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The Federal Arbitration Act and the Power of Congress over State Courts

When pre-emption of state law is at issue, we must respect the principles [that] are fundamental to a system of federalism in which the state courts share responsibility for the application and enforcement of federal law. This respect is at its apex when we confront a claim that federal law requires a State to undertake something as fundamental as restructuring the operation of its courts.¹

[Federal Arbitration Act preemption] entails a permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of disputes.²

The Federal Arbitration Act is unconstitutional as applied to the states—and no one has noticed. In its 1984 decision *Southland Corp. v. Keating*,³ the U.S. Supreme Court held that section 2 of the Federal Arbitration Act (FAA)⁴ is substantive

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¹ *Johnson v. Fankell*, 520 U.S. 911, 922 (1997) (internal quotations and citations omitted).

² *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 284-85 (1995) (Scalia, J., dissenting).

³ 465 U.S. 1 (1984).

⁴ 9 U.S.C. §§ 1-16 (2000). Section 2 provides:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

law that binds state courts under the Supremacy Clause and preempts contrary state law.⁵ “In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and *withdrew the power of the states to require a judicial forum for the resolution of claims* which the contracting parties agreed to resolve by arbitration.”⁶ Dissenting justices and academic critics have focused on the statutory interpretation question, arguing (correctly) that Congress intended nothing of the sort.⁷ But even critics of FAA preemption have failed to raise the underlying constitutional question. Assuming Congress had intended the FAA to preempt state law, where did Congress get this power to bar the states from requiring a judicial forum for cases properly filed in state court? This article argues that FAA preemption is nothing more or less than procedural regulation of state courts, and that Congress lacks the power to regulate procedures in state courts. In short, FAA preemption is unconstitutional.⁸

⁵ 465 U.S. at 16 (explaining that FAA section 2 “creat[es] a substantive rule applicable in state as well as federal courts”).

⁶ *Id.* at 10 (emphasis added).

⁷ Justice Scalia, for instance, in the statement quoted as an epigraph to this article, meant that the eviction of state court procedural power was unauthorized by *Congress*. He did not consider whether it was authorized by *the constitution*. *Accord Southland*, 465 U.S. at 22-31 (O’Connor, J., dissenting); *Allied-Bruce*, 513 U.S. at 285-95 (Thomas, J., dissenting); IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION—NATIONALIZATION—INTERNATIONALIZATION* 92-121 (1992); David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 *LAW & CONTEMP. PROBS.* 5 (2004) [hereinafter Schwartz, *Correcting Federalism Mistakes*]; Stephen L. Hayford & Alan R. Palmiter, *Arbitration Federalism: A State Role in Commercial Arbitration*, 54 *FLA. L. REV.* 175, 183 (2002); Edward Brunet, *Toward Changing Models of Securities Arbitration*, 62 *BROOK. L. REV.* 1459, 1469 n.33 (1996); Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 *SUP. CT. REV.* 331, 380 (1996). For a thought-provoking argument concluding that the *Southland* Court reached a correct conclusion about the FAA’s legislative history, see Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 *NOTRE DAME L. REV.* 101 (2002) [hereinafter Drahozal, *In Defense of Southland*]. I believe Professor Drahozal is incorrect in this, for reasons I have explained elsewhere. See Schwartz, *Correcting Federalism Mistakes*, *supra*, at 18 n.89. Professor Drahozal and I debate the issue in greater detail in David S. Schwartz, *FAA Preemption: Does it Wipe Out State Contract Law?* 10 *DISP. RESOL. MAG.* 23 (Spring 2004) and Christopher R. Drahozal, *Revisiting Southland*, 10 *DISP. RESOL. MAG.* 23 (Spring 2004).

⁸ No academic commentator so far as I know has argued that FAA preemption is unconstitutional. I have argued elsewhere that FAA preemption raises sufficient constitutional doubts to trigger the twin statutory interpretation policies of constitutional avoidance and presumption against preemption. Schwartz, *Correcting Federalism Mistakes*, *supra* note 7, at 48-50 & n.246. In a different context, and on entirely different grounds, Jean Sternlight has questioned the constitutionality of the

The Supreme Court has long recognized that the states' sovereignty over the procedures of their own courts is a foundational principle of federalism.⁹ Procedure in this sense includes not only rules of practice, but also questions of court structure (such as whether there will be an intermediate appellate court and how many judges will sit on it) and questions of jurisdiction. The Supremacy Clause requires state courts to apply federal substantive law, but subject to a few narrow and very limited exceptions, state courts have the power to apply neutral state rules of procedure and jurisdiction to unremoved federal claims. The Constitution also authorizes Congress, acting within its enumerated powers, to federalize an area of substantive law and make federal court jurisdiction exclusive, thereby displacing state courts from hearing that set of claims.¹⁰ But the FAA is not such a statute. The FAA does not create federal question jurisdiction, let alone exclusive jurisdiction in federal court.¹¹ On its face, the FAA is a statute enforcing arbitration agreements, which in turn determine the allocation of decision-making authority between a court and arbitrator, and set up the rules governing the dispute resolution process. Such questions of structure and practice are fundamentally procedural, and in every context other than preemption, the Supreme Court has determined that the law of

FAA insofar as enforcement of arbitration agreements imposes an impermissible waiver of due process and the Seventh Amendment right to jury trial. See Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1 (1997); see also Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 989 (2000) (arguing that statutorily-enforced arbitration agreements raise constitutional state action issues).

Nor to my knowledge have any litigants squarely raised the issue. An amicus curiae brief in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), argued that the FAA's restructuring of state dispute resolution procedures without a substantive federal interest at stake raised constitutional doubts. Brief of Law Professors as Amici Curiae in Support of Respondents at 22-25. (This author was lead counsel and co-author of the brief. *Id.*) None of the opinions in *Bazzle* addressed the argument. See 539 U.S. 444.

⁹ "The States thus have great latitude to establish the structure and jurisdiction of their own courts." *Johnson v. Fankell*, 520 U.S. 911, 919 (1997). One would expect this principle to have particular force now, when a majority of the Court is thought to be leading a federalism revival—even a federalism "revolution." See, e.g., Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 430 (2002); see also Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7 (2001).

¹⁰ See *infra* Part III.C.

¹¹ See *infra* text accompanying notes 57-58, 261-62.

arbitration agreements is procedural and not substantive.¹² The constitutional problem of applying the FAA to the states has been avoided or overlooked, simply by taking at face value the *Southland* Court's assertion that the FAA is "substantive" law. But what if it is not?

If the FAA is really procedural, then its constitutionality as applied to the states depends on the existence of a power of Congress over state courts. This larger constitutional question, too, has received comparatively scant analysis from courts and commentators.¹³ Yet its importance is emerging, as Congress seems increasingly to put forward legislative proposals regulating state court procedures as an indirect way of achieving "tort reform."¹⁴ The FAA itself is an example of this: it is now on the edge of being reshaped as a federal tort reform statute, allowing corporate defendants who draft adhesive arbitration agreements to exempt themselves from significant aspects of state contract regulation, particularly in the consumer and employment contexts. But the FAA is unique in an important sense: whereas most other tort reform proposals mingle procedural controls with substantive liability rules, the FAA is pure procedural regulation. Although the Supreme Court has just recently noted that it has never decided the question of the power of Congress to "prescribe procedural rules for state courts' adjudication of purely state-law claims,"¹⁵ that issue will become increasingly difficult to avoid.

Part I of this Article examines the practical impact of *Southland's* doctrine of FAA preemption on states' authority to regulate their own judicial processes. Not only does the enforcement of arbitration agreements impose a particular procedural regime

¹² See *infra* Part IV.A.

¹³ The relevant case law is discussed *infra* Parts II, III. Among a small handful of scholarly commentary on this question, the leading articles are Anthony J. Bellia, Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947 (2001); Wendy E. Parmet, *Stealth Preemption: the Proposed Federalization of State Court Procedures*, 44 VILL. L. REV. 1, 42-52 (1999). While both Professors Bellia and Parmet conclude, as I do, that Congress lacks the authority to regulate state court procedure for state law claims, I believe the power of Congress to do so where federal claims are present is even less than Bellia and Parmet suggest. See *infra* Part II.B.3. Further thoughtful commentary on the subject is found in Louise Weinberg, *The Power of Congress over Courts in Nonfederal Cases*, 1995 BYU L. REV. 731 (1995); Margaret G. Stewart, *Federalism and Supremacy: Control of State Judicial Decision-Making*, 68 CHI.-KENT L. REV. 431 (1992).

¹⁴ See *infra* Part I.C.

¹⁵ *Jinks v. Richland County*, 538 U.S. 456, 464-65 (2003).

on state court litigants, but it also represents the allocation of power between alternative forums in the state's dispute resolution machinery. The resulting doctrine of FAA preemption has nullified dozens of state contract laws, sown confusion in the courts, and set the FAA to become a significant "tort reform" statute.

Part II analyzes the extent, and limits, of federal power over the structure, jurisdiction, and procedure of state courts for unremoved cases. By "unremoved cases," I mean those for which federal diversity or "arising under" jurisdiction is available, but which stay in state court because the plaintiff chose to file there and the defendant declined to remove the action to federal court.¹⁶ I argue that the constitutional text fails to create any congressional power over state court systems beyond the requirement that state courts entertain federal claims, and that there is no basis to infer that Congress has a power in any other respect to treat state courts as federal courts for cases falling within the federal judicial power. Rather, in limited and exceptional circumstances, federal substantive law may at most require adjustments in state procedures to ensure that states apply federal substantive law in a non-discriminatory manner. But Congress cannot require state courts to change their structure or jurisdiction, or to adopt alien procedures, even where the state courts are hearing cases under federal substantive law. The constitutional principle that federal law "treats state courts as it finds them" is consistent with both longstanding Supreme Court precedent known as the "reverse-*Erie*" doctrine, as well as the more recent "anti-commandeering" doctrine.

Part III looks at possible congressional power over state procedure in the absence of federal jurisdiction. I argue that the absence of any federal substantive interest makes the claim to control state procedure even weaker. The only constitutional basis for such a power would be either the Commerce Clause or the Fourteenth Amendment's Due Process Clause. But an arguable power to regulate state court procedures as commerce does not overcome the state sovereignty interests reflected in the anti-commandeering doctrine and elsewhere. Nor does the power to regulate a field substantively and to displace state courts through exclusive federal jurisdiction imply a "lesser included" power to regulate state courts where Congress has not federalized the rele-

¹⁶ See *infra* Part III.A.

vant substantive law. Finally, the Fourteenth Amendment authorizes Congress to regulate procedure only in limited circumstances where existing state procedures fail to meet minimal due process guarantees, and creates no general congressional power over state court procedure.

In Part IV, I apply these principles to the FAA. Given the fundamental principle that Congress has the power to impose substantive, but not procedural, law on the states, it becomes necessary to determine whether the FAA is substantive or procedural for purposes of the Supremacy Clause and preemption. *Southland*, of course, says the FAA is substantive; but that determination, which has never rested on anything more than the Court's own say-so, does not withstand scrutiny. I examine the substance-procedure distinction in six arguably relevant contexts and show that the FAA is properly seen as procedural when viewed from any angle.

I

THE FEDERAL ARBITRATION ACT'S PREEMPTION OF STATE LAW

FAA preemption means the displacement of state law on the grounds that it conflicts with the FAA, or creates an obstacle to the statute's purported "proarbitration policy."¹⁷ FAA preempt-

¹⁷ See, e.g., *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989); Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 *IND. L.J.* 393, 394-95 (2004) [hereinafter Drahozal, *FAA Preemption*]. The general law of preemption can be briefly summarized as follows: "[U]nder the Supremacy Clause, from which our pre-emption doctrine is derived, 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.'" *Gade v. Nat'l Solid Wastes Mgmt. Ass'n.*, 505 U.S. 88, 108 (1992). Assuming that legislation is within Congress' enumerated powers, its power to displace state law as part of that legislation is "plenary." See, e.g., *United States v. Lopez*, 514 U.S. 549, 609 (1995) (Souter, J., dissenting).

The black-letter preemption doctrine tells us that preemption, while constitutionally based in the Supremacy Clause, is an issue of congressional intent. With congressional intent as the central issue, the courts have organized doctrine into questions of "express" and "implied" preemption. Express preemption cases involve the interpretation of federal statutes with an express provision dealing with preemption. See, e.g., *Employee Retirement Income Security Act*, 29 U.S.C. § 1144(a) (2000) (providing that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan"). Implied preemption cases involve statutes with no such preemptive language, and try to determine the preemptive intent of Congress in other provisions of the statute or its legislative history.

tion began with the *Southland* decision in 1984. For a decade and a half, *Southland* was understood as construing the FAA to bind state courts and preempt state laws that target arbitration agreements for special barriers to enforcement. In effect, this turned the FAA into an attack on the autonomy of state procedural systems, as well as on the states' related policy choices to preserve the right to go to court for certain types of substantive claims. However, *Southland*'s incoherent and internally contradictory character has made it difficult to confine its preemptive sweep to the "mere" undermining of state autonomy over the procedural and jurisdictional question of whether a dispute will be litigated or arbitrated. More recent preemption litigation has raised the question of whether an arbitration agreement can be used by drafting parties to obtain significant procedural, remedial, and even substantive advantages or to immunize themselves from certain forms of contract regulation entirely.

A. *FAA Preemption as a Restructuring of State Court Systems*

The division of authority between courts and arbitrators is a question of procedure, court structure and jurisdiction—"the State's allocation of power between alternative tribunals."¹⁸ State law rights of action, whether "public law" or "private law," provide for the invocation of the state's dispute resolution machinery.¹⁹ Provisions for arbitration of cases that would otherwise be heard in state court are plainly part of the state's dispute resolution system. Arbitration systems, and the statutes that give them the sanction of law, therefore form part of the structure and

Implied preemption is divided, by the doctrine, into further subcategories. "Field" preemption is a finding by the Court that Congress intended to occupy a particular field of legislation to the exclusion of the states; any state law in the field will be preempted irrespective of whether the law is consistent with federal law. *See, e.g., English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990). Under "conflict" preemption, in contrast, a state law is void only if it conflicts with federal law. Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 227-28 (2000). The notion of a conflict has been defined by two further categories. If the commands of federal and state law are so in conflict that it is impossible to comply with both, then the state law is void. *See, e.g., Fla. Lime & Avocado, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963). Finally, a conflict will also be found if the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). FAA preemption is deemed to be located in this last category. *See, e.g., Volt Info Scis., Inc.*, 489 U.S. at 477; Drahozal, *FAA Preemption, supra*, at 396-98.

¹⁸ *Mastrobuono*, 514 U.S. at 60.

¹⁹ *See Reuben, supra* note 8, at 957-58.

jurisdiction of state courts. Particularly in the current era when most civil suits are potentially arbitrable under both state statutes and the FAA,²⁰ arbitration has taken on the role of “a civil court of general jurisdiction.”²¹

The FAA restructures state courts by determining most of these judicial-power-allocation questions under federal law. The FAA does not explicitly make its provision applicable to the states. But since its 1984 decision in *Southland*, the Supreme Court has construed the FAA as creating a rule that state laws, whether legislative or judicial, that target arbitration agreements for special barriers to enforcement are preempted, whereas “generally applicable contract defenses” and rules that “arose to govern . . . contracts generally” may be applied to arbitration agreements “without contravening [FAA] § 2.”²² These latter exceptions to FAA preemption will be discussed in the following sections.

The FAA’s restructuring of state judicial processes takes at least two forms. First, when a state court enforces an arbitration agreement under the FAA, it imposes arbitration in place of its own judicial procedures for resolution of the merits of the case.²³ Second, the decision to enforce arbitration rather than allow a case to be litigated in state court directly implicates the state’s “allocation of power between alternative tribunals.”²⁴ The FAA shifts authority over this allocation of power from states to contract-making individuals.²⁵ While every state has enacted an arbitration statute providing for specific enforcement of arbitration

²⁰ See, e.g., David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 95-104 [hereinafter Schwartz, *Enforcing Small Print*].

²¹ Thomas J. Stipanowich, *Punitive Damages and the Consumerization of Arbitration*, 92 NW. U. L. REV. 1, 8 (1997).

²² *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996).

²³ What procedures the state court must use to enforce the arbitration agreement remains unclear. Most states have their own procedures for staying litigation and compelling arbitration. In federal court, such procedures are specified by sections 3 and 4 of the FAA. But the Supreme Court has “never held that §§ 3 and 4, which by their terms appear to apply only to proceedings in federal court, are nonetheless applicable in state court,” and has expressed doubt about applying them to state courts. *Volt Info. Scis., Inc.*, 489 U.S. at 477 n.6; see *infra* text accompanying notes 91-96.

²⁴ *Mastrobuono*, 514 U.S. at 60.

²⁵ Under the FAA, “parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted.” *Volt Info Scis., Inc.*, 489 U.S. at 479 (internal citations omitted).

agreements, adopting language similar to the FAA,²⁶ several of these state arbitration statutes limit the enforcement of arbitration agreements, typically by carving out an exception to the general rule of enforcement.²⁷ The Supreme Court has held that Congress may exempt a certain kind of claim from arbitration by an express provision or by implication showing such an intent, but under *Southland*, states are denied that authority.²⁸ Dozens, and probably hundreds, of state laws declining to enforce arbitration agreements for various consumer or employment contracts have been held to be, or presumably are, preempted by *Southland*.²⁹ Each of these exceptions to enforcement of arbitration agreements represents a state effort to allocate dispute resolution power to courts for specific substantive claims.

State courts make important policy determinations regarding the structure of their dispute resolution systems in determining whether specific remedies—as opposed to causes of action—can be issued by arbitrators.³⁰ But the Supreme Court has suggested

²⁶ Reuben, *supra* note 8, at 976.

²⁷ See Schwartz, *Correcting Federalism Mistakes*, *supra* note 7, at 13-14 (citing state statutes). The FAA itself exempts “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” FAA, 9 U.S.C. § 1 (2000). This exemption from FAA coverage has been construed improbably narrowly to mean “transportation workers.” See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001).

²⁸ *Shearson/Am. Express v. McMahon*, 482 U.S. 220, 226 (1987). Thus, a statute in California’s Labor Code preserving the administrative and judicial forum, and barring enforcement of arbitration agreements, for claims for unpaid wages was held preempted by the Court in *Perry v. Thomas*, 482 U.S. 483, 491 (1987) (preempting CAL. LABOR CODE § 229 (West 2003)).

²⁹ Between January 2002 and April 2004, almost fifty state laws were held preempted. David S. Schwartz, *State Judges as Guardians of Federalism: Resisting the Federal Arbitration Act’s Encroachment on State Law*, 16 WASH. U. J.L. & POL’Y 129, 154-59, app. A (2004) [hereinafter Schwartz, *State Judges*]; see also Schwartz, *Correcting Federalism Mistakes*, *supra* note 7, at 13-14. Moreover, individual preemption rulings are just the tip of the iceberg because the preemption of one state law by a binding precedent will effectively preempt similar laws. The generic antiwaiver language held preempted in *Southland* appears in at least thirty state laws other than the one before the Court. See Schwartz, *State Judges*, *supra*, at 160-61 app. B. This suggests that hundreds of state laws are held preempted each year.

³⁰ In *Garrity v. Lyle Stuart, Inc.*, 353 N.E.2d 793 (N.Y. 1976), for example, the New York Court of Appeals held that an arbitrator cannot award punitive damages, even if agreed to by the parties. Punitive damages, the court reasoned, are “a social exemplary ‘remedy,’ not a private compensatory remedy,” and are therefore “reserved to the State” as a “public policy of such magnitude as to call for judicial intrusion.” *Id.* at 795, 796 (internal quotations omitted). More recently, two decisions from the California Supreme Court have held that statutory “public policy” claims could not be compelled into arbitration, because the arbitrator could not issue broad injunctive relief for the benefit of the general public. In *Broughton v.*

that the FAA casts serious doubt on states' authority to restrict the remedial powers of arbitrators. In *Mastrobuono v. Shearson Lehman Hutton, Inc.*, the defendant Shearson had added to its adhesive arbitration clause a choice of law clause that incorporated New York law.³¹ Shearson argued that the choice of New York law incorporated a New York decisional rule, known as the *Garrity* rule, barring arbitrators from awarding punitive damages.³² Although limiting issues to be submitted to an arbitrator and waiving substantive rights may be two different matters entirely, Shearson intended to weld the two together, arguing to the Court that "the parties to a contract may lawfully agree to limit the issues to be arbitrated by *waiving any claim* for punitive damages."³³ The arbitrator did award punitive damages to the Mastrobuenos—\$400,000—and Shearson went to court to vacate that part of the award. The Supreme Court affirmed the punitive damage award. Although noting that punitive damages are "an important substantive right," the Court did not decide whether a

Cigna Healthplans of Cal., 988 P.2d 67 (Cal. 1999), the court held that claims for injunctive relief under the state Consumer Legal Remedies Act designed to protect the public from deceptive business practices were not subject to arbitration. *Id.* at 79; accord *Cruz v. PacifiCare Health Systems, Inc.*, 66 P.3d 1157, 1165 (Cal. 2003) (extending *Broughton* to preserve claims to enjoin unfair competition and misleading advertising under the state Business and Professions Code). According to the *Broughton* and *Cruz* courts, such claims were unsuitable for arbitration because (1) these statutory injunction claims were "for the benefit of the general public rather than the party bringing the action," and (2) courts have "significant institutional advantages over arbitration in administering a public injunctive remedy, which as a consequence will likely lead to the diminution or frustration of the public benefit if the remedy is entrusted to arbitrators." *Id.* at 1162 (quoting *Broughton*, 988 P.2d at 67). For these reasons, the court concluded there was an inherent conflict between arbitration and the statutory remedies, which gave rise to the inference that the state legislature intended to withhold the substantive claims from arbitration.

It stands to reason that a substantive claim should be withheld from arbitration if the arbitrator is not authorized to issue a remedy crucial to the claim. This principle follows logically from the Supreme Court's repeated admonition that "[b]y agreeing to arbitrate . . . a party does not forego . . . substantive rights" See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). Thus, courts have denied arbitration where the contract deprives the arbitrator of remedial authority sufficient to redress the substantive claim. See, e.g., *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 674 (Cal. 2000). See generally David S. Schwartz, *Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability and Preclusion Principles*, 38 U.S.F. L. REV. 49, 66-74 (2003) [hereinafter Schwartz, *Remedy-Stripping Clauses*].

³¹ 514 U.S. 52, 59 (1995).

³² See *Garrity*, 353 N.E.2d 793, 794, discussed *supra* note 30.

³³ 514 U.S. at 58 (emphasis added).

prospective waiver of that right in an arbitration clause would be enforceable, instead relying on a contractual ambiguity to construe the agreement to permit the arbitrator to award punitive damages.³⁴ In passing, the Court indicated that its prior FAA preemption decisions make clear that

[I]f contracting parties agree to *include* claims for punitive damages within the issues to be arbitrated, the FAA ensures that their agreement will be enforced according to its terms even if a rule of state law would otherwise exclude such claims from arbitration [I]n the absence of contractual intent to the contrary, the FAA would pre-empt the *Garrity* rule.³⁵

This statement, although dictum, presages a future preemption decision that would intrude on this state allocation of remedial power.³⁶

An important, recurring question in the law of arbitration is

³⁴ In language of great significance for the constitutional argument discussed below, the Court reasoned that the choice-of-law clause could reasonably have been read to incorporate New York substantive law, but not its arbitration law—the latter being part of the state’s “allocation of power between alternative tribunals.” 514 U.S. at 59-60.

³⁵ *Id.* at 52, 59.

³⁶ Because the arbitration occurred in Illinois and the arbitration enforcement procedures were heard in federal court, the case did not squarely raise the question of New York’s power to allocate decision-making authority between its own courts and an arbitrator. Since the *Mastrobuono* court essentially defined the *Garrity* rule as procedural law, it therefore arguably has no application to an Illinois proceeding under standard conflict-of-laws principles wholly irrespective of FAA preemption. *See infra* notes 250-52 and accompanying text.

Mastrobuono naturally gives rise to the argument that *Broughton* and *Cruz* were wrongly decided. It is worth noting, however, that *Broughton* and *Cruz* are distinguishable from *Garrity*, and arguably fall outside the dictum from *Mastrobuono*. *Garrity*, like *Mastrobuono* and all of the FAA preemption cases decided by the U.S. Supreme Court to date, involved private damages claims, not public injunctions, so the Court has never had occasion to determine whether broad injunctive relief affecting third parties or the public can be issued by arbitrators. *See Cruz*, 66 P.3d at 1163 (quoting *Broughton*, 988 P.2d at 78-79). What the Court has said, however, is that compelled arbitration of statutory claims is appropriate insofar as the claimant “does not forgo . . . substantive rights[.]” *E.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). Arbitrators’ authority arises from private contracts, and it is hard to imagine how two private parties can empower an arbitrator to make decisions binding on third parties and the public at large, while maintaining any semblance of a private, contractual form of dispute resolution. Thus, even zealous arbitration advocates would hesitate to assert that arbitrators can issue and administer public injunctions; absent an express assertion to that effect by the Supreme Court, it is reasonable for a state court to conclude that arbitrators cannot do so. This the California courts have done. In such a case, compelling public injunction claims into arbitration would indeed “forgo substantive rights.”

