pharm., Inc.*, 478 U.S. at 810).

83. *See id.* at 319 ("A general rule of exercising federal jurisdiction over state claims resting on federal mislabeling and other statutory violations would thus have heralded a potentially enormous shift of traditionally state cases into federal courts.").

84. *Id.* at 310–11.

85. *Grable & Sons Metal Prods.*, 545 U.S. at 319.

86. *Id.* at 319–20. The Court has subsequently indicated that the propriety of federal jurisdiction in *Grable & Sons* was buttressed by the fact that the case "presented a nearly 'pure issue of law,' one 'that could be settled once and for all and thereafter would govern numerous tax sale cases.'" *Empire Healthchoice Assur., Inc. v. McVeigh*, 126 S. Ct. 2121, 2137 (2006) (quoting R. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 65 (2005 Supp.)). The *McVeigh* Court also highlighted the fact that *Grable's* finding of federal jurisdiction was in the context of a "dispute . . . centered on the action of a federal agency (IRS) and its compatibility with a federal statute," 126 S. Ct. at 2137, a potential circumstance that may provide some basis for limiting the breadth and impact of the *Grable* decision going forward.

87. *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 814 (1986) (emphasis added).

determination is merely one factor to be considered as part of the Court's determination of whether permitting federal jurisdiction would be contrary to "congressional judgment about the sound division of labor between state and federal courts."⁸⁸ According to the *Grable & Sons* Court, if federal jurisdiction over state law claims implicating a particular federal statute appears likely not to impact a significant number of cases, then Congress's failure to provide for a private right of action is relegated to congressional "ambivalence" on the matter that permits the Court to declare itself that "there is no good reason to shirk from federal jurisdiction."⁸⁹

This, needless to say, is nonsense. Federal question jurisdiction cannot depend on the Court's own estimation of the volume of state law claims that would be moved to federal court in the event that federal jurisdiction were permitted. Federal jurisdiction either is conferred by the statute or it is not. Further, if congressional intent is supposed to be the indicium of the permissibility of jurisdiction under § 1331, then certainly the Court should treat absence of a private right of action as Congress's expression of an intent that violations of the statute not be litigated in federal courts.

Most importantly, however, are the anti-federalist attributes of the Court's new approach to federal question jurisdiction. It is axiomatic that "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, . . . which is not to be expanded by judicial decree."⁹⁰ When Congress enacts a statute without making a private right of action available but the Court nevertheless declares that state law claims implicating or raising issues respecting those statutes are indeed cognizable in federal courts, the Court, not Congress, is conferring jurisdiction over such matters by its own decree. By expanding the jurisdiction of federal courts over these state law claims in the absence of a true congressional grant of jurisdiction, the Supreme Court has empowered federal courts to hear cases they have no constitutional authority to hear, robbing state courts of jurisdiction over these claims in the process. Unfortunately, in *Grable & Sons*, the Court made no mention of a state's sovereign interest in exercising its judicial authority within its legitimate sphere in its discussion of the considerations relevant to determining whether federal arising under jurisdiction is available. If states' sovereign authority to adjudicate disputes involving their own laws had been truly respected, the Supreme Court would have required that Congress

88. *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 313–14 (2005).

89. *Id.* at 319–20.

90. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994).

speak clearly if it intended to permit federal courts to rob states of their own claims based on imbedded federal issues.

2. Removal Under the Complete Preemption Doctrine

The federal removal statute permits civil actions "arising under" federal law to be removed from state court to federal court.⁹¹ Ordinarily, the Court evaluates the removability of actions based on the well-pleaded complaint rule:

[A] suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. It is not enough that the plaintiff alleges some anticipated defense to his cause of action, and asserts that the defense is invalidated by some provision of the Constitution of the United States.⁹²

Pursuant to the well-pleaded complaint rule, "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint"⁹³ and thus actions are not removable simply because the defendant raises a defense based on federal law.⁹⁴ The rule that federal defenses fail to confer federal jurisdiction applies even when the federal defense is one asserting that federal law preempts the state law action in some way.⁹⁵

In *Avco Corp. v. International Association of Machinists and Aerospace Workers*,⁹⁶ the Supreme Court created an exception to the well-pleaded complaint rule for cases where the Court determines that a federal cause of action completely preempts a state cause of action.⁹⁷ The Court later explained the *Avco* rule as follows:

The necessary ground of decision was that the preemptive force of § 301 [the portion of the federal statute at issue in *Avco*] is so powerful as to displace entirely any state cause of action "for violation of contracts

91. 28 U.S.C. § 1441(b) (2000).

92. *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908).

93. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987).

94. See *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 9–10 (1983) (requiring under the well-pleaded complaint rule that the complaint establish federal question jurisdiction).

95. *Caterpillar*, 482 U.S. at 393 ("[A] case may not be removed to federal court on the basis of . . . the defense of pre-emption . . .") (emphasis omitted).

96. *Avco Corp. v. Int'l Assoc. of Machinist & Aerospace Workers*, 390 U.S. 557 (1968).

97. See *id.* at 559–60 (finding that federal interpretation of federal law will govern in cases arising under the Labor Management Relations Act even though the action is brought in state court).

between an employer and a labor organization." Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301. *Avco* stands for the proposition that if a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily "arises under" federal law.⁹⁸

Thus, this exception, which has come to be known as the complete preemption doctrine, applies when federal law displaces entirely a state action falling within the scope of the cause of action made available under the federal law because, in the Court's words, the state law claim "necessarily 'arises under' federal law."⁹⁹

The Court applied the complete preemption doctrine to usurp state court jurisdiction not too long ago in *Beneficial National Bank v. Anderson*.¹⁰⁰ In *Beneficial National Bank*, a group of borrowers brought an action in Alabama state court against Beneficial for charging excessive interest in violation of Alabama's common law usury doctrine and an Alabama usury statute.¹⁰¹ Beneficial removed the action to Alabama federal court, arguing that the National Bank Act¹⁰² exclusively governed the rate of interest that a national bank may lawfully charge and provided the exclusive remedies available against a national bank charging excessive interest, thus making the action removable under the removal statute and the complete preemption doctrine.¹⁰³ The district court agreed with Beneficial's position but a panel of the Eleventh Circuit disagreed on the ground that the relevant provisions of the National Bank Act disclosed no congressional intent to permit removal of state law claims preempted by the Act.¹⁰⁴ The Supreme Court reversed the Eleventh Circuit, finding the claims to be removable based on complete preemption.¹⁰⁵ The Court reasoned that because the National Bank Act provides the exclusive cause of action for usury claims against national banks "there is, in short, no

98. *Franchise Tax Bd. of Cal.*, 463 U.S. at 23–24.

99. *Id.* at 24.

100. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1 (2004).

101. *Id.* at 3–4.

102. National Bank Act, 12 U.S.C. §§ 85–86 (2000).

103. *See Beneficial Nat'l Bank*, 539 U.S. at 4–5 (discussing 28 U.S.C. § 1441).

104. *See Anderson v. H&R Block, Inc.*, 287 F.3d 1038, 1048 (11th Cir. 2002), *rev'd*, 539 U.S. 1 (2004) (finding no clear congressional intent to permit removal under §§ 85–86 of the National Bank Act).

105. *See Beneficial Nat'l Bank*, 539 U.S. at 11 ("In actions against national banks for usury, [the National Bank Act] supersede[s] both the substantive and the remedial provisions of state usury laws and create[s] a federal remedy for overcharges that is exclusive, even when the state complaint . . . relies entirely on state law.").

such thing as a state law claim of usury against a national bank" and thus "[t]his cause of action against national banks only arises under federal law and could, therefore, be removed under § 1441."¹⁰⁶

Unfortunately, the Court in *Beneficial National Bank* provided no more explanation of this incomprehensible doctrine than it had given on previous occasions. Although the Court rightly noted that the fact that the National Bank Act provides defendants with a complete federal preemption defense "would not justify removal," the Court felt that the preemptive effect was so absolute and complete so as to give the statute "the requisite pre-emptive force to provide removal jurisdiction."¹⁰⁷ Of course, this is not an explanation but simply the Court's own *ipse dixit*, in effect declaring that because the Bank Act is *really* preemptive, preempted state law claims magically turn into removable federal claims. In his dissent in *Beneficial National Bank*, Justice Scalia properly labeled this hocus pocus as "jurisdictional alchemy" that the Court has never adequately explained or justified.¹⁰⁸ Just because federal law may preempt a state law claim does not somehow transform the state claim into a federal one.¹⁰⁹ Rather, the claim is merely a state law claim that is preempted.

Thus, the proper approach in such instances would be to require defendants to raise their preemption defenses in the state courts in which the state law claims were brought and permit those state courts to resolve them. Then, as the United States explained in its *amicus* brief in *Beneficial National Bank*, the state court could either recharacterize the preempted state law claim as federal, dismiss the claim on preemption grounds, or reject the preemption defense and find that the state law claim was not preempted.¹¹⁰ In the event of an erroneous preemption determination, the U.S. Supreme Court would remain available to review the decision through its certiorari jurisdiction.¹¹¹ By not

106. *Id.* at 11.

107. *Id.*

108. *See id.* (Scalia, J., dissenting) (finding that the majority's view has "scant support in our precedents and no support whatever in the National Bank Act or any Act of Congress").

109. *See id.* at 18–19 (Scalia, J., dissenting) ("[E]ven if the Court is correct that the National Bank Act obliterates entirely any state-created right to relief for usury against a national bank, that does not explain how or why the claim of such a right is transmogrified into the claim of a federal right.").

110. Brief for United States as Amicus Curiae Supporting Petitioners at 17–18, *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1 (2004) (No. 02-306), 2003 WL 1098993.

111. *See* 28 U.S.C. § 1257 (2000) (granting the U.S. Supreme Court the power to review judgments of the States' highest courts); *Franchise Tax Bd. v. Constr. Laborers Vacation Trust of S. Cal.*, 463 U.S. 1, 12 n.12 (1983) ("[T]he absence of original jurisdiction does not mean that there is no federal forum in which a pre-emption defense may be heard. If the state courts reject a claim of federal pre-emption, that decision may ultimately be reviewed on appeal by this Court.").

taking this course, the Court usurped the legitimate jurisdiction of state courts and worked "an expansion of federal jurisdiction [that] wrest[s] from state courts the authority to decide questions of pre-emption."¹¹² Therein lies the aspect of the complete preemption doctrine that makes it a manifestation of anti-federalist procedure: Through complete preemption the Court denies states the right to hear state law claims in their courts, based not on any express determination by Congress that such claims are removable to federal court, but based solely on the Court's fanciful determination that these claims are in reality not state law claims at all. But unless Congress makes that so through its legislative authority, the Court cannot simply declare it to be so by judicial fiat.¹¹³

3. *Expansive Supplemental Jurisdiction*

Congress has provided for "supplemental jurisdiction" over claims that by themselves would not enjoy federal jurisdiction but form part of the same case or controversy as claims that do qualify for federal jurisdiction asserted in the same action. Supplemental jurisdiction is governed by 28 U.S.C. § 1367, which has two main parts. Section 1367(a) contains the grant of supplemental jurisdiction by stating, *inter alia*:

[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.¹¹⁴

Section 1367(b) then outlines the instances where supplemental jurisdiction is unavailable:

In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental

112. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 19 (2004) (Scalia, J., dissenting).

113. *See id.* at 21 (Scalia, J., dissenting) ("[I]t is up to Congress, not the federal courts, to decide when the risk of state-court error with respect to a matter of federal law becomes so unbearable as to justify divesting the state courts of authority to decide the federal matter.").

