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FEDERALISM AND SUPREMACY: CONTROL OF STATE JUDICIAL DECISION-MAKING

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In Chicago, there are certain inevitable signs of spring: the first robin; the first frostbitten tulip leaf; the "unexpected" April snow storm; and, given my college's curricular calendar, the glazed expressions of first year law students confronted with the bewildering mystery of *Erie*.[1] After a few day's exposure, a faint hope seems to dawn and relieved voices chime, "state substance, federal procedure." But then come "outcome determinative" and "forum shopping," and confusion again reigns supreme. As if all that were not enough to bear, in the last week a merciless professor asks, "What if a state court is hearing a case which arises under federal law?" One brave voice will usually whisper, "federal substance, state procedure?" only to be abashed by reference to "completely different theoretical sources" and to a Supreme Court command to construe allegations in one such complaint pursuant to federal rather than state law. Defeated, students tend to put the entire conundrum into the folder of "things I hope won't be on the bar exam."

But what if that one brave voice was right?

Of course, the reasons why federal and state courts in some circumstances utilize some portion of the other system's law are theoretically distinct. Federal courts constitutionally must use state law when the federal system lacks regulatory authority over the conduct at issue in the litigation[2] and are statutorily compelled to do so, in the absence of contrary federal legislation, whenever state law is a "rule of decision."[3] State courts, on the other hand, are free to utilize whatever law the state chooses absent some constitutional, or constitutionally proper congressional restraint. Other than the guarantees of individual rights, the pri-

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1. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

2. Given the current scope of the Commerce Clause, such situations are increasingly difficult to hypothesize. Presumably, today the restraint as a practical matter is statutory (Rules of Decision Act) and discretionary (court-imposed limits on the creation of federal common law) rather than constitutional. Nonetheless, the concept of the federal government as one of limited rather than general power is historically central to our understanding of the United States and is the "distinct" theory distinguishing *Erie* from cases like *Dice*, *see infra* note 10 and accompanying text.

3. 28 U.S.C. § 1652 (1988).

mary[4] source of such federal restraint is the Supremacy Clause.[5] That clause refers generally to laws of the United States "made in [p]ursuance" of the Constitution, thus negating any obligation to accord supremacy to laws passed under the Articles of Confederation. However, other than that chronological clue, the clause does not define "law." There is initially no intuitive guide pointing decisively to "any law," "all law," "substantive law," "rules of decision" or any other set of congressional statutes and federal common law.

There is general agreement however, that our one brave voice was half-correct: in deciding cases which arise under federal law, state courts must use federal substantive law. A preliminary question involves when state courts can or must be open to adjudicate federal claims. For purposes of this Essay, it suffices to say that states may not discriminate against claims based on their legal source and so must hear federal cases unless there is a valid, i.e. neutral, excuse[6] or unless Congress has precluded the exercise of such jurisdiction by making federal jurisdiction exclusive.[7] A more complex question is the definition of "substantive" law. There is little controversy over the narrowest definition, put most clearly by Justice Harlan: substantive law is that law which controls "the primary activity of citizens."[8] 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."

In the context of *Erie*, federal courts are constitutionally compelled to use such state laws if the regulated conduct falls outside federal authority. In the parallel situation, the Supremacy Clause logically must require state courts to use such federal "substantive" law; failure to do so would grant the states an effective veto over federal regulatory choices within the states' spheres or render meaningless their obligation to provide a forum for such causes of action. Assuming that doctrines of preemption, also grounded in the Supremacy Clause, would prevent a state

4. Article I, § 10, and Article IV, §§ 1 and 2, of the U.S. Constitution impose some direct restraints on the states, the most notable of which are the inability to impair the obligation of contract, the requirements of full faith and credit, and the Privileges and Immunities Clause.

5. U.S. CONST. art VI.

6. Testa v. Katt, 330 U.S. 386 (1947).

7. Such exclusive jurisdiction most frequently is found as part of specific regulatory enactments, but also may explain the result in cases preventing state courts from issuing writs of mandamus to federal officers, M'Clung v. Silliman, 19 U.S. (6 Wheat.) 598 (1821), or granting habeas corpus to one in federal custody, Tarbles's Case, 80 U.S. (13 Wall.) 397 (1872).