“arbitrability”—whether a court or an arbitrator will decide the merits of the case.³⁷ An arbitrability decision is, in effect, a determination of the jurisdictional boundary between the arbitrator and the court.³⁸ Since arbitration is a creation of contract, and the power of an arbitrator flows from the parties’ agreement, arbitrability is a question of contract interpretation.³⁹ Arbitrability thus presents a question of presumptive state law twice over: the interpretation of a contract—a matter of state law that federal courts should be “reluctant to federalize”⁴⁰—that will determine a question of state judicial jurisdiction. Nevertheless, under FAA section 2, a state court deciding arbitrability—deciding, therefore, its own power to decide a merits issue in a case before it—must apply federal law, which tilts in favor of arbitration and against state judicial power.⁴¹ In this way, too, the FAA

³⁷ See, e.g., *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 82-83 (2002); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995). Although there is some confusion surrounding the term, it is best defined as either of the following two questions: (1) whether the arbitration agreement covers the parties, or (2) whether the arbitration agreement extends to the substantive issues raised. Schwartz, *Remedy-Stripping Clauses*, *supra* note 30, at 75-76.

³⁸ Arbitrability cases have included decisions about whether a court or arbitrator decides such issues as: whether the contract containing the arbitration clause was procured by fraud, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 396-97 (1967); whether a statute of limitations bars the arbitration from proceeding on the merits, *Howsam*, 537 U.S. at 82; or whether an arbitration provision barring the arbitrator from awarding punitive damages prevents an award of statutory treble damages, *PacificCare Health Sys., Inc. v. Book*, 538 U.S. 431, 432 (2003). Federal common law has awarded each of these decisions to the arbitrator. The question of who decides arbitrability—literally, “who decides who decides”—is normally for the courts, though an arbitration agreement can give that decision to an arbitrator as well. See *First Options*, 514 U.S. at 942-43.

³⁹ “Arbitration under the Act is a matter of consent, not coercion, and parties . . . may limit by contract the issues which they will arbitrate . . .” *Volt Info Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989); accord *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) (“[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.”). The FAA provides for a reviewing court to set aside an arbitration award that exceeds the arbitrator’s authority or reaches matters not submitted to the arbitrator. FAA §§ 10(a), 11(b). See also Schwartz, *Remedy Stripping Clauses*, *supra* note 30, at 80 (“[A]rbitrators ‘exist’ as dispute-resolving entities only if there is a valid contract so empowering them.”).

⁴⁰ *Patterson v. McLean Credit Union*, 491 U.S. 164, 183 (1989) (quoting *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 479 (1977)).

⁴¹ FAA section 2 “create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act,” and further provides that “as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 24-25 (1983). The Court has backtracked—

restructures state dispute resolution processes.

A plain, recent example of the FAA's restructuring of state court systems is the decision last term in *Green Tree Financial Corp. v. Bazzle*.⁴² In *Bazzle*, defendant Green Tree successfully moved to compel arbitration of two separate consumer class actions filed in South Carolina courts. The arbitrator ultimately found for the claimants in both class actions, and awarded a total of approximately \$27 million in damages and attorneys' fees against Green Tree. The South Carolina Supreme Court rejected Green Tree's challenge to the classwide arbitration procedure, on the ground that class arbitration was permissible as a matter of state procedural law. Green Tree argued to the U.S. Supreme Court that an arbitration agreement that does not expressly authorize class arbitrations must be construed, as a matter of federal law, to bar class claims entirely; and, so construed, the contract must be enforced under the FAA, notwithstanding the state's procedural law allowing classwide arbitration.

Although the opinions in *Bazzle* resolved very little other than the case at hand,⁴³ the implications for the state's sovereignty over their own courts are striking. A four-justice plurality opinion by Justice Breyer reasoned that the issue of "whether the [arbitration] agreement forbids class arbitration" was a contract-interpretation question for the arbitrator.⁴⁴ The plurality (joined in the judgment by Justice Stevens) vacated the judgment of the South Carolina Supreme Court, and remanded the case to allow the arbitrator to make this highly significant determination, one which could make or break a case.⁴⁵ State procedural law might apply, but the decision to invoke it is removed by the FAA from state courts and reallocated to an arbitrator. Meanwhile, three dissenting justices argued that the contract "simply" precluded class arbitrations and that the application of a state law rule to

though only slightly—from the notion that the law of arbitrability is entirely federal, stating that "in applying general *state-law* principles of contract interpretation to the interpretation of an arbitration agreement . . . due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration." *Volt Info Scis., Inc.*, 489 U.S. at 475-76 (emphasis added).

⁴² 539 U.S. 444 (2003).

⁴³ *Bazzle* implies that class arbitrations are permissible; but the two opinions forming the judgment do not indicate whether an unambiguous class action ban would be enforceable.

⁴⁴ 539 U.S. at 451 (Breyer, J., plurality opinion).

⁴⁵ See *infra* note 96 and accompanying text.

vary those written terms should have been preempted by the FAA.⁴⁶ Thus, seven justices seem to have taken for granted—without any constitutional analysis—that these significant matters of state court procedure and jurisdiction are to be decided as a matter of federal law under the FAA.

B. The Fundamental Incoherence of Southland and its Progeny

Southland's determination that the FAA is substantive, preemptive federal law is based on reasoning that is at odds with both the FAA and subsequent FAA preemption decisions. The result of these inconsistencies is some incoherence in the judicial efforts to sort out what aspects of state law are saved from preemption by the terms of the statute.

1. *The Southland Decision*

In *Southland Corp. v. Keating*, several California franchisees of 7-Eleven convenience stores sued the corporate owner-franchisor of the 7-Eleven chain in state court under various state law theories, one of which was based on a state franchise law designed to protect franchisees against overreaching by franchisors.⁴⁷ *Southland* sought to compel arbitration of all claims pursuant to an arbitration clause in the form franchise agreement. But the California Supreme Court denied arbitration on the basis of a generic antiwaiver provision in the Franchise Investment Law, which stated that “[a]ny condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with *any provision* of this law or any rule or order hereunder is void.”⁴⁸ The California court reasoned that the arbitration agreement operated as a waiver of the statutory right to a jury trial, and was therefore void under the

⁴⁶ *Bazzle*, 539 U.S. 444, 458-60 (Rehnquist, C.J., dissenting).

⁴⁷ 465 U.S. 1, 21 (Stevens, J., dissenting) (discussing California Franchise Investment Law, CAL. CORP. CODE §§ 31000-31516 (West 1977)).

⁴⁸ CAL. CORP. CODE. § 31512 (West 1977) (emphasis added). This antiwaiver provision is modeled after an antiwaiver provision in section 14 of the Securities Act of 1933, 15 U.S.C. § 77n, which has long served as a model for the drafting of consumer-protection statutes of all kinds through the country. See Drahozal, *FAA Preemption*, *supra* note 17, at 409 n.127 (listing state antiwaiver provisions); Edward J. Heiser, Jr., *The Wisconsin Consumer Act—A Critical Analysis*, 57 MARQ. L. REV. 389, 480-82 (1974) (discussing antiwaiver provision in 1974 state consumer protection statute based on 1933 Securities Act); Schwartz, *State Judges*, *supra* note 29, at app. B (2004) (listing state antiwaiver provisions).

antiwaiver provision.⁴⁹ The U.S. Supreme Court reversed, holding that the state rule against arbitrating statutory franchise disputes was preempted by section 2 of the FAA. Section 2 created a substantive “national policy favoring arbitration” that conflicted with a state rule that would prevent a category of claims from being arbitrated.⁵⁰

The *Southland* decision was correct on one key point: in order to preempt state law under the Supremacy Clause, Congress must enact substantive law. *Southland* seems implicitly to have recognized the constitutional principle, argued in detail below, that Congress lacks power to make purely procedural regulations binding on state courts.

But *Southland* is otherwise a poorly-reasoned decision. I have argued elsewhere that the Court should not have attributed to Congress an intention to make the FAA preemptive substantive law. Given the FAA’s silence on the question of the statute’s applicability in state court, and legislative history pointing strongly *against* a construction that the FAA preempts state law, the preemption holding was a stretch and becomes increasingly difficult to justify in the Court’s recent federalism revival.⁵¹ Irrespective of what Congress may have intended, *Southland*’s critical argument, defining the FAA as substantive rather than procedural law for preemption purposes, is extremely thin. On its face, the question of the allocation of a state’s power between alternative dispute resolution processes seems quintessentially like the sort of procedural or jurisdictional question committed to a state’s sovereignty and not to Congress.⁵² The *Southland* majority, disregarding this, decided that the FAA was “substantive” law because it reasoned that Congress, by basing the FAA on its power “to enact substantive rules under the Commerce Clause,” necessarily makes “substantive” law binding on state as well as federal courts.⁵³ *Southland*’s preemption ruling also created a conundrum: interpreting the FAA as preempting state law

⁴⁹ See *Southland*, 465 U.S. at 10 (citing CAL. CORP. CODE § 31512).

⁵⁰ 465 U.S. at 10. The relevant language is quoted *supra* text accompanying note 6.

⁵¹ Schwartz, *Correcting Federalism Mistakes*, *supra* note 7, at 18-27, 44-50. *But see* Drahozal, *Revisiting Southland*, *supra* note 7.

⁵² See *infra* Part II.

⁵³ 465 U.S. at 11-12. In fact, the Court has elsewhere recognized that Congress may indeed enact procedural or “housekeeping” rules for federal courts under any applicable enumerated power, including the Commerce Clause. See *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 32 & n.11 (1988); *Prima Paint Corp. v. Flood & Conklin*

necessarily meant deciding that the FAA is “substantive” law, yet the statute makes clear that it creates no federal question.⁵⁴ The FAA provides for enforcement of section 2 only in federal courts, either where a suit is already pending (section 3), or by petition to a federal district court “which, save for such agreement, would have jurisdiction” (section 4).⁵⁵ These provisions have always been understood as conferring no independent federal question jurisdiction.⁵⁶ When it suggested for the first time the year

Mfg. Co., 388 U.S. 395 (1967); *Hanna v. Plumer*, 380 U.S. 460 (1965); Schwartz, *Correcting Federalism Mistakes*, *supra* note 7, at 34-38.

The Court may have felt no need to justify its conclusion that the FAA is substantive law, given its decision the preceding year in *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983). There, the Court had stated that

Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.

Id. at 24. However, this statement in *Moses H. Cone* was itself devoid of justification, and it is probably dicta as well, *see Southland*, 465 U.S. at 24 (O'Connor, J., dissenting), because the questions of the FAA's preemptive effect or its applicability in state court were not raised.

The *Southland* Court may also have mistaken the Court's earlier decision in *Prima Paint Corp.*, 388 U.S. at 395, for a declaration that the FAA is substantive law. But *Prima Paint* did not say that, holding only that “[f]ederal courts are bound to apply rules enacted by Congress with respect to matters—here, a contract involving commerce—over which it has legislative power.” *Id.* at 406. Indeed, *Prima Paint* adheres to the notion that the FAA, though “outcome determinative,” and thus “substantive” for purposes of the *Erie* doctrine, is procedural law: a set of congressional rules “prescrib[ing] how federal courts are to conduct themselves” rather than “substantive rules to govern . . . simple diversity cases[.]” 388 U.S. at 405 (emphasis added). *Prima Paint* could and should have been understood as clarifying that the Commerce Clause, no less than Article III and the Necessary and Proper Clause, can provide the basis for a federal procedural rule applicable in federal but not state courts. *See* Schwartz, *Correcting Federalism Mistakes*, *supra* note 7, at 35-36.

⁵⁴ *Southland*, 465 U.S. at 15 n.9.

⁵⁵ The phrase “courts of the United States” in section 3 means federal courts. *See* *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 n.6 (1989) (explaining that “§§ 3 and 4 . . . by their terms appear to apply only to proceedings in federal court”). Thus, for example, the Seventh Amendment's explicit reference to “any Court of the United States” (stating that “no fact tried by a jury, shall be otherwise re-examined in any Court of the United States”) applies only to federal courts. *See, e.g.*, *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 217 (1916) (“[T]he Seventh Amendment applies only to proceedings in courts of the United States and does not in any manner whatever govern or regulate trials by jury in state courts”); *see also* *Clafin v. Houseman*, 93 U.S. 130, 136-37 (1876) (“[R]ights . . . acquired under the laws of the United States, may be prosecuted in the United States courts, or in the State courts”).

⁵⁶ *See* *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32

before *Southland* that the FAA created a substantive federal right that creates no federal question jurisdiction, the Court transformed the FAA into “something of an anomaly in the field of federal-court jurisdiction.”⁵⁷ *Southland* notes this anomaly, and establishes it as the law, but makes no attempt to explain why Congress would have created the anomaly or its constitutional basis for doing so.⁵⁸

Finally, *Southland*’s holding is difficult to reconcile with the limitation in FAA section 2, which provides that arbitration agreements shall be deemed enforceable “save upon such grounds as exist at law or in equity for the revocation of any contract.”⁵⁹ This “savings clause” makes clear that state law contract defenses apply to arbitration agreements, as to any other contracts.⁶⁰ This is consistent with the recognized purpose of the FAA to place arbitration agreements “upon the same footing as other contracts,”⁶¹ and “make arbitration agreements as enforceable as other contracts but not more so.”⁶² State legislatures’ sovereign prerogative to declare public policy has always provided a basis “at law” for “the revocation of any contract.”⁶³ California construed its Franchise Investment Law to preclude contractual waivers of any rights, including the right to jury trial, in franchise contracts as a public policy to protect franchisees, who are typically the weaker party in such bargains. In holding this anti-waiver provision preempted, the *Southland* Court created an apparent conflict with the FAA’s section 2 savings clause.⁶⁴

To resolve this tension, *Southland* asserted that “the defense to arbitration found in the California Franchise Investment Law is not a ground that exists at law or in equity ‘for the revocation of

(1983). For early cases, see *Krauss Bros. Lumber Co. v. Louis Bossert & Sons, Inc.*, 62 F.2d 1004, 1006 (2d Cir. 1933); *In re Woerner*, 31 F.2d 283, 284 (2d Cir. 1929).

⁵⁷ *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 25 n.32.

⁵⁸ *Southland*, 465 U.S. at 15 n.9.

⁵⁹ Federal Arbitration Act, 9 U.S.C. § 2 (1997).

⁶⁰ This language becomes a “savings clause”—in the sense of saving state law from preemption—only as a result of *Southland*’s general rule of preemption. Without *Southland* preemption, the proviso would function simply as a reminder to federal courts to apply state law contract defenses to arbitration agreements, rather than to create federal law.

⁶¹ H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924); accord *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

⁶² *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967).

⁶³ See RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981).

⁶⁴ *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984).

any contract' but merely a ground that exists for the revocation of arbitration provisions in contracts subject to the California Franchise Investment Law."⁶⁵ But this interpretation of section 2, as will be seen, makes little sense, and has created difficulties for later courts.

2. *Judicial Coping with Southland's Tension with FAA Section 2*

FAA section 2 should have been understood as a procedural rule for federal courts that minimizes, even in federal court cases, the displacement of state law, through the section 2 savings clause. But by holding section 2 to be substantive, *Southland* dug itself into an analytical hole, which subsequent Supreme Court preemption decisions seem to try to escape. In the next FAA preemption case, *Perry v. Thomas*,⁶⁶ the Court invalidated a California statute that expressly preserved the right to a judicial forum for state wage and hour claims "without regard to the existence of any private agreement to arbitrate."⁶⁷ While *Perry* thus involved what might be seen as a "clear" example of a law singling out arbitration agreements for special enforcement barriers, the Court took pains to identify what state law would be saved by the proviso in FAA section 2:

Thus state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2. A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law. Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot.⁶⁸

Since *Perry*, the Court has reiterated that arbitration agreements are not exempt from defenses that apply to other contracts: "States may regulate contracts, including arbitration

⁶⁵ *Id.* at 16-17 n.11.

⁶⁶ 482 U.S. 483 (1987).

⁶⁷ CAL. LABOR CODE § 229 (West 2003).

⁶⁸ *Perry*, 482 U.S. at 492 n.9 (citations omitted).

clauses, under general contract law principles.”⁶⁹

Yet an ambiguity persists. *Southland* is now understood by most as distinguishing between laws that “single out” or are specifically “hostile” to arbitration, and “general contract laws.”⁷⁰ This attempted “general/specific” distinction seems to be necessary to reconcile *Southland* with FAA section 2, but it tends to break down because it is fundamentally incoherent.

To begin with, the distinction drives a wedge between legislative and judge-made contract law. State legislatures do not typically legislate in the “general” terms suggested by *Southland*. Instead, they focus on specific categories of contracts marked by unequal bargaining power and other market failures: consumer contracts, franchise agreements, and employment contracts, for example.⁷¹ It would be inappropriate to make “one-size-fits-all” contract rules for the fundamental reason that, in contract, one size does not fit all. Rules protecting an individual 7-Eleven franchisee from overreaching by the parent Southland Corporation may be wholly unnecessary to apply to agreements between, say, Southland Corporation and Wal-Mart. Indeed, *Southland*’s misguided notion of “general contract law” strongly implies that FAA preemption doctrine disfavors state legislation, compared to state judge-made rules.⁷²

⁶⁹ Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 281 (1995); accord Doctor’s Assocs., Inc. v. Casarotto, 517 U.S. 681, 685 (1996).

⁷⁰ See, e.g., Casarotto, 517 U.S. at 687 (stating that the FAA “preclude[s] States from singling out arbitration provisions for suspect status”); Ting v. AT&T, 319 F.3d 1126, 1152 (9th Cir. 2003) (stating that the FAA preempts laws that are “hostile” to arbitration); Goff Group v. Greenwich Ins. Co., 231 F. Supp. 2d 1147, 1150 (M.D. Ala. 2002) (same). But see Drahozal, *FAA Preemption*, supra note 17, at 409-10.

⁷¹ Any state code provides numerous examples demonstrating that most contract law is subject-specific, rather than “general.” For example, Chapters 214 through 221 of the Wisconsin Statutes regulate a variety of business entities—banking institutions, finance companies, car dealers, collections agencies, and others—in ways that control the terms of their contracts. The Wisconsin legislature has created special contracting rules to deal with insurance contracts, real estate contracts, landlord-tenant agreements, and consumer contracts. See WIS. STAT. §§ 421-27, 631-32, 704.01-704.90, 706-09 (2003).

⁷² See *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) (holding that the FAA was “intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements”) (emphasis added). To the extent that “general contract law” means judge-made principles to the exclusion of statutory public policies, *Southland*’s distinction is reminiscent of the now-discredited view of contract law of 100 years ago, in which universal or general principles of common law were “discovered” by courts and legal rules enacted by legislatures were deemed inferior and dangerous. This view of the law, of course, has been rejected, and wisely so, ever since Holmes first pointed out that “[t]he common law is not a brooding omnipres-

This hostility to legislated contract law shows up plainly in *Southland*. There, the law in question was, in fact, general contract law, and not a law specifically targeting, or “hostile” to, arbitration. The antiwaiver provision in the California Franchise Investment Law made void as against public policy “[A]ny. . . provision purporting to. . . waive compliance with *any provision* of this law.”⁷³ The antiwaiver provision does not single out arbitration agreements at all. Adhesion contracts that force the weaker party to waive rights in advance have long been disfavored under the general judge-made principle that contracts against public policy are void.⁷⁴ When a legislature attaches such an antiwaiver provision to a statute, it does nothing more than exercise its sovereign prerogative to declare public policy, and thereby remind a court to apply the “void as against public policy” doctrine. Construing a generic antiwaiver provision to preclude arbitration of claims under the statute simply applies a general contract principle to the specific instance of arbitration. Indeed, since *Southland*, the Supreme Court has held that such an antiwaiver provision does *not* specifically target arbitration.⁷⁵

Moreover, even seemingly “general” judge-made doctrines, such as unconscionability, can be shown to fail a test that equates “specific” anti-arbitration rules with any law “that takes its meaning precisely from the fact that a contract to arbitrate is at issue.”⁷⁶ To apply unconscionability doctrine, a court always has

ence in the sky but the articulate voice of some sovereign or quasi sovereign that can be identified.” *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

⁷³ CAL. CORP. CODE § 31512 (West 1977) (emphasis added).

⁷⁴ See RESTATEMENT (SECOND) OF CONTRACTS §§ 178, 195 (1981).

⁷⁵ In *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477 (1989), the Court overruled its earlier holding in *Wilko v. Swan*, 346 U.S. 427 (1953), to the effect that a generic antiwaiver provision in section 14 of the Securities Act of 1933, 15 U.S.C. § 77n (discussing a provision virtually identical to the one in *Southland*) precluded enforcement of predispute agreements to arbitrate securities fraud claims. The issue in *Rodriguez* was not preemption, since a federal law was involved, but whether the generic antiwaiver provision was evidence of a specific congressional intent to preserve the judicial forum against arbitration agreements. See *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (stating that the federal statutory claim not arbitrable if Congress evinces an intent to preclude arbitration). The *Rodriguez* court determined, in essence, that the antiwaiver language does not specifically target arbitration: “the language prohibiting waiver . . . could easily have been read to relate to substantive provisions of the Act” rather than arbitration. 490 U.S. at 480 (citing *Alberto-Culver Co. v. Scherk*, 484 F.2d 611, 618 n.7 (7th Cir. 1973) (Stevens, J., dissenting), *rev’d* 417 U.S. 506 (1974)). *Rodriguez* thus contradicts *Southland* on this key point.

⁷⁶ *Perry v. Thomas*, 482 U.S. 483 (1987).

to scrutinize the fairness of a particular contract term in the context of the transaction between particular parties. Perhaps an arbitration agreement written to preclude class actions or punitive damages can be held unconscionable without having that application of unconscionability doctrine “take its meaning” from the existence of the arbitration clause: such terms could be unconscionable whether they were attached to an arbitration agreement or not. But what about a state-law principle that an arbitration agreement is unconscionable or otherwise unenforceable because the obligation to arbitrate is not mutual?⁷⁷ Provisions holding that the drafting party has the exclusive right to choose the arbitrator have also been held unconscionable under general state contract law.⁷⁸ These applications of unconscionability doctrine clearly “take their meaning” from the existence of the arbitration clause. Taking the “general/specific” distinction to its (il)logical conclusion suggests that these applications are preempted.

Ultimately, the “general/specific” distinction is incoherent, because nearly every general principle of contract law “takes its meaning” from the specific contract term at issue.⁷⁹ The difficulty in applying the “general/specific” distinction is reflected in the difficulty courts have had in explaining it. The Supreme Court may have made such confusion more likely with some unfortunately unclear language in *Allied-Bruce Terminix Cos. v. Dobson*.⁸⁰ In summarizing the import of the savings clause, the Court stated:

States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause “upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2 (emphasis added). What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service,

⁷⁷ See, e.g., *Armendariz v. Found. Health Psychcare Servs.*, 6 P.3d 669, 691-92 (Cal. 2000); *Arnold v. United Cos. Lending Corp.*, 511 S.E.2d 854, 861 (W. Va. 1998).

⁷⁸ See, e.g., *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 175-78 (Cal. 1981).

⁷⁹ Defenders of *Southland* preemption have taken to arguing that there is such a thing as general contract law saved from preemption, but it happens to be limited to “doctrines like” fraud or duress. In other words, the FAA preempts any contract doctrine based on actual contract terms, and saves only those contract doctrines that go to underlying transacting behavior that is not manifested in written terms. See, e.g., Drahozal, *FAA Preemption*, *supra* note 17, at 403.

⁸⁰ 513 U.S. 265 (1995).

credit), but not fair enough to enforce its arbitration clause.⁸¹

The second sentence simply cannot mean what it sounds like. An arbitration agreement may be unfair under general contract law principles even if its basic terms are fair: a consumer contract may establish a reasonable sales price, but provide that future disputes will be arbitrated in Borneo before a panel of arbitrators chosen by the seller, with the consumer to pay a \$1 million forum fee to arbitrate his claim. Unconscionability doctrine recognizes that facts creating substantive contractual unfairness may differ not only from case to case, but also from term to term within a single contract. A great deal of unfairness in contracts stems not from the basic price bargain, but from subsidiary terms buried in the fine print—typically, terms seeking to gain an unfair advantage in potential future disputes.

In implicitly striving to reconcile *Southland*'s inconsistency with the FAA, the *Perry*, *Doctors*, and *Allied-Bruce* decisions give rise to a contradiction between themselves and *Southland*. If general contract law “of legislative or judicial origin” is saved from preemption by section 2, there is no reason why an antiwaiver provision—like the one struck down in *Southland* itself—should be preempted. *Perry*, *Doctors*, and *Allied-Bruce* could not escape the analytical trap of *Southland* because there is no such thing as “general contract law” as distinct from arbitration-specific rules. This is particularly so if “arbitration specific rules” are understood, not as a statute's express mention of arbitration, but rather as the case-specific application of general statutes or rules to an arbitration agreement.