114. 28 U.S.C. § 1367(a) (2000).

jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.¹¹⁵

Absent from this language is any reference to Rule 23, the rule that permits parties to sue or be sued as a class.¹¹⁶ Nor does the provision refer to Rule 20, which permits parties to sue or be sued jointly within a single action.¹¹⁷ Prior to the 1990 enactment of the supplemental jurisdiction statute the Supreme Court held in *Zahn v. International Paper Co.*¹¹⁸ that in the context of a class action invoking diversity jurisdiction, every plaintiff must separately satisfy the amount-in-controversy requirement of the diversity statute, 28 U.S.C. § 1332.¹¹⁹ However, a plain reading of the language of § 1367(b) permits the conclusion that Congress overturned *Zahn* because, although it withholds supplemental jurisdiction from claims asserted by parties joined under Rule 19 and Rule 24, it makes no mention of claims asserted by parties joined under Rule 20 or Rule 23. The Supreme Court adopted this interpretation of § 1367(b) in *Exxon Mobil Corp. v. Allapattah Services, Inc.*¹²⁰ Although opponents of this view suggested that the statute is ambiguous in this regard and that the legislative history reveals no intention to overrule *Zahn*,¹²¹ the Court found no ambiguity in the statute and thus rejected any notion that the statute's legislative history should be consulted.¹²² As a result, under the Court's reading of the statute in *Allapattah Services*, if there is one class member asserting a claim worth more than \$75,000, § 1367(a) gives federal courts supplemental jurisdiction over the claims of all fellow class members, even though their claims may fall below the jurisdictional amount in controversy.

The Court's reading of the statute is clearly correct, given the fact that parties joined under Rule 20 and Rule 23 are nowhere denied the benefits of

115. *Id.* § 1367(b).

116. FED. R. CIV. P. 23.

117. FED. R. CIV. P. 20.

118. *Zahn v. Int'l Paper Co.*, 414 U.S. 291 (1973), *superseded by statute*, Act of Dec. 1, 1990, Pub. L. No. 101-650, 104 Stat. 5113.

119. *See Zahn*, 414 U.S. at 301 ("Each plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount.").

120. *See Exxon Mobil Corp. v. Allapattah Servs.*, 125 S. Ct. 2611, 2621 (2005) (finding that § 1367 confers jurisdiction over claims brought by Rule 23 plaintiffs).

121. *See id.* at 2625 ("The proponents of the alternative view of § 1367 insist that the statute is at least ambiguous and that we should look to other interpretive tools, including the legislative history of § 1367, which supposedly demonstrate Congress did not intend § 1367 to overrule *Zahn*.").

122. *See id.* ("We can reject this argument at the very outset simply because § 1367 is not ambiguous.").

supplemental jurisdiction in the text of § 1367(b). However, Congress made clear in the House and Senate reports accompanying the legislation that overturning *Zahn* was not their intent.¹²³ Because ours is a nation governed by laws and not legislative committee reports, what matters is the language of the statute passed by Congress and signed by the President.¹²⁴ Thus, the Court was correct to eschew any reliance on the legislative history and stick with the plain language of the statute. Nevertheless, it must be acknowledged that the effect of § 1367(b) as interpreted by the Court is a substantial broadening of the jurisdiction of federal courts over state law claims. Section 1367(b) as interpreted by the Court is thus an instance of anti-federalist procedure because it permits large numbers of jurisdictionally insufficient non-federal claims to be heard in federal rather than state court simply by virtue of their relation to a jurisdictionally sufficient related state law claim.

D. Federal Review of State Judicial Determinations

The final variant of anti-federalist procedure comes in the form of federal review of state judicial determinations. Movement in an anti-federalist direction in this area has occurred on several fronts. In the area of punitive damages, the Supreme Court has constitutionalized the issue of the magnitude of punitive damages awards, enabling the Court to review and strike down punitive awards coming out of state courts.¹²⁵ In the 2000 Presidential election, *Bush v. Gore*¹²⁶ saw the Court intervening in Florida's electoral process to reverse the determination of that state's courts regarding the need for a recount. In 2005, Congress intervened in a Florida right-to-die case by creating special federal jurisdiction that empowered the federal courts to review the determinations of state courts on the matter.¹²⁷ What connects these three

123. H.R. REP. NO. 101-734, at 28-29 (1990) ("The section is not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to *Finley*." (citing *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921) and *Zahn v. Int'l Paper Co.*, 414 U.S. 291 (1973))).

124. See ANTONIN SCALIA, A MATTER OF INTERPRETATION 17 (1997) ("It is the *law* that governs, not the intent of the lawgiver Men may intend what they will; but it is only the laws that they enact which bind us.").

125. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562 (1996) (imposing Due Process limitations on punitive damages awards).

126. See *Bush v. Gore*, 531 U.S. 98, 106 (2000) (determining the Florida Supreme Court's order for a manual recount without any other guidance to be an inadequate remedy).

127. See *Relief of the Parents of Theresa Marie Schiavo*, Pub. L. No. 109-3, § 1, 119 Stat. 15, 15 (2005) (granting jurisdiction to a Florida federal district court to hear a claim brought by Theresa Marie Schiavo's parents).

efforts is the willingness of the Court and Congress to engage in selective, robust federal review of matters that ordinarily should be treated as having been conclusively resolved by the state courts—intervention motivated largely by the perceived unfavorable results generated by the state courts. Each of these examples will be reviewed in turn.

1. *Due Process Remittitur*

In *BMW of North America, Inc. v. Gore*,¹²⁸ the Supreme Court invested itself with the authority to review punitive damages awards imposed in state courts for "excessiveness" based on standards derived from the Due Process Clause of the Fourteenth Amendment. Specifically, the Court wrote, "The Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a 'grossly excessive' punishment on a tortfeasor."¹²⁹ Excessiveness, the Court announced, was to be determined with reference to three "guideposts": "the degree of reprehensibility of the [challenged conduct]; the disparity between the harm or potential harm suffered . . . and [the] punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases."¹³⁰ The Court subsequently declared that "the level of punitive damages is not really a 'fact' 'tried' by the jury," opening the door for the Court's utilization of a *de novo* standard of review for jury-imposed punitive damages awards.¹³¹ More recently, the Court added, "[I]n practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."¹³²

The result of this series of Court opinions is that state courts are no longer the sole authorities over what level of punishment is appropriate for tortfeasors who violate state law. If the Supreme Court feels that the amount is too high because of its view that the offending conduct was insufficiently reprehensible, the Court may simply strike down the award. Of course, this doctrine then enables the Supreme Court to substitute its own judgment of reprehensibility for those of state legislatures and juries, something it has no right to do.

128. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

129. *Id.* at 562 (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 454 (1993)).

130. *Id.* at 575.

131. See *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437 (2001) (quoting *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 459 (1996) (Scalia, J., dissenting)).

132. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003).

Although it invokes the Due Process Clause as justification for this intrusion on state sovereign authority, as I have discussed in a previous article, there is no substantive due process protection against punitive damages beyond a certain level.¹³³ Federal excessiveness jurisprudence is thus not only an anti-federalist imposition on state prerogatives; it is illegitimate in its foundation on phony due process principles.

2. *Bush v. Gore*

*Bush v. Gore*¹³⁴ provides another notable instance of federal review of state judicial determinations. Article II, § 1 of the U.S. Constitution provides: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress."¹³⁵ This provision unambiguously makes it the exclusive province of states to determine—through their regularly constituted and constrained legislatures—the "Manner" of appointing presidential Electors. Indeed, the Court has affirmed that the authority of states in this sphere is "plenary."¹³⁶ However, once a state decides to allow its electorate to vote for the state's electors, that state may not arbitrarily treat the votes cast in a disparate manner.¹³⁷ The central issue in *Bush v. Gore* was whether Florida transgressed this principle in ordering manual recounts of votes cast to determine "the intent of the voter."¹³⁸ The majority in *Bush v. Gore* held that largely because the standards for determining voter intent might differ from one county to the next or even within counties, the recount plan violated the Equal Protection Clause of the Fourteenth Amendment.¹³⁹

133. See A. Benjamin Spencer, *Due Process & Punitive Damages: The Error of Federal Excessiveness Review*, 79 S. CAL. L. REV. 1085, 1088 (2006) ("What history and precedent indicate is that due process has never been construed to impair the common law practice of states permitting civil juries to award exemplary damages at levels they deem appropriate under the circumstances.").

134. *Bush v. Gore*, 531 U.S. 98 (2000).

135. U.S. CONST. art. II, § 1.

136. See *McPherson v. Blacker*, 146 U.S. 1, 35 (1892) (deciding that the Constitution gives States the plenary power to decide how to choose their presidential electors).

137. See *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966) ("[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.").

138. *Bush*, 531 U.S. at 105–06.

139. See *id.* at 106 (stating that voter intent standards would not be uniform throughout the state and thus violated the Equal Protection Clause).

Although the propriety of such an application of the Equal Protection Clause can be and has been debated,¹⁴⁰ of more importance to our exploration of anti-federalist procedure was the Court's further determination that Florida would not be given the opportunity to design and implement a recount process that would alleviate these equal protection concerns. Finding that "[t]he Supreme Court of Florida has said that the legislature intended the State's electors to 'participat[e] fully in the federal electoral process,' as provided in 3 U.S.C. § 5,"¹⁴¹ and finding that a constitutional recount could not possibly be concluded by the December 12 "safe harbor"¹⁴² date established by 3 U.S.C. § 5, the Court simply reversed the Florida Supreme Court's judgment that a recount proceed.¹⁴³

Two things were remarkable about the Court's decision not to permit Florida to develop a constitutionally sound recount scheme. First, the Court's basis for doing so was thin; although the Court claimed that the Supreme Court of Florida had announced a legislative intent that Florida's "electors" "participat[e] fully in the federal electoral process," the Florida high court said no such thing. Instead, here is what the Florida court said:

[I]n this case involving a presidential election, we conclude that the reasoned basis for the exercise of the Department's discretion to ignore amended returns is limited to those instances where failure to ignore the amended returns will: . . . in the case of a federal election, will result in Florida voters not participating fully in the federal electoral process, as provided in 3 U.S.C. § 5.¹⁴⁴

Florida's Supreme Court was speaking here about the discretionary rejection of amended returns in a federal election and laying down the rule that such discretion is appropriately exercised if the failure to do so would prevent voters (not "electors") from participating in the federal electoral process. Reference to

140. See, e.g., Michael W. McConnell, *Two-and-a-Half Cheers for Bush v. Gore*, 68 U. CHI. L. REV. 657, 673–74 (2001) (defending *Bush v. Gore*'s Equal Protection Clause holding); David A. Strauss, *Bush v. Gore: What Were They Thinking?*, 68 U. CHI. L. REV. 737, 749–51 (2001) (criticizing *Bush v. Gore*'s Equal Protection Clause holding); Cass R. Sunstein, *Order Without Law*, 68 U. CHI. L. REV. 757, 758 (2001) ("[T]he Court's rationale was not only exceedingly ambitious but also embarrassingly weak. However appealing, its equal protection holding had no basis in precedent or in history.").

141. *Bush v. Gore*, 531 U.S. 98, 110 (2000) (quoting *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1273, 1289 (Fla. 2000)); see 3 U.S.C. § 5 (2000) (providing that if a state legislature has provided for the final determination of contests or controversies by law, that determination shall be conclusive if made at least six days prior to the meeting of electors).

142. *Bush*, 531 U.S. at 110.

143. *Id.*

144. *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1273, 1289 (Fla. 2000).

3 U.S.C. § 5 is made in order to indicate that the deadlines contained therein must be taken into account when deciding whether to ignore amended returns.¹⁴⁵ Nothing in this statement commits the State of Florida to an unyielding policy of submitting a slate of electors by the deadline imposed by 3 U.S.C. § 5. Rather, the Florida court was speaking only of the propriety of rejecting amended returns in an effort to meet that deadline. For the U.S. Supreme Court to misuse this statement by the Supreme Court of Florida as its sole basis for cutting off the recount was disingenuous.

This brings us to the second difficulty with the Court's decision to preclude Florida from proceeding with a recount under a revised scheme: The U.S. Supreme Court completely usurped Florida's exclusive and plenary power over the appointment of electors as promised by Article II, § 1 of the U.S. Constitution. Florida has determined that its voters will select presidential electors and that in counting the votes of the electorate "the intent of the voter" must be determined,¹⁴⁶ a mandate that the U.S. Supreme Court acknowledged was "unobjectionable as an abstract proposition and a starting principle."¹⁴⁷ Beyond the obligation to comply with the mandates of the Equal Protection Clause and other pertinent constitutional constraints, Florida, not the U.S. Supreme Court, is empowered to design, administer, and implement whatever process for selecting presidential electors it sees fit to pursue. It was for Florida to determine whether the votes of its voters had been properly and fully counted in the election of its electors, and if the state was going to miss the safe harbor deadline of 3 U.S.C. § 5 to make that determination, that was their prerogative. Missing the deadline is not unprecedented¹⁴⁸ and only deprives the state of having its slate of electors treated as "conclusive."¹⁴⁹ In favoring manual recounts, it appears that Florida had prioritized making sure that every vote was properly counted above receiving safe harbor protection for its electors.