8. Hanna v. Plumer, 380 U.S. 460, 474 (1965). *See also* Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954) (defining the command of *Erie* as a federal court obligation to accept state "premises of decision in those respects which are important to the generality of people in everyday, pre-litigation life").

from enforcing state law contrary to the federal choice (certainly the least required by the supremacy of federal law), failure to use federal substantive law would make state enforcement of such federal regulation impossible.

Beyond this basic demand, however, lies confusion. A generally held assumption mirrors the whispering student: courts of a sovereign state, within the confines imposed by the due process clause, are free to regulate their procedures as they see fit, and litigants raising federal claims in such courts take the courts as they find them.[9] This assumption is reflected in the notion that states may have a valid excuse to decline to hear certain federal cases, as well as in the freedom of the states to ignore the strictures of the Seventh Amendment regarding civil juries. Given the incorporation of the rest of the Bill of Rights into the Fourteenth Amendment, the states' continuing freedom to define the contours of civil juries for themselves underscores dramatically the systemic independence of state judiciaries. The confusion arises because the assumption appears to have been rebutted by certain Supreme Court decisions, raising the question of the assumption's source. If states may regulate their own procedures, why may they do so? Because constitutionally they always may do so? Because constitutionally sometimes they may do so? Because usually Congress permits them to do so? Because usually the Supreme Court permits them to do so? Finally (and most enjoyably), is there a difference between the answers garnered from Supreme Court opinions and those arguably best designed to maintain both federalism and supremacy? What if that one brave voice was not only right as a matter of general practice but also constitutionally correct?

The case whose name is synonymous with the problem under discussion is *Dice v. Akron, Canton & Youngstown Railroad Co.*[10] *Dice* was the last in a series of cases considering what federal law state courts needed to apply in cases arising under the Federal Employers' Liability Act ("FELA") and required Ohio to submit to a jury the question of whether plaintiff's employer had fraudulently procured a release from liability. Prior cases had compelled the use of federal law with respect to burdens of proof[11] and the construction of a complaint,[12] while preventing states from directing verdicts in favor of employers[13] and allowing states to enter a verdict in favor of the employee-plaintiff in the absence

9. Hart, *supra* note 8, at 508.
10. 342 U.S. 359 (1952).
11. Central Vt. Ry. v. White, 238 U.S. 507 (1915).
12. Brown v. Western Ry. of Ala., 338 U.S. 294 (1949).
13. Bailey v. Central Vt. Ry., Inc., 319 U.S. 350 (1943).

of a unanimous verdict.[14] In none of the cases was there any indication that the state court was treating the FELA claim any differently than it treated analogous state-created claims; supremacy, not discrimination, was the issue.

The case compelling states to follow federal law regarding burdens of proof need not detain us. As the Court noted, the issue of whether a plaintiff must prove himself free from contributory negligence or whether the defendant must prove that the plaintiff was contributorily negligent involves the obligations which flow from the employer to the employee—it is a question of "substantive" law.[15] Dissents in two other cases, *Dice* and *Bailey*, presented arguments (which they rejected and which the majorities failed to adopt) that the federal law involved might also be characterized as substantive. In *Dice*, if juries are uniformly more favorable to employees than to employers, then utilizing a jury would effectively lessen the plaintiff's burden of proof.[16] Similarly, in *Bailey*, if juries favor plaintiffs even in the absence of evidence indicating an employer's negligence, preventing the direction of a verdict in favor of the employer allows the jury to convert the FELA into a strict liability statute, obviously affecting the substantive obligations of the employer.[17]

Ignoring the fact that the cases were not decided pursuant to these rationales, three problems preclude the conclusion that the Court got it "right" (federal substance and state procedure), albeit without its own coherent scheme. In the first place, the underlying assumption that the choice of jury rather than judge will lessen a plaintiff's burden is unsubstantiated and was unpersuasive to the Court in a different context.[18] Secondly, if the underlying assumption controlled the results, it is difficult to reconcile the Court's willingness to allow a state to enter judgment on a non-unanimous verdict. If the choice of jury rather than judge affects substantive rights because of its effect on a plaintiff's burden, surely the choice between unanimous and less-than-unanimous jury verdicts is even more clearly "substantive," indicating that here too states

14. Minneapolis & St. L. R.R. v. Bombolis, 241 U.S. 211 (1916).

15. *Central*, 238 U.S. at 512.