C. Recent FAA Preemption Cases: Substantive Tort Reform Through Procedural Regulation

Due to the internal incoherence of *Southland*, and its erroneous holding that the FAA is substantive, FAA preemption has become a case study in the use of procedures to gain substantive deregulatory advantages through contract. The developing law of the FAA is in some ways just the latest chapter in the age-old conflict between the party who imposes and the party who submits to an adhesion contract. The pre-dispute arbitration agreements which give rise to most of the objections to the FAA are themselves virtually always found in adhesion contracts. Draft-

⁸¹ *Id.* at 281.

ers of these contracts generally have superior bargaining power and information, engage in repeat transactions, and find the use of form terms advantageous. Drafters naturally try to “place a thumb on the scales of justice” by adding contract terms which give them advantages if disputes should arise.⁸² Advance waivers of substantive rights, remedies, class actions, and jury trials, or agreements to litigate in distant and inconvenient forums are common examples.⁸³ The non-drafting party—typically a consumer, employee or franchisee—engages in relatively few such transactions and is often protected from the drafters’ overreaching by regulatory statutes and common law doctrines such as unconscionability. Drafters have a tendency to “draft up to the limit allowed by law” and to find innovative means to draft around regulation.⁸⁴

As the judicial appetite for “rigorously” enforcing arbitration agreements became clearer in the 1980s and 1990s,⁸⁵ adhesion contract drafters have tried to shift these dispute resolution advantages into catch-all arbitration clauses. A clause forcing the consumer to waive punitive damages, which would be plainly unenforceable were it written “at large” in a form contract, gets moved into an arbitration clause by providing that all disputes between the contracting parties are to be arbitrated but the arbitrator cannot award punitive damages.⁸⁶ A forum selection clause requiring the Seattle, Washington consumer to litigate in Miami, Florida may fall afoul of a state rule limiting unfair venue

⁸² *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 598 (1991) (Stevens, J., dissenting) (noting contractual waivers and dispute resolution clauses “all similarly designed to put a thumb on the [contract drafter’s] side of the scale of justice”); Schwartz, *Enforcing Small Print*, *supra* note 20, at 53-60; Carrington & Haagen, *supra* note 7, at 336-37; Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1229 (1983) (“The use of form documents, if legally enforceable, imparts to firms . . . a freedom from legal restraint and an ability to control relationships across a market.”).

⁸³ See Schwartz, *Remedy-Stripping Clauses*, *supra* note 30, at 56-59.

⁸⁴ See, e.g., Rakoff, *supra* note 82, at 1205.

⁸⁵ *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)) (stating that the FAA requires that courts “rigorously enforce” arbitration agreements). For a historical outline of the emergence of the federal courts’ policy favoring arbitration, see, e.g., Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 943-56 (1999); Schwartz, *Enforcing Small Print*, *supra* note 20, at 81-109; Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L. Q. 637 (1996).

⁸⁶ See, e.g., *PacificCare Health Sys., Inc. v. Book*, 583 U.S. 401, 405 (2003).

clauses, but it may be viewed under the more favorable pro-arbitration lens of the FAA if it takes the form of an agreement to arbitrate in Miami.⁸⁷ Corporate defendants have had mixed success with such “remedy-stripping” arbitration agreements.⁸⁸

The issue for state law under the FAA in recent cases seeking enforcement of such agreements is whether state contract regulation designed to prevent contractual overreaching independent of arbitration will be preempted in cases where the overreaching contract term has been piggy-backed onto an arbitration clause. Drafting parties have pressed two related preemption arguments to achieve this outcome.

1. *The “Enforce As Written” Rule*

Compelled arbitration proponents have begun to argue that the FAA creates a substantive federal rule of contract law that arbitration agreements must be enforced *as written*, notwithstanding any state law which may vary the effect or meaning of specified terms. This notion is broader than the basic, “singling out” rule of FAA preemption, which nullifies state laws that expressly or specifically regulate or invalidate arbitration agreements.⁸⁹ Under the “enforce as written” concept, the drafting party is given a federal mandate to write an arbitration agreement that conflicts with state contract regulations and thereby to preempt them. For instance, if the arbitration clause states that the Seattle consumer must arbitrate in Miami, a state law prohibiting burdensome venue clauses will be preempted by the federal rule that the arbitration clause must be enforced as written.

The “enforce as written” rule has gained some traction in the courts. In *Bazzle*, for example, the three dissenting justices accepted the defendant’s argument that their consumer arbitration agreement precluded class arbitrations and therefore had to be enforced “according to [its] terms”; to the dissenters, the application of a state law rule to vary those written terms should have been preempted by the FAA.⁹⁰ At least one scholar contends that the FAA creates a substantive “freedom of contract” regime

⁸⁷ See, e.g., *Bradley v. Harris Research, Inc.*, 275 F.3d 884 (9th Cir. 2001), and cases cited *infra* note 111.

⁸⁸ Schwartz, *Remedy-Stripping Clauses*, *supra* note 30, at 66-74, 78-79.

⁸⁹ See *supra* text accompanying note 70.

⁹⁰ *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 458-59 (2003) (Rehnquist, C.J., dissenting) (citing *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 54 (1995) (alteration in original)).

to be imposed on the states.⁹¹ But, the “enforce as written” rule is dubious as a matter of statutory interpretation.

The argument for it apparently arises from FAA sections 3 and 4. Section 3 provides that a district court may stay a pending lawsuit “until . . . arbitration has been had in accordance with the terms of the agreement.” Section 4 provides that a party may petition a district court for an order “directing that such arbitration proceed *in the manner provided for in such agreement*” or, further on in section 4, an order “directing the parties to proceed to arbitration *in accordance with the terms of the agreement.*”⁹²

It is something of an oddity to find in these provisions a substantive regime of freedom of contract. In contrast to sections 1 and 2, the so-called “substantive” provisions of the FAA,⁹³ the Court has viewed sections 3 and 4 as procedural. In *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, the Court was asked to consider an apparent conflict in state and federal arbitration procedures.⁹⁴ Previously, in *Dean Witter Reynolds Inc. v. Byrd*, the Court had held that, under the FAA, a federal court must invariably stay litigation and order arbitration to proceed first, where a single case raised both arbitrable and non-arbitrable issues.⁹⁵ *Volt* raised the question of whether the *Byrd* rule applied to a proceeding in California state court.⁹⁶ California’s controlling civil procedure statute provides that a court has discretion to stay the arbitration and allow the litigation of non-arbitrable claims to proceed first, based on efficiency and fairness concerns.⁹⁷ The Supreme Court held that the federal rule did not preempt the state rule where the parties’ arbitration agreement contained a choice-of-law clause construed as adopting California procedural law. The Court concluded that the “substantive” policy of FAA section 2 did not require arbitration to precede litigation in state court

⁹¹ Stephen J. Ware, *Punitive Damages in Arbitration: Contracting out of Government’s Role in Punishment and Federal Preemption of State Law*, 63 *FORDHAM L. REV.* 529, 530-31 (1994); see also Stephen J. Ware, *Arbitration and Unconscionability After Doctors’ Assocs., Inc. v. Casarotto*, 31 *WAKE FOREST L. REV.* 1001, 1006 (1996).

⁹² Federal Arbitration Act, 9 U.S.C. §§ 3, 4 (1997) (emphasis added).

⁹³ *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 n.6 (1989).

⁹⁴ *Id.* at 468.

⁹⁵ 470 U.S. 213, 223-24 (1985).

⁹⁶ *Volt Info. Scis., Inc.*, 489 U.S. at 470.

⁹⁷ See *CAL. CODE CIV. PROC.* § 1281.2(c) (West 1998).

where that reversal of the *Byrd* rule appeared consistent with the parties' contractual choice.⁹⁸

Language in *Volt* seems supportive of a broad "enforce as written" rule, but only if taken out of context. The *Volt* decision stated that the FAA "requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms" and that "parties . . . may limit by contract the issues which they will arbitrate . . . [and] specify by contract the rules under which that arbitration will be conducted."⁹⁹ However, parties to a contract are generally not allowed to dictate what procedures a court will follow, and *Volt* does not hold otherwise.¹⁰⁰ The *Byrd* rule is plainly a procedural interpretation of sections 3 and 4, and the Court was not at all convinced that these procedures could be imposed on state courts: "[W]e have never held that §§ 3 and 4, which by their terms appear to apply only to proceedings in federal court, . . . are nonetheless applicable in state court," and the argument that they do not bind state courts had "some merit."¹⁰¹

If the "enforce as written" rule were to be pushed beyond *Volt* and *Mastrobuono* (which had some "enforce as written" dicta), it could have potentially far-reaching consequences. If it were applied to allow contract drafters to bar class actions against themselves, as the petitioner argued in *Bazzle*, this would in itself be an extraordinary exemption from state consumer contract regulation, since "[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights."¹⁰² Conceivably, the "enforce as written" rule could also support enforcement of the sorts of waiv-

⁹⁸ See *Volt Info. Scis., Inc.*, 489 U.S. at 477-79.

⁹⁹ *Id.* at 478-79.

¹⁰⁰ See *infra* Part IV.B.1. Private contracts can normally influence procedural law only by forum selection, not by telling courts what procedures to follow.

¹⁰¹ *Volt Info. Scis., Inc.*, 489 U.S. at 477, 477 n.6. Professor Drahozal argues that *Volt* necessarily implies that the California procedural statute would have been preempted by the *Byrd* rule had the parties not made a choice of California procedural law in their arbitration agreement. Drahozal, *FAA Preemption*, *supra* note 17, at 406. That is not necessarily so, given the Court's expression of doubt that procedural aspects of the FAA can bind state courts and its express determination to decline to reach that issue. 489 U.S. at 477. The issue is currently pending before the California Supreme Court. See *Chronus Invs. v. Concierge Servs.*, 72 P.3d 1166 (Cal. 2003) (granting review).

¹⁰² *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (citing *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (1997)) (internal quotations omitted); see also

ers that would be unenforceable absent an arbitration agreement or FAA preemption. More aggressive proponents of arbitration agreements have pushed the argument that far.¹⁰³ At its extreme, a rule requiring enforcement of an agreement literally “according to its terms” could be seen to conflict with a rule holding that, for instance, unconscionable terms will not be enforced, and such a federal enforcement rule would trump the state unconscionability rule. Because only a federal common law of contract defenses would withstand this preemption doctrine, the “enforce as written” rule would effectively immunize arbitration agreements from any review whatsoever for fairness under state law.

Whatever the basis for the “enforce as written” argument, it must be harmonized with section 2 of the FAA, which provides that arbitration agreements are enforceable, save upon grounds for the revocation of any contract. All contracts are subject to background state contract law, which will provide, as a matter of public policy, that certain terms cannot be enforced as written. The recognized purpose of the FAA is to “make arbitration agreements as enforceable as other contracts, but not more so.”¹⁰⁴ Therefore, the “enforce as written” rule, which would immunize arbitration agreements from state contract law, is inconsistent with section 2 of the FAA.¹⁰⁵ On the contrary, any dispute-control terms—including remedy-stripping clauses, bans

Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 28-33 (2000).

¹⁰³ See, e.g., *W. Va. ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 279-80 (W. Va. 2002), cert. denied, 537 U.S. 1087 (2002) (explaining that the drafting party argued that FAA preempts application of state unconscionability doctrine to arbitration agreement purporting to waive punitive damages); *Discover Bank v. Super. Ct.*, 129 Cal. Rptr. 2d 393, 408 (Cal. Ct. App. 2003) (suggesting that FAA preempts any departure from enforcing arbitration agreements as written).

¹⁰⁴ *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967); *accord Volt Info. Scis., Inc.*, 489 U.S. at 479; H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924) (explaining that the FAA’s purpose is to place arbitration agreements “upon the same footing as other contracts”).

¹⁰⁵ Supporters of FAA preemption will argue that an “enforce as written” rule flows from the so-called “substantive” language in section 2, that a written arbitration agreement “shall be valid, irrevocable and enforceable.” This entails creative statutory interpretation that ignores the legislative history stating that arbitration agreements will be treated like other contracts. See Drahozal, *FAA Preemption*, *supra* note 16. Nothing in section 2 suggests the “as written” or “according to its terms” language that proponents of the “enforce as written” argument purport to rely on. And the general notion that enforcing a contract necessarily implies enforcing it “as written” or “according to its terms” begs the main question of the effect of contract regulation. Of course, contract enforcement usually means enforcing the

on class actions, forum selection clauses, or arbitrator payment provisions—that go beyond the choice of arbitration itself could be deemed unconscionable and denied enforcement as a matter of state law saved from preemption under section 2.¹⁰⁶

2. *The Incoherent Concept of “General” Contract Law*

The Court’s efforts to harmonize *Southland* with the FAA’s section 2 savings clause have unsurprisingly led to confusion—in the form of erroneous preemption holdings—in the lower courts. The Court has instructed that “state law, whether of legislative or judicial origin” is saved from preemption if it “arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.”¹⁰⁷ Unfortunately, the concept of “generally applicable contract law” lends itself to misapplication. For example, in *Bradley v. Harris Research*, the court misapplied the concept to hold that a California statute barring unfair venue provisions in franchise agreements was preempted by the FAA.¹⁰⁸ The court acknowledged that the state venue statute did not single out arbitration and would have applied irrespective of the presence of an arbitration agreement. But the court nevertheless concluded that “general” contract law under *Doctors Associates* means a law that applies to *every* contract, whereas the California statute “applies only to forum selection clauses and only to franchise agreements; it therefore does not apply to ‘any contract.’”¹⁰⁹ Accordingly, the court held the venue statute preempted by the FAA.¹¹⁰

A growing number of cases make the same error made by the *Bradley* court, and thereby threaten to undermine broad swaths of state contract regulation.¹¹¹ Like the purported federal “en-

written terms, but, again, contract regulation makes certain terms not enforceable as written.

¹⁰⁶ Furthermore, even if certain remedy-stripping clauses were enforced, the effect should not be the loss of substantive rights and remedies. If the arbitration agreement says that punitive damages should not be awarded, the plaintiff could well be entitled to have her punitive damage claim heard in court after the arbitration. See Schwartz, *Remedy-Stripping Clauses*, *supra* note 30, at 90-99.

¹⁰⁷ *Perry v. Thomas*, 489 U.S. 483, 492 n.9 (1987); *accord Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995).

¹⁰⁸ 275 F.3d 884 (9th Cir. 2001).

¹⁰⁹ *Id.* at 890; see *Doctor’s Assocs., Inc.*, 517 U.S. at 681.

¹¹⁰ 275 F.3d at 893.

¹¹¹ See *Ting v. AT&T*, 319 F.3d 1126, 1148 (9th Cir. 2003) (finding that the provision of the California consumer protection statute prohibiting contractual waiver of

force as written” rule, *Bradley*’s application of the “general/specific” distinction would have the effect of turning arbitration agreements into blanket exemptions from consumer protection and other statutes aimed at preventing contractual overreaching. An arbitration agreement could be written to mandate a waiver of injunctive relief, compensatory damages, or attorney fees guaranteed by a state consumer or antidiscrimination statute. Because those statutes do not apply to *every* contract and are not “general contract law,” as construed by *Bradley*, they would be preempted and the arbitration agreement “enforced as written” under the *Bradley* analysis.

Bradley breathes new life into *Southland*’s error, despite the Supreme Court’s post-*Southland* move away from it, that there are general contract defenses wholly distinct from statutes creating public policies as to specific categories of contracts. But legislatures deal with specific problems, not abstractions, and therefore the vast majority of state contract legislation targets specified categories of contracts rather than “all contracts.” Longstanding “general” contract law holds that “[a] promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable.”¹¹² Likewise, seemingly “general” judge-made contract defenses take their meaning from application to specific factual settings. A court is no more likely than is a legislature to find the need to apply protective doctrines like unconscionability to agreements freely negotiated between, say, Bank of America and Citibank, yet both the court and the legislature might well seek to apply an unconscionability protection to an individual consumer doing business with either of those firms.¹¹³ *Bradley*’s erroneous reasoning would apply *Southland*’s general/specific distinction to

class action remedy is preempted because consumer protection statute is not “general contract law”); *KKW Enters. v. Gloria Jean’s Gourmet Coffees Franchising Corp.*, 184 F.3d 42, 50 (1st Cir. 1999) (holding that FAA preempts venue provision in state franchise law); *Doctors Assocs., Inc. v. Hamilton*, 150 F.3d 157, 163 (2d Cir. 1998) (same); *Boynton v. ESC Med. Sys.*, 566 S.E.2d 730 (N.C. Ct. App. 2002).

¹¹² RESTATEMENT (SECOND) OF CONTRACTS § 178(1) (1981).

¹¹³ The Uniform Commercial Code, which has been adopted in some form in 49 states, is about as “general” as contract law gets. See 1 STEWART MACAULAY ET AL., *CONTRACTS: LAW IN ACTION* 37 (1995). Yet even the U.C.C. would fail the “test” for generality adopted in *Bradley* and similar cases. The U.C.C. does not apply to “all contracts”—even taking all nine of its articles together—but rather is limited to “certain” commercial transactions. See U.C.C. preamble, *reprinted in* CONTRACT LAW: SELECTED COURSE MATERIALS 7 (Steven J. Burton & Melvin A. Eisenberg, eds. 2002). The limited scope of the U.C.C. is even more apparent when

preempt virtually all state contract law where an arbitration agreement is involved.¹¹⁴

II

CONGRESSIONAL POWER TO REGULATE STATE COURT PROCEDURES: UNREMOVED CASES

The notion that Congress may control state court procedures finds scant support within the constitutional text. This section considers whether Congress has the power to control state court procedures for “unremoved” cases in state courts. Federal jurisdiction is present in such cases, either because the case pleads a federal question or because the parties are diverse, but the parties have consented to the jurisdiction of the state court—the plaintiff by electing to file in state court, and the defendant by declining to remove to federal court.¹¹⁵ Supreme Court decisions considering the question have viewed the power of Congress over state court procedure as a limited exception to a general rule of state sovereignty over their own courts, existing only

viewing its various articles separately: Article Two of the U.C.C., of course, limits its scope to transactions in goods. *See* U.C.C. § 2-102 (1977).

¹¹⁴ Professor Drahozal, defending decisions like *Bradley*, argues that the general/specific distinction is dictated by the “plain language” of the “savings clause” of FAA section 2, which provides for arbitration clauses to be invalidated on “such grounds as exist at law or in equity for the revocation of *any* contract.” Drahozal, *FAA Preemption*, *supra* note 17, at 409-11; *accord* Stephen J. Ware, *Contractual Arbitration, Mandatory Arbitration, and State Constitutional Jury Trial Rights*, 38 U.S.F. L. REV. 39, 47 (2003). Clearly, it is overselling the point to suggest that “any contract” plainly means “all contracts.” True enough, “any” *can* mean “all or every,” but it can also mean “one out of many.” *See, e.g.*, OXFORD AMERICAN DICTIONARY OF CURRENT ENGLISH 31 (1999); JOHN BOUVIER, BOUVIER’S LAW DICTIONARY AND CONCISE ENCYCLOPEDIA 205 (8th ed., 3d. rev. 1914). Thus, the “singling out” interpretation is consistent with the statute’s plain language. Drahozal argues further that the “singling out” interpretation of the FAA is inconsistent with *Southland*. Drahozal, *FAA Preemption*, *supra* note 17, at 410. So it is, but it derives from *Perry*, *Allied-Bruce*, and *Casarotto*. If those cases are inconsistent with *Southland* on this point, as I argue they are, then they should supersede *Southland*. To sustain his argument, Professor Drahozal would have to explain why those three cases should not be controlling. Professor Drahozal’s better argument is that the “singling out” interpretation leaves open the possibility that states could effectively opt out of the FAA by enacting a general law, such as the New Mexico “disabling civil dispute clause” statute, barring in general terms any contractual waivers of procedural safeguards. Drahozal, *FAA Preemption*, *supra* note 17, at 410; *see, e.g.*, N.M. STAT. ANN. § 44-7A-1(b)(4) (Michie 1978). That may be true, yet his alternative is equally questionable, because it renders the section 2 savings clause a virtual nullity, and would effectively allow parties to opt out of most state contract law that would touch on an arbitration agreement.

¹¹⁵ *See infra* note 165.

where a federal procedure is bound up with a federal substantive right. It appears that while Congress may create substantive law that state courts must apply as rules of decision without discriminating against the federal right, states remain sovereign over the structure and procedures of their courts.

A. Starting Point: State Sovereignty and Constitutional Silence

Two constitutional principles form the starting point for analysis of the question of whether Congress has the power to regulate state court procedure. First, a state's authority over the structure and procedure of its own court system is a fundamental attribute of state sovereignty: "Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign."¹¹⁶ Second, the grant of enumerated powers to the national government implies the continued existence of a "[r]esidual state sovereignty," an implication which "was rendered express by the Tenth Amendment."¹¹⁷ In the absence of an express or implied waiver of sovereignty by the states over their court systems, or grant of power to Congress, the states' control over their own court procedures must be seen as part of their residual sovereignty. These two principles will be discussed in turn.

Procedure is important. One shouldn't be misled by the fact that many procedural rules extend to such mundane matters as how many interrogatories may be served in pre-trial discovery in a civil case. Procedural questions fundamentally concern the allocation of the state's decision-making power to courts. This allocation question is an instance of the most basic question of constitution-making—"deciding who decides"—and therefore goes to the very heart of government sovereignty.¹¹⁸ How procedural systems are structured also determines the nature of justice that is delivered.¹¹⁹ These attributes of procedure no doubt underlie the consistently recognized principle that sovereign gov-

¹¹⁶ *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1990).

¹¹⁷ *Printz v. United States*, 521 U.S. 914, 919 (1997); see generally LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1978).

¹¹⁸ See NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 3-5 (1994).

¹¹⁹ See, e.g., William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 *CARDOZO L. REV.* 1865, 1911 (2002) (explaining that the "design and implementation of the [procedural] systems themselves" have greater impact on equality for participants than external constitutional norms).

ernments in the federal system control their own procedural systems: Questions of procedure “belong[] to the discretion of every government, consulting its own interest and convenience.”¹²⁰

The Supreme Court has repeatedly treated as axiomatic the notion that states are sovereign over the structure, jurisdiction, and procedure of their court systems. A unanimous Court in *Johnson v. Fankell* recently declared, “We have made it quite clear that it is a matter for each State to decide how to structure its judicial system.”¹²¹ Over a century earlier, the Court likewise stated, “[U]ndoubtedly, a state may regulate at pleasure the modes of proceeding in its courts.”¹²² As will be explored further below, the Supremacy Clause requirement “that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include a requirement that the State create a court competent to hear the case in which the federal claim is presented.”¹²³ 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.”¹²⁴

¹²⁰ *Sun Oil Co. v. Wortman*, 486 U.S. 717, 726 (1987) (quoting 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 462-63 (2d ed. 1832)). The framers recognized that courts are an integral part of any sovereign government, and therefore state courts were an integral part of the states’ sovereignty that would be maintained in the constitutional scheme. Hamilton wrote in THE FEDERALIST NO. 82:

[T]he States will retain all pre-existing authorities which may not be exclusively delegated to the federal head . . . [And] I shall lay it down as a rule that the State courts will *retain* the jurisdiction they now have, unless it appears to be taken away in one of the enumerated models.

THE FEDERALIST NO. 82, at 492 (Hamilton) (Rossiter ed. 1961); see Parnet, *supra* note 13, at 45-47.

¹²¹ 520 U.S. 911, 923 n.13.

¹²² *Bronson v. Kinzie*, 42 U.S. (1 How.) 311, 315 (1843); *accord* *Howlett v. Rose*, 496 U.S. 356, 372 (1990) (“The states thus have great latitude to establish the structure and jurisdiction of their own courts.”); *Wolfe v. North Carolina*, 364 U.S. 177, 195 (1960) (“Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise.”); *Hardware Dealers’ Mut. Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 158 (1931) (“[T]he procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control.”); *In re Tarble*, 80 U.S. (13 Wall.) 397, 407-08 (1871) (“How [state and federal governments’] respective laws shall be enacted [sic]; how they shall be carried into execution; and in what tribunals, or by what officers . . . are matters subject to their own control, and in the regulation of which neither can interfere with the other.”) (emphasis added).

¹²³ *Johnson v. Fankell*, 520 U.S. 911, 919 (1997).

¹²⁴ *Howlett*, 496 U.S. at 372 (quoting Henry M. Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954)); see *Wolfe*, 364 U.S. at 195

Absent from the Constitution's grant of enumerated powers to Congress is any general power to regulate the judiciaries of the several states. This absence is striking, given the centrality in the Constitution of state courts in handling not only interstate judicial business arising under state law, but also (unless and until lower federal courts were created) most federal judicial business as well.¹²⁵

Where the Constitution grants Congress general authority to regulate a court system, the Constitution speaks of a power to "constitute" or "ordain and establish" "Tribunals" or "Courts" that are "inferior" to the Supreme Court.¹²⁶ These are plainly federal courts. According to Chief Justice Marshall, "state courts are not, in any sense of the word, *inferior* courts . . . because they emanate from a different authority, and are the creatures of a distinct government."¹²⁷

(explaining that states' control over their own court structure, procedure and jurisdiction "are no less applicable when federal rights are in controversy than when the case turns entirely upon questions of local or general law").

¹²⁵ The framers contemplated that state courts would handle a significant quantity of federal judicial business. See THE FEDERALIST NO. 82, *supra* note 120, at 492-95; Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 2012-18 (1993). This understanding is implicit in the "judges clause" taken together with "vesting clause," U.S. CONST. art. III, § 1. Under these, state judges must apply federal law as rules of decision in cases before them, while Congress need not create any lower federal courts to hear federal law cases. The framers also provided for cohesion in the national network of state judiciaries for state law business. For example, the inclusion within the federal judicial power of state law diversity cases—a category of federal jurisdiction that was implicitly understood to be non-exclusive—itsself implied an understanding that such interstate causes would form a part of state judicial business. See Weinberg, *supra* note 13, at 757-59. And under the Privileges and Immunities Clause, a state court was forbidden from discriminating against out-of-state litigants. U.S. CONST. art. IV, § 2, cl. 1; see Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 261-62 (1992).