The problem is that the U.S. Supreme Court reached its own judgment regarding Florida's policy in this regard, contriving a non-existent Florida

145. See *id.* ("However, in this case involving a presidential election, the decision as to when amended returns can be excluded from the statewide certification must necessarily be considered in conjunction with the contest provisions of section 102.168 and the deadlines set forth in 3 U.S.C. § 5.").

146. *Gore v. Harris*, 772 So. 2d 1243, 1256 (Fla. 2000) (explaining that state legislation requires a legal vote to represent a voter's intent), *rev'd*, *Bush v. Gore*, 531 U.S. 98 (2000).

147. *Bush*, 531 U.S. at 106.

148. See *id.* at 127 (Stevens, J., dissenting) ("[I]n 1960, Hawaii appointed two slates of electors and Congress chose to count the one appointed on January 4, 1961, well after the Title 3 deadlines." (citing William Josephson & Beverly J. Ross, *Repairing the Electoral College*, 22 J. LEGIS. 145, 166 n.154 (1996))).

149. 3 U.S.C. § 5 (2000).

legislative intent to meet the safe harbor deadline at all costs and purporting to render its decision in deference to that intent. The anti-federalist aspects of the process now become clear. Constitutionally, the procedure for selecting electors is the exclusive province of the states, as is the procedure for resolving controversies surrounding their selection.¹⁵⁰ Establishing the selection process is a state *legislative* concern as is establishing the process for resolving election controversies. The actual resolution of those controversies, to the extent they turn on issues of state electoral law, is ultimately for a state's *judiciary*. The Supreme Court's intervention into this sphere, not to enforce federal constitutional guarantees, but rather to pronounce Florida policy respecting the selection of electors and to bring an end to a process that Florida had determined should continue, deprived Florida of its constitutional power to "appoint, in such Manner as the Legislature thereof may direct, a Number of Electors."¹⁵¹ In doing so, the Court deprived Florida of an express power granted to it under the Constitution, arrogated that power unto itself, transgressed the principle of limited federal government, and trammelled on the right of states to resolve conclusively issues of state law, all in one fell swoop.

What prompted the Court's failure to defer to Florida's interpretation and application of its own laws? Chief Justice Rehnquist, in a separate concurring opinion stated, "Though we generally defer to state courts on the interpretation of state law, there are of course areas in which the Constitution requires this Court to undertake an independent, if still deferential, analysis of state law."¹⁵² This was one of those areas, Rehnquist explained, because "[a] significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question"¹⁵³ and the question before the Court was whether the Supreme Court of Florida's judgment represented an impermissible departure from Florida's selection scheme. The Court concluded that it did.¹⁵⁴ More explanatory may be one commentator's analysis: "[T]his Court found the national interests at stake—what it perceived as the fairness and reliability of the presidential election result—more compelling than

150. *Bush v. Gore*, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring) ("Art. II, § 1, cl. 2 'convey[s] the broadest power of determination' and 'leaves it to the legislature exclusively to define the method' of appointment." (quoting *McPherson v. Blacker*, 146 U.S. 1, 8 (1892))).

151. U.S. CONST. art. II, § 1.

152. *Bush*, 531 U.S. at 114 (Rehnquist, C.J., concurring) (citations omitted).

153. *Id.* at 113 (Rehnquist, C.J., concurring).

154. *See id.* at 120 (Rehnquist, C.J., concurring) ("For the court to step away from this established practice, prescribed by the Secretary [of State] . . . was to depart from the legislative scheme.").

Florida's sovereignty interest in resolving its own election controversy."¹⁵⁵ In other words, it was more important—in the Court's view—to bring the presidential election to a secure conclusion than the chaos that would have ensued were Florida's authority respected and its recount permitted to go forward.

Although the validity of the Court's conclusion that the recount would impermissibly depart from Florida's electoral scheme constituted a significant aspect of the decision, the remedy the Court selected—reversal of the Florida Supreme Court's decision and the cutting off of any recounts—is what makes the Court's decision fundamentally anti-federalist. As was done in the Court's *per curiam* majority opinion, Chief Justice Rehnquist in his concurrence relied upon the strained notion that the Florida legislature had made taking advantage of the safe harbor provided by 3 U.S.C. § 5 an absolute priority that constrained any efforts state courts might undertake in resolving electoral controversies.¹⁵⁶ As discussed earlier, that this was actually the position of the Florida legislature is not something that the Court convincingly established. Nor was it something for the U.S. Supreme Court to declare. True respect for the constitutional authority of Florida's legislature to select electors, and of the authority of Florida's courts to adjudicate ensuing disputes would have demanded a remand to the Supreme Court of Florida to enable it to determine whether the legislature did indeed prioritize meeting the safe harbor deadline over verifying a proper count of votes and to fashion a constitutionally acceptable recount procedure if necessary, the impending passage of the safe harbor deadline notwithstanding. As the Court ironically noted in its *per curiam* opinion, "The press of time does not diminish the constitutional concern. A desire for speed is not a general excuse for ignoring equal protection guarantees."¹⁵⁷ Neither should the press of time have motivated the Court to usurp Florida's constitutional entitlement to control the selection of its presidential electors and determine its legislative intent for itself.

155. Bradley W. Joondeph, *Bush v. Gore, Federalism, and the Distrust of Politics*, 62 OHIO ST. L.J. 1781, 1804 (2001).

156. See *Bush v. Gore*, 531 U.S. 98, 120–21 (2000) (Rehnquist, C.J., concurring) ("The scope and nature of the remedy ordered by the Florida Supreme Court jeopardizes the legislative wish to take advantage of the safe harbor provided by 3 U.S.C. § 5.") (citations omitted); see also *id.* at 121 (Rehnquist, C.J., concurring) ("Surely when the Florida Legislature empowered the courts of the State to grant 'appropriate' relief, it must have meant relief that would have become final by the cutoff date of 3 U.S.C. § 5.").

157. *Id.* at 108.

3. *The Case of Terri Schiavo*

On March 21, 2005 Congress enacted legislation entitled "Relief of the Parents of Theresa Marie Schiavo" (Terri's Law).¹⁵⁸ The Act was in response to decisions by Florida state courts that Ms. Schiavo was in a persistent vegetative state and that she would have elected to forego further use of a feeding tube.¹⁵⁹ Terri's Law conferred jurisdiction over any federal claims pertaining to the withholding or withdrawal of medical treatment, foods or fluids from Ms. Schiavo to the United States District Court for the Middle District of Florida.¹⁶⁰ Terri's Law also granted standing to the parents of Ms. Schiavo to bring suit

against any other person who was a party to State court proceedings relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain the life of Theresa Marie Schiavo, or who may act pursuant to a State court order authorizing or directing the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life.¹⁶¹

Pursuant to this Act, Ms. Schiavo's parents filed suit in Florida federal court, seeking a temporary restraining order directing Ms. Schiavo's guardian and the hospice where she was located to transport her to a hospital for medical treatment.¹⁶² Both the district court¹⁶³ and the Eleventh Circuit¹⁶⁴ rejected the parents' request for a temporary restraining order and the Supreme Court declined to intervene.¹⁶⁵

The anti-federalist attributes of Terri's Law are obvious. Florida's determination regarding Ms. Schiavo's medical condition and her wishes regarding death were matters of Florida state law that had been conclusively resolved by Florida's courts. Nevertheless, because Congress and the President disagreed with the decision made by the courts, they took the extraordinary step

158. Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109-3, 119 Stat. 15 (2005).

159. See *In re Guardianship of Schiavo*, 916 So. 2d 814, 819 (Fla. App. 2005) (upholding the lower court's decision to terminate life-sustaining procedures).

160. Relief of the Parents of Theresa Marie Schiavo § 1, 119 Stat. at 15.

161. *Id.* § 2, 119 Stat. at 15.

162. See *Schiavo ex rel. Schindler v. Schiavo*, 358 F. Supp. 2d 1161, 1163-64 (M.D. Fla. 2005) (deciding that the plaintiffs had not established the necessary elements for granting a temporary restraining order).

163. *Id.* at 1168.

164. *Schiavo ex rel. Schindler v. Schiavo*, 403 F. 3d 1289, 1303 (11th Cir. 2005).

165. See *Schiavo ex rel. Schindler v. Schiavo*, 544 U.S. 945 (2005) (denying the petition for writ of certiorari).

of enacting legislation on behalf of one individual to provide a federal forum for challenging compliance with the state courts' decrees. Ordinarily, under the so-called *Rooker-Feldman* doctrine,¹⁶⁶ lower federal courts have no jurisdiction over "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments."¹⁶⁷ Such appellate jurisdiction is limited to the U.S. Supreme Court.¹⁶⁸ Terri's Law nullified this doctrine but only for one special case. In doing so, the Act's proponents clearly violated principles of federalism that many of them otherwise held dear.¹⁶⁹

III. Analysis & Critique

Although many of the demerits of anti-federalist procedure have already been alluded to, this Part undertakes a more comprehensive analysis of the deeper issues raised by this phenomenon. The critique will be fivefold. First, to the extent that Congress has relied upon its authority under the Commerce Clause to interfere with state judicial prerogatives as described above, such reliance has been misplaced. Neither the clause itself nor the Supreme Court's Commerce Clause jurisprudence provides Congress with any authority to limit the award of punitive damages by state courts, to require the application of Rule 11 in state court, or to determine intrastate venue in personal injury cases tried in state court. Second, the Guarantee Clause—a provision written off by many, including the Supreme Court, as moribund—should be read to preclude the

166. The name for this doctrine is drawn from *Rooker v. Fid. Trust Co.*, 261 U.S. 114 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

167. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005).

168. See 28 U.S.C. § 1257 (2000) ("Final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court.").

169. David Davenport of the Hoover Institute criticized Terri's Law by stating:

When a case like this has been heard by 19 judges in six courts and it's been appealed to the Supreme Court three times, the process has worked—even if it hasn't given the result that the social conservatives want. For Congress to step in really is a violation of federalism.

Adam Nagoumey, *G.O.P. Right Is Splintered on Schiavo Intervention*, N.Y. TIMES, Mar. 23, 2005, at A14, available at <http://www.nytimes.com/2005/03/23/politics/23repubs.html?ei=5088&en=370f736315233581&ex=1269234000&partner=rssnyt&pagewanted=print&position=>. Stephen Moore, president of the Free Enterprise Fund, was quoted in the same article as having said, "I don't normally like to see the federal government intervening in a situation like this, which I think should be resolved ultimately by the family: I think states' rights should take precedence over federal intervention. A lot of conservatives are really struggling with this case." *Id.*

degree of interference with state judiciaries contemplated by anti-federalist legislation. Third, principles of federalism enshrined in the Tenth Amendment cast doubt on the validity of the federal imposition on state judiciaries via the congressional enactments and Court decisions described above. Fourth, expansive grants of federal jurisdiction and interpretations of federal jurisdictional statutes run afoul of the limitations set forth in Article III by empowering federal courts to hear cases the Constitution neglects to place within their authority. Finally, this Part will challenge the doctrinal consistency of the proponents of anti-federalist procedure, highlighting their tendency to support principles of federalism and states' rights in most instances but forsake those principles in the procedural areas reviewed above.

A. A Misuse of the Commerce Clause Power

Current understandings of the Commerce Clause preclude congressional efforts to constrain the authority of state courts to impose punitive damages awards in state law cases.¹⁷⁰ Modern Commerce Clause jurisprudence permits Congress to regulate the channels of interstate commerce, the instrumentalities of interstate commerce, and activities that "substantially affect"¹⁷¹ interstate commerce.¹⁷² State courts are not "channels" or "instrumentalities" of interstate commerce and thus can only be regulated if their activity falls under the third

170. Professor Bellia has previously addressed the question of the propriety of regulating state court procedures under the Commerce Clause but his answer was ultimately too equivocal and unsatisfactory:

[The] constitutionality [of the Y2K Act's regulation of state court procedure] thus may depend on whether the Commerce Clause permits only direct regulation of economic activity or regulation of noneconomic activity that has substantial economic effects. Until that question is resolved, Congress's authority to regulate state court procedures under Article I remains open to question.