16. *Dice*, 342 U.S. at 368 (Justices Franfurter, Reed, Jackson, and Burton concurring for reversal but dissenting from the Court's opinion).

17. *Bailey*, 319 U.S. at 358 (Roberts, J. & Frankfurter, J., dissenting).

18. Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525 (1958). Technically, the case held that the *state's* choice not to utilize a jury was serendipitous, reflecting no *state* attempt to affect burdens of proof. It then considered whether the difference in decision-maker was actually likely to affect the outcome of the case in the context of determining whether, on balance, the Rules of Decision Act mandated federal use of non-substantive state law. While it is possible that a congressional choice of jury could reflect an attempt to ease plaintiff's burden, it seems an oddly inept tool for that purpose.

must follow federal law. And in any event, there is the third problem presented by the other case in the quartet. By no even arguably logical stretch of the imagination can rules of construction applied to pleadings affect the primary, every-day activities of individuals. Whether a pleading is construed most strictly against the pleader or in the light most favorable to her, the activity affected is that of pleading, a clear litigation activity. Even if rules concerning the degree of specificity necessary to withstand a motion to dismiss or a demurrer are viewed, not as historical hang-overs from English common law, but rather as the tools needed to enforce systemic choices about how much information a party should have before being allowed to engage the judicial machinery, such rules remain non-substantive. When applied at the time of *trial*, they define the situations in which an obligation is owed to the plaintiff; when applied to the *complaint*, 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.[19]

If the fairest characterization of all cases but the one involving burden of proof is that they determined whether a state must follow federal procedural or non-substantive law, it may be critically revealing that in only one instance was a state not required to do so—when the state procedure made it easier, rather than more difficult, for an employee to recover against his employer. That result, when contrasted with the others, at least eliminates the opposite of the general assumption of state procedural independence; the Supremacy Clause of its own force does not compel state courts to adopt federal procedural rules in federal question cases.[20] The source of the compunction then must be either federal common law or Congress. The creation of federal common law is ordinarily limited to those situations in which there is either a uniquely governmental interest (interpretation of federal bonds, etc.; foreign affairs; state border disputes) or a federal statutory gap which must be filled

19. Even if seen as "outcome determinative" such choices remain procedural. The policies underlying *Erie* may require that certain state procedures be considered "rules of decision" which federal courts are statutorily compelled to follow, but those policies are distinct from those underlying the Supremacy Clause.

20. Theoretically, I suspect the Supremacy Clause of its own force probably doesn't force the states to follow anything but the Constitution. If Congress chose to pass federal regulatory legislation, or if the Senate chose to consent to a treaty, which permitted the continued state enforcement of contrary state regulations, it is hard to understand how the Supremacy Clause would be violated. The "supreme" law itself would provide for enforcement of something other than itself. To the extent that such an Alice-in-Wonderland scenario might result in a party being simultaneously subject to incompatible regulations, the party would surely have a due process objection to enforcement of both regulations, but that is a separate story.

(statute of limitations for violations of the securities acts, for example).[21] In other instances, when the Court announces what federal law is, it usually speaks in terms of interpreting congressional intent. The difference between this and "interstitial" judicial rule-making is nebulous and, in this context anyway, doesn't matter. If the Court, as a matter of policy, is itself deciding when federal common law compels states to use federal procedures, its choices may be overturned by Congress, and its authority is no greater than the authority to which Congress can constitutionally lay claim. If, on the other hand, the Court is divining congressional intent, its divination may again be overturned by Congress, and its interpretation of congressional choice leaves open the issue of congressional authority to act upon that choice. In either event, the ultimate source of the requirement is Congress.