¹²⁶ U.S. CONST. art. I, § 8, cl. 9; U.S. CONST. art. III, sec. 1.

¹²⁷ *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 97 (1807); see, e.g., *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 222 (1916) (explaining that the Supremacy Clause requirement that state courts hear federal cases "in no sense implied . . . that, for the purpose of enforcing the right, the state court was to be treated as a Federal court, deriving its authority not from the state creating it, but from the United States"); 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 442 (7th ed. 1851) (state courts have an "inherent jurisdiction" to hear federal cases, but "do not become inferior courts in the sense of the constitution, because they are not ordained by congress"). It has almost never been seriously suggested that the "inferior" courts which Congress was authorized to create included state courts. Professor Prakash has suggested, rather ambiguously, that "some framers thought that Congress could constitute state courts as inferior federal courts." See Prakash, *supra* note 125, at 2007. Prakash makes the interesting observation that nothing in the

Equally significant is the Constitution's failure to grant the Supreme Court appellate authority over state court decisions on matters of state law, even though such an authority could promote a national interest in uniformity of decision.¹²⁸ The Supreme Court does, of course, exercise supervisory jurisdiction over state courts in federal question cases, but even here the states' procedural and jurisdictional autonomy is apparent. In *Cohens v. Virginia*, for example, Chief Justice Marshall reasoned that Supreme Court review of federal law decisions in state court was needed precisely because federal questions were otherwise "confided . . . to the State Courts, however they may be constituted."¹²⁹ Marshall assumed that state courts deciding federal issues were, but for Supreme Court review, "independent," hence the need to impose uniformity.¹³⁰

Constitution prevents a sitting state judge from contemporaneously holding a life-tenured federal judgeship. As with other scholars asserting a federal power to commandeer certain state officers, Prakash assumes that the Supremacy Clause's requirement that state judges apply federal law authorizes "commandeering" of state court judges to that extent. However, Prakash stops short of claiming that Congress's arguable power to commandeer state judges or to "constitute" an inferior court meant a congressional power to create a state court to hear federal cases or a power to dictate procedure to a state court. *See id.* at 2032.

It might be said that the power to create a court includes a power to establish both its jurisdiction and procedure. Congress's power over lower federal court procedure can be seen as flowing from the power to create such courts. Congress, of course, was not given power to create jurisdiction of the Supreme Court, *see* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), though Congress gains power to create procedures and limit the constitutionally-created appellate jurisdiction of the Supreme Court under the Exceptions and Regulations Clause. U.S. CONST. art. III, § 2, cl. 2.

¹²⁸ *See* *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875) (declining to recognize any power of Supreme Court to review state law decisions from state courts); Hart, *supra* note 124, at 499-500.

¹²⁹ 19 U.S. (6 Wheat.) 264, 415 (1821).

¹³⁰ "Thirteen independent Courts," says a very celebrated statesman, (and we have now more than twenty such Courts,) 'of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed.'" *Id.* at 415-16.

Indeed, state courts are empowered to render independent interpretations of federal law, and are bound by U.S. Supreme Court, but not lower federal court, precedents. *See* *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 617 (1989); *Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring). Lower federal courts exercise no direct appellate review over state court decisions in federal question cases. The *Rooker-Feldman* doctrine, which bars direct review by lower federal courts of state court decisions, is technically based on an interpretation of 28 U.S.C. § 1257, authorizing Supreme Court review of state decisions, but the constitutional dimension to the ruling lurks plainly in the background. *See* *Rooker v. Fid. Trust Co.*, 263 U.S. 413 (1923); *D.C. Ct. App. v. Feldman*, 460 U.S. 462 (1983). Finally, the adequate-state-ground doctrine, under which the Supreme Court will not review cases raising federal questions where the state courts have disposed of them on adequate state

The closest the Constitution comes to authorizing Congress to determine modes of proceeding in state courts is the Full Faith and Credit Clause, allowing Congress “by general Laws [to] prescribe the Manner in which [sister state] Acts, Records and Proceedings shall be proved.”¹³¹ Under this clause, Congress can regulate to some degree the procedural questions of the effect of judgments of one state’s court in another, as well as rules governing the choice of law in state courts.¹³² However, the Full Faith and Credit Clause’s specific constitutional mandates involve coordination of state authority vis-à-vis each other, rather than between the federal and state sovereigns, and are a far cry from a general power over state court procedures. In sum, the Constitution impinges on state court structure only by superimposing Supreme Court review over state court determinations of federal law questions.

B. Possible Constitutional Sources of an Implied Congressional Power over State Courts

Can any generalized congressional authority to direct state court procedures be inferred from other constitutional provisions, or from its “structure” or “essential postulate[s]”?¹³³ In the absence of a grant of such authority, the Constitution’s federalist structure, particularly as articulated in the Rehnquist Court’s federalism cases in the past decade, weighs heavily against the idea. I can conceive of five possible sources of a general congressional authority over state court procedure. The Commerce Clause and the Fourteenth Amendment Due Process Clause suggest arguments that Congress has a direct power to regulate state procedures even for state law claims; these arguments are considered below, in section III.¹³⁴

law grounds, “accords respect to state courts as decisionmakers by honoring their modes of procedure.” *Howlett v. Rose*, 496 U.S. 356, 370 n.16 (1990).

¹³¹ U.S. CONST. art. IV, § 1. Similarly, but even narrower in scope, is the Extradition Clause, U.S. CONST. art. IV, § 2, cl. 2, which allows some federal statutory coordination of detention and prosecution of criminal defendants. *See Puerto Rico v. Branstad*, 483 U.S. 219, 227-28 (1987).

¹³² *See, e.g., Sun Oil Co. v. Wortman*, 486 U.S. 717, 729 (1988). There is considerable debate over the extent of Congress’s power under the Full Faith and Credit Clause to legislate nationwide choice-of-law rules. *See, e.g., Laycock, supra* note 125, at 252-55; Scott Ruskay-Kidd, Note, *The Defense of Marriage Act and the Overextension of Congressional Authority*, 97 COLUM. L. REV. 1435, 1450-51, 1451 n.78 (1997). However, this question is outside the scope of this Article.

¹³³ *Printz v. United States*, 521 U.S. 914, 918 (1997).

¹³⁴ Again, the “Full Faith and Credit” and “Extradition” Clauses are expressly

The discretionary “vesting” clause, the Supremacy Clause and the Necessary and Proper Clause, either separately or in some combination, suggest arguments that Congress has an implied power over state procedure that follows from its power to make substantive law applicable in state court. These arguments will be considered in the immediately following subsections.

1. *Constitutional Structure—The Supremacy and Vesting Clauses*

The Supremacy Clause provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; *and the Judges in every State shall be bound thereby*, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.¹³⁵

The italicized “judges clause,” read in the context of the whole Supremacy Clause, establishes two principles relevant here. First, it forms a powerful choice-of-law rule by which state judges must follow applicable federal law in cases before it, superseding or preempting any conflicting state law. Second, it reaffirms what is implicit in the discretionary “vesting” clause of Article III, that state courts must keep their doors open to federal substantive claims and defenses.

It has never seriously been argued that the Supremacy Clause is itself an affirmative grant of legislative authority to Congress to control state courts; rather, any federal statute binding on state courts must be duly enacted according to one of Congress’s

limited in their scope, and do not confer such a general power. *See supra* note 131 and accompanying text. Perhaps it could be argued that the Guaranty Clause is another source of congressional authority over state court procedures. The argument would be that a judicial branch is a fundamental part of republican government, and Congress can legislate to enforce the republican guarantee. Yet republican state government also presumes state autonomy from congressional control over matters concerning government structure. *See* Deborah Jones Merritt, *The Guaranty Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 25-26 (1988). If Congress may regulate any state government structures under the Guaranty Clause, presumably it could do so only at the extremes—for example, if a state were to impose a monarchy or dictatorship and dispense with elections. *See id.* Thus, a Guaranty Clause power over state court systems might come into play were a state to abolish its courts entirely. If such a power exists, it would, I believe, fold into the Due Process Clause. Therefore, I will not consider the Guaranty Clause separately.

¹³⁵ U.S. CONST. art VI., cl. 2 (emphasis added).

enumerated powers.¹³⁶ The strongest argument for federal control over state court procedure is based on the Supremacy Clause and the discretionary “vesting” clause. Under that argument, the supremacy of federal law, the requirement that state judges apply it, and the expectation that state courts will carry a significant part of any federal law caseload, together authorize Congress to treat state courts as federal courts when hearing federal cases; federal substantive law would carry federal procedure in train into state court. The Supremacy Clause would thereby authorize Congress to “commandeer” state courts and make them de facto federal courts when hearing federal claims. In other words, Congress could control the structure and procedure of state courts hearing federal law cases.

This argument is dubious. As argued above, the “inferior courts” referred to in the vesting clause are federal, not state, courts. It stands the discretionary character of the vesting clause on its head to say that, by failing to create federal courts, Congress exercises an arguably greater power to reconstitute state courts as federal courts. Nor does the obligation of a state court to apply federal law imply any diminution of state sovereignty over how those courts are constituted. On the contrary, the framers recognized that the power of state courts to apply federal law follows from their preexisting jurisdiction.¹³⁷ Thus, Hamilton argued that state courts will necessarily have “a concurrent jurisdiction in all cases arising under the laws of the Union, where it is not expressly prohibited,” precisely because “[t]he judiciary power of every government” includes the power to apply the substantive law of any sovereign that may be applicable to a dispute before it.¹³⁸ As seen in the following sections, the fact that federal substantive law provides a mandatory rule of decision for state courts does not support the argument that Congress can thereby commandeer state courts by controlling their procedure.

2. *The Supreme Court’s Approach: Testa and Commandeering*

The Supreme Court has examined the Supremacy Clause as a

¹³⁶ See, e.g., *Printz*, 521 U.S. at 925. Some commentators have argued that *Printz* gives such a broad reading to the Supremacy Clause, not because they believe federal supremacy is so broad, but to criticize *Printz*. This reading of *Printz* seems improbable in light of its holding limiting congressional authority to commandeer state officials. See Bellia, *supra* note 13, at 974.

¹³⁷ See Parmet, *supra* note 13, at 45-47.

¹³⁸ THE FEDERALIST NO. 82, *supra* note 120, at 492.

source of congressional authority to require state officials to implement federal law, in a trio of cases that have been associated with the concept of federal “commandeering” of actors within each of the three branches of state government. In *New York v. United States*,¹³⁹ the Court invalidated a provision of a federal radioactive waste statute that required states either to regulate in a particular way, or else to “assume the liabilities of certain state residents,” either of which would require legislative action and thereby “‘commandeer’ state governments into the service of federal regulatory purposes.”¹⁴⁰ Therefore, “[w]hether one views the take title provision as lying outside Congress’ enumerated powers, or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the federal structure of our Government established by the Constitution.”¹⁴¹ In *Printz v. United States*,¹⁴² two local sheriffs challenged a provision of a federal gun control statute that required them to perform certain administrative and investigative functions in connection with federally-required background checks for purchasers of handguns.¹⁴³ The Court struck down the challenged provision on the ground that Congress “cannot circumvent” the anti-commandeering rule of *New York* “by conscripting the State’s officers directly” to carry out a federal directive or regulatory program.¹⁴⁴ *New York* and *Printz* thus establish that Congress cannot “commandeer” state legislative or executive officials, notwithstanding the Supremacy Clause.

Some judges and commentators maintain that state courts can be commandeered, despite *New York* and *Printz*,¹⁴⁵ based on the principle derived from *Testa v. Katt*.¹⁴⁶ In *Testa*, a state court dismissed a federal action seeking a civil penalty, relying on the traditional conflict-of-laws principle that a court need not en-

¹³⁹ 505 U.S. 144, 188 (1992).

¹⁴⁰ *Id.* at 175.

¹⁴¹ *Id.* at 177.

¹⁴² 521 U.S. 898 (1997).

¹⁴³ *Id.* at 902-04; Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993).

¹⁴⁴ *Printz*, 521 U.S. at 935.

¹⁴⁵ See, e.g., *id.* at 968 n.31 (Stevens, J., dissenting); Martin H. Redish & Steven G. Sklaver, *Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism*, 32 IND. L. REV. 71, 75 (1998); Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1036-38 (1995).

¹⁴⁶ 330 U.S. 386 (1947).

force the penal laws of another, or “foreign” sovereign. The U.S. Supreme Court reversed, holding that the Supremacy Clause overrides this conflict-of-laws principle, in that it makes federal law “as much the policy of [the state] as if the act had emanated from [that state’s] own legislature.”¹⁴⁷ Therefore, a federal claim must be heard in any state court “hav[ing] jurisdiction adequate and appropriate under established local law to adjudicate” it.¹⁴⁸ It is thus argued that the *Testa* principle allows Congress to commandeering state courts, in that “state courts of appropriate jurisdiction must occupy themselves adjudicating [federal] claims . . . regardless of how otherwise crowded their dockets might be with state-law matters.”¹⁴⁹

But it is a mistake to view the applicability of federal law in state court as an example of commandeering. *Testa*’s reference to courts of “appropriate jurisdiction” implies a lack of congressional power to force courts to change their jurisdiction or structure to accommodate federal claims. The Supreme Court has unanimously recognized that *Testa*’s “requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented.”¹⁵⁰ Indeed, *Testa* is a continuation of a long-standing line of cases which take pains to point out that in imposing federal law on state courts through the Supremacy Clause, Congress “had not attempted ‘to enlarge or regulate the jurisdiction of state courts or to control or affect their modes of procedure.’”¹⁵¹ Thus, the *Testa* principle is fundamentally a non-

¹⁴⁷ *Id.* at 392 (quoting *Mondou v. New York, New Haven & Hartford R.R. Co.*, 223 U.S. 1, 57 (1912)).

¹⁴⁸ *Testa*, 330 U.S. at 394.

¹⁴⁹ *Printz*, 521 U.S. at 967 (Stevens, J., dissenting). The majority’s imprecise formulation of *Testa* could be read to understand *Testa* to mean nothing more than the relatively narrow duty “to apply federal law in cases that the states have consented to entertain.” *Id.*

¹⁵⁰ *Howlett v. Rose*, 496 U.S. 356, 372 (1990), *quoted in* *Johnson v. Fankell*, 520 U.S. 911, 919 (1997).

¹⁵¹ *Howlett*, 496 U.S. at 373 (quoting *Mondou*, 223 U.S. at 56; *see* *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 222 (1916) (explaining that a state court is required to hear federal claim “if only the authority to enforce such right comes generally within the scope of the jurisdiction conferred by the government creating” the state court); *Claffin v. Houseman*, 93 U.S. 130, 137 (1876) (explaining that federal claims are cognizable in state court “competent to decide rights of the like character and class”); *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 415 (1821) (explaining that other than Supreme Court review, federal claims are decided in state courts “however they may be constituted”).

discrimination principle.¹⁵² The “judges’ clause,” as interpreted by *Testa*’s non-discrimination principle, means that state courts must hear federal claims to the extent that they are already set up to hear like state claims.¹⁵³

Testa’s supremacy principle, requiring state courts to remain open to federal claims on a non-discriminatory basis, is not commandeering in the relevant sense: it does not require an arm of state government to regulate its citizens in a particular way. The *Testa* line of cases is quite consistent with the principle underlying *Printz* and *New York*, that federal supremacy means the power of Congress to regulate the people, but not necessarily the power to act directly on the states.¹⁵⁴ In contrast, for Congress to dictate rules of court structure, procedure and jurisdiction would amount to commandeering in this sense. Rules of procedure regulate the conduct of litigants qua litigants. A congressional directive to change a state court procedure is not simply a command to apply existing state judicial resources to enforce a

¹⁵² See, e.g., *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 363 (1952) (citing *Testa* for proposition that state may not “single out” an aspect of federal question for differential treatment); Daan Braveman, *Enforcement of Federal Rights Against States: Alden and Federalism Non-Sense*, 49 AM. U. L. REV. 611, 647 n.271 (2000); Caminker, *supra* note 145, at 1030 n.110; Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 255 n.165 (1985).

¹⁵³ Thus, the Court has recognized neutral jurisdictional limitations as a “valid excuse” to decline to exercise jurisdiction over federal claims. See *Herb v. Pitcairn*, 324 U.S. 117 (1945) (upholding state court determination that its “city court” lacked jurisdiction to hear federal FLSA claim arising outside its geographical jurisdiction); *Douglas v. New York, New Haven & Hartford Ry. Co.*, 279 U.S. 377 (1929) (upholding state court’s discretionary dismissal of FELA action where neither plaintiff nor defendant resided in forum state); see also *Missouri ex rel. S. Ry. Co. v. Mayfield*, 340 U.S. 1 (1950) (upholding state court dismissal of FELA case on *forum non conveniens* grounds); Caminker, *supra* note 145, at 1025.

¹⁵⁴ See *New York v. United States*, 505 U.S. 144, 164-65 (1992); *Printz*, 521 U.S. at 920. *Testa* reasoned that:

When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of [the state] as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State.

330 U.S. at 392 (quoting *Mondou*, 223 U.S. at 57). This language is ambiguous enough to support a commandeering argument only if one takes it out of context. In *Mondou*, the Court held that the Supremacy Clause required state courts to apply the substantive provisions of the Federal Employers’ Liability Act. 223 U.S. at 57. Significantly, the FELA is substantive regulation of individuals, not states, and the *Mondou* court made clear that state courts applying the FELA retain their autonomy over jurisdiction and procedure. *Id.* at 56. *Testa*’s reference to “appropriate jurisdiction” implies the same.

federal right, but a directive to state courts to regulate persons in the state—litigants—in a particular way.

Moreover, controlling procedure and jurisdiction differs significantly from imposing a choice of substantive law on a court. Codes of procedure come directly either from state legislatures, from courts in a quasi-legislative rulemaking capacity, or from state constitutions. Likewise, the creation of a court and the definition of its jurisdiction are in the first instance legislative or constitutional acts, rather than judicial acts. To assert control over procedure or jurisdiction, Congress would have to commandeer the state's legislative or constitutional process. Congressional control over state procedure thus seems to be the very sort of commandeering condemned in *Printz* and *New York*. Wherever the Court now finds itself on its continuing “unsteady path” of Tenth Amendment decisions, it is clear that federalism principles, whether located in the Tenth Amendment or elsewhere, protect the states' sovereignty over such state governmental processes from commandeering.¹⁵⁵

3. *The Necessary and Proper Clause and “Reverse-Erie” Doctrine*

As suggested by the anti-commandeering principle, the Supremacy Clause requirement that state courts apply *substan-*

¹⁵⁵ *New York*, 505 U.S. at 160. *New York* and *Printz* both disclaimed reliance on the Tenth Amendment. *New York*, 505 U.S. at 156; *Printz*, 521 U.S. at 923-24. However, the Court more recently recast those decisions by stating that “[i]n *New York* and *Printz*, we held federal statutes invalid, not because Congress lacked legislative authority over the subject matter, but because those statutes violated the principles of federalism contained in the Tenth Amendment.” *Reno v. Condon*, 528 U.S. 141, 149 (2000).

The “unsteady path” to which *New York* referred involved the question of whether Congress could make state governments subject to “generally applicable laws.” This question came up repeatedly in the context of whether the state, as employer, was subject to federal minimum wage/maximum hour laws under the Fair Labor Standards Act. See *Maryland v. Wirtz*, 392 U.S. 183 (1968) (yes); *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976) (overruling *Wirtz*) (no); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (overruling *Nat'l League of Cities*) (yes). It now appears settled that Congress can regulate state governments in the same manner as private parties under “generally applicable laws.” See *Reno v. Condon*, 528 U.S. 141 (2000) (upholding application of Drivers' Privacy Protection Act to states). However, the notion that it is constitutionally problematic for Congress to regulate “the states as states” or interfere with fundamental state governmental processes, arising from the short-lived *National League* line of cases, seems not to have completely died away: perhaps it has found its final expression in the anticcommandeering doctrine of *Printz* and *New York*.

tive federal law does not imply a power to impose *procedural* law. Could it be argued that the effective implementation of substantive federal mandates by state courts implies some control over the manner of implementation? Put another way, does the Necessary and Proper Clause allow Congress to control state procedure for unremoved federal question cases? A simple example illustrates the problem. Imagine Congress enacting a statute requiring state courts to give trial-setting priority to federal question cases: Here is a general procedure designed to further the federal interest in resolution of federal law disputes across the board. What could be more central to “supremacy” of federal law than a rule that federal law always goes to the head of the line in state court?

But this suggestion has been rejected—and rightly so—throughout the history of Supreme Court statements on the matter. The Court has been remarkably consistent in adhering to “[t]he general rule, ‘bottomed deeply in belief in the importance of state control of state judicial procedure . . . that federal law takes the state courts as it finds them.’”¹⁵⁶ The implications of the anti-commandeering doctrine—that Congress would impermissibly commandeer state courts by dictating rules of procedure and jurisdiction to them—reinforces this view.

The Court unanimously ruled in favor of state sovereignty in *Johnson v. Fankell*, a case which presents in sharp relief a distinct conflict between a strong argument for applying federal procedural law to a state court’s adjudication of a federal right and the state’s interest in controlling its own court system.¹⁵⁷ In *Johnson*, the Idaho courts applied state appellate procedure to deny the defendant state officials an interlocutory appeal from the trial court’s denial of summary judgment on their qualified immunity defense.¹⁵⁸ Under *Mitchell v. Forsyth*,¹⁵⁹ a district court order denying a qualified immunity defense prior to final judgment—whether on a 12(b)(6) motion to dismiss or motion for summary judgment—is immediately appealable on an interlocutory basis. The practical implications of this federal procedural right are quite significant: the plaintiff’s pretrial case preparation through discovery is stayed while the defendant takes one appeal as of

¹⁵⁶ *Howlett*, 496 U.S. at 372 (quoting Hart, *supra* note 124, at 508); *accord* *Johnson v. Fankell*, 520 U.S. 911, 919 (1997).

¹⁵⁷ 520 U.S. 911.

¹⁵⁸ *Id.* at 919.

¹⁵⁹ 472 U.S. 511 (1985).

right to the federal courts of appeals, and may even petition for certiorari. The *Mitchell* doctrine holds that a valid qualified immunity defense carries in tow the important procedural right not to have to submit to the burden of pretrial litigation, particularly discovery processes, which cost time and money.¹⁶⁰ Under *Mitchell*, this procedural right is so important that the possibility of correcting an erroneous denial of the sovereign immunity defense is deemed to outweigh the cost to the plaintiff's ability to prove his substantive claim: a cost measured in loss of evidence due to what might be years of delay during appeal.¹⁶¹ The *Johnson* defendants argued that the right to interlocutory appeal was bound up with their substantive federal defense of qualified immunity, and that the Idaho rule barring interlocutory appeal was therefore preempted because it interfered with their federal right.¹⁶²

The Supreme Court unanimously rejected that argument. The Court reasoned that the "normal presumption against pre-emption" was "buttressed" by the compelling federalism interest in allowing states to control their own judicial procedures; the Idaho courts' dismissal of the interlocutory appeal "rested squarely on a neutral state rule regarding the administration of the state courts."¹⁶³ "[P]rinciples [that] are fundamental to a system of federalism" outweighed the defendant's argument that their federal rights would justify "requir[ing] a State to undertake something as fundamental as restructuring the operation of its courts."¹⁶⁴ Thus, as *Johnson* makes clear, federal

¹⁶⁰ The *Johnson* Court's correct assumption that this right is procedural notwithstanding its substantial practical value, weighs heavily against the notion that the FAA—which also provides a right to avoid pre-trial litigation—is substantive. See *infra* Part IV.A.2.

¹⁶¹ This cost to the plaintiff should not be minimized. If denial of qualified immunity is affirmed on appeal, an average of two years will have elapsed prior to remand. If the defendant petitions for certiorari—unsuccessfully—another six months is likely to be added. During this time, witnesses' memories will fade and documentary and tangible evidence may be lost. These cannot be preserved by depositions or other discovery, which are stayed on appeal absent unusual circumstances. The loss of evidence tends to hurt the plaintiff, as the party bearing the burden of proof.

¹⁶² In terms of the limited precedents for imposing federal procedures on state courts, defendants' argument was that the interlocutory appeal right was "part and parcel" of the substantive federal defense. See *infra* text accompanying notes 164-70.

¹⁶³ *Johnson v. Fankell*, 520 U.S. 911, 918 (1997).

¹⁶⁴ *Id.* at 922 (quoting *Howlett v. Rose*, 496 U.S. 356, 372 (1990)). The Court threw in the additional point that the interlocutory appeal right was not based on § 1983, but on 28 U.S.C. § 1291. This argument, which seems to be something of a

supremacy of substantive law stops short of permitting Congress to override neutral rules of state procedure or judicial administration. The illustrative “federal priority” rule would no doubt be held unconstitutional, and properly so.