Bellia, *supra* note 9, at 970.

171. Although the Court has not shirked from the notion that activities that substantially affect interstate commerce may be reached under the Commerce Clause, it is worth noting that this strain of the doctrine arguably stretches the clause beyond its originally understood meaning. *See* *United States v. Morrison*, 529 U.S. 598, 627 (2000) (Thomas, J., concurring) ("[T]he very notion of a 'substantial effects' test under the Commerce Clause is inconsistent with the original understanding of Congress' powers and with this Court's early Commerce Clause cases."). Although challenging this aspect of Commerce Clause jurisprudence is beyond the scope of this article, the contested validity of the substantial effects test should caution against expansive applications of the doctrine to permit the regulation of non-economic activity traditionally falling within the states' spheres of authority.

172. *See* *Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (reiterating the rule that "Congress has the power to regulate activities that substantially affect interstate commerce").

category—referred to as the "substantial effects" test. But the Court has thus far confined congressional authority to regulate activity under this test to "economic" activity,¹⁷³ a characterization one cannot fairly ascribe to the adjudication of claims by state courts. Although the outcomes of state court adjudication of commercial disputes may substantially affect interstate commerce, the adjudication of claims in and of itself does not constitute economic activity. Rather, state court adjudication is quintessential governmental activity—the operation of the state's official mechanism for hearing and resolving claims seeking redress for violation of state laws. States open their courts to the resolution of disputes not as a business enterprise, but as a fundamental component of the exercise of their law enforcement authority within their respective jurisdictions. Labeling such activity "economic" is a stretch at best.

Congressional attempts to regulate state punitive damages awards run into further difficulty because they purport to regulate an area within the traditional sphere of state authority. The Court has noted that activity cannot be regulated under the Commerce Clause solely based on the activity's aggregate effect on interstate commerce when the activity falls within areas of traditional state regulation.¹⁷⁴ This limitation is meant to prevent Congress from exercising, via the Commerce Clause, a plenary police power of the kind that has been reserved to the states.¹⁷⁵ As the Court explained in *United States v. Morrison*,¹⁷⁶ permitting violent crimes against women to be regulated based on their aggregate effects on interstate commerce "will not limit Congress to

173. See *Morrison*, 529 U.S. at 613 ("While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."). Speaking of its decision in *Morrison*, the *Raich* Court explained:

Despite congressional findings that such crimes had an adverse impact on interstate commerce, we held the [Violence Against Women Act] unconstitutional because, like the statute in *Lopez*, it did not regulate economic activity. We concluded that "the noneconomic, criminal nature of the conduct at issue was central to our decision in *Lopez*"

Raich, 545 U.S. at 25 (emphasis added) (quoting *Morrison*, 529 U.S. at 610).

174. See *Morrison*, 529 U.S. at 615–16 ("Petitioners' reasoning, moreover, will not limit Congress to regulating violence but may, as we suggested in *Lopez*, be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant."); *id.* at 617 ("We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce.").

175. See *United States v. Lopez*, 514 U.S. 549, 566 (1995) ("The Constitution . . . withhold[s] from Congress a plenary police power.").

176. *United States v. Morrison*, 529 U.S. 598 (2000).

regulating violence but may, as we suggested in *Lopez*, be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant.¹⁷⁷ Because "the Constitution requires a distinction between what is truly national and what is truly local,"¹⁷⁸ such interference with traditional state bailiwicks based on their inevitable aggregate effects on interstate commerce cannot be permitted consistent with the notion of a national government of limited powers.

The fixing and award of punitive damages for judgments on state law claims tried in state courts has always been the province of the states,¹⁷⁹ rendering congressional attempts to regulate in this area improper under the Commerce Clause. As I have explained elsewhere, states have always enjoyed a pre-constitutional right to empower juries to impose punitive damages as they see fit, and this power was not yielded to the federal government in the Constitution.¹⁸⁰ Thus, Congress's efforts to use its Commerce Clause authority to limit the remedies that state courts can provide for the vindication of state law claims trample on states' exercise of a reserved power and usurps the states' exercise of their police powers, substituting a federal police power in its place. The Commerce Clause does not now nor was it ever intended to permit Congress to control remedies available under state law in state courts. The Supreme Court has written that the Commerce Clause "authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce."¹⁸¹ This principle applies with equal force to state courts: The Commerce Clause does not authorize Congress to regulate state governments' *adjudication* of commercial disputes based on state law,¹⁸² a process that is part and parcel of a state's exercise of its police power. In sum, regulating non-economic activity (state court adjudication), in an area of traditional state regulation (punitive damages for state law claims), by regulating courts rather than economic actors themselves—all based on the idea that such adjudications substantially affect interstate commerce—is a few bridges too far.

177. *Id.* at 615–16.

178. *Id.* at 617–18.

179. See Spencer, *supra* note 133, at 1125 ("[I]t is clear that states traditionally have been unconstrained in their ability to award punitive damages.").

180. *Id.*

181. *New York v. United States*, 505 U.S. 144, 166 (1992).

182. See Bellia, *supra* note 9, at 966 ("Historically, even the most contested exercises of the commerce power have operated directly upon the primary economic activity of individuals rather than upon how disputes arising from that economic activity are litigated.").

The same analysis applies to the Lawsuit Abuse Reduction Act's command that state courts apply Rule 11 of the Federal Rules of Civil Procedure to state court proceedings in all cases where they determine that the action would "substantially affect[] interstate commerce."¹⁸³ Although this language attempts to exploit the substantial effects test as a hook for Congress's regulation of state court procedure in this regard, as discussed above, Congress may not regulate the operation of state courts under the Commerce Clause because state court adjudication of state law claims is a non-economic activity within the traditional sphere of authority retained by the states.¹⁸⁴ Congress certainly can legislate in areas of interstate commerce and provide for exclusive federal court jurisdiction over disputes involving those matters, in which case the federal rules of civil procedure could properly be applied; however, Congress can hardly claim the authority to require that states follow the federal procedural rules when adjudicating state law claims in their own courts.

B. Violation of the Guarantee Clause

Article IV, § 4 of the United States Constitution provides: "The United States shall guarantee to every State in this Union a Republican Form of Government"¹⁸⁵ There are two sides to the Guarantee Clause:¹⁸⁶ a limitation on states and a limitation on the federal government. States are

183. Lawsuit Abuse Reduction Act of 2005, H.R. 420, 109th Cong. § 3 (1st Sess. 2005).

184. See *supra* Part II.A (discussing instances in which state courts have been ousted of their jurisdiction over certain common law tort claims).

185. U.S. CONST. art. IV, § 4.

186. It should be noted at the outset that the Court has long viewed claims based on the Guarantee Clause as nonjusticiable. See *New York*, 505 U.S. at 184 ("In most of the cases in which the Court has been asked to apply the Clause, the Court has found the claims presented to be nonjusticiable under the 'political question' doctrine."). Thus, the vision of the Guarantee Clause propounded herein would have to "overcome deeply held notions that the Clause is nonjusticiable." Deborah Jones Merritt, *Republican Governments and Autonomous States: A New Role for the Guarantee Clause*, 65 U. COLO. L. REV. 815, 822 (1994). As Professor Richard Fallon recently pointed out, the possibility of a relaxation of the Court's absolute nonjusticiability position is not far-fetched:

Several prominent Supreme Court decisions have held that Guarantee Clause cases present nonjusticiable political questions. In *New York* [*v. United States*, 505 U.S. 144 (1992)] however, Justice O'Connor's majority opinion signaled a potential willingness to consider whether the reach of those decisions should be limited Although inconclusive, this discussion held out the plain possibility that the Court might treat some Guarantee Clause claims as justiciable in the future, even if it adhered to the view that others are not.

Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1308 n.158 (2006) (citations omitted).

required, as a matter of federal constitutional law, to vest power in the people to select and control their rulers.¹⁸⁷ More importantly for our purposes is the admonition the clause gives to the federal government: The federal government may not interfere with states' autonomy to such an extent that it prevents them from enjoying "untrammelled self-government."¹⁸⁸ This notion derives from the fact that undue interference with state autonomy eviscerates popular sovereignty, supplanting republican self-governance by the people with federal control of state authorities. It cannot be gainsaid that "a separate and independent judiciary is an indispensable element of a republican form of government"¹⁸⁹ and thus state courts must properly be regarded as an essential piece of the republican form protected by the clause. In light of these principles, congressional enactments that either directly control state courts or that eliminate their ability to adjudicate state law claims pursuant to their respective charters of authority offend republicanism in a way the Guarantee Clause should be seen as competent to prevent.

The Lawsuit Abuse Reduction Act would have crossed this line. The bill called for the application of Rule 11 to state court proceedings that "substantially affect[] interstate commerce"¹⁹⁰ and also mandated that personal injury claims filed in state court be filed in the state and county in which either of the parties resides or where the injury occurred.¹⁹¹ Both of these provisions transgress the Guarantee Clause because the federal prescription of civil procedure for state courts would prevent states from prescribing such procedure themselves. Because promulgating its own judicial procedure is an ordinary function of state government, the Guarantee Clause bars the federal government from taking this power out of the hands of state citizens and arrogating it unto itself.¹⁹² When states cannot control their own judicial procedure, the people

187. See Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 23 (1988) ("[A] republican government is one in which the people control their rulers. That control, moreover, is exerted principally—although not exclusively—through majoritarian processes.").

188. WILLIAM WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* 294 (1972); see Merritt, *supra* note 187, at 22–23 ("[I]n the guarantee clause the United States promises to secure each of the states the autonomy necessary to maintain a republican form of government. The guarantee clause, therefore, provides an essential constitutional limit on federal interference with state autonomy.").

189. *Bauers v. Heisel*, 361 F.2d 581, 588 (3d Cir. 1966) (en banc), *cert. denied*, 386 U.S. 1021 (1967); see *County of Lane v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869) (indicating that states are "endowed with all the functions essential to separate and independent existence").

190. Lawsuit Abuse Reduction Act of 2005, H.R. 420, 109th Cong. § 3 (1st Sess. 2005).

191. *Id.* § 4.

192. *Cf. United States v. Downey*, 195 F. Supp. 581, 585 (S.D. Ill. 1961) (holding that the federal government cannot promulgate rules for criminal procedure in the State courts because

no longer control the judicial arm of their respective state governments; instead, the federal government controls the state judiciary, meaning that republicanism no longer prevails. Such a state of affairs would transform state governments from sovereign republican entities into subordinate administrative units of the central national government. The conversion of states into administrative subordinates or mere colonial outposts of the federal government must be viewed as an outcome that the Guarantee Clause cannot tolerate. When the states are relegated to subordinate units or instrumentalities of the federal government to be commandeered and directed according to the federal will, particularly with respect to matters reserved to state control, they are stripped of their autonomy and are prevented from maintaining and operating the government of laws instituted by their respective citizenries.

The affront to the Guarantee Clause imposed by the Class Action Fairness Act is more tentative and subtle. Although CAFA operates to enlarge the diversity jurisdiction of federal courts to embrace the filing and removal of certain putative class actions, the practical result of CAFA will most likely not simply be the litigation of certain class actions in federal versus state court; rather, some if not many of the cases that otherwise would have been litigated as class actions in state court will face more challenging class certification standards that will prevent the cases from moving forward at all.¹⁹³ That this might occur was Congress's stated expectation in its report supporting the

doing so would "disregard the provisions of [the Guarantee Clause]," which precludes the federal government from "prevent[ing] a state from discharging its ordinary functions of government").