What then is the requirement imposed on the states by the FELA cases? Since three of the four relevant ones involve the use of juries, an initial response might focus on the fundamental nature of the right to trial by jury in the federal system. States, then, would be compelled to follow non-substantive federal law when the federal procedural choice was "fundamental." Language in *Bailey* quoted with approval in *Dice* lends some support to this construct. The problem, of course, is that the Fourteenth Amendment incorporates fundamental rights articulated by the first eight amendments, and the right to a civil jury is not included among those fundamental rights. However, perhaps the right is "fundamental" enough that Congress may require states to recognize it but insufficiently "fundamental" that the Constitution compels its recognition. The state's ability to endorse a non-unanimous verdict, although federal practice was to the contrary, would then be explained by the distinction between the fundamental "right" and the "various incidents" of that

21. To the extent that such gaps are procedural, of course, compelling states to use the federal common law (or for that matter a statutory gap-filler) raises the precise problem under discussion. Interestingly, at least with respect to statutes of limitations, the assumption that states must follow federal law seems well-entrenched. *See* Felder v. Casey, 487 U.S. 131, 153 (1988) ("It cannot be disputed that, if Congress had included a statute of limitations in 42 U.S.C. § 1983, any state court that entertained a § 1983 suit would have to apply that statute of limitations.") (White, J., concurring).

Setting aside the fact that "it cannot be disputed" brings out the worst in any law professor I know, the statement does not seem to me to be self-evident. If such statutes are designed to keep stale litigation out of court and are not substantively discriminatory (*see infra* notes 31 et seq., and accompanying text), it is certainly arguable that the state's procedural choice should not be forcibly set aside. If states would routinely permit suits subsequent to the running of the federal statute, and if that is contrary to strongly-held federal policy, federal jurisdiction may be made exclusive. On the other hand, if states would routinely impose a shorter time period than the federally chosen one, the federal system remains open to vindicate that federal procedural choice.

right,[22] which the state would remain free to change.

Unfortunately, strong arguments can be made that both *Dice* and *Bailey* also involved "incidents" of the right, rather than the right itself. At issue in *Bailey* was the sufficiency of evidence as against a motion for a directed verdict. The same term, the Court had upheld the constitutionality of such a motion in the federal courts.[23] Even assuming that the degree of control a judge may exercise over a jury is part of the fundamental right,[24] it is hard to argue convincingly that, granted a judge *may* take a case from the jury if there is no real relevant factual dispute, the sub-standard applied to judge evidentiary sufficiency is also fundamental. In *Dice*, the state court permitted disputed facts in legal claims to be resolved by a jury but adhered to the traditional view that the issue of fraudulent procurement of a release sounded at equity. The law/equity distinction is embodied in the Seventh Amendment as well and is clearly "fundamental." But the varying historical and modern definitions determining what issues fall on which side of the line is arguably "incidental" to the key division.[25] And in any event, the notion of "fundamental" procedure fails totally to account for the result in *Brown*, the non-jury case in the quartet involving construction of the plaintiff's complaint.

When read together, the four cases reveal a pro-plaintiff bias and a concern that "unnecessary" state rules may frustrate the congressional remedial purpose. The history of the FELA demonstrates that Congress was in fact concerned that state courts, frequently more geographically convenient for plaintiffs, be a realistic option; suits brought under the FELA against railroads (as were the quartet) may not be removed to federal court.[26] The final choice of forum, therefore, belongs to the injured employee. But geographical convenience may be offset by procedural inconvenience. Perhaps the cases stand for the proposition that

22. Colgrove v. Battin, 413 U.S. 149 (1973) (the last in a series of cases dealing with the required size of a criminal jury in both the state and federal systems).

23. Galloway v. United States, 319 U.S. 372 (1943).

24. If the assumption is correct, the right of judges to comment on the evidence, for example, would also be "fundamental," a result which seems to confuse "fundamental" and "important." Size and unanimity are both important, though neither may be fundamental.

25. In any event, it is possible today to argue that not all issues need be resolved by a jury. Tull v. United States, 481 U.S. 412 (1987), permitted the judge rather than the jury to determine the appropriate civil penalty for violation of a "legal" statute; perhaps defenses and rebuttals are no more "fundamental" than damages. This argument, however, is sillier and more dangerous than it's worth. When the Court first distinguished between fundamental and non-fundamental aspects of the right, it did so in the context of what a jury *is* rather than what a jury *does*. It is fundamental that juries be unprejudiced; it is not fundamental that they be comprised of twelve people. However, it is indeed fundamental that juries decide factual issues in legal claims (though the definitions of "fact" and "legal" may not be fundamental), if for no other reason than that it is not possible to articulate a neutral hierarchy of such issues.