While there are exceptions to the general rule that “federal law takes the state courts as it finds them,” these exceptions have such a sketchy, limited quality that they underscore the vigor of the rule. The case law suggests three ways in which Congress may influence the procedural aspects of federal rights heard in state courts—the so-called “reverse-*Erie*” question.¹⁶⁵ First, it seems apparent that remedies deemed necessary to the enforcement of a federal right—punitive damages in connection with a Title VII claim, for example—would no doubt apply in state court. Likewise, a federal statute establishing a statute of limitations for a particular federal claim would bind state courts. This is so even though, traditionally, “matters respecting the remedy—such as the form of the action, sufficiency of the pleadings, rules of evidence, and the statute of limitations—depend upon the law of the place where the suit is brought.”¹⁶⁶

makeweight, is overly formalistic, and not completely accurate. The construction of § 1291 to allow interlocutory appeal of the specific qualified immunity defense in § 1983 cases is based on policies flowing from a defendant’s rights in § 1983 cases. The more important point is that the procedural right incident to the substantive federal defense was not sufficient to outweigh the state’s sovereign interest in structuring its own court procedure.

¹⁶⁵ Concurrent jurisdiction, rather than exclusive federal court jurisdiction, is probably the norm for federal rights of action, and *Testa* compels state courts to entertain such federal claims in their courts of competent jurisdiction. But nothing compels parties to maintain their federal cases in state court, and, between the plaintiff’s right to file federal claims in federal court, *see* 28 U.S.C. § 1331 (2000), and the defendants’ right to remove such cases, *see* 28 U.S.C. § 1447 (2000), federal questions in state court are somewhat exceptional. Combine that with the broad similarity between state and federal procedures, and there will be relatively few occasions for the Supreme Court to decide how state courts are to proceed when handling federal questions.

¹⁶⁶ *Cent. Vt. Ry. v. White*, 238 U.S. 507, 511 (1915). In the conceptual vocabulary of earlier times, it appears that “remedy” and “procedure” were essentially congruent—either synonymous, or at least overlapping concepts. For example, as expressed in a contemporary conflict of laws text: “[A]n important distinction arises between what are called matters of right and matters of remedy, or matters of substance and matters of procedure Matters of remedy, or procedure, then, are determined by the law of the forum.” GOODRICH, HERBERT FUNK, HANDBOOK ON THE CONFLICT OF LAWS 157, 159 (1927), *quoted in* Walter Wheeler Cook, “Substance” and “Procedure” in the Conflict of Laws, 42 YALE L.J. 333, 334-35 (1933). *Compare* *Red Cross Line v. Atl. Fruit Co.*, 264 U.S. 109, 124-25 (1924) (Brandeis, J.) (“The [New York] Arbitration Law deals merely with the remedy in the state courts It does not attempt either to modify the substantive maritime law or to

Second, a limited number of questions that have been traditionally viewed as matters of “procedure” or “remedy” may be so closely related to the definition of the federal right—so “bound up with substance”—that the federal rule would apply in state court. The leading case for this exception is generally taken to be *Dice v. Akron, Canton & Youngstown Railroad Co.*¹⁶⁷ In *Dice*, the defendant sought dismissal of the plaintiff’s claim under the Federal Employers’ Liability Act (FELA) on the ground that the plaintiff had signed a release, while the plaintiff argued that the release was procured by fraud and, therefore, void.¹⁶⁸ Under Ohio procedure, the question of whether a release is vitiated by fraud is a question of equity, to be decided by the judge, who in this case found, as a factual matter, that the release was valid.¹⁶⁹ The Supreme Court reversed. The Court deemed the question of the validity of the release as one of federal substantive law, and, what is important for present purposes, that the plaintiff had a right to have that factual question decided by the jury:

“The right to trial by jury is ‘a basic and fundamental feature of our system of federal jurisprudence’” and . . . is “part and parcel of the remedy afforded railroad workers under the [FELA].” . . . It follows that the right to trial by jury is too substantial a part of the rights accorded by the Act to permit it to be classified as a mere “local rule of procedure” for denial in the manner that Ohio has here used.¹⁷⁰

deal with the remedy in courts of admiralty.”), *with Berkovitz v. Arbib & Houlberg, Inc.*, 130 N.E. 288, 290 (N.Y. 1921) (Cardozo, J.) (“Arbitration is a form of procedure whereby differences may be settled. It is not a definition of the rights and wrongs out of which differences grow.”) Both *Red Cross Line* and *Berkovitz* were construing the New York Arbitration Law of 1920.

¹⁶⁷ 342 U.S. 359 (1952). *See, e.g.*, *Bellia*, *supra* note 13, at 984; *Parment*, *supra* note 13, at 17; *Stewart*, *supra* note 13, at 432-33; William F. Baxter, *Choice of Law and the Federal System*, 16 *STAN L. REV.* 1 (1963).

¹⁶⁸ *Dice*, 342 U.S. at 360; *see* Federal Employers’ Liability Act, 45 U.S.C. §§ 51-60 (2000). The FELA, a turn-of-the-century statute governing tort claims by railroad workers, was designed to override various anti-plaintiff tort doctrines. *See* Schwartz, *Correcting Federalism Mistakes*, *supra* note 7, at 25, 28 n.103. It guaranteed ultimate choice of forum—federal or state—to the plaintiff by barring removal of cases filed in state court. The FELA is thus unique in modern legislation, and arguably makes greater demands on state court dockets than any other federal statute. A number of questions naturally arose as to the relationship between FELA’s substantive provisions and state court procedures.

¹⁶⁹ *Dice*, 342 U.S. at 360-62.

¹⁷⁰ *Id.* at 363 (quoting *Bailey v. Cent. Vt. R.R. Co.*, 319 U.S. 350, 354 (1943)). Most scholars understand *Dice* to create a rule that a federal procedure applies in state court where it is “part and parcel” of the federal right at issue, *see Bellia*, *supra*

Similarly, questions that define the nature of the federal right, such as the form of action (legal or equitable),¹⁷¹ the placement of the burden of proof (which distinguishes whether the right is a claim or defense),¹⁷² and the elements required to plead it sufficiently, may be matters of federal law.¹⁷³

note 13, at 960-61; Parmet, *supra* note 13, at 18; Stewart, *supra* note 13, at 433-34, but its holding may be even narrower than that. Significantly, *Dice* distinguishes, but does not overrule, *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 219 (1916), which held that Minnesota's provision for non-unanimous jury verdicts was validly applied to an FELA case in the Minnesota courts, notwithstanding the long-established requirement of unanimous jury verdicts for federal trials. *Bombolis*, which stands for the proposition that federal statutory rights do not carry federal jury practices in tow, could be reconciled with *Dice* by distilling the rule that FELA questions must be decided by the jury according to whatever jury *practice* the state court provides. But the *Dice* opinion says even less than this: it appears to leave open the possibility that Ohio could have had a judge decide all FELA questions without a jury "had Ohio abolished trial by jury in all negligence cases including those arising under the federal Act." *Dice*, 342 U.S. at 363. Instead, "[Ohio] has provided jury trials for cases arising under the federal Act but seeks to single out one phase of the question of fraudulent releases for determination by a judge rather than by a jury. Compare *Testa v. Katt*, 330 U.S. 386." *Id.* The citation to *Testa* suggests that *Dice* advances nothing more than a non-discrimination principle: Congress could not compel a state to provide a jury trial for a category of actions—such as negligence actions—but must instead "take state courts as it finds them," so long as the state court does not treat the federal right differently. *See id.*

¹⁷¹ *Dice* can be seen as deciding who gets to define the form of action of a federal statutory right. The right to jury factfinding is a right at common law, whereas judges are the factfinders in equity. *Dice* suggests that a state court may not recharacterize a federal right "at law" as an equitable right, as the Ohio court did, thereby taking a fact issue away from the jury. Justice Black, the author of *Dice*, was known for his solicitude for the role of the jury, and was hostile in particular to judges taking issues away from the jury by the device of deciding equitable issues in the same case. *See Dairy Queen v. Wood*, 369 U.S. 469 (1962) (Black, J.) (explaining that the judge cannot take fact question away from jury by characterizing the common law jury question as "incidental" to equitable issues); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959) (Black, J.) (explaining that the right to jury trial of legal issues cannot be lost through prior determination of equitable claims in the same case).

¹⁷² *See Cent. Vt. R.R. Co. v. White*, 238 U.S. 507, 512 (1915) (holding that the FELA intended to adopt the federal rule placing that burden of proof on the defendant and that such a rule "is a part of the very substance of [plaintiff's] case" and not "a mere matter of state procedure").

¹⁷³ *See Brown v. W. R.R. of Ala.*, 338 U.S. 294, 295-96 (1949) (reversing dismissal of FELA complaint by Georgia state court applying a strict state "pleading sufficiency" rule). While the Court in *Brown* opined that "[s]trict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws," the Court stopped short of stating that a liberal federal pleading rule should apply in state court. *See id.* at 298-99. Instead, the case seems limited to the proposition that unduly narrow construction of federal claims pleaded in state courts will be scrutinized and reversed by the Supreme Court exercising its supervisory authority over state courts on federal questions. *See id.* at 296 (emphasizing the

Finally, a handful of decisions seem to establish a rule that state procedures which “unduly burden” or “frustrate” a federal substantive right in state court are preempted. In *Felder v. Casey*, the Supreme Court invalidated a state law “notice of claim” requirement that created additional procedural hurdles to a plaintiff bringing a police brutality case in state court under 42 U.S.C. § 1983.¹⁷⁴ Viewing the question as “essentially one of preemption,” the Court reasoned that the notice of claim statute stood as an obstacle to the purposes of Congress in enacting section 1983.¹⁷⁵ Thus, “[f]ederal law takes state courts as it finds them only insofar as those courts employ rules that do not ‘impose unnecessary burdens upon rights of recovery authorized by federal courts.’”¹⁷⁶ Significantly, these are special cases of *Testa*’s non-discrimination principle: preemption of a state procedure does not result in the imposition of a federal procedural rule by default, but rather forces the state to treat the federal claim in the same manner as comparable state claims.

This distinction between a non-discrimination rule and a principle that federal procedural law sometimes applies, while perhaps subtle, is important. The non-discrimination principle stops

Court’s “duty to construe the allegations of this complaint ourselves”); *id.* at 297 (“We hold that the allegations of the complaint do set forth a cause of action which should not have been dismissed.”); *id.* at 299 (“Should *this Court* fail to protect federally created rights from dismissal because of over-exacting local requirements for meticulous pleadings, desirable uniformity in adjudication of federally created rights could not be achieved.”) (emphasis added); *see also* *Felder v. Casey*, 487 U.S. 131, 159-60 (1988) (O’Connor, J., dissenting) (explaining that *Brown* does not hold that federal procedures apply in state courts). *Cf.* *Bailey v. Cent. Vt. Ry. Co.*, 319 U.S. 350 (1943) (reversing directed verdict in Vermont state court FELA adjudication on ground that evidence was sufficient to go to jury). In other words, the Court may have assumed that while it could apply a federal pleading construction rule in the Supreme Court itself—a federal court—its guidance to state courts to construe FELA complaints broadly may have been mere exhortation. Nevertheless, *Brown* has subsequently been taken to stand for its more broadly stated proposition that a “federal right cannot be defeated by the forms of local practice,” and as at least implying that a state pleading rule might be preempted in state court. *Felder v. Casey*, 487 U.S. 131, 138 (1988) (quoting *Brown*, 338 U.S. at 296.)

¹⁷⁴ 487 U.S. 131. The net effect of the notice-of-claim provision was both to create an exhaustion requirement that would not apply to the same claim filed in federal court, and to shorten the otherwise applicable statute of limitations. *Id.* at 136-37 (discussing Wis. STAT. § 893.801(1)(a) (1997) and similar state statutes).

¹⁷⁵ 487 U.S. at 138.

¹⁷⁶ *Id.* at 150 (quoting *Brown*, 338 U.S. at 298-99). *See also* *Howlett v. Rose*, 496 U.S. 356 (1990) (striking down state-law qualified immunity defense applied to bar a section 1983 action against a municipality in state court); *Brown*, 338 U.S. at 298-99 (holding, arguably, that restrictive state pleading rule is preempted if applied as an undue burden on federal cause of action).

short of requiring states to restructure neutral rules of their court system. The *Dice/Felder/Testa* line of cases imposes a non-discrimination principle requiring that federal claims be heard in a non-discriminatory manner. But *Johnson* and the “valid excuse” cases suggest that states do not have a duty to take affirmative steps other than opening their courthouse doors in a non-discriminatory manner. Thus, states do not have to expand the existing jurisdiction of their courts or create new procedures—or adopt federal procedures—to accommodate a federal claim. Suppose, for example, a state court system abolished pre-trial discovery, and a party claimed that this significant limitation—which applied neutrally across the board—made it impracticable to assert his federal claim or defense. One solution would be to hold that, in the extreme case where the state fails to provide minimally adequate procedures, the federal procedure follows the federal substantive right in tow into state court, lest the federal substantive right be undermined. But this solution seems much more problematic than the alternatives. It may be sufficient to allow the parties equal access to federal court through federal question jurisdiction and removal; if they decide to remain in state court, they must accept the state’s neutral procedural limitations. This is the implicit solution in *Johnson*. In extreme cases, it might be held that the state courts lack “competent” or “adequate” jurisdiction to hear the federal claims because they fail to provide the minimum procedural protections contemplated by Congress in creating the federal right. The proper constitutional solution is not to change a state’s neutral rule of judicial administration, but to make sure that a federal forum is available to hear the claim (and require that the state dismiss the federal claim for lack of appropriate jurisdiction).¹⁷⁷

III

CONGRESSIONAL POWER TO REGULATE STATE COURT PROCEDURES (II): STATE LAW CLAIMS

If Congress has any implied power at all over state court procedure or jurisdiction, that power would seem to be greatest when it was being exercised in service of a federal substantive right, which would apply in state court under the Supremacy Clause. In the absence of such a federal right, the claim to any

¹⁷⁷ See Hart, *supra* note 124, at 508.

power over state courts seems *a fortiori* weaker. Moreover, if Congress were to have a direct and per se authority over the structure and procedures of state courts, such authority must still fall within one of its enumerated powers. This section examines whether Congress has the power to regulate state court structure and procedure without creating federal substantive rights, in order to further a national objective that arguably falls within one of Congress's enumerated powers.¹⁷⁸

The question of the power of Congress to regulate state court procedures for resolving state law claims has not been squarely considered by the Supreme Court, although a number of recent bills, and at least two enacted federal laws, raise that issue.

A. *Sample Statutes*

The idea of congressional assertions of power over state court procedures for state law claims is not hypothetical. A number of attempts have been proposed and even enacted in recent years, mostly in the areas of “tort reform” and in an effort to effect a nationwide settlement of tobacco litigation. These bills and enactments reflect attempts by Congress to regulate a substantive area that would undoubtedly fall within the commerce power, but to do so indirectly, using state courts and state law as the medium—“stealth preemption,” in the words of Professor Parmet.¹⁷⁹ I add to these a hypothetical statute in which Congress seeks to regulate, not a substantive area, but the problem of state-court dispute resolution itself—a regulation of procedure for the sake of regulating procedure. The latter hypothetical is a useful foil to analyze the FAA, since, I will argue, the FAA is itself a procedural statute that has been construed as national regulation of state court dispute resolution processes.

1. *Actual Bills and Enactments*

In recent years, a number of proposals have been introduced in Congress, and at least one bill has been enacted, that would

¹⁷⁸ The following argument analyzes the assertion by Congress of a *coercive* power over state judicial procedure, against non-consenting states. Use of the spending power changes the analysis entirely. Subject to limits beyond which a purported exercise of spending power becomes “coercive,” Congress may well be able to use federal funds to induce state consent to nationwide reforms of state judicial procedures. See *South Dakota v. Dole*, 483 U.S. 203 (1987).

¹⁷⁹ Parmet, *supra* note 13, at 1.

regulate state court procedures.¹⁸⁰ “Tort reform” proposals governing specific categories of state law cases, such as products liability or securities fraud, have sought to regulate such state court procedures as statutes of limitations and the availability of class actions.¹⁸¹ Proposed federal legislation to craft a nationwide settlement of tobacco litigation would have prohibited class actions and consolidation of state court claims without a defendant’s consent.¹⁸²

The Y2K Act,¹⁸³ which became law in 1999, may well have been the most sweeping congressional effort to regulate state procedures for state law claims. The Act was designed to control the impact of anticipated litigation arising from “Y2K failures.” Prior to 2000, it was feared that most computers, programmed to read dates by the last two digits of the year (for example, “99” for “1999”), would “fail to process dates after December 31, 1999,” and would therefore malfunction, bringing down with them much of the computer-based infrastructure of the United States, and indeed the world.¹⁸⁴ Congress was concerned that

¹⁸⁰ See generally Bellia, *supra* note 13, at 953-56; Parmet, *supra* note 13, at 3-10; Cynthia C. Lebow, *Federalism and Federal Product Liability Reform, Warning Not Heeded*, 64 TENN. L. REV. 665, 667 (1997); Georgene Vairo, *Judicial v. Congressional Federalism: The Implications of the New Federalism Decisions on Mass Tort Cases and Other Complex Litigation*, 33 LOY. L.A. L. REV. 1559, 1605-10 (2000).

¹⁸¹ See, e.g., Asbestos Compensation Fairness Act of 2003, H.R. 1586, 108th Cong. (2003) (limiting venue in state court asbestos cases and requiring filing of injury report with complaint); Product Liability Reform Act of 1998, S. 2236, 105th Cong. (1998) (imposing nationwide statute of limitations for certain state law products liability actions); Product Liability Reform Act of 1997, S. 648, 105th Cong. (1997) (establishing procedural requirements for award of punitive damages in state law cases); Securities Litigation Uniform Standards Act of 1997, S. 1260, 105th Cong. (1997) (prohibiting certain class actions in state court under state securities laws); Common Sense Product Liability and Legal Reform Act of 1995, H.R. 956, 104th Cong. (1995) (same); Product Liability Fairness Act of 1993, S. 687, 103d Cong. (1993) (establishing certain settlement procedures for state court cases). The American Law Institute has advocated rationalizing “mass tort” cases by federal coordination of state court complex litigation. See AMERICAN LAW INSTITUTE, COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS WITH REPORTER’S STUDY 36 (1994) (proposing federal panel to select state court to hear consolidated mass tort case); *id.* at 192-93 (proposing nationwide service of process for state court actions).

¹⁸² See Parmet, *supra* note 13, at 5. Professor Laurence H. Tribe, testifying before Congress on the global tobacco settlement, considered the constitutionality of this aspect of the proposal. See *A Review of the Global Tobacco Settlement: Hearing Before the S. Comm. on the Judiciary*, 105th Cong. 158 (1997) (statement of Laurence H. Tribe, Professor of Law).

¹⁸³ 15 U.S.C. §§ 6601-6617 (2000).

¹⁸⁴ *Id.* § 6601(a)(1)(A).

Y2K failures would produce “a significant volume of litigation, much of it insubstantial,”¹⁸⁵ which would “strain the Nation’s legal system” and “threaten . . . the effective functioning of the national economy.”¹⁸⁶ Thus, to “establish uniform legal standards” and “encourage private and public parties alike to resolve disputes . . . by alternative dispute mechanisms,”¹⁸⁷ the Act imposed a number of procedural requirements for any “Y2K action,” defined in part as “a civil action commenced in any Federal or State court.”¹⁸⁸ These included a requirement that plaintiffs serve written notice before filing suit, the imposition of a remediation period to fix the problem before a suit could be maintained, rules governing class actions, and various heightened pleading requirements.¹⁸⁹ The Act also imposed damages caps and certain rules governing substantive liability, contribution, and apportionment of fault.¹⁹⁰ Happily, the Y2K crisis proved to be a non-event, and a constitutional test of the statute was not needed.

2. *The Expeditious Dispute Resolution Act*

Most of the actual bills and enactments in which Congress attempts to regulate state court procedure have involved statutes that seem to mix procedural and substantive provisions, such as the Y2K Act. To throw the question of congressional power to regulate state procedure into sharper relief, we should consider a federal statute regulating procedure only, with no substantive provisions. To do this, we must move to the realm of the hypothetical.

Imagine a proposed Expeditious Dispute Resolution Act of 2005. In the interest of the expeditious resolution of disputes involving contracts relating to interstate commerce, all such disputes in state court shall follow certain federally mandated rules. First, no jury trial will be permitted; all such cases must be tried to the court. Second, state appellate courts may only reverse trial court judgments for “manifest disregard of the law.” Third, denial of motions for summary judgment shall be immediately appealable to the state appellate court, on an interlocutory basis,

¹⁸⁵ *Id.* § 6601(a)(3)(A).

¹⁸⁶ *Id.* § 6601(a)(3)(B)(ii), (iii).

¹⁸⁷ *Id.* § 6601(b)(1), (3).

¹⁸⁸ *Id.* § 6602(1).

¹⁸⁹ *Id.* §§ 6606-07, 6614.

¹⁹⁰ *Id.* §§ 6604, 6608-12.

before the case is tried. Fourth, there is no presumptive right to pre-trial discovery, which will be limited to whatever discovery the parties agree upon. For good measure, the EDRA provides for a nationwide jurisdictional minimum of \$50,000 in order to gain entry into a state court of general jurisdiction, and holds that claims for any lesser amount must be submitted to limited jurisdiction courts with simplified procedures and evidentiary rules, such as small claims courts.

An amended version of the EDRA “contractualizes” these provisions. Instead of imposing them directly on the states, EDRA II provides that private parties can agree to an “EDRA clause” in any contract involving interstate commerce. Such EDRA clauses will be enforced as a matter of federal law, preempting any state law to the contrary.

The constitutional problems inherent in either version of EDRA—as well as the parallels between the EDRA and the FAA—are intended to be fairly obvious, and will be discussed below.

B. The Commerce Clause as a Source of Congressional Power over State Court Procedure

The most arguable basis for a general congressional power over state court procedures independent of federal substantive law is the commerce power. Under this argument, Congress may assert general authority over state court dispute resolution, particularly with respect to disputes involving interstate commerce subject matter, because state court litigation substantially affects interstate commerce. None of the real or imaginary congressional statutes that impose procedural rules on the states have as their aim the modification of state court systems for its own sake: Congress is not simply saying, “We have a better way to run a court system.” In each case, Congress is pursuing a policy goal other than procedure, one that is at bottom substantive. The Tobacco Settlement Act is a regulation of the tobacco industry. The Y2K act is designed to lessen the impact of tort liability on high tech industry. Various tort reform proposals are designed to lessen tort liability of classes of tort defendants. Even EDRA is aimed at promoting efficiency in interstate commerce by making litigation cheaper and faster. Any of these goals appear to fall within the commerce power. Why can’t Congress promote these “substantive” goals indirectly by legislating state court proce-

dures? Aren't such laws "necessary and proper" in the sense of being "rationally related" to a legislative end that falls within the Commerce Clause or other Article I powers?

Under the "substantial effects" test as clarified or (depending on your point of view) modified by *United States v. Morrison*¹⁹¹ and *United States v. Lopez*,¹⁹² Congress may regulate intrastate activities that have a substantial effect on interstate commerce, *if* those activities are "economic" or "commerical" in nature.¹⁹³ The argument in favor of finding a commerce power to regulate state court procedures might start with the fact that litigation involves economic transactions at two levels: parties typically pay to conduct it, and the remedies sought between the parties typically involve the redistribution of economic values, whether money or something else. The tort reform statutes, aimed at regulating particular substantive areas of interstate commerce such as the tobacco industry or products liability, reveal a clear link between the regulation and interstate commerce, since litigation undoubtedly has a significant effect on these areas. The commerce argument for EDRA, however, is that state law dispute resolution affects interstate commerce more generally.

The argument on the other side is that state court litigation is an intrastate activity and that, although it undoubtedly has a substantial affect on interstate commerce, it is itself not economic or commercial. Even if litigants are themselves pursuing economic activity by litigating, federal regulation of state court procedures is one step removed: not regulation of that activity, but regulation of *state government regulation of* that arguably commercial activity. Thus, by making procedural law for state courts, Congress regulates not the economic aspects of litigation, but instead regulates the state's regulation of litigation.

The argument may be something of a close call, though one

¹⁹¹ 529 U.S. 598 (2000) (striking down civil enforcement provision of Violence Against Women Act).

¹⁹² 514 U.S. 549 (1995) (striking down Gun-Free School Zones Act).

¹⁹³ See *Lopez*, 514 U.S. at 560, 565; *Morrison*, 529 U.S. at 610. The economic/non-economic distinction was applied only insofar as Congress sought to regulate intrastate activity having substantial interstate effects. See, e.g., *Lopez*, 514 U.S. at 560. At least some state court litigation—cases involving parties or attorneys from more than one state—is arguably an interstate activity, which could thus be regulated, insofar as *Lopez* and *Morrison* are concerned, by requiring an interstate jurisdictional element (traveling or communicating across state lines to litigate) irrespective of whether litigation is "economic" activity. See *Lopez*, 514 U.S. at 549, 561-62.

should not have great confidence that an activity at only one remove from commercial activity falls outside the commerce power, particularly when the objective of the statute is to regulate commerce.¹⁹⁴ But I find the definitional argument somewhat sterile, because the application of the *Lopez-Morrison* test fails to capture the real federalism stakes. The question is not whether some clear definition of commerce prevents application of the commerce power, but rather this: if the federal system is to mean anything, there must be certain aspects of state sovereignty that are immune from commerce regulation even though an argument could be made that the law falls within the definition of the modern commerce power.