193. The more stringent class certification and settlement standards imposed by the Supreme Court in cases like *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), particularly with respect to the predominance requirement for damages classes, will likely stymie more putative class actions removed to federal court than would be the case were those cases to remain in state courts. See Morrison, *supra* note 60, at 1522 ("[U]nderlying the arguments about whether these cases 'ought' to be in state or federal court is a deeply held belief by each side that the choice of forum will significantly affect the outcome of the case."). Congress recognized the heightened scrutiny of class certifications by federal judges in its committee report accompanying CAFA:

The Committee finds, however, that one reason for the dramatic explosion of class actions in state courts is that some state court judges are less careful than their federal court counterparts about applying the procedural requirements that govern class actions. In particular, many state court judges are lax about following the strict requirements of Rule 23 (or the state's parallel governing rule), which are intended to protect the due process rights of both unnamed class members and defendants. In contrast, federal courts generally scrutinize proposed settlements much more carefully and pay closer attention to the procedural requirements for certifying a matter for class treatment.

S. REP. NO. 109-14, at 14 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 14.

legislation.¹⁹⁴ To the extent that state law class actions are removed to federal court under CAFA and decertified, state courts are robbed of the opportunity to adjudicate claims that might have vindicated important state law interests and possible transgressions of state law go unchallenged. In effect, then, CAFA in these instances will nullify state law by neutering the ability of state courts to enforce violations thereof and by moving them into a federal forum only to be dismissed, a process I refer to as "CAFA nullification."

The essence of a republican form of government "is the right of the people to choose their own officers for governmental administration, and pass their own laws."¹⁹⁵ When the state judiciary—the arm of government responsible for interpreting and applying popularly authorized state laws—effectively loses the ability to adjudicate claims arising under state law through CAFA nullification, the state no longer retains control over the just administration of its laws. Because Article III expressly extends the federal judicial power to cases described in CAFA, this usurpation in and of itself cannot be the source of complaint. The problem is federal courts' application of stringent federal certification standards to decertify and dismiss removed class actions that would have been permitted to proceed in state court. The result in such circumstances is that the will of the people (expressed through their duly selected state officials) to provide a state law right and state judicial remedy is nullified and self-governance dies. Not only does CAFA nullification undermine republicanism, it compromises the rule of law by stripping states of the ability to enforce the law in certain instances and it interferes with the right of citizens to petition their respective state governments for the redress of grievances.¹⁹⁶

C. *An Affront to Federalism*

Our Constitution creates a federal system in which the original sovereignty of the states is retained to the extent it has not been surrendered to the national government expressly. The vision of the Framers, as expressed by James Madison, was that "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the

194. See *id.* at 64 ("The only thing that would be denied when an interstate class action is removed to federal court is the plaintiffs' lawyers' ability to strike it rich on class actions that should not be certified by any court because they do not meet the requirements of a proper class.").

195. *In re Duncan*, 139 U.S. 449, 461 (1891).

196. Cf. U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.").

State governments are numerous and indefinite."¹⁹⁷ The limited government thus described was assured via the adoption of the Ninth and Tenth Amendments to the Constitution. The Ninth Amendment provides, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."¹⁹⁸ The Tenth Amendment provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."¹⁹⁹ As I have written elsewhere:

Together, the Ninth Amendment, which guards "against a latitude of interpretation," and the Tenth Amendment, which "exclud[es] every source of power not within the constitution itself," combine to impose a "federalist rule of constitutional construction" that bars any interpretation of the Constitution that either infringes upon rights retained by the people or arrogates to the national government power reserved to the states.²⁰⁰

The Tenth Amendment in particular, which makes the states all powerful in areas where they have not ceded authority to the federal government, is a major bulwark against federal incursions into the sphere of authority intended to be confined to the states. Thus, the Court has emphasized that "judicial enforcement of the Tenth Amendment is essential to maintaining the federal system so carefully designed by the Framers and adopted in the Constitution."²⁰¹

Congress's misuse of the Commerce Clause to regulate state courts directly is a clear violation of the Tenth Amendment.²⁰² Once it is acknowledged that the substantial effects test does not permit Congress to require application of Rule 11 in state courts or to determine venue within state judicial systems, no other provision remains as a source for such regulation,

197. THE FEDERALIST NO. 45 (James Madison); *see also* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (Marshall, C.J.) ("The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.").

198. U.S. CONST. amend. IX.

199. U.S. CONST. amend. X.

200. Spencer, *supra* note 133, at 1140 (citations omitted).

201. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 570 (1985) (Powell, J., dissenting).

202. Professor Tribe made a similar comment with respect to the proposed National Tobacco Settlement. *A Review of the Global Tobacco Settlement: Hearing before the Senate Comm. on the Judiciary*, 105th Cong. 160 (1997) (statement of Laurence H. Tribe) ("For Congress directly to regulate the procedures used by state courts in adjudicating state law tort claims—to forbid them, for example, from applying their generally applicable class action procedures in cases involving tobacco suits—would raise serious questions under the Tenth Amendment and principles of federalism.").

which indicates that the regulation of state judicial procedure hearing state law claims was a matter reserved to the states.²⁰³ Because states retain authority over their respective judiciaries under the Tenth Amendment, the Court has indicated that "the procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control."²⁰⁴ Clearly, then, if Congress cannot control state judicial procedure through the Commerce Clause, the Tenth Amendment makes such efforts unconstitutional.

Similarly, Congress's attempts to limit punitive damages awards—an effort not sanctioned by the Commerce Clause—transgress the reserved authority of states to control the remedies to be available for violations of their laws. As the Supreme Court remarked long ago, "There can, of course, be no doubt of the general principle that matters respecting the remedy . . . depend upon the law of the place where the suit is brought."²⁰⁵ States have traditionally controlled punitive damages awards on state law claims heard in their courts, making congressional limitations of this non-economic activity a non-starter under current Commerce Clause jurisprudence and thus unconstitutional per the Tenth Amendment. The Supreme Court's attempt to limit punitive damages via the Due Process Clause fares no better; as I have explained in a previous writing:

By interpreting the Due Process Clause in a manner that co-opts the authority of state juries to determine the appropriate level of punitive damages and instead permits the U.S. Supreme Court to do so, the Court has engaged in precisely the expansive and aggrandizing constitutional interpretation prohibited by the Ninth and Tenth Amendments.²⁰⁶

Neither Congress nor the Court, then, can limit the availability or amount of punitive damages in state law cases consistent with the mandate of the Tenth Amendment.

The Court's implied preemption doctrine contravenes the Tenth Amendment as well because the doctrine empowers the Court to declare that a statute preempts state law notwithstanding the absence of a congressional mandate to that effect. Congress unquestionably has the power to legislate in

203. See *Bronson v. Kinzie*, 42 U.S. (1 How.) 311, 315 (1843) ("[U]ndoubtedly, a state may regulate at pleasure the modes of proceeding in its courts . . .").

204. *Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 158 (1931); see also Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954) ("The general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them."), quoted in *Johnson v. Fankell*, 520 U.S. 911, 919 (1997); *Howlett v. Rose*, 496 U.S. 356, 372 (1990).

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

206. *Spencer*, *supra* note 133, at 1142.

areas within its constitutional grant of authority and direct that such enactments preempt relevant state law. However, the Court lacks this authority; thus, when it reads preemption into a statute where Congress has not expressly provided for it or expressed its intention that there be preemption, the Court illegitimately nullifies state laws and judicial procedures meant to be protected by the Tenth Amendment. Further, the Court has endorsed a presumption of concurrent federal and state jurisdiction, rebuttable only "by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests."²⁰⁷ The Court's implied preemption jurisprudence goes against this notion, reaching out to invalidate state jurisdiction without the clarity or explicitness the Court has otherwise indicated should be required given the implications for state sovereignty.

The same can be said of the Court's broad interpretation of federal question and removal jurisdiction. The Court has stated that "[d]ue regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined."²⁰⁸ But the Court has not adhered to its own admonition. Permitting arising under jurisdiction in the face of congressional failure to provide for a private right of action is hardly consistent with the admonition to "confine . . . jurisdiction to the precise limits"²⁰⁹ defined by jurisdictional statutes. Similarly, although the Court has insisted on a "strict construction" of the federal removal statutes,²¹⁰ transmogrifying state law claims into federal claims through the complete preemption doctrine is anything but a strict construction of the removal statute, which requires that the removed claims "arise under" federal, not state law. Both instances of overly-broad interpretations of federal jurisdiction have the effect of ripping away from states the practical ability to adjudicate state law claims that they have every right to adjudicate per the Tenth Amendment in the absence of a valid exercise of Congressional authority.

207. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981).

208. *Healy v. Ratta*, 292 U.S. 263, 270 (1934).

209. *Id.*

210. *See Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941) ("Not only does the language of the Act of 1887 evidence the Congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation.").

D. Exceeding Article III's Grant of Jurisdiction

Unwarranted expansions of federal jurisdiction result in vesting federal courts with the ability to hear cases over which Article III fails to confer jurisdiction. Thus, in the instance of the complete preemption doctrine, by declaring that preempted state law claims "arise under" federal law when in reality they do not gives federal courts jurisdiction over cases involving non-diverse parties where only state law claims are asserted, a category of cases the federal judiciary is not empowered to hear. Congress, when legislating pursuant to its constitutional authority, may always declare that preempted state law claims indeed do arise under federal rather than state law and are thus removable. However, the Supreme Court may not itself make such a declaration; it may only enforce Congress's determination that such is the case.

Congress's extension of standing to Terri Schiavo's parents to assert claims on her behalf also drew the federal courts into a case not falling within their Article III jurisdictional grant. The parents of Ms. Schiavo were not her legal guardians but were permitted under the Act to pursue claims asserting violations of Ms. Schiavo's rights, not their own. Under ordinarily applicable principles, Ms. Schiavo's parents would lack both Article III standing and prudential standing to assert the array of federal statutory and constitutional violations they claimed in their suit. Article III standing requires the plaintiff to have suffered an "injury in fact" that a favorable judgment will redress, while prudential standing "encompasses the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked."²¹¹

Ms. Schiavo's parents spectacularly failed to meet these standards. The injuries presented by her parents in federal court were alleged violations of Ms. Schiavo's rights under the Americans with Disabilities Act,²¹² the Rehabilitation Act of 1973,²¹³ the Due Process Clause,²¹⁴ and the Eighth

211. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004).

212. *See Schiavo ex rel. Schindler v. Schiavo*, 358 F. Supp. 2d 1161, 1164 (M.D. Fla. 2005) ("Plaintiffs allege that the failure and refusal of Defendant Michael Schiavo to furnish Theresa Schiavo with necessary and appropriate therapy, rehabilitation services and essential medical services and his demand that she be deprived of food and water violate *her* rights under the Americans with Disabilities Act.") (emphasis added).

213. *Id.* at 1165 ("Plaintiffs allege that Hospice of Florida Sun Coast, Inc. violated Theresa Schiavo's right to rehabilitation under the Rehabilitation Act of 1973.") (citation omitted).

214. *Id.* at 1166 ("Count Eight alleges that Theresa Schiavo's Fourteenth Amendment due process rights were violated . . .").

Amendment.²¹⁵ Presenting no injury of their own but merely those alleged to have been suffered by one they could not claim to represent under Florida law,²¹⁶ Ms. Schiavo's parents clearly lacked Article III and prudential standing. Because Article III standing is a constitutional requirement necessary for federal jurisdiction, Congress is not empowered to waive the requirement under any circumstances. Thus, the extension of federal jurisdiction to the parents of Terri Schiavo was unconstitutional.

E. Doctrinal Hypocrisy

In the "Contract with America," Republicans promised that giving them control of the House of Representatives would mean "the end of government that is too big, too intrusive"²¹⁷ But the same document promised to introduce The Common Sense Legal Reform Act, a bill, which, as noted above, sought to cap punitive damages awards in state law cases tried in state court, a traditionally state-level prerogative.²¹⁸ Indeed, it was widely known that the philosophy behind the "Contract with America" was one of devolution of power to the states,²¹⁹ yet Republican controlled Congresses have been responsible for the federal tort reform measures discussed above and for the private legislation intervening in the Terri Schiavo case. President George W. Bush, a Republican, has similarly mouthed the rhetoric of federalism: "The framers of the Constitution did not believe in an all-knowing, all-powerful Federal Government. They believed that our freedom is best preserved when power is dispersed. That is why they limited and enumerated the Federal Government's powers, and reserved the remaining functions of government to the States."²²⁰ Nevertheless, Mr. Bush also joined the Terri Schiavo

215. *Id.* at 1167 ("Plaintiffs assert that 'Judge Greer and Michael Schiavo, as state actors, have vioated [sic] Terri Schiavo's Eighth Amendment rights by demonstrating a deliberate indifference to a know [sic], substantial risk of serious harm'" (citation omitted)).

216. *See Schiavo ex rel. Schindler v. Schiavo*, 357 F. Supp. 2d 1378, 1384 (M.D. Fla. 2005) ("[T]he state court appointed Michael Schiavo, Theresa Schiavo's husband, as plenary guardian and proxy for Theresa.").

217. *Contract with America*, <http://www.house.gov/house/Contract/CONTRACT.html> (last visited Dec. 4, 2006) (on file with the Washington and Lee Law Review).

218. *Id.*

219. *See, e.g., CONTRACT WITH AMERICA*, *supra* note 7, at 125–41 (explaining the Republican platform during the 104th Congress).

220. Remarks at the National Governors' Association Conference, 2001 PUB. PAPERS 132–33 (Feb. 26, 2001), *available at* <http://www.whitehouse.gov/news/releases/2001/02/20010226-8.html>.

bandwagon, favoring the promotion of "a culture of life" over adherence to the federalist principles he ordinarily espouses.²²¹

The Supreme Court also has embraced states' rights, articulating in a string of cases over the past decade or so a robust vision of constitutional federalism.²²² The Court has intoned that "[i]t is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority,"²²³ invoking our system's "dual sovereignty" to invalidate congressional efforts to protect women against violence,²²⁴ to keep school zones free of guns,²²⁵ and to require state law enforcement officers to conduct background checks on prospective handgun purchasers.²²⁶ At the same time, the Court has vacated state-imposed punitive damages awards,²²⁷ halted the recount process ordered by Florida's highest court pursuant to state law in the exercise of authority granted to states under Article II,²²⁸ maintained the doctrines of implied²²⁹ and complete²³⁰

221. Press Release, President George W. Bush, President's Statement on Terri Schiavo (Mar. 17, 2005), <http://www.whitehouse.gov/news/releases/2005/03/20050317-7.html> (last visited Dec. 4, 2006) (on file with the Washington and Lee Law Review).

222. See Calabresi, *supra* note 5, at 25 ("Perhaps the most striking feature of the Rehnquist Court's jurisprudence has been the revival over the last 5–10 years of doctrines of constitutional federalism Not since before the New Deal-era constitutional revolution of 1937 have the states received such protection in the U.S. Supreme Court from allegedly burdensome federal statutes.").

223. *Printz v. United States*, 521 U.S. 898, 928 (1997).

224. See *United States v. Morrison*, 529 U.S. 598, 627 (2000) (declaring 42 U.S.C. § 13981 unconstitutional).

225. See *United States v. Lopez*, 514 U.S. 549, 552 (1995) (invalidating the Gun-Free School Zones Act of 1990 as exceeding the power of Congress under the Commerce Clause).

226. See *Printz*, 521 U.S. at 935 ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers to administer or enforce a federal regulatory program.").

227. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) ("[I]n practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996) (striking down a punitive damages award of \$2 million as "grossly excessive").

228. See *Bush v. Gore*, 531 U.S. 98, 111 (2000) ("Seven Justices of the Court agree that there are constitutional problems with the jurisdiction recount ordered by the Florida Supreme Court that demand a remedy.").

229. See *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 865 (2000) (holding that a safety standard promulgated under the authority of the National Traffic and Motor Vehicle Safety Act of 1966 preempts a state common law action).

230. See *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 11 (2003) ("Because §§ 85 and 86 provide the exclusive cause of action for such claims, there is, in short, no such thing as a state-law claim of usury against a national bank.").

preemption, and supplied expansive interpretations of federal jurisdictional statutes.²³¹

What is going on here? How is it that the advocates of devolution, states' rights, dual sovereignty, and federalism are the progenitors of so much anti-federalist procedure? Apparently, most of those officials responsible for the schizophrenic policies just described are fair-weather federalists. That is, their belief in federalism is insufficiently principled to withstand the unfavorable outcomes that sometimes result when states make their own decisions.²³² Rep. Christopher Shays of Connecticut, one of five House Republicans who voted against Terri's Law, appeared to agree with this assessment when he stated, "My party is demonstrating that they are for states' rights unless they don't like what states are doing. . . . This couldn't be a more classic case of a state responsibility."²³³ Under the notion of fair-weather federalism, then, when state courts permit overly large punitive damages awards or too many frivolous lawsuits, states' rights must take a back seat to federal tort reform.

If these strong advocates of states' rights are yielding federalism principles on occasion, what principles are being favored in their stead? In the case of Terri Schiavo, for some a sincere belief in the need to protect a "culture of life"

231. See *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 320 (2005) (confirming federal court over state law quiet title claims if they present a contested federal issue); *Exxon Mobil Corp. v. Allapattah Servs. Inc.*, 125 S. Ct. 2611, 2625 (2005) (allowing supplemental jurisdiction in diversity actions over plaintiffs who fail to meet the amount-in-controversy requirement, as long as other diversity requirements are met and at least one plaintiff satisfies the amount-in-controversy requirement).

232. See, e.g., Jerome Ringler, *The Unfairness of the Class Action Fairness Act*, 29 L.A. LAWYER 52, 52 (March 2006) ("[The Class Action Fairness Act] destroys a sacrosanct principle among conservatives—federalism [I]t is hypocritical to brandish the Constitution and publicly recite the Tenth Amendment while simultaneously erasing important rights among the individual states."). This hypocrisy also manifests itself outside of matters of process; fair-weather federalists have sought to impose their substantive policy preferences on states in various areas such as education and same-sex marriage. See, e.g., No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (imposing national requirements intended to close the achievement gap by providing accountability, flexibility, and choice); Remarks of Pres. George W. Bush Calling for a Constitutional Amendment Defining and Protecting Marriage, 40 WEEKLY COMP. PRES. DOC. 276 (Feb. 24, 2004), available at <http://www.whitehouse.gov/news/releases/2004/02/20040224-2.html> ("Today I call upon the Congress to promptly pass and send to the Senate for ratification an amendment to our Constitution defining and protecting marriage as a union of man and woman as husband and wife.").

233. Adam Nagourney, *G.O.P. Right Is Splintered on Schiavo Intervention*, N.Y. TIMES, Mar. 23, 2005, at A14, available at <http://www.nytimes.com/2005/03/23/politics/23repubs.html?ei=5088&en=370f736315233581&ex=1269234000&partner=rssnyt&pagewanted=print&position=>.

motivated their actions;²³⁴ for others, it is probably safe to surmise that politics had something to do with it. In the area of federal tort reform, the nature of the policies embodied in the legislation seems to indicate that federalism is yielding to a desire to protect corporate defendants against certain kinds of suits. The legislation seeking to limit punitive damages, the PSLRA and SLUSA, the Class Action Fairness Act, and the Lawsuit Abuse Reduction Act all interfere with state judicial authority in categories of cases where corporate defendants face potentially large liability and have sought to make it more difficult for plaintiffs to initiate and prevail in such cases.²³⁵ The aim and effect of these bills and enactments uniformly has been to alter state legal rules in ways that favor such defendants rather than the parties seeking relief.

What explains the Supreme Court's moments of anti-federalism in the midst of its federalism renaissance? In *Bush v. Gore* many have speculated that raw politics motivated the Justices, given what was at stake in the case.²³⁶ It is not far fetched to suppose that the outcome their decision would bring about—a Republican presidential victory—was squarely in mind when the five "conservative" Justices decided the case as they did.²³⁷ More certain is the fact that the Court's due process remittitur jurisprudence is motivated by a distaste for the outcomes produced by state courts awarding punitive damages. In cases leading up to *BMW of North America v. Gore*, Justice O'Connor remarked that "[a]wards of punitive damages are skyrocketing,"²³⁸ while Justice Blackmun expressed concern about "punitive damages that 'run wild.'"²³⁹ Further, as with

234. See *id.* ("[S]ome conservatives . . . argued that their opposition to euthanasia as part of their support of the right-to-life movement trumped any aversion they might have to a dominant federal government.").

235. See, e.g., Ringler, *supra* note 232, at 52 ("What these elected officials—Democrats and Republicans alike—really object to is that too many class action lawsuits are successful. It should come as no surprise that principal supporters of CAFA are large corporations (and political contributors) that find themselves accused of wrongdoing.").

236. For example, David Strauss has stated:

The conclusion that emerges, in my view, is that several members of the Court—perhaps a majority—were determined to overturn any ruling of the Florida Supreme Court that was favorable to Vice President Gore, at least if that ruling significantly enhanced the Vice President's chances of winning the election.

Strauss, *supra* note 140, at 737–38.

237. See, e.g., Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1063 (2001) ("*Bush v. Gore* seems to involve 'low politics'—with the five conservatives adopting whatever arguments were necessary to ensure the election of the Republican candidate, George W. Bush.").

238. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part).

239. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991).

congressional tort reform efforts, the Court's excessiveness jurisprudence benefits corporate defendants, whether by chance or by design.

Explaining the Court's anti-federalism with respect to preemption doctrines and federal jurisdiction is more difficult. The federalist tendencies of the Court have revealed themselves primarily in the context of limiting Congress's ability to impose its will on the states, leading many to conclude that the Court was vigorously protective of states' rights. However, the Court has not been solicitous of states' rights when it comes to interpreting the scope of federal jurisdiction or federal preemption. Is there an inconsistency here? Yes, if the Court's effort to constrain congressional authority is viewed through the prism of states' rights. However, as it turns out, the Court's invalidation of Congressional action has not been so much a result of the Court's desire to protect states as it has been an effort aimed at diminishing the power of Congress to exercise plenary regulatory authority.²⁴⁰ The Court's overly broad views of federal jurisdiction and preemption have revealed a Court protective of its own power or that of the federal courts in general vis-à-vis the states. Thus, the two jurisprudential strains can both be seen as variants of the same phenomenon: the Court's ascription of more power to itself and pursuit of judicial supremacy.²⁴¹ As one commentator stated it, "There is a Rehnquist Court revolution in progress, and it is definitely not . . . a states' rights revolution Rather, it is a separation of powers revolution that has to do with the primacy of the judicial branch and of the Court itself."²⁴² Of course,

240. See Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 83 (2001) ("In acting repeatedly to invalidate federal legislation, the Court is using its authority to diminish the proper role of Congress."); see also Sylvia A. Law, *In the Name of Federalism: The Supreme Court's Assault on Democracy and Civil Rights*, 70 U. CIN. L. REV. 367, 371 (2002). Sylvia Law notes that:

[T]he Supreme Court has diminished the power of Congress to address national problems in ways that we have not seen since the Taft Court Era and the constitutionally disastrous period when the Court denied the New Deal Congress and president the power to adopt federal responses to the Great Depression.

Id.

241. See, e.g., Linda Greenhouse, *Thinking about the Supreme Court after Bush v. Gore*, 35 IND. L. REV. 435, 436–37 (2002). As Linda Greenhouse points out:

People who think that what has motivated the Rehnquist Court in such cases as *United States v. Lopez*, *City of Boerne v. Flores*, *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, *Alden v. Maine*, *Kimel v. Florida Board of Regents*, and just last month, *Board of Trustees of the University of Alabama v. Garrett* is states' rights are looking through the wrong end of the constitutional telescope. The game that is really afoot is judicial supremacy

Id. (citations omitted).

242. *Id.* at 438.

although judicial supremacy may be the practical result of the Court's decisions, it is not possible to ascribe to the Court with any determinacy the motive to achieve this end.

Nevertheless, a federalism-respecting approach to federal jurisdiction and preemption demands that the Court restrain itself from self-aggrandizing interpretations of congressional enactments when doing so interferes with the traditionally recognized authority of state judiciaries to hear and manage state law claims in their courts. The Court's rejection of congressional overreaching under the Commerce Clause has largely been proper because the rejected statutes were not properly aimed at regulating interstate commerce. However, the Court's own inventions of implied and complete preemption and expansive notions of arising under jurisdiction are no more legitimate from a constitutional perspective, as has been shown above. Thus, the larger inconsistency here is that the Court reprimands Congress for unsupported forays into the regulation of states but itself indulges in the same.