Nothing about the commerce power changes the applicability of the state sovereignty arguments. Commerce simply means that the legislative subject matter falls within Congress's enumerated powers. In *Johnson v. Fankell*, there was no question that section 1983 claims were within Congress's enumerated power; nevertheless, the Court held that Congress's power over substance did not extend to a power over state court procedure.¹⁹⁵ Likewise, to say that regulating procedure means regulating state government regulation rather than regulating individuals directly, is simply to restate that the law in question—though perhaps within the commerce power—nevertheless improperly commandeers the state courts, and the state legislatures who have constitutional authority to prescribe rules for them. Legislation may fall within the commerce power but fall outside the power of Congress because it impermissibly interferes with state autonomy, as seen in *New York* and *Printz*. The Necessary and Proper Clause adds nothing to the analysis, which is the gist of the majority's barb in *Printz* that the clause is used as "the last, best hope of those who defend ultra vires congressional action."¹⁹⁶

To sustain the argument that Congress lacks power to prescribe procedural rules for state law claims, there is no need to arrive at a precise "location" for the state's core sovereignty over its own courts or Congress's corresponding lack of power. As in *Printz*, the state's power is part of that "residuary and inviolable sovereignty" that is "reflected throughout the Constitution's

¹⁹⁴ See Bellia, *supra* note 13, at 970.

¹⁹⁵ 520 U.S. 911, 911 (1997).

¹⁹⁶ *Printz v. United States*, 521 U.S. 898, 923 (1997).

text.”¹⁹⁷ In addition to the provisions cited in *Printz* reflecting state sovereignty in general, the implications of Article III’s vesting clause for the related question of jurisdiction lend further support to this limit on Congress’s power. As argued above, the discretionary character of Congress’s power to create lower federal courts implies, at the same time, both that state courts of competent jurisdiction will conduct federal judicial business, and that Congress’s solution to the absence of sufficient state courts is to create not state, but federal courts of competent jurisdiction. By analogy, where Congress would prefer to control the details of procedure for a federal right, its solution is not to legislate procedures for state courts, but to make federal court jurisdiction exclusive for that right.¹⁹⁸

*C. Congressional Power over State Procedure to Pursue
Unenacted Federal Substantive Goals? Protective Jurisdiction
and “Lesser-Included” Preemption*

So how would Congress implement selective tort reforms, when much of the subject of tort reform is probably well within its commerce power? Is Congress powerless to enact nationwide procedural reforms in state courts?

The Supremacy Clause gives Congress vast potential power to preempt state law; even within the confines of the enumerated powers, the modern Commerce Clause allows Congress to regulate most things, *Lopez* and *Morrison* notwithstanding. But the Supremacy Clause and preemption of state law are limited to substantive law. As a corollary, preemption of state law does not imply the imposition of federal procedural codes. The FELA, for example, occupies the field of tort regulation of railroad workers, but leaves state court procedures in place (subject to the limited exceptions discussed above).¹⁹⁹

The Constitution’s answer is thus that Congress’s means of controlling state courts—beyond the narrow, incidental influence in some reverse-*Erie* cases described above—is limited to the blunt instrument of preemption combined with exclusive federal jurisdiction. If Congress wanted to immunize all car manufactur-

¹⁹⁷ *Id.* at 918-19 (quoting THE FEDERALIST NO. 39, at 245 (Madison) (Clinton Rossiter ed., 1961)).

¹⁹⁸ *Cf.*, *Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1, 8 (2003) (describing instances of exclusive federal jurisdiction, which “completely pre-empt[]” state courts from hearing claim).

¹⁹⁹ *See supra* text accompanying notes 162-75.

ers from class actions, under *Johnson v. Fankell* and the federalism principles described above, it could not pass a law simply barring states from entertaining class actions in state cases against car manufacturers; it would have to occupy the field of car manufacturer liability, grant exclusive jurisdiction of such claims to federal courts, and bar federal class actions.²⁰⁰

Preemption of this sort may seem like overkill—taking over the whole field to fix a small piece. The argument has been advanced that Congress’s power to enact a substantive regulatory scheme preempting state law carries the “lesser included” power of dictating state court procedures.²⁰¹ To take the hypothetical EDRA example, if Congress could federalize all cases involving transactions affecting interstate commerce, and deprive state courts of jurisdiction over them entirely, why can it not take the less “intrusive” measure of prescribing certain procedural requirements to apply to state court in those cases?

There are two fundamental flaws with this argument. To begin with, while the purported power to regulate state procedures for state law contracts claims may represent a lesser *intrusion* on state autonomy than complete preemption of the field, it is not a “lesser included” power, *because it is not “included.”* The fact that Congress possesses the nuclear bomb of preemption-plus-exclusive jurisdiction does not imply that it also possesses a small commando team with “surgical strike” capability to take out state court procedures only. As seen above, the principle that federal substantive law “takes state courts as it finds them” necessarily views substantive and procedural rules as distinct, and Congress’s power to make substantive law has never been held to include a power over state procedure—beyond those exceptional

²⁰⁰ Congress could impose more modest procedural reforms through reverse-*Erie* principles. For instance, to impose a heightened burden of proof (such as clear and convincing evidence), or a six-month statute of limitations in all product liability cases, it would have to enact a substantive federal product liability standard that preempted all state laws imposing liability for product defects. Arguably, under *Dice*, state courts should then apply the federal burden of proof or statute of limitations as procedural incidents bound up with the federal defense.

Congress can preserve state substantive law rules in a preempted area by making state law the rule of decision. Two examples of this technique are the Federal Tort Claims Act, 28 U.S.C. §§ 2671-80 (2000), and the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act of 1974, 15 U.S.C. §§ 2301-12 (2000). Note, however, that these areas are federalized in the relevant sense, insofar as such a statute creates federal jurisdiction. Neither of these statutes purports to modify state court procedure beyond what might be implicit in reverse-*Erie* doctrine.

²⁰¹ See Parnet, *supra* note 13, at 24-25.

cases in which a discriminatory state procedure is preempted, or where federal law views the purported state procedure as “part and parcel” of a federal substantive right.

Second, as argued above, recognized federalism principles hold that states have a fundamental interest in control over their own court procedures, and the implication of the *Felder* line of cases is that this interest cannot be overcome unless the state procedural rule undermines, or (an even narrower version of the exception) discriminates against, a substantive federal interest. In the EDRA example, as with the actual proposed tobacco settlement and “tort reforms,” Congress has not made manifest the underlying federal interests in the form of a substantive right. The lack of a federal commitment reflected in such a move further counsels against ceding to Congress the power over state procedure in this context.

As pointed out by Professors Parmet and Bellia, the “lesser included” argument is also a close cousin to the constitutionally dubious theory of “protective jurisdiction.”²⁰² The concept of “protective jurisdiction” holds that Congress can give jurisdiction to federal courts over state law claims where Congress could, but has not, preempted state law with substantive federal regulation.²⁰³ The “protective” federal jurisdiction is a less intrusive means of creating federal jurisdiction than is substantive regulation, because it would allow states to continue to control the substantive law, while allowing federal courts to adjudicate the state law claims in an area of unspoken federal concern. The Supreme Court has declined several opportunities to adopt a theory of protective jurisdiction, suggesting that such a theory “present[s] grave constitutional problems.”²⁰⁴

Finally, although it seems problematic at first blush to allow Congress no choices between the two poles of taking state courts as it finds them and displacing state courts from classes of adjudication entirely, on further reflection that principle has much to recommend it, if one believes in federalism. Whether tinkering with, or more aggressively restructuring state court structure and procedures, congressional control raises all the accountability

²⁰² *Id.*; Bellia, *supra* note 13, at 991.

²⁰³ See Parmet, *supra* note 13, at 24 & n.154.

²⁰⁴ See *id.* at 25-26 (quoting *Mesa v. California*, 489 U.S. 121, 137 (1989)). Again, Congress can come close to doing this by adopting state substantive rules of decision for federal statutory claims. See *supra* note 200.

problems identified in *New York* and *Printz*. It also enables Congress to undertake controversial substantive regulation under the double guise of procedural regulation, and *state* procedural regulation at that—hence Professor Parmet’s phrase, “stealth preemption.”²⁰⁵ On the other hand, requiring Congress to create preemptive substantive law coupled with exclusive federal jurisdiction requires a level of substantive commitment to an area of law commensurate with the intrusion on state autonomy. Federal judicial and administrative resources, rather than state, must be committed to such an undertaking. Congress is not likely to undertake this lightly—it has done so only rarely in federal law.

D. *The Fourteenth Amendment Due Process Clause*

There is some force to the argument that Congress may have some power over state court procedure pursuant to section 5 of the Fourteenth Amendment, which authorizes Congress to enforce the amendment’s commands.²⁰⁶ If this is the case, then Congress may have the power to enact legislation to modify or nullify state court procedures that violate due process or equal protection. Moreover, Congress’s section 5 power extends to “prophylactic” legislation aimed at state action that, while constitutional in itself, is justifiably prohibited in order to prevent constitutional violations. Under *City of Boerne v. Flores*, however, such “prophylactic” legislation must be “congruent” and “proportional” to the constitutional violations.²⁰⁷ “Congruence” seems to refer to the degree of logical “fit” between the prohibition to the violations, while “proportionality” suggests that there must be a significant record of past constitutional violations to support the need for the preventive measure.²⁰⁸ It is thus clear

²⁰⁵ Parmet, *supra* note 13, at 1.

²⁰⁶ U.S. CONST. amend. XIV, § 5. It is a commonplace to speak of various constitutional provisions as imposing “federal” control over state courts. For example, the Fourth, Fifth, and Sixth Amendments, which have been applied to the states by means of incorporation into the Fourteenth Amendment Due Process Clause, have been recognized as imposing an elaborate “code of criminal procedure” on the states. The Fourteenth Amendment has frequently been applied to constrain state judicial procedures. *See, e.g.*, *Fuentes v. Shevin*, 407 U.S. 67 (1972). But federal *constitutional* control over state procedures is a very different matter from *congressional* control, raising fewer and different federalism issues, and these should not be confused. Congress has rarely, if ever, used its Fourteenth Amendment enforcement power to regulate state procedures.

²⁰⁷ 521 U.S. 507, 519-20 (1997).

²⁰⁸ *See id.*

that congressional regulation of state procedure under the Due Process Clause would be exceptional in nature.²⁰⁹

For instance, neither EDRA nor the tobacco settlement nor tort reform statutes would pass the test for Fourteenth Amendment regulation aimed at preventing state constitutional violations. To begin with, most state legislative classifications making distinctions among types of tort or contract claims are constitutional: they would be scrutinized only under the Fourteenth Amendment rational basis test, and would doubtless be found rationally related to a legitimate governmental objective. While constitutional state action can be regulated as a “prophylactic” measure, it is difficult to imagine what possible constitutional violation such a regulation would be designed to prevent. The only significant constitutional issue the modern Supreme Court has found relating to “tort reform” is the question of excessive punitive damages violating due process;²¹⁰ but it is doubtful that the Court would find that any state has demonstrated a “pervasive” pattern of allowing unconstitutional awards, particularly in the limited time frame when “excessive” awards have been deemed to violate the Fourteenth Amendment. In sum, the Fourteenth Amendment Due Process Clause falls short of providing a general congressional authority over state court procedures.

IV

THE PRINCIPLES APPLIED: DOES CONGRESS HAVE THE POWER TO IMPOSE ARBITRATION PROCEDURES ON THE STATES?

The Supreme Court, implicitly recognizing the foregoing principles, acknowledged in *Southland* that the FAA must be deemed substantive law in order for it to bind state courts under the Supremacy Clause.²¹¹ Conversely, if the FAA is a procedural statute, it cannot be constitutionally applied to state courts. The FAA does not, in its plain terms, purport to impose procedural regulation upon state courts, and *Southland* says the FAA is substantive law.²¹² In this section, however, I look beneath *South-*

²⁰⁹ See Vicki C. Jackson, Printz and Testa: *The Infrastructure of Federal Supremacy*, 32 IND. L. REV. 111, 127-36 (1998).

²¹⁰ See, e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

²¹¹ *Southland Corp. v. Keating*, 465 U.S. 1, 11 (1984).

²¹² *Id.*

land's semantics to examine whether the FAA is indeed procedural or substantive law.

Thus far I have taken for granted the existence of a viable distinction between “substantive” and “procedural” law. A good-faith effort to grapple with the elusive substance-procedure distinction is perhaps overdue, and is certainly needed to analyze whether FAA section 2 is substantive or procedural. Every second-year law student knows that substance and procedure are intertwined, because substantive rights realized in litigation are implemented—by definition—through procedures. For that reason, in addition to the inherent porosity of categories, the distinction between substance and procedure is a notoriously moving target. In tones equally frustrated and pragmatic, the Supreme Court recently observed that “the meaning of ‘substance’ and ‘procedure’ in a particular context is ‘largely determined by the purposes for which the dichotomy is drawn.’”²¹³ How many such contexts there are is unclear: a 1933 law review article claimed to find eight.²¹⁴ But since the answers to some important legal questions are made to turn on this distinction, it is not sufficient to throw up our hands and dismiss the whole enterprise as arbitrary, thereby empowering the Court or Congress simply to make ad hoc definitions to suit a desired outcome.

For present purposes, the issue is whether the FAA should be deemed substantive for preemption purposes—substantive in terms of what the Supremacy Clause allows to be imposed on the states.

A. *The FAA as Procedure in Any Relevant Context*

The contextual nature of the substance-procedure inquiry means that the definition shifts, or that a law might be deemed substantive for some purposes but procedural for others.²¹⁵ The

²¹³ *Jinks v. Richland County*, 538 U.S. 456, 465 (2003) (quoting *Sun Oil Co. v. Wortman*, 486 U.S. 717, 726 (1988)).

²¹⁴ Walter Wheeler Cook, “*Substance*” and “*Procedure*” in the Conflict of Laws, 42 *YALE L.J.* 333, 341-43 (1933). I suspect that a close examination of these contexts would reveal that there are in fact fewer in which the substance-procedure line is drawn differently.

²¹⁵ A classic example is the placement of the burden of proof in a negligence case. For purposes of retroactivity (whether a change in the law’s placement of the burden will apply only prospectively, to future torts, or will apply retroactively, to pending cases) the issue has been held to be procedural in some cases and substantive in others. *See id.* at 345. In contrast, for purposes of whether the FELA’s placement of the burden binds a state court, it has been held to be effectively “substantive”—

following contexts seem sufficiently relevant to the question of FAA preemption to merit consideration. From any of the following angles, the FAA appears to be fundamentally procedural.

1. *The Classical Context*

What I am calling the “classical” context for the substance-procedure distinction is really a formalist position, reflecting the idea that a single line can be drawn distinguishing the two categories for all purposes. Although this idea has been deflated by the legal realism movement,²¹⁶ like classical microeconomics, classical music, and classical anything, it continues to have adherents and can often provide an informative analytical starting point. Justice Harlan’s concurrence in *Hanna v. Plumer* supplies as clear a version as any,²¹⁷ as explained by Professor Margaret Stewart: “substantive law is that law which controls ‘the primary activity of citizens.’ In other words, laws that tell you what promises you must keep, what degree of care you must exercise toward others, and what lies you may not tell, all regulate your daily conduct and are ‘substantive.’”²¹⁸ This definition implies a connection between substantive law and grounds for liability; in the same vein, in *Felder v. Casey*, the Court equated substantive law with “rights of recovery.”²¹⁹ Procedural rules, in contrast, do not “affect the primary, every-day activities of individuals . . . they define procedural choices about the allocation of judicial resources. Such choices do obviously affect the ease with which litigation may be pursued, but that impact does not convert those choices into ‘substantive’ law.”²²⁰

Certain questions regarding retroactive application of a statute—whether a change in the law will apply to conduct completed before the change—seem to turn on the classical

that is, sufficiently bound up with substance to apply in state court. *See* Cent. Vt. Ry. Co. v. White, 238 U.S. 507, 512 (1915).

²¹⁶ The Cook article is a neat and entertaining example of a realist shredding a formalist conceptual distinction. *See* Cook, *supra* note 214. Llewellyn’s article on canons of statutory construction is probably the gold standard for this endeavor. *See generally* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950).

²¹⁷ 380 U.S. 460, 474 (1965) (Harlan, J., concurring).

²¹⁸ Stewart, *supra* note 13, at 432 (quoting *Hanna*, 380 U.S. at 474 (Harlan, J., concurring)).

²¹⁹ *Felder v. Casey*, 487 U.S. 131, 141, 150 (1988).

²²⁰ Stewart, *supra* note 13, at 435.

substance-procedure distinction. Changes in procedural rules “instituted after the conduct giving rise to the suit” will be applied without concerns regarding retroactivity “[b]ecause rules of procedure regulate secondary rather than primary conduct.”²²¹ Likewise, new jurisdictional rules will normally be applied to pending cases because they “speak to the power of the court rather than to the rights or obligations of the parties” and “take[] away no substantive right but simply change[] the tribunal that is to hear the case.”²²²

Under the classical definition, the FAA looks much more procedural than substantive. On one hand, the FAA seems to create a federal right of action or “right of recovery,” together with a remedy to enforce arbitration agreements. Yet, the closer one looks, the less the FAA appears substantive in this sense. Enforcement of an arbitration agreement is the imposition of “alternative dispute resolution,” which is simply the substitution of one set of procedures for another. An arbitration agreement “trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.”²²³

Enforcing an arbitration agreement under the FAA means only one thing: providing a specific enforcement remedy compelling arbitration. A major purpose of the FAA was to ensure that the specific performance remedy would be available; some courts had previously allowed a damages remedy, but the drafters of the FAA deemed this insufficient. A specific performance remedy is procedural in classical terms.²²⁴

Moreover, the rule of enforcement is aimed, not at primary behavior, but at disputing behavior—litigation behavior. The right does not even come into existence in the absence of the assertion of real primary rights under some other, truly substantive law. Once the court enforces the arbitration agreement, the consequences are entirely procedural. The standard package of litigation procedures—including discovery, motion practice, trial (perhaps by jury, and always with a set of evidence rules), appeal of right with *de novo* review of questions of law, and more limited, but significant, fact review—are out the window. Unless

²²¹ *Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 (1994).

²²² *Id.* at 274 (internal citations and quotations omitted).

²²³ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

²²⁴ *See supra* note 166.

provided for by contract, arbitration imposes a set of default procedures in which there is no discovery or motion practice, the rules of evidence are dispensed with, there is of course no jury, and judicial review is far more limited than an appellate review of a lower court.²²⁵ The operation of the FAA to enforce a contractual arbitration agreement at most triggers the imposition of a procedural regime, substituting arbitral for court procedures. When the enforcement right is granted by an order compelling arbitration, the substantive merits of the dispute only then begin to be heard.

Although the FAA provides for enforcement of contract terms agreeing to arbitrate disputes, an arbitration agreement is a contract about procedure. It does not establish any primary rights or duties, or create a right of recovery, but rather establishes the rules to be followed in the event of a dispute. In retroactivity terms, whether or not an arbitration agreement is enforced is not substantive, because it “simply changes the tribunal that is to hear the case.”²²⁶ As Justice Scalia argued, overruling *Southland* and dispensing with FAA preemption would not disturb the kind of reliance interests considered in retroactivity cases: “Primary behavior is not affected: No rule of conduct is retroactively changed, but only (perhaps) the forum in which violation is to be determined and remedied.”²²⁷

²²⁵ For a detailed overview of arbitration procedures, see Schwartz, *Enforcing Small Print*, *supra* note 20, at 40-53.

²²⁶ *Landgraf*, 511 U.S. at 274.

²²⁷ *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 285 (1995) (Scalia, J., dissenting). The fact that the FAA creates no federal question jurisdiction casts further doubt on the argument that the FAA creates a substantive cause of action. Federal rights of recovery invariably create subject matter jurisdiction in federal court under Article III and 28 U.S.C. § 1331. The FAA provides for enforcement of section 2 only in federal courts, either where a suit is already pending (section 3), or by petition to a federal district court “which, save for such agreement, would have jurisdiction” (section 4). Federal Arbitration Act, 9 U.S.C. §§ 2-4 (2000). *See supra* note 55 (explaining that “courts of the United States” refers to federal courts). These provisions have always been understood as conferring no independent federal question jurisdiction. *See supra* text accompanying note 57. Even where a right is undisputedly substantive, it is far from clear whether Congress has the constitutional power to create a federal cause of action and grant exclusive original jurisdiction to state courts or to create a federal claim but provide that it is to be treated as state law for jurisdictional purposes. The latter is the status the Supreme Court has attributed to the FAA.

To be sure, under the well-pleaded complaint rule, a federal defense, while “substantive,” nevertheless does not create federal question jurisdiction. *See, e.g.*, *Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1, 6 (2003). But an analogy between the FAA and a federal defense is imperfect. The FAA is not supposed to defeat liabil-

2. *The Predispute Waiver Context*

Courts have used the substance-procedure distinction for purposes of applying the common law policy against prospective waivers of substantive rights, a species of the general notion of contract discussed above that contracts against public policy are void. It might be said that for purposes of applying this antiwaiver rule, the primary remedial enforcement mechanisms—damages, injunctions, and restitution—will almost always be deemed substantive.²²⁸ They are bound up with the right, insofar as enforcement of the right would be vitiated without them. Thus, a number of cases hold that allowing advance contractual waivers of remedies to be imposed by regulated drafting parties would “nullify the purposes’ of the statute.”²²⁹

Certain procedures are deemed substantive for this purpose—sometimes called “substantial,” perhaps in the hope of avoiding the linguistic conundrum of “substantive procedure”—if they supply a crucial element of the remedy.²³⁰ Class actions are a leading example.²³¹ But any procedure could fall into this category, if fairness were clearly placed on the line. For instance, an adhesion contract that seized key procedural advantages for the drafting party might be deemed “substantively” unconscionable.²³² Procedures equated with fundamental or constitutional rights are also sometimes called “substantial” and are protected by the policy against prospective waivers—the right to jury trial

ity, but switch to an alternate forum. A federal defense applied in state court should lead to a judgment for the defendant, in contrast to the affirmative remedy—staying litigation and compelling arbitration—mandated under the FAA.

²²⁸ See, e.g., *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995) (noting in the pre-dispute waiver context that the right to punitive damages is “an important substantive right”); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985) (“[I]n the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party’s right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.”); Schwartz, *Remedy-Stripping Clauses*, *supra* note 30, at 53-56.

²²⁹ *Barrentine v. Ark.-Best Freight Sys., Inc.* 450 U.S. 728, 740 (1981) (quoting *Brooklyn Savings Bank v. O’Neil*, 324 U.S. 697, 707 (1945)).

²³⁰ *Wilko v. Swan*, 346 U.S. 427, 438 (1953) (explaining that the right to select judicial forum is “substantial”), *overruled by Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

²³¹ See *supra* note 100 and accompanying text.

²³² See, e.g., *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 689 (Cal. 2000).

has sometimes been so regarded.²³³

The Supreme Court has emphatically held arbitration under the FAA to be procedural for predispute waiver purposes, reversing its former position. The FAA enforces predispute arbitration agreements, as well as so-called “submission agreements” to send an existing dispute to arbitration. The former are far more problematic, since they appear in adhesion contract situations where the non-drafting party—typically, a consumer or employee—has no ability or opportunity to bargain over the terms, and has relatively poor information about its meaning and value.²³⁴ In the 1953 case *Wilko v. Swan*, the U.S. Supreme Court rejected a claim by a defendant brokerage firm to enforce a predispute arbitration agreement against a customer for a securities fraud claim.²³⁵ Construing the antiwaiver provision in section 14 of the Securities Act of 1933, which prohibited any contract term “purporting to . . . waive compliance with any provision of this law,”²³⁶ the Court held that the right to enforce the Securities Act provisions in court was a “substantial” right that could not be validly waived in advance, pursuant to an adhesion contract. *Wilko* reasoned that arbitration was an inferior forum that would be significantly less likely to give the plaintiff a fair shake.²³⁷ The right to judicial and jury trial, as opposed to arbitration, was in effect deemed a substantial right for waiver purposes.

However, in 1989, the Court overruled *Wilko*, holding in *Rodriguez de Quijas v. Shearson/American Express, Inc.* that the right to a judicial forum for Securities Act claims, which is waived by a predispute arbitration agreement, is not substantive.²³⁸ The antiwaiver language in the Securities Act should

²³³ See *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359, 363 (1952) (explaining that the right to jury trial is “substantial”).

²³⁴ All significant criticism of the FAA and arbitration agreements in courts and the academy pertains to pre-dispute arbitration agreements. See, e.g., Schwartz, *Enforcing Small Print*, *supra* note 20, at 37; Sternlight, *supra* note 85, at 637-38 & n.2; Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 728-29 (1999) (risk that arbitration waives substantive law rights applies only to pre-dispute arbitration agreements).

²³⁵ 346 U.S. 427 (1953).

²³⁶ 15 U.S.C. § 77n (2000).

²³⁷ This may have been somewhat justified, since securities arbitration was established to resolve disputes among securities industry insiders. Because most arbitrators were employed within the securities industry, there was some reason for concern about bias.

²³⁸ 490 U.S. 477, 481, 485 (1989).

have been “read to relate to substantive provisions of the Act” rather than arbitration.²³⁹ The *Rodriguez* Court specifically rejected *Wilko*’s determination that arbitration affected substantive rights, calling the selection of an arbitral versus a judicial forum merely “procedural.”²⁴⁰ The Court asserted that arbitration agreements are “in effect, a specialized kind of forum selection clause”²⁴¹ and that a party compelled to arbitrate “does not forgo . . . substantive rights,” but “only submits to their resolution in an arbitral, rather than a judicial, forum.”²⁴² At the same time, the *Rodriguez* Court rejected the idea that arbitration affects “substantial” rights because, according to the Court, arbitration provides a fair forum in no way inferior to litigation.²⁴³

That is now the official line of the courts under the FAA. For purposes of prospective waiver, arbitration is procedural, and is neither “substantive,” “substantial,” nor a procedure that substantially affects substantive rights. True enough, I have argued, and still believe, that arbitration probably tends to favor corporate defendants—otherwise, they would not be imposing arbitration agreements in their form contracts, and there would be little reason for the substantial controversy over the matter in the courts and the academy.²⁴⁴ But the Supreme Court’s marching orders are to assume there is no such advantage. More to the point, *Wilko*’s (and my) argument that the right to judicial and jury trial should be protected against prospective waiver does not imply the opposite, that the right to arbitrate is equally fundamental. The policy against waivers of substantive rights does not recognize a non-waivable right to impose equally fair alternative procedures, let alone unfair ones, in the form of arbitration or otherwise.

²³⁹ *Id.* at 480 (internal quotations omitted).

²⁴⁰ *Id.* at 482.

²⁴¹ *Id.* at 482-83 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974); *accord* *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 295 (2002) (explaining that an arbitration agreement is “effectively a forum selection clause”).

²⁴² *E.g.*, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (explaining that “by agreeing to arbitrate . . . a party does not forego . . . substantive rights”); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (same); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 630 (1985) (same).

²⁴³ Thus, *Wilko*’s “general suspicion of the desirability of arbitration and the competence of arbitral tribunals,” *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 231 (1987), was deemed “far out of step with our current strong endorsement” of arbitration under the FAA. *Rodriguez de Quijas*, 490 U.S. at 480.

²⁴⁴ See Schwartz, *Enforcing Small Print*, *supra* note 20, at 39, 53-66, 125.

3. The Erie Context

In 1938, the Supreme Court decided *Erie Railroad Co. v. Tompkins*,²⁴⁵ and the Federal Rules of Civil Procedure went into effect the same year. “To oversimplify the transformation: Before 1938 the federal courts in diversity cases applied federal substantive law through state procedure (except in equity cases); after 1938 they applied state substantive law through federal procedure.”²⁴⁶ This transformation of the federal court system has created the need to distinguish procedure and substance for purposes of the *Erie* doctrine. As construed by *Guaranty Trust Co. of New York v. York*²⁴⁷ and subsequent cases, a federal diversity court has to apply state law on questions that “‘substantially affect the enforcement of the right as given by the State,’” lest “the outcome of litigation . . . depend on the courthouse where [the] suit [was] brought.”²⁴⁸ Thus “outcome-determinativeness” has become the litmus test for the *Erie* substance-procedure distinction: generally speaking, a prima facie procedural law will be deemed “substantive” for *Erie* purposes if it is outcome determinative.

Statutes of limitations present an archetypal *Erie* problem. A statute of limitations is procedural in the classical sense, defined as a matter of “remedy” rather than of “right,” since it creates no primary obligations.²⁴⁹ Yet statutes of limitations are notoriously “outcome determinative”—they can extinguish liability—and have been treated as substantive for *Erie* purposes.²⁵⁰ Thus, where federal statutes are silent about the limitations period, courts—federal and state alike—generally apply the limitations period provided under forum state law for similar causes of action.²⁵¹

The *Erie* analysis tracks the predispute waiver analysis very closely: a procedure that skews the outcome enough to be deemed substantively important will also be “outcome determi-

²⁴⁵ 304 U.S. 64 (1938).

²⁴⁶ FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., *CIVIL PROCEDURE*, § 2.35, at 119 (3d ed. 1985).

²⁴⁷ 326 U.S. 99 (1945).

²⁴⁸ *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 203 (1956) (citing *Guaranty Trust Co. of N.Y.*, 326 U.S. at 108-09.)

²⁴⁹ See *Sun Oil Co. v. Wortman*, 486 U.S. 717, 725-26 (1988).

²⁵⁰ See *id.* at 726; *Guaranty Trust Co. of N.Y.*, 326 U.S. at 108.

²⁵¹ See, e.g., *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 146 (1987).

native.” Thus, the same reasoning that led the *Wilko* Court to conclude that the court-or-arbitration choice was substantive for waiver purposes led the Court three years later, in *Bernhardt v. Polygraphic Co. of America*, to conclude that the law governing enforcement of arbitration agreements was outcome determinative, and therefore “substantive” for *Erie* purposes.²⁵² Tracking a nearly identical passage in *Wilko*, the *Bernhardt* opinion reasoned that arbitration was substantive in its implications because it was an inferior form of dispute resolution for important substantive rights claims, and could therefore have a substantive effect on the outcome of litigation.²⁵³ Accordingly, the *Erie* doctrine required that state law govern enforceability of the arbitration agreement in a federal diversity case.²⁵⁴

Although the Court has had no occasion to revisit *Bernhardt*'s determination that arbitration is “outcome determinative,” the holding and rationale of *Rodriguez* effectively overrule *Bernhardt* as well. Under current law, arbitration would probably be found to be “procedural”—non-outcome determinative—for *Erie* purposes. *Erie* analysis is supposed to be guided by the “twin aims” of discouraging forum shopping and avoiding unfairness in the administration of justice. If, as the Supreme Court now assures us, arbitration provides a fair forum with no impact

²⁵² 350 U.S. 198, 204-05 (1956).

²⁵³

[T]he remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action created by the State . . . Arbitrators do not have the benefit of judicial instruction on the law; they need not give their reasons for their results; the record of their proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited than judicial review of a trial—all as discussed in *Wilko v. Swan* [.]

Bernhardt, 350 U.S. at 203 (citing *Wilko v. Swan*, 376 U.S. 427, 435-38 (1953)).

²⁵⁴ *Bernhardt*, 350 U.S. at 204-05. The Court held that the FAA did not apply to the particular dispute because the contract in question was deemed not to involve interstate commerce, as required to trigger the FAA. *Id.* at 200-01. The question of whether the FAA could constitutionally govern a diversity case in federal court where the contract *did* involve interstate commerce remained open for another decade. In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), the Court decided that the FAA governed such cases. Notwithstanding *Erie*, Congress could prescribe rules for federal courts in diversity cases even on outcome-determinative procedural matters, so long as the rule was within one of Congress's enumerated powers. *Id.* at 404-05 (“Congress may prescribe *how federal courts are to conduct themselves* with respect to subject matter over which Congress plainly has power to legislate.”) (emphasis added). For a discussion of how this aspect of *Bernhardt* and *Prima Paint* contributed to *Southland*'s erroneous determination that the FAA is substantive law, see Schwartz, *Correcting Federalism Mistakes*, *supra* note 7, at 34-36.

on substantive rights, the FAA is not outcome determinative in any sense. It should not affect the substantive result of the case, nor create the sort of predictable advantage to one side that would encourage forum shopping.²⁵⁵ Hence, there is no *Erie*-based reason to characterize the FAA's arbitration-enforcement right as substantive law.

4. *The Reverse-Erie Context*

The “reverse-*Erie*” question—when will a matter of procedure or remedy be sufficiently substantive that it will follow federal substantive law into state court—provides yet another context for the substance-procedure distinction. The reverse-*Erie* cases typically start with a rule of state law that is presumptively procedural in the classical sense, and then determine whether the substantive federal interest at stake in the case requires that the procedural rule be essentially absorbed into the federal substantive rule. Again, statutes of limitations are classically a matter of “procedure” or “remedy” and therefore presumptively a matter of forum law. But it is generally accepted that a particular limitations period attached by federal statute to a federal right of action must be applied in state court. The rationale for this is a reverse-*Erie* notion that the statute of limitations is inextricably bound with the substantive federal right. The key point is that procedures or remedies carried into state court by federal substantive law are treated as part of that substantive law for Supremacy Clause purposes.

I have already suggested that from a classical starting point, the FAA is procedural. A reverse-*Erie* case would then ask whether arbitration is so intimately bound up with, or necessary to the enforcement of, a federal substantive right to impose it on state courts. This reverse-*Erie* analysis is necessarily a hypothetical thought experiment since there is no substantive right in the FAA apart from arbitration. One must envision a federal substantive law which adds a provision creating a predispute right to insist on arbitration. Suppose, for example, that the Securities Act of 1933 had a provision stating, in FAA section 2 terms, that as to securities claims, an arbitration agreement is valid save upon grounds as exist at law or equity, etc. Would arbitration be enforced in state court? As a matter of reverse-*Erie* doctrine (as opposed to the *Southland* regime), plainly not. Under *Rodri-*

²⁵⁵ See Schwartz, *Correcting Federalism Mistakes*, *supra* note 7, at 28-29.

gues, the Court's view of arbitration as a substantively fair procedure with no substantive implications, and its rejection of *Wilko*'s holding that the right to proceed in court rather than arbitration was a "substantial" right, mean that arbitration would not be "part and parcel" of any federal substantive right in the reverse-*Erie* sense.

5. *The Conflict-of-Laws Context*

Under conflict-of-laws principles, a state may have to, in some cases, apply the substantive law of another state to a dispute in its courts. Choice-of-law rules generated through a state's own law, through judicial interpretation of the mandate of the Full Faith and Credit Clause, or conceivably through an act of Congress under the Full Faith and Credit Clause, might require a state court to apply another state's substantive law.²⁵⁶ However, states may always apply their own procedural law, and are not required to apply another state's procedural law, even when applying that state's substantive law to a claim.²⁵⁷ Thus, in *Sun Oil Co. v. Wortman*, the Supreme Court held that a state could apply its own statute of limitations to a cause of action governed by the substantive law of a sister state.²⁵⁸ The statute of limitations was procedural for choice-of-law purposes, and therefore a matter of state sovereignty, "one which belongs to the discretion of every government, consulting its own interest and convenience."²⁵⁹

²⁵⁶ See, e.g., *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722-27 (1987); see also *id.* at 729 (suggesting that Congress may determine choice of law rules by statute); Laycock, *supra* note 125 (arguing the same).

²⁵⁷ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 (1971).

²⁵⁸ 486 U.S. 717, 722 (1988).

²⁵⁹ *Id.* at 726 (quoting KENT, *supra* note 120, at 462-63. The *Sun Oil* decision holds more broadly that a state is always free to apply its own law—substantive or procedural—rather than that of another state, so long as the law is within the "legislative competence" of the forum state. Clearly, "legislative competence" is an aspect of "sovereignty," see Bellia, *supra* note 13, at 978, and one application of this broad rule is that a state is never required to apply another state's procedures, since procedure is within the legislative competence of every state.

Professor Bellia argues that the substance-procedure distinction arising from general conflict-of-laws principles predating the Constitution governs the distinction for Supremacy Clause purposes. Thus, since traditional conflicts principles have always been understood to protect the sovereignty of a forum state over "procedure," the Supremacy Clause maintains that guarantee. Professor Bellia's argument is persuasive on two key points. First, conflict-of-laws principles distinguish procedure and allocate control of it to the forum state out a concern for sovereignty. Second, *Testa*'s rejection of the specific conflict-of-laws rule against enforcement of foreign penal law—which is, after all, a rule that states may decline to entertain substantive

This issue arose in *Mastrobuono v. Shearson Lehman Hutton*,²⁶⁰ discussed above. The Supreme Court was asked to determine whether a choice-of-law clause adopting “the laws of the state of New York” was intended to incorporate a state law rule barring arbitrators from awarding punitive damages. The Court held the agreement to be ambiguous on this point, in large part because choice-of-law provisions are naturally read to include only substantive law: “In other words, the provision might include only New York’s substantive rights and obligations, and not the State’s allocation of power between alternative tribunals.”²⁶¹ By placing the question of the state’s “allocation of power between [courts and arbitrators]” on the other side of the line from “substantive rights and obligations,” *Mastrobuono* strongly indicates that arbitration is not substantive law for conflict-of-laws purposes.²⁶²

6. *The Supremacy/Preemption Context*

As we have seen, the Supremacy Clause requires states to apply federal substantive law and entertain federal “rights of recovery.” But principles of state autonomy—captured in the notion that federal law takes the state courts as it finds them, the anti-commandeering principle, and the absence of sources of congressional authority over state procedure—imply that state courts will apply their own procedures and that, with limited exceptions, Congress cannot dictate procedural rules to the states. Thus, the substance-procedure distinction exists in the Supremacy Clause context as well.

Southland holds that the FAA is substantive for Supremacy Clause purposes, but it does so without undertaking any analysis

federal law—overrides the traditional conflicts paradigm only as to substantive federal law applicable to states; the conflicts paradigm otherwise remains intact, giving states a residual sovereignty over procedure.

However, while the conflicts context is highly relevant, I believe that federal supremacy and preemption are their own, separate context. The conflicts context deals with the states’ sovereignty vis-à-vis one another, while the supremacy context concerns the states’ sovereignty vis-à-vis the federal government.

²⁶⁰ 514 U.S. 52 (1995). See *supra* text accompanying notes 17, 31-36.

²⁶¹ 514 U.S. at 60.

²⁶² This of course contradicts other statements in *Mastrobuono* to the effect that such an allocation of power by a state would be preempted by the FAA if a state barred punitive damage awards by arbitrators while the parties contracted otherwise. *Id.* at 58. The contradiction is just another anomaly following from the Court’s continuing adherence to the erroneous *Southland* decision.

of “the purposes for which the dichotomy is drawn.”²⁶³ The purposes of the substance-procedure distinction in the supremacy-preemption context is to balance the federalism interest between Congress’s power to govern the people of the several states under its enumerated powers and the states’ interest in maintaining sovereignty over their courts. Analysis of the substance-procedure distinction for purposes of the Supremacy Clause should consider whether the federal statute restructures or modifies neutral rules of state judicial administration without the presence of a substantive impact on primary rights. With the exception of the *Erie* context, in which a “substantive” characterization limits rather than expands federal power, the other four contexts suggest factors that should be considered.²⁶⁴

Significantly, the FAA emerges as procedural in each of these contexts. The classical, predispute waiver and reverse-*Erie* contexts point to the absence of a federal right of recovery or substantial federal interest held by any litigant. The conflict-of-laws context emphasizes that the FAA’s arbitration-enforcement right is fundamentally an “allocation of power between alternative tribunals.” Looking at the state sovereignty stakes, the effect of the FAA as a procedural restructuring of state courts is readily apparent. As described above, with FAA preemption, state law cases between non-diverse parties—cases that would be decided entirely within the state court system—must be reallocated to the alternative dispute resolution forum, notwithstanding any contrary state policy. One set of procedures—arbitration procedures—are thereby substituted for state-mandated procedures. Although most states have arbitration enforcement statutes, many of these create exceptions allowing certain categories of cases to remain in court. Although these questions remain open, the argument has been entertained that other procedural attributes of the FAA, aside from the enforcement of the arbitration agreement as such, would apply in state court.²⁶⁵ Thus, the FAA

²⁶³ *Jinks v. Richland County*, 538 U.S. 1667, 1672 (2003) (quoting *Sun Oil*, 486 U.S. at 726).

²⁶⁴ Under the *Erie* doctrine, a determination that the state rule is substantive tells us that a federal court must apply it, thereby limiting the scope of otherwise applicable federal law. *Erie* determinations do not bind state courts to apply federal law. See *Bellia*, supra note 13, at 978 (arguing that the substance-procedure distinction under the *Erie* doctrine is “inapposite to the question whether Congress has the power to regulate state court procedures in state law cases”).

²⁶⁵ See, e.g., *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477-79 (1989). These include: the issuance of a stay of litigation, Fed-

should be viewed as procedural for Supremacy Clause purposes because its primary effect, applied to the states, is to restructure their judicial systems by reallocating disputes among alternative forums within the state dispute resolution system.

Two objections could be raised to the argument that arbitration is part of the state's dispute resolution system. First, it can be argued, consistent with broad and overheated dicta from some Supreme Court decisions, that the FAA federalizes all arbitration law.²⁶⁶ Therefore, arbitration is not part of the state adjudication system, but part of a federal adjudication system. Where the FAA applies, this argument suggests, arbitration is an adjunct federal forum with exclusive jurisdiction. The FAA's intrusion on state sovereignty is essentially the same as that of the National Labor Relations Board, a non-judicial federal instrumentality which has exclusive original jurisdiction over certain labor law matters, displacing state courts.²⁶⁷

But this argument—FAA arbitration as a federal adjunct—fails. The Constitution does not grant Congress freestanding power over dispute resolution; that power, instead, comes from Congress's power under Article III and the Necessary and Proper Clause to establish courts and procedures for cases to which the federal judicial power extends. These, of course, are cases involving either diversity jurisdiction or substantive federal regulation. To suggest that Congress can federalize dispute resolution of all potentially arbitrable state law matters is in essence to extend the judicial power of the United States beyond the bounds of Article III, a course whose unconstitutionality was made clear in *Marbury v. Madison*.²⁶⁸ Thus, when the Supreme

eral Arbitration Act, 9 U.S.C. § 3 (2000); a separate cause of action to petition for an order compelling arbitration, *id.* § 4; a petition or motion to confirm the arbitration award as a judgment, *id.* § 9; limitations on grounds for appellate review, *id.* § 10; and provision for interlocutory review of an order denying arbitration, *id.* § 16. An additional question concerns whether the FAA would deprive a state of the authority ever to stay arbitration in favor of litigation. See *Volt Info. Scis., Inc.*, 489 U.S. at 477-79.

²⁶⁶ *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983). See *supra* note 53.

²⁶⁷ See *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 241-42 (1959) (holding that National Labor Relations Board has preemptive primary jurisdiction over federal labor matters); National Labor Relations Act, 29 U.S.C. § 160 (2000).

²⁶⁸ 5 U.S. (1 Cranch) 137 (1803). Nor can Congress get around this Article III stricture by purporting to federalize all arbitrable state cases under an administrative law rubric. Administrative adjudication derives its mandate from substantive law. There is no Department of Dispute Resolution outside the judicial branch, and it is

Court (correctly) noted that the FAA creates no federal question jurisdiction, it was not speaking about a mere formality that could be corrected by a simple amendment or judicial construction adding federal jurisdiction. Only if the right to enforce arbitration agreements is substantive could the FAA support federal jurisdiction, unless Congress were to regulate some substantive aspect of all interstate contracts. Thus, while arbitration may be a federal adjunct in those cases where arbitration is compelled by a federal court, FAA preemption means that state courts must compel arbitration, even where no federal jurisdiction is present. This fact undermines the “exclusive jurisdiction” aspect of the “arbitration as federal adjunct” objection. A law cannot deprive state courts of jurisdiction while at the same time expecting state courts to apply it as a rule of decision.²⁶⁹

The second objection is that arbitration is not part of the state’s public dispute resolution system, because it is “private.” The FAA does not restructure state courts, it could be argued, but rather bars a class of cases from state court and sends them into a third world of adjudication, one that is independent of both the state and federal systems.²⁷⁰ But this objection does not work either. To begin with, the public/private distinction is itself a subject of sovereign determination. No one needs the state to say that people may privately order their affairs in the absence of rights of action.²⁷¹ By definition, the creation of a right of action means opening the door of a state’s dispute resolution system.

Moreover, most of the “law” of arbitration—and certainly the doctrine of FAA preemption—arises only in the context of disputed arbitration agreements. Where parties engage in truly private ordering to resolve their dispute by arbitration, they can reach a private agreement to arbitrate (predispute or not), ad-

highly doubtful, under the doctrines of enumerated powers and separation of powers, that there could be.

²⁶⁹ Where federal courts have exclusive jurisdiction, a state court must simply dismiss the case—the state court’s involvement ends. With arbitration, under the FAA and state analogues, a court normally stays the litigation but retains jurisdiction as the parties arbitrate. Often the winner in arbitration will return to court to ask for the award to be confirmed as a judgment; sometimes the loser will seek to have the award set aside on one of the limited grounds for judicial review.

²⁷⁰ See *Ware*, *supra* note 234, at 727 (“An arbitration clause is, as the Supreme Court recognizes, a specialized kind of forum-selection clause. It is special in that it chooses a private, not government, forum.”).

²⁷¹ The phrase “private right of action” refers to a different context, and means a right held by a non-governmental entity to proceed in the state’s dispute resolution system.

here to that agreement without contesting it in court, and submit voluntarily to the arbitrator's decision. But the FAA and state arbitration statutes make that process part of the public dispute resolution system for any dispute where one of the parties deviates from that purely private model—typically, by resisting arbitration or asking a court to compel it; by seeking judicial review of a disputed procedural matter or of the arbitrator's award; or by seeking to confirm the arbitration award as a judgment of the court. Invoking any aspect of an arbitration statute crosses a significant line from pure private ordering into a zone of public dispute resolution.²⁷² Even where the parties submit to a predispute arbitration agreement without litigating any enforcement issues, the background law of enforcement and the prospect of state coercion make that agreement part of the state system. Only if an arbitration is purely voluntary at every stage—regardless of background state arbitration law—could it be seriously contended that arbitration was not part of the state dispute resolution system. Of course, those are not preemption cases.

B. Arguments for the FAA as Substantive Law

Notwithstanding these reasons to view arbitration, and the FAA, as fundamentally procedural, two arguments can be made for finding this facially procedural issue a matter of substantive law. First, FAA section 2 is a rule of construction of a particular type of contract—an arbitration agreement—and can therefore be seen as substantive contract law. Second, it could be argued that Congress said (or, rather, intended) that FAA section 2 is substantive law. Our law's elusive and malleable distinction between “substance” and “procedure” recognizes that some procedural rights are of sufficient importance that they become “substantive” for certain purposes. Section 2 arguably creates a procedural right that may be defined as substance for preemption purposes even though it is concededly not substantive for other purposes.

1. Contractual Alchemy: Are Contracts Regarding Procedure “Substantive”?

There is at least superficial appeal to the suggestion that the

²⁷² See Reuben, *supra* note 8, at 956, 998, 1044-45, 1048-49.

law of contracts is always a matter of substantive law. Contract law, in this sense, consists of the rules of formation and validity, as well as contract defenses. Therefore, the FAA's rule that arbitration agreements are enforceable appears to be a federal rule of contract interpretation, and necessarily substantive.

But that argument remains troublesome, and one need not dig far beneath the surface to encounter serious problems. To begin with, the contract remains one regarding procedure. FAA section 2 says nothing about rights giving rise to the substantive dispute that will be arbitrated or litigated; arbitration agreements simply determine whether a substantive, underlying dispute—the merits—will be decided by “the procedures and opportunity for review of the courtroom” or “the simplicity, informality, and expedition of arbitration.”

Do procedural matters become substantive when made the subject of a contract? There is little reason to think so. Parties may agree—the relevant professional jargon is “stipulate”—to all sorts of procedural matters, which do not thereby become enforceable private rights subject to “substantive” contract regulation. While judges may honor and enforce such stipulations as a matter of convenience or judicial policy, enforceability is assumed to be a matter of judges' discretion or at most a question of forum law—but either way, a question of procedure. Whether a state court action dismissed by stipulation can be reinstated is a question of state procedural law, for instance. The parties might stipulate to refrain from filing summary judgment motions, yet a court could undoubtedly override that stipulation by considering summary judgment *sua sponte* and ordering briefing. The parties might stipulate to a mutually convenient briefing schedule, but there can be no doubt that a court could overrule such stipulations, and it is silly to believe that formalizing such stipulations into written “private contracts” would change their enforceability one iota.

It is hard to believe that Congress could constitutionally pass a law requiring state courts to honor either stipulations or “written contracts” of litigants to alter such state judicial procedures. I have suggested that the proper metric for determining the meaning of “substantive” law for preemption purposes is whether the impact falls primarily on state judicial procedure. The holding in *Johnson v. Fankell* suggests that Congress lacks the authority to require a state court to entertain an interlocutory appeal from a

denial of summary judgment under a federal defense, even if it believes that a federal interest would be furthered. Congress should not be able to acquire that power by delegating it to individuals through the mechanism of “private contract.” The effect on state sovereignty—the commandeering—is not lessened simply because it has been in some trivial sense privatized. Thus, the take-title provision in *New York* would not have become more constitutional if the statute had authorized a private owner of waste to go to the county recorder’s office and transfer title to the state. The background-check provision in the Brady Act would not have become constitutional if it had been written in the form of an authorization to gun dealers to add a provision to their sales agreements requiring the local chief law enforcement officer to conduct the background check.