IV. Towards Federalist Procedure

What would federalism-respecting procedure look like, specifically, in the areas discussed above? Federalist procedure, in general, would take seriously the limits imposed on federal authority—as exercised by all three branches—vis-à-vis the states by treading lightly in instances where traditional state judicial authority might be imposed upon and declining to offend state judicial prerogatives through implication. Such an approach would require the wholesale repudiation of several doctrines and congressional enactments, but would result in a legal landscape more in line with the principles of federalism enshrined in the Constitution.

A. Limited Preemption

Justice Thomas perceives that the Court has an "increasing reluctance to expand federal statutes beyond their terms through doctrines of implied preemption" in light of the belief that "pre-emption analysis is not '[a] freewheeling judicial inquiry into whether a state statute is in tension with federal objectives.'"²⁴³ If indeed there is such a growing reluctance, that would

243. *Bates v. Dow Agrosciences L.L.C.*, 544 U.S. 431, 459 (2005) (Thomas, J., concurring in part and dissenting in part) (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in the judgment)).

be a promising move in the right direction. However, if the Court was interested in fully embracing federalist procedure, it would need to reshape preemption doctrine in the following manner.

1. Abolition of Implied Preemption

In order to respect principles of federalism and the sovereign authority of states, the starting point for analyzing the preemptive effect of any federal law that operates "in a field which the States have traditionally occupied"²⁴⁴ should be a presumption against preemption. As Justice Stevens has explained:

Our presumption against pre-emption is rooted in the concept of federalism. It recognizes that when Congress legislates "in a field which the States have traditionally occupied . . . [.] we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."²⁴⁵

To depart from this presumption, then, the Court should require that the federal law at issue contain a clear expression of congressional intent to preempt state law.²⁴⁶

a. Express Preemption Requirement

Given the weighty concerns underlying this presumption, courts should only find the presence of a congressional intent to preempt state law when the relevant federal statute contains an express preemption clause. Because states are sovereigns within our federal system that retain the power to legislate and adjudicate with respect to matters within their traditional sphere of authority,²⁴⁷

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

245. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 907 (2000) (Stevens, J., dissenting) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230).

246. *See Geier*, 529 U.S. at 894 (Stevens, J., dissenting). Justice Stevens stated:

Because of the role of States as separate sovereigns in our federal system, we have long presumed that state laws—particularly those, such as the provision of tort remedies to compensate for personal injuries, that are within the scope of the States' historic police powers—are not to be pre-empted by a federal statute unless it is the clear and manifest purpose of Congress to do so.

Id. (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) and *Gade v. Nat'l Solid Wastes Mgmt Ass'n*, 505 U.S. 88, 116–117 (1992) (Souter, J., dissenting)).

247. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). The Court stated:

[T]he Constitution of the United States . . . recognizes and preserves the autonomy and independence of the States—independence in their legislative and

the preemption of state law is a serious result that only congressional action can achieve. Congress, not the courts, has the power of preemption; it is only for the courts to enforce preemption in those circumstances where Congress has imposed it. Congress clearly knows how to do this expressly and unambiguously, given the innumerable occasions on which it has done so. Certainly, then, federal statutes that fail to provide expressly for the preemption of state law should not be read to do so anyway. Such a practice—which fairly describes the Court's current doctrine of implied preemption—makes the courts rather than Congress the progenitors of preemption, a role courts have no authority to play.

b. Scope of Preemption Limited to Terms of Express Provision

Further, when Congress includes an express preemption clause in a statute, courts should confine the preemptive effect of the statute on state law to those instances covered by the express provision. By specifically delineating the domain expressly preempted by the statute, Congress should be viewed as having intended to limit the scope of preemption to that domain. As the Supreme Court explained in a now emasculated opinion that suggested support for such a rule,

When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation. Such reasoning is a variant of the familiar principle of *expressio unius est exclusio alterius*: Congress' enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not pre-empted.²⁴⁸

The Court inexplicably backpeddled from this position in *Freightliner Corp. v. Myrick*²⁴⁹ by writing, "The fact that an express definition of the pre-

independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence.

Id. at 78–79.

248. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992) (citations omitted).

249. *See Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995) (holding that the National Traffic and Motor Vehicle Safety Act did not expressly or implicitly preempt state common law design defect claims).

emptive reach of a statute 'implies'—i.e., supports a reasonable inference—that Congress did not intend to pre-empt other matters does not mean that the express clause entirely forecloses any possibility of implied pre-emption."²⁵⁰ This position must be abandoned. Again, Congress alone holds the power of preemption. By exercising that power in a definitive and unambiguous fashion through an express preemption provision, there is no room for courts to say that Congress intended to say more and preempt more but for some reason was reticent. Such a maneuver is nothing more than judicially-created preemption that illegitimately impinges on states' legitimate sphere of authority.

c. Savings Clauses as a Bar to Implied Preemption

Worse still is the circumstance in which courts imply preemption notwithstanding the presence of a savings clause expressly declaring that certain state laws or legal actions are not preempted. Savings clauses, which spell out the extent to which a congressional enactment does not preempt state law, should serve as an absolute bar to field and obstacle preemption. Nevertheless, the Court has determined that a savings clause only "saves" state legal rules or remedies from the scope of any express preemption clause, not from the reach of any implied preemption that courts may discern.²⁵¹ Federalism-respecting procedure would reject this reasoning and treat savings clauses as foreclosing any recourse to implied preemption. Of course, adherence to the previous two rules—no preemption in the absence of an express preemption provision and preemption limited in scope to the terms of the express provision—already eliminate implied preemption *in toto*, rendering savings clauses not much more than a belt-and-suspenders approach.

It should be noted that none of these rules preclude a finding of preemption in cases where it is impossible to comply both with federal and state law. Even where Congress neglects to insert an express preemption clause in a federal statute, when federal and state law collide to such an extent that the compliance with one necessitates the violation of the other, the federal law trumps or preempts the conflicting state law purely by direct application of the Supremacy Clause. Article VI, clause 2 provides, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall

250. *Id.* at 288.

251. *See* *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000) ("We have just said that the saving clause at least removes tort actions from the scope of the express pre-emption clause. . . . We now conclude that the saving clause (like the express preemption provision) does not bar the ordinary working of conflict pre-emption principles.").

be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."²⁵² Thus, Congress, when validly legislating pursuant to its constitutional authority, need not expressly declare any intention that its law preempt any contrary state law with which simultaneous compliance would be impossible; the Supremacy Clause of its own force declares that result. The preemption that results is in no sense "implied" as the Supreme Court has stated,²⁵³ quite to the contrary, such preemption is the most basic and express form of preemption that exists because the express terms of the Supremacy Clause ("any Thing in the Constitution or Laws of any State to the Contrary notwithstanding") call for it.

In sum, a preemption doctrine that respects federalism principles should abandon implied preemption—specifically "obstacle" and "field" preemption—and confine itself to instances of express preemption and situations where it is impossible to comply both with federal and state law.²⁵⁴

2. *Narrow Construction*

When reading federal statutes to determine their preemptive effect, courts should construe those statutes narrowly—consistent with their stated purpose—in order to avoid unnecessary and improper preemption of state law. The Supreme Court provided a good example of this practice recently in *Bates v. Dow Agrosciences*²⁵⁵ where it faced the question of whether state law damages claims against the sellers of a certain pesticide were preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).²⁵⁶ Specifically, because FIFRA provided that states "shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter" the question was whether successful state tort

252. U.S. CONST. art. VI, cl. 2.

253. See *Freightliner Corp.*, 514 U.S. at 287 ("We have found implied conflict preemption where it is 'impossible for a private party to comply with both state and federal requirements.'") (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990)).

254. See Erwin Chemerinsky, *Empowering States: The Need to Limit Federal Preemption*, 33 PEPP. L. REV. 69, 74–75 (2005) ("I think there should be only two situations when there is preemption of state law. One is express preemption. The other is when federal law and state law are mutually exclusive, so it is not possible for somebody to comply with both.").

255. *Bates v. Dow Agrosciences L.L.C.*, 544 U.S. 431 (2005).

256. *Id.* at 434.

claims would create a state common law labeling requirement in contravention of this provision in the Act.²⁵⁷

Rather than reading the preemption clause of FIFRA broadly to prohibit any state judicial action that would influence sellers to alter their labeling, the Court held that only state legal rules that required manufacturers to label or package their products in a particular way would be preempted by FIFRA.²⁵⁸ Finding that "[r]ules that require manufacturers to design reasonably safe products, to use due care in conducting appropriate testing of their products, to market products free of manufacturing defects, and to honor their express warranties or other contractual commitments plainly do not qualify as requirements for 'labeling or packaging,'" the Court concluded that "petitioners' claims for defective design, defective manufacture, negligent testing, and breach of express warranty are not pre-empted."²⁵⁹ In rejecting the lower court's "effects-based test" that sought to bring labeling-influencing state court judgments within the ambit of FIFRA's preemption provision, the Court properly confined the statute to the reading that respected state sovereign authority by not requiring the preemption of many important state law claims.

Another example of narrow construction can be found in *Geier v. American Honda Motor Co.*, a case this Article has already discussed.²⁶⁰ The express preemption provision of the statute at issue in *Geier*, the National Traffic and Motor Vehicle Safety Act (Safety Act), provides:

[N]o State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment[,], any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.²⁶¹

The question for the Court was whether the use of the term "standard" rather than "requirement" in the statute meant that the preemption provision failed to embrace tort actions since the Court had previously held that the word "requirement" included such actions. Although the Court felt that "it is possible to read the pre-emption provision, standing alone, as applying to standards imposed in common-law tort actions," the Court concluded that such a "broad reading" would render the Safety Act's savings clause—which preserves potential "liability at common law" notwithstanding compliance with

257. *Id.* at 436.

258. *Id.* at 444.

259. *Id.*

260. See *supra* Part II.A (discussing *Geier* in an implied preemption context).

261. 15 U.S.C. § 1392(d) (1988) (repealed 1994) (emphasis added).

the Safety Act—meaningless.²⁶² In opting for the "narrow reading that excludes common-law actions," the Court again comported itself in a manner consistent with principles of federalist procedure.²⁶³

B. The Proper Regulation of Interstate Commerce

Moving definitively towards federalist procedure requires a substantial paring back of Congress's ability to regulate state courts under the Commerce Clause. Two main pronouncements from the Supreme Court would achieve this end: (1) a prohibition against regulating state court jurisdiction and procedure via the Commerce Clause or (2) the wholesale adoption of a strict prohibition against regulating non-economic activity thought to have a substantial effect on interstate commerce in the name of the Commerce Clause.

The error of regulating state court efforts to adjudicate commercial disputes has already been made clear.²⁶⁴ Such adjudication constitutes non-economic activity but more importantly consists of the exercise, by states, of their sovereign authority to resolve disputes arising under their own laws. While the substantial effects test itself is of questionable validity,²⁶⁵ its invocation to uphold direct congressional regulation of state court jurisdiction and procedure should never be countenanced given the resultant subversion of basic principles of dual sovereignty and federalism.²⁶⁶ Because the latter of the two proposals—the wholesale abandonment of the substantial effects test in the context of non-economic activity—would affect Congress's power not only respecting anti-federalist procedure but also all non-economic activity, opting for the former proposal would be the more cautious approach.

262. *Geier*, 529 U.S. at 868 ("On that broad reading of the pre-emption clause little, if any, potential 'liability at common law' would remain. And few, if any, state tort actions would remain for the saving clause to save.").

263. *Id.*

264. See *supra* Part II.A (discussing the impropriety and overreaching of the Court's finding of implied preemption in *Geier*).

265. See *Gonzales v. Raich*, 545 U.S. 1, 67 (2005) (Thomas, J., dissenting) ("[T]he 'substantial effects' test is a 'rootless and malleable standard' at odds with the constitutional design.") (quoting *U.S. v. Morrison*, 529 U.S. 598, 627 (1999) (Thomas, J., concurring)).

266. Cf. *id.* at 65 (Thomas, J., dissenting) ("Congress may not use its incidental authority to subvert basic principles of federalism and dual sovereignty.").