The analogous category of forum selection clauses is instructive. The Supreme Court has called arbitration agreements “in effect, a specialized kind of forum selection clause.”²⁷³ A “forum selection” or “venue” clause is also a contract about a procedural matter—which court shall hear the dispute. Like an arbitration agreement, a forum selection clause may divest a state court of jurisdiction over a case, while requiring no more of an affirmative obligation than a dismissal or transfer order. In *Stewart Organization, Inc. v. Ricoh Corp.*,²⁷⁴ the Court, by an eight to one margin, held that the federal venue statute, 28 U.S.C. § 1404(a), controlled the determination of proper venue in a federal diversity case, notwithstanding the dictates of a forum selection clause or the forum state’s law construing such a clause. Had the presence of a contract term rendered forum selection a “substantive” law question, there may have been an *Erie* problem in applying federal law in a diversity case, but the court brushed this concern aside. “Section 1404(a) is doubtless capable of classification as a procedural rule . . . [and] [t]herefore falls comfortably within Congress’ powers under Article III.”²⁷⁵ The forum selection

²⁷³ *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 482-83 (1989) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974)); *accord* *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 295 (2002) (explaining that the arbitration agreement is “effectively a forum selection clause”); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (“[B]y agreeing to arbitrate . . . a party does not forgo . . . substantive rights.”); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (same); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (same).

²⁷⁴ 487 U.S. 22 (1988).

²⁷⁵ *Id.* at 32.

clause, and the forum state policy disfavoring such clauses, were merely “factors” to be balanced against procedural fairness concerns under § 1404(a).²⁷⁶ Thus, *Ricoh* implicitly recognizes that a contract about procedure remains a matter of procedure.

If a right to have an arbitration agreement enforced is a substantive “primary right,” the reason cannot be its mere presence in a contract, because the FAA’s requirement of a written contract is a formality from the vantage point of rights. Such a right should theoretically be cognizable without a contract. Suppose the FAA had been written in the following way:

Any dispute arising out of a transaction affecting interstate commerce shall be submitted to private, binding arbitration pursuant to such rules as determined by the parties to the dispute or by the arbitrator of such dispute; and no such dispute may proceed in court in place of arbitration without the consent of all parties.

This statute accomplishes the same thing as the FAA minus only the requirement of a contract. It is limited to transactions affecting commerce, and requires the consent of both parties to litigate rather than arbitrate. Likewise, the FAA is limited to transactions affecting commerce, and de facto requires the consent of both parties to litigate, insofar as an arbitration clause in an adhesion contract is enforced in the absence of meaningful consent by the putative plaintiff. Thus, a plaintiff under such a clause who prefers litigation cannot submit the merits of the dispute to court without the consent, in the form of a waiver of the arbitration agreement, of the drafting party. The right created by this revised FAA against being haled into court could be called primary and even fundamental, granted directly to individuals for assertion against compulsory state process. That the right is based on consent, or is waivable, does not make it a matter of substance rather than procedure, however. Many plainly procedural rights are waivable, and many procedures are consent-based. For example, the effect of the federal removal statute is that a defendant to a federal claim cannot be sued in state court without his consent.²⁷⁷ Nor can it be said that the consent element makes this hypothetical FAA a matter of (“substantive”)

²⁷⁶ *Id.* at 30 (holding that “the parties’ private ordering of their affairs” was to be weighed against “the convenience of the witnesses and those public-interest factors of systemic integrity and fairness that, in addition to private concerns, come under the heading of ‘the interest of justice’”).

²⁷⁷ See 28 U.S.C. § 1447. See also *supra* note 182 and accompanying text (global

private contract disguised as something else; mutual consent may be a necessary element of contract, but it does not perfect even an oral contract.

Contract is simply a formality demonstrating what the law recognizes as consent. Contract law is substantive not because contracts express “consent,” and not because the formalities of contracting are present, but rather because the underlying subject matter is substantive. The formalities—legal principles regarding offer, acceptance, and consideration, for instance—become part of substantive law because of the underlying substance, not because of some magical substantiality of what are, after all, abstractions. The underlying substance is what gives “substantive law”-ness to contracting formalities, not the other way around. Quasi-contract principles provide an obvious example: A party who provides valuable services without a valid contract is entitled to recover the fair market value of those services under quantum meruit.²⁷⁸ Likewise, the Fair Labor Standards Act may require that a minimum wage be paid for those services—as a matter of substantive federal law—even if the parties contracted for a lesser wage or if the parties did not contract at all. The right to a minimum wage—clearly, both a primary and a substantive right—gains its substance from some quality other than the existence of a contract. So the fact that the FAA makes arbitration a matter of contract does not convert arbitration into “substance.”

What about the fact that the FAA supplies a specific performance remedy for this contract term? Although remedies were generally regarded as procedural, and therefore forum law when the FAA was enacted in 1925,²⁷⁹ I have acknowledged that our conception of remedy has migrated in the direction of substance. Still, a “remedy” for a procedural “right” should not transform that right into substantive law any more than the contract itself. A state court litigant aggrieved by her adversary’s unjustified refusal to produce documents in pretrial discovery in a civil case

tobacco settlement would have prohibited class and consolidated actions against non-consenting defendants).

²⁷⁸ Of course, quantum meruit is arguably a species of restitution, a remedy, and may therefore have historically been viewed as non-substantive *lex fori*. Now, however, it is considered part of the substantive law of contract. See, e.g., *Grochowski v. Phoenix Constr.*, 318 F.3d 80, 84-85 (2d Cir. 2003); *Newbery Corp. v. Fireman’s Fund Ins. Co.*, 95 F.3d 1392, 1404 (9th Cir. 1996).

²⁷⁹ See *supra* note 166 and accompanying text.

may have, as a “remedy,” a motion to compel discovery, resulting in an order commanding disclosure and even monetary sanctions to compensate for the attorney-time spent in pursuing the motion. Nothing about those remedies—essentially an injunction and damages—would convert the legal standards for granting the motion to compel into substantive law, and it is hard to imagine how Congress could be empowered to regulate any aspect of that procedure in state courts.

Perhaps more importantly, to call the FAA substantive law because it specifies a specific performance remedy is pure bootstrapping. A remedy is substantive to the extent it is bound up with a substantive right. Here, specific performance is an equitable remedy for a breach of contract where money damages are inadequate. Certainly, it is easy to see how money damages may be an ineffective means of enforcing arbitration agreements, but the same might be said for other procedural rights as well.

2. *Congressional Alchemy: Substance Because We Say So*

In its simplistic form, the argument that Congress could make section 2 substantive merely by saying so need not detain us for long. If Congress lacks the constitutional power to amend state court procedures, it cannot acquire that power simply by saying in the statute that it is making substantive law, any more than it can acquire power over purely intrastate matters by calling them “interstate commerce.”²⁸⁰ A reviewing court would have to determine whether the law was substantive in some relevant and legally cognizable sense. Interestingly, the *Southland* Court failed to do so, relying on an implied congressional say-so. The FAA was “substantive law,” according to *Southland*, merely because Congress claimed to rely on its commerce power as a basis for the enactment. But as we have seen, relying on the commerce power does not justify the unconstitutional assertion of power to commandeer state courts by dictating procedures to them. In so holding, *Southland* ascribed to Congress a power it plainly does not have—another of the several serious flaws in that decision.

There are two more sophisticated versions of this argument,

²⁸⁰ *Cf.* *United States v. Morrison*, 529 U.S. 598, 614 (2000) (quoting *United States v. Lopez*, 514 U.S. 549, 557 n.2 (1995)) (“[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.”).

however. One is to say that Congress may view the forum choice between arbitration and litigation as a significant national regulatory matter—an instance where procedure has itself become a substantive problem. The other is to say that Congress may deem certain procedural rights to be fundamental and impose that choice on the states.

a. A Substantive Federal Interest in State Dispute Resolution?

It could be argued that the FAA is interstate commerce regulation, pure and simple: arbitration agreements affect interstate commerce, and Congress, by regulating only those contracts “involving commerce” or “in admiralty,” is invoking its commerce power, which necessarily implies that it is regulating substantively. This argument is implicit in *Southland*. However, it is not in fact the case that Congress automatically regulates substantively when invoking its commerce power.²⁸¹ Congress can use its commerce power to make “housekeeping” (i.e., procedural) rules for federal courts.²⁸² More importantly, as discussed above, the fact that disputing procedures plainly affect interstate commerce does not make those procedures constitutionally permissible subjects of commerce regulation. In any event, the question-begging quality of this argument should by now be clear. Although Congress has made contracts involving commerce the category of contracts affected, that does not make the nature of the regulation itself substantive. The FAA regulates procedures for contracts involving commerce, and the commerce hook no more makes the law “substantive” than it would the EDRA or a “Federal Depositions Act” which provided: “No state court shall allow more than ten depositions in any litigated dispute arising out of a contract involving interstate commerce.”

I have suggested that state courts form part of a national dispute resolution system and are therefore plainly a matter of national concern. The aggregate economic consequences of state court litigation are undoubtedly significant. Shouldn't it be within the power of Congress to say that the state courts are broken and try to fix them? Can't procedure become a substantive regulatory problem?

The Supreme Court has issued several recent reminders that the seriousness of national problems does not create powers of

²⁸¹ See *supra* note 53 and accompanying text.

²⁸² See *supra* note 53.

Congress that are otherwise unrecognized by the Constitution.²⁸³ On closer examination, this argument is simply a repeat of the Commerce Clause argument discussed above. If federalism principles preserve the state's autonomy over their own dispute resolution procedures, the fact that they have interstate commerce implications does not suffice to overcome the state's autonomy. And there are serious problems in viewing procedural regulation as regulation of interstate commerce.

The Constitution affirmatively grants Congress power over state procedures only through the Full Faith and Credit Clause. The commerce power assumes substantive regulation, rather than an interest in disputing as such. In other areas where Congress has displaced state adjudicative processes with statutes either granting federal courts exclusive jurisdiction, such as the Securities Exchange Act, or creating national tribunals, such as the National Labor Relations Board, the displacement is justified by a set of substantive policies deemed suitable for uniform, national treatment.²⁸⁴ Even if one were tempted to argue that the FAA creates a "substantive" rule of contract interpretation that arbitration agreements will always be enforced despite contrary state policies, there is no substantive subject matter behind the law, which deals only with a forum choice for dispute resolution. The notion that a strong, substantive federal interest must be present in order to justify a preemption of state law is a corollary of the doctrine of enumerated powers. That a statute dealing fundamentally with procedure would preempt state law, or that an act of Congress would regulate state courts on a matter of procedure under the Commerce Clause seems constitutionally problematic.

b. Congress's Power to Declare Fundamental Rights

It might be argued that the FAA reflects a judgment by Congress that the choice of arbitration over litigation, though procedural, is so fundamental that it should be deemed substantive law for preemption purposes and should therefore permit a restructuring of state procedures. But, it should be apparent that if Congress were deemed to have the authority to regulate state procedures by declaring procedural rights "fundamental," the

²⁸³ See, e.g., *New York v. United States*, 505 U.S. 144, 187-88 (1992).

²⁸⁴ Securities and Exchange Act of 1934, 15 U.S.C. § 78aa (2000); National Labor Board Act, 29 U.S.C. § 160 (2000).

current understanding of states' authority over their own judicial systems would be seriously eroded. *Johnson*, again, held that a § 1983 defendant had no right to demand an interlocutory appeal from a denial of summary judgment in state court, even though he would have had that right had the case been heard in a federal court. A congressional power, analagous to the FAA, to impose "fundamental" procedures, would enable Congress to determine that all states must allow interlocutory appeals from denials of summary judgment, even in state cases. This is a power far broader than the one found to exceed constitutional limits in *Johnson*.

This is really a restatement of the Fourteenth Amendment argument. It is true that some procedural rights are so fundamental that they may be imposed on the states. Congress's section 5 enforcement power gives it a power to impose a limited range of procedure rules on the states. Congress has even created a category of substantive "primary rights" creating causes of action for violations of procedures, whose remedies are procedural corrections. 42 U.S.C. § 1983 and federal habeas corpus both arguably create substantive causes of action for violation of procedural norms. But this category cannot apply to the FAA, which was not, and under *Boerne* could not be, enacted under Congress's section 5 enforcement power. The Due Process Clause is not a general authorization to Congress to define procedures as "fundamental" for Supremacy Clause purposes. The section 5 enforcement power allows Congress narrowly confined leeway to expand on judicially recognized constitutional rights by creating remedies for patterns of violations. There can be no contention that arbitration is so vastly superior to litigation that states have violated due process by restricting enforcement of arbitration agreements.

c. Substantive "Immunity" from Suit?

It might be argued that the FAA is in effect a substantive affirmative defense, providing that a suit will be dismissed from court (and compelled into arbitration). In this sense, the FAA is substantive law, and is no different from other substantive law doctrines that divest a state court of jurisdiction over a claim. This argument is fatally flawed. A substantive immunity from suit is a rule shielding the defendant from liability. If the FAA stated that "a party to an arbitration agreement shall not be liable for

any alleged wrong arising out of the contract,” period, then a state court would have to dismiss a claim brought against such a defendant as a matter of federal substantive law. But there would be no arbitration either. Enforcement of an arbitration agreement does not terminate the dispute on the merits, but shifts it into another forum. It is thus more analogous to removal. But removal is a procedural incident to a substantive right; its divestiture of state court jurisdiction is not itself “substantive law.”

3. *The Federal Freedom of Contract Act*

Finally, it might be argued that the FAA creates a federal substantive regime of freedom of contract that preempts state substantive law purporting to regulate contract. This argument suggests that the displacement of state adjudication in favor of private arbitration is merely a procedural incident to the substantive “freedom,” the way the right to jury determination was incident to the FELA claim in *Dice*. Under this view, all contracts containing arbitration agreements are federal—at least insofar as their provisions can be linked to arbitration—and preempt any state law that would regulate such a contract.

This argument restates the “enforce as written rule,” discussed above. I have argued that the FAA cannot be construed as a substantive law defense to state contract regulation or a bar to remedies necessary to effectuate state regulatory policies. The Supreme Court has agreed by its repeated admonition that arbitration does not “waive substantive rights.” Litigants who have argued otherwise are misconstruing the FAA. But suppose there were such a statute. Could Congress impose arbitration on the states as part of a statute that did create a substantive federal defense to state contract regulation?

Let me hypothesize the law that some litigants and scholars wish upon the FAA:

Any contract involving interstate commerce shall be enforced as written, notwithstanding any state law to the contrary.

We can analyze the constitutionality of applying this law to contracts that include an arbitration agreement. Alternatively, the statute might specifically pertain to arbitration agreements:

Any contract involving interstate commerce which contains an agreement to arbitrate shall be enforced as written, notwithstanding any state law to the contrary.

We now have a substantive federal defense that requires arbitration.

Congress presumably has the power to federalize all the law of all contracts involving interstate commerce, and could displace substantive state contract regulation entirely. Could it require state courts to make arbitration part of that?

The answer is still no. Congress could create a freedom of contract regime by preempting all substantive state regulation of certain categories of contract, but that preemption would not relieve Congress of its constitutional obligation to “take the state courts as it finds them.” It could not restructure the operation of state courts by substituting arbitration, unless arbitration were a procedural incident whose enforcement was necessary to implementing the substantive deregulation. But it is not. As seen above, the Court’s insistence that arbitration is a neutral procedural regime necessarily recognizes that a state’s choice of litigation over arbitration is itself neutral as to any federal substantive right. Congress could require arbitration of state court cases only if it made arbitration into a federal instrumentality and either authorized removal or made federal jurisdiction exclusive.

C. The Proper Application of the Procedural FAA

The FAA is a procedural statute that cannot constitutionally bind state courts or preempt state law. *Southland* and its progeny should be overruled. How then should the FAA be applied?

State law claims in state court would constitute the easiest category of cases to resolve. The FAA simply would not apply, and arbitration agreements would be governed by state law. As a practical matter, given the prevalence of state arbitration acts, most arbitration agreements would still be enforced. However, state law exceptions to their own arbitration acts would be applicable.²⁸⁵

²⁸⁵ This aspect of overruling *Southland* extends to the so-called “federal common law of arbitrability.” The Supreme Court in dicta in *Moses H. Cone* said the FAA was an invitation to the courts to make a body of federal substantive law of arbitration. Such federal common law raises a huge *Erie* problem. *Erie* suggests that a court may not assert substantive lawmaking power displacing state law when its only springboard is a federal statute that itself does not regulate substantively. What distinguishes the Rules of Decision Act from, say, the NLRA, is the lack of a substantive law concern. If the federal concern is only with the non-substantive arrangement of state disputing, to create substantive law from such a statute is to violate *Erie*.

Federal question cases in state court would raise a reverse-*Erie* issue. An argument could be made that FAA should be enforceable in state court as to federal claims. However, as discussed above, the Supreme Court's pronouncements that arbitration is a fair procedure without substantive implications should defeat any argument that arbitration is inextricably bound up with any federal substantive right. A party asserting or defending against a federal claim who believes arbitration is important can remove the case to federal court, where the FAA will apply.

The FAA was originally intended to provide procedural regulation for the federal courts. Where a federal court is hearing state law claims, either under supplemental jurisdiction or diversity jurisdiction, pre-*Southland* law holds that the FAA is valid regulation for federal courts irrespective of whether arbitration is outcome determinative for *Erie* purposes.²⁸⁶ Accordingly, overruling *Southland* would restore this original intent, and the FAA would govern arbitration agreements in federal court. Yet section 2 preserves a role for state law. Here, the argument over the general/specific distinction reasserts itself. Moreover, the FAA should not be interpreted to strip remedies—such as punitive damages, attorney fees or class actions—which state law has deemed necessary for enforcement of the right. In diversity cases, this restriction is mandated by *Erie*; in supplemental jurisdiction cases, it is a “reverse reverse-*Erie*” principle, in which state remedial law is seen as inextricably bound with enforcement of the state right.

CONCLUSION:

FORMALISM AND THE REALITIES OF ADJUDICATION

The conclusion seems to me inescapable that the FAA is unconstitutional as applied to the states. It is more than a theoretical possibility that a statute may be constitutional as enacted but unconstitutional as construed by the courts. The classic example, of course, was the interpretation of the Rules of Decision Act in *Swift v. Tyson*.²⁸⁷ *Swift* had authorized federal courts, exercising their diversity jurisdiction, to make independent determinations of “general” non-federal law, and to freely ignore state court in-

²⁸⁶ See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404-06 (1967); see also *supra* note 53.

²⁸⁷ 41 U.S. (16 Pet.) 1 (1842), overruled by *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

terpretations of state common law.²⁸⁸ In overruling *Swift*, the Court in *Erie* observed: “If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course [pursued] has now been made clear, and compels us to do so.”²⁸⁹

Southland is not only erroneous as statutory interpretation, it is itself unconstitutional—as *Swift v. Tyson* was found to be in *Erie*. At the same time, it is difficult to imagine, as of this writing, that the Supreme Court will reverse its direction after twenty years of advancing a “national pro-arbitration policy” and admit that it has made a terrible mistake. Even though five Justices on the present Court have at one time or another dissented from *Southland* or a case applying it, there seems to be a settled resignation among the dissenters; perhaps they have come to see it as a good idea.²⁹⁰

Federalism arguments that lead to acts of Congress being held unconstitutional often—perhaps more often than not—have a formalistic quality. Sometimes the statute makes good policy sense, and the justices who would find it a violation of the state-federal balance will admit—in language ambiguously rueful and proud—that the test of constitutionality in a federalism case is not the soundness of the policy of the statute. Rather, the soundness of the Constitution’s policy of federalism can require invalidating a good contemporary idea, and can require rigidity rather than flexibility in approaching a societal problem. In cases where federalism is held to pose no obstacle, however, it may well be federalism and the Constitution itself that are seen to be flexible. Sometimes the idea of the statute seems just too good.

The FAA is a quaint 1925 procedural statute that has been re-

²⁸⁸ *Swift*’s interpretation of section 34 held that the phrase “laws of the several States” meant a state’s statutes, but not its decisional law. In the absence of a controlling state statute, the *Swift* doctrine opined, federal courts could exercise “independent judgment” on any substantive question of “general law,” including commercial law, torts, and even property matters. EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION* 51-56 (2000). The theory was that courts, federal or state, were similarly engaged in the process of attempting to discover the true pre-existing common law principle—the “brooding omnipresence” criticized by Holmes. See *Southern Pac. R.R. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (“The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified.”); PURCELL, *supra*, at 51, 68-69, 78.

²⁸⁹ *Erie*, 304 U.S. at 77-78.

²⁹⁰ See Schwartz, *Correcting Federalism Mistakes*, *supra* note 7, at 10.

shaped by the courts—not by legislative amendment—into a significant vehicle of judicial administration. Most judges like arbitration: it is, for some, the jewel in the crown of ADR, disposing of cases more finally and certainly than any other ADR method. And they like the new FAA, because it allows them to sweep cases off their dockets. It is an open secret that the national policy favoring arbitration is a judges' policy, not the policy of Congress in enacting the statute, and everyone knows what only the occasional dissenter and numerous academic critics claim: that “the [Supreme] Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation.”²⁹¹ The Supreme Court has taken some statutory materials that came to hand and used them to further its own judicial administration agenda.

If the urge underlying that agenda is strong enough, formalistic arguments cannot prevail. A judicial policy whose power is undeniable will reshape the rules, rather than the other way around. Exceptions are created—the FAA is the only federal “substantive right” that creates no subject matter jurisdiction—not because of doctrinal logic but in spite of it, because the exceptions serve the underlying policy of judicial promotion of this form of ADR. If the argument in this Article is pressed before the courts, another exception may well be created: the FAA is the only federal statute that is “substantive” for preemption purposes even though it is really procedural, and procedural for every other purpose. Formalistic arguments can persuade only those who make a principle of the form, or who don't care enough about the opposing agenda.

It can be said that there are other factors at work here. The “special force” of *stare decisis* in statutory cases would seem to apply here, and perhaps there is a related “water under the bridge” argument—too many decisions have been issued applying or building on *Southland*. I have addressed the *stare decisis* point elsewhere; suffice it to say that the Court must correct its own mistaken statutory constructions when the mistake is one that attributes an unconstitutional excess of power to a branch of

²⁹¹ *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring).

the federal government.²⁹² Even if Congress were to amend the FAA to reaffirm that it is indeed procedural, and has no application to the states, its amendment cannot undo the Court's *constitutional* error of holding—at least implicitly—that Congress can regulate state court procedures. As for water under the bridge, let us assume that vast networks of reliance interests have been built upon this unconstitutional imposition of federal power on the states. The fact is that Congress could undo them with an amendment to the FAA, one that would probably apply retroactively.²⁹³ Those reliance interests, whose existence is in any event debatable, do not supply a compelling reason for the Court to fail to correct its unconstitutional course.

As a practical matter, it may be that the question of the constitutionality of the FAA as applied to the states is unwieldy enough to deter the Court from tackling it. But there are two closely related doctrines that allow the Court to reach the proper resolution without providing a definitive answer to the constitutional question. A long-established principle of judicial restraint, the doctrine of constitutional avoidance, holds that “if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.”²⁹⁴ Thus, “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”²⁹⁵ The Court has failed to apply this principle in the *Southland* line of cases.

In a closely-related doctrinal development, in *Gregory v. Ashcroft*, the Supreme Court established a rule of statutory interpretation designed to protect state autonomy against federal

²⁹² See *Erie*, 304 U.S. at 77-78; Schwartz, *Correcting Federalism Mistakes*, *supra* note 7, at 44-50.

²⁹³ See *supra* text accompanying notes 213-18.

²⁹⁴ *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

²⁹⁵ *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 173 (2001) (internal quotations omitted). In *Solid Waste Agency*, a federal agency interpreted the Clean Water Act in a manner that raised a federalism-based constitutional question by “invok[ing] the outer limits of Congress’ power.” *Id.* at 172. The Court gave a narrowing construction to the statute to avoid the constitutional issue. *Id.* at 173-74. See also *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 534, 542 (2002) (holding that federal statute tolling state statutes of limitations did not apply to suits against the states because contrary interpretation would raise serious constitutional doubts).

encroachment: “‘If Congress intends to alter the ‘usual constitutional balance between the States and the Federal Government,’ it must make its intention to do so ‘unmistakably clear in the language of the statute.’”²⁹⁶ A subset of this federalism-based “clear statement” rule is the long-established presumption against preemption: “‘where . . . the field which Congress is said to have pre-empted’ includes areas that have ‘been traditionally occupied by the States,’ congressional intent to supersede state laws must be ‘clear and manifest.’”²⁹⁷

Even if one were not entirely persuaded by my argument that the FAA is procedural law, it is hard to deny that *Southland*'s interpretation of the FAA at a minimum “raise[s] serious constitutional problems.” Likewise, FAA preemption alters the traditional constitutional balance between the state and federal governments. FAA preemption intrudes heavily on state contract regulation, an area the courts should be reluctant to federalize. FAA preemption also restructures state dispute resolution procedures, an area over which states have been repeatedly recognized as sovereign. No one has seriously argued that Congress expressed an unmistakably clear intention to preempt state law. Applying any of these doctrines in a straightforward manner should lead to overruling *Southland* and its rule of FAA preemption.

²⁹⁶ 501 U.S. 452, 460 (1991) (internal quotations omitted).

²⁹⁷ *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring) (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990)). “To the extent that federal statutes are ambiguous, we do not read them to displace state law.” *Allied-Bruce Terminix Cos.*, 513 U.S. at 292 (Thomas, J., dissenting); accord *Southland v. Keating Corp.*, 465 U.S. 1, 18 (1984) (Stevens, J., concurring in part and dissenting in part) (“The exercise of State authority in a field traditionally occupied by State law will not be deemed preempted by a federal statute unless that was the clear and manifest purpose of Congress.”).