C. Narrowly Construed Federal Jurisdiction

To place the scope of federal jurisdiction back within its proper confines, the Supreme Court will have to take two radical steps: (1) adopt Justice Holmes's "Creation Test" for determining the presence of federal question jurisdiction and (2) abolish the complete preemption doctrine. Further, to undo the substantial expansion of federal jurisdiction worked by the Court's correct interpretation of the supplemental jurisdiction statute, Congress must amend the statute to clarify its apparent original intent that claims by parties joined under Rule 23 not receive the benefit of supplemental jurisdiction in diversity cases.

1. Adoption of Holmes's "Creation Test"

The court's current view of arising under jurisdiction pursuant to the federal question jurisdiction statute, 28 U.S.C. § 1331, is that it confers federal jurisdiction both over claims created by federal law and state law claims that implicate substantial federal issues.²⁶⁷ Virtually all complexity in this body of law derives from the latter portion of this statement. That is, the Court's federal question cases have almost uniformly concerned themselves with determining the circumstances under which state law claims may nonetheless be deemed to arise under federal law.²⁶⁸ Given the sovereign authority of states to adjudicate claims created by their respective laws and the traditional understanding that state courts are competent to resolve federal issues, broadly interpreting federal

267. *Grable & Sons Metal Prods. Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005).

268. *See, e.g., Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 817 (1986) (holding that a complaint alleging a violation of a federal statute as an element of a state cause of action does not state a claim arising under federal law when Congress has determined that there should be no private federal cause of action); *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 28 (1983) (holding that a suit by state tax authorities to enforce its levies against funds held in a trust pursuant to an ERISA-covered employee benefit plan is neither a creature of ERISA itself nor a suit which turns on a question of federal law); *Gully v. First Nat'l Bank*, 299 U.S. 109, 112 (1936) ("To bring a case within [a federal] statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action."); *Smith v. Kan. City Title & Trust Co.*, 255 U.S. 180, 199 (1921) (holding that an *ultra vires* claim under state law against a corporation that invested funds in the bonds of Congressionally created banks, on grounds that the Congressional creation acts themselves were unconstitutional, states a claim that arises under federal law); *Hopkins v. Walker*, 244 U.S. 486, 490–91 (1917) (providing federal jurisdiction over a state quiet title action that involved the construction and effect of U.S. mining laws); *Shulthis v. McDougal*, 225 U.S. 561, 569 (1912) (finding that a suit involving rights to land acquired under a law of the United States does not necessarily raise a federal question).

arising under jurisdiction to include state law claims is both unnecessary and offensive to state sovereignty. The Court has noted in the past that respect for state sovereignty must factor into determinations of the scope of federal question jurisdiction: "We have consistently emphasized that, in exploring the outer reaches of § 1331, determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system."²⁶⁹ Unfortunately, the Court's own view of arising under jurisdiction in *Grable & Sons* gives too little regard to federalist concerns.

A federalism-respecting approach to federal question jurisdiction demands the adoption of the so-called "creation test" originally propounded by Justice Oliver Wendell Holmes. Under the creation test, "A suit arises under the law that creates the cause of action."²⁷⁰ That means that § 1331 jurisdiction would be confined to "cases in which federal law creates the cause of action pleaded on the face of the plaintiff's complaint."²⁷¹ In addition to having the benefit of clarity and simplicity,²⁷² the creation test conforms with the meaning one must ascribe to the "arising under" language of the statute if federalism concerns are to be honored. That is, not only is it strained to say that a case arising under state law nonetheless arises under federal law because of the presence of an embedded substantial federal issue, but it is a strained interpretation used to encroach upon cases that unquestionably fall within the jurisdiction of state courts. Certainly, sensitivity to the federal system demands that the Court opt for the more natural and less offensive interpretation of § 1331 until Congress gives some clear indication of its intent to the contrary.

One should be clear that confining federal question jurisdiction in the manner herein proposed does not mean the relinquishment of federal control over vast instances of critical matters of federal law. The Supreme Court would retain the ability to review state decisions on federal issues through its certiorari jurisdiction.²⁷³ However, were the Court disinclined to move in this direction—

269. *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 810 (1986).

270. *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916).

271. *Grable & Sons Metal Prods. Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 320 (2005) (Thomas, J., concurring).

272. The clarity of the creation test is the principal attribute that commends adoption of the rule to Justice Thomas:

Whatever the vices of the *American Well Works* rule, it is clear. Moreover, it accounts for the vast majority of cases that come within § 1331 under our current case law—further indication that trying to sort out which cases fall within the smaller *Smith* category may not be worth the effort it entails.

Id. at 321 (Thomas, J., concurring) (citations omitted).

273. *Merrell Dow*, 478 U.S. at 816 ("[E]ven if there is no original district court jurisdiction for these kinds of action, this Court retains power to review the decision of a federal issue in a

which is likely to be the case given the unanimity of the *Grable* decision (Justice Thomas' nod in this direction notwithstanding)—Congress could achieve this result legislatively by amending § 1331 as follows: "The district courts shall have original jurisdiction of all civil actions in which the Constitution, laws, or treaties of the United States create the claims asserted therein." The virtue of this route would be the certainty provided by clear words from Congress and the elimination of any need to rely on the Court's potentially changeable interpretation of § 1331's existing language.

2. Abolition of the Complete Preemption Doctrine

The doctrine of complete preemption should be abolished to the extent that the Court infers its existence in any given case. Congress of course retains the authority to provide expressly for the removability of preempted state law claims, as it has done in the past,²⁷⁴ and the Court would be obliged to enforce such a provision. Further, state law claims preempted by statutes where Congress adopted the language approved in *Avco Corp. v. International Association of Machinist and Aerospace Workers*²⁷⁵ as indicative of an intent to permit complete preemption removal should continue to be removable not by operation of the complete preemption doctrine but rather to honor the clear expression of congressional intent that such be the case.²⁷⁶ This is what occurred in *Metropolitan Life Ins. Co. v. Taylor*,²⁷⁷ where the Court held that complete preemption supported the removal of state common law causes of action asserting improper processing of benefit claims under a plan regulated by the Employee Retirement Income Security Act (ERISA).²⁷⁸ They did so because ERISA's "jurisdiction subsection, § 502(f), used language similar to the statutory language construed in *Avco*, thereby indicating that the two statutes should be construed in the same way" and "the legislative history of ERISA unambiguously described an intent to treat such actions 'as arising

state cause of action." (citing *Moore v. Chesapeake & Ohio Ry. Co.*, 291 U.S. 205, 214–15 (1934))).

274. See, e.g., *El Paso Natural Gas Co. v. Neztosie*, 526 U.S. 473, 484–85 (1999) (discussing the Price-Anderson Act, 42 U.S.C. § 2014(hh)).

274. See *supra* notes 95–96 and accompanying text (discussing *Avco*).

276. See *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 21–22 (Scalia, J., dissenting) ("I would adhere to the approach taken by *Taylor* and on the basis of *stare decisis* simply affirm, without any real explanation, that the LMRA and statutes modeled after it have a 'unique preemptive force' that (quite illogically) suspends the normal rules of removal jurisdiction.").

277. *Metro. Life Ins. Co., v Taylor*, 481 U.S. 58 (1987).

278. *Id.* at 64–66.

under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947."²⁷⁹

3. *Legislative Overruling of Allapattah Services*

As already noted, the Court was correct in *Exxon Mobil Corp. v. Allapattah Services Inc.* to interpret the supplemental jurisdiction statute, 28 U.S.C. § 1367, to allow supplemental jurisdiction over jurisdictionally insufficient claims asserted by parties in diversity actions joined under Rules 20 or 23.²⁸⁰ However, given the broad implications of such an interpretation—that only named plaintiffs in class actions will have to satisfy the amount in controversy requirement—Congress should amend the statute to reinstate the holding of *Zahn v. International Paper Co.*²⁸¹ Specifically, an amended § 1367(b) would read as follows (with inserted language italicized):

In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, *joined as plaintiffs under Rule 20 of such rules, proceeding as members of a class under Rule 23 of such rules*, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

Making this change would prevent litigants from circumventing the ordinary requirement of the diversity statute, as interpreted by *Zahn*, that jurisdiction is proper only over those claims "where the matter in controversy exceeds the sum or value of \$75,000" and that insufficient claims of multiple plaintiffs may not piggyback on a claim that has satisfied the required amount.²⁸² Under the current version of § 1367(b) as interpreted by the Court, the named class representative could assert a claim for \$75,001 and remaining class members could each assert negligible claims for \$1 each. Diversity

279. *Beneficial Nat'l Bank*, 539 U.S. at 7–8 (quoting *Metro. Life*, 481 U.S. at 65–66).

280. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2621 (2005) ("The natural, indeed the necessary, inference is that § 1367 confers supplemental jurisdiction over claims by . . . Rule 23 plaintiffs.").

281. See *Zahn v. Int'l Paper Co.*, 414 U.S. 291, 300 (1973) (holding that in the context of a class action invoking diversity jurisdiction, every plaintiff must separately satisfy the amount-in-controversy requirement of the diversity statute, 28 U.S.C. § 1332).

282. *Id.* at 301.

jurisdiction has not been made available for those claims and supplemental jurisdiction has been extended to them apparently only accidentally. Clearly, with Congress's passage of the Class Action Fairness Act, it indicated the degree to which it wished to permit the aggregation of class action claims in order to enjoy federal jurisdiction. It makes no sense then for Congress to leave § 1367(b) in its current state because it allows class actions that aggregate to less than \$5 million (the CAFA amount)²⁸³ into the federal courthouse, notwithstanding CAFA's \$5 million requirement.

D. General Principles

Beyond these specific reforms, it is worth sketching out several general principles of federalist procedure that should guide Congress and the federal courts in enacting and interpreting laws in ways that respect principles of federalism and state sovereign authority:

First, under no circumstances should Congress be permitted to prescribe procedure to be applied within state courts adjudicating state law claims. If Congress wants certain types of claims to be handled in a particular fashion, it must legislate in the area and expressly preempt state law, so that such cases can be treated as federal claims triable in the federal courts where Congress can directly control procedure if it wishes.

Second, all doubts or ambiguities regarding federal jurisdictional statutes should be resolved against jurisdiction where a contrary interpretation would interfere with the ability of state courts to hear and adjudicate state law claims traditionally within their sphere of authority. In effect, there should be a strong presumption against federal jurisdiction over state law claims unless Congress has made plain its intent to the contrary. The jurisdiction of the federal courts should not be expanded through judicial implication when state law claims are at issue. Indeed, in our system of constitutional federalism, it may even be appropriate to consider embracing a canon of statutory construction that obliges courts to read statutes with an eye towards respecting state sovereign authority and the notion of reserved powers under the Tenth Amendment.

Third, Congress must stop playing politics with procedure. Procedural rules in the civil context must be motivated by establishing, *ex ante*, a fair and efficient process for resolving disputes, not with an eye towards facilitating a particular outcome. More often than not, anti-federalist procedure has been the product of thinly-veiled efforts to manipulate process in a manner that will yield

283. See *supra* note 62 and accompanying text (discussing CAFA provisions).

or facilitate a desired substantive outcome: lower and fewer punitive damages awards, fewer certified class actions, fewer securities fraud lawsuits, a ruling to reinsert life support for Terri Schiavo, and a Republican victory in a Presidential election. The sovereign authority of states to control their judiciaries and to adjudicate state law claims are rights preserved by the Tenth Amendment that should not cavalierly be trampled upon for the sake of mean political ends.

V. Conclusion

Constitutional federalism is an important value that deserves to be upheld consistently by Congress and the Supreme Court. Though a preponderance of the members of both of these branches of government are self-professed federalists, some of them have too often indulged in anti-federalist policies and doctrines when the authority of state courts hung in the balance. No longer can such lapses be tolerated. The reforms proposed above go a good way towards bringing respect for constitutional federalism into relations between the federal government and state judiciaries. Hopefully, policy leaders and members of the Supreme Court who espouse a belief in limited federal government and a respect for state sovereign authority will have the courage of their convictions to move in this direction notwithstanding the substantive policy consequences that may result. If principle can prevail over politics, our national government can be pushed back within the confines of the limited authority the Founders envisioned.