26. 28 U.S.C. § 1445 (1988).

Congress may "even the playing fields" by removing "unnecessary" boulders in the state's field. If so, it is necessary to realize that congressional authority to require state compliance with federal procedure in federal question cases is judicially unlimited. Any state practice Congress did not wish to be followed would by definition be "unnecessary" and its removal critical to assure similar fields. Deference to those kinds of congressional determinations effectively insulates them from review.[27]

This imposition on the states by Congress must be justified by reference to some grant of congressional or at least federal authority in the Constitution. Two sources come to mind: whatever regulatory authority supports the substantive law giving rise to the federal cause of action, or the Supremacy Clause.

The degree of regulatory authority that Congress may currently constitutionally exercise pursuant to the Commerce Clause in combination with the "Necessary and Proper" Clause is virtually unlimited, save by "external" restraints regarding individual rights. But there does remain a distinction between laws governing conduct and laws designed to enforce the regulation of conduct. *Erie* itself reflected precisely that distinction, though in a situation opposite to our problem. In *Erie*, the authority of the federal system to enforce regulation of conduct was not at issue; Article III and congressional statutes clearly provided for the exercise of subject matter jurisdiction by federal courts in cases which arose between citizens of different states. However, the authority to enforce governmentally imposed standards of conduct did *not* carry with it the systemic authority to create those standards of conduct—the ability to create courts inferior to the U.S. Supreme Court did *not* permit Congress (or the courts themselves) to create the substantive law to be applied by those courts. For that power, it was necessary to look to other sections of Article I which directly address the areas in which the federal government may regulate out-of-court-room activity. If, then, the power to enforce regulation does not carry with it the power to regulate, it would seem intuitive that the power to regulate does not carry with it the power to enforce the regulation.[28]

27. The reading does at least preclude Congress from insisting that states make it easier for federally-favored parties to prevail in state court than it would be in federal court. It seems incredible in any event that Congress should wish to do so.

28. Two of my colleagues have argued that symmetry is not necessarily intuitive. But I still think that if two powers are separate in one context, they should be considered separate in the other. A contrary result would require that the power to regulate be defined as "greater" than the power to enforce and thus inclusive of that "lesser" power. However, I see no particular reason why such a hierarchy should be assumed; there is certainly no constitutional language to justify it. True, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), linked the existence of a vested right to the existence

Intuition is supported by history and at least one current doctrine.[29] The existence of a federal court system itself was a matter of some debate in the Constitutional Convention; the structure of Article III, establishing the Supreme Court but leaving to congressional discretion the existence of the rest of the judicial machinery, reflects a compromise between those who believed the lack of a federal judiciary was one of the critical weaknesses under the Articles of Confederation and those who believed the states could be relied upon to enforce federal law. There is no indication that any of the participants thought that an enforcement mechanism could be devised simply as "necessary and proper" to carrying out regulatory requirements. Similarly today, the Court has firmly rejected the notion that Article I regulatory authority inevitably carries with it the power to create non-Article III courts to hear and decide disputes arising under appropriate federal law.[30] While the Court has also rejected a blanket prohibition on such courts, recognition of the issue reflects the distinction between regulation and enforcement. Admittedly, two central concerns of the Court in this context, the effects of such bodies on both the values of Article III itself and the Seventh Amendment right to trial by jury, are not implicated when the exercise of congressional enforcement power is directed at state rather than alternative federal judiciaries. As will be argued more extensively below, however, the federal structure of our government *is* implicated and provides another reason for continuing to separate differing powers.

Standing against intuition, history and analogy is an alternative and troublesome analogy drawn from *FERC v. Mississippi*.[31] Building on the

of a remedy for its violation, but the Constitution provides for both in the federal system in separate grants of authority. It is this separateness for which I argue.

29. One side in the academic debate concerning the constitutionality of so-called "protective jurisdiction" also reflects a bit murkily this separateness. Briefly, the argument for protective jurisdiction is that, "Congress *could* regulate X; it may, therefore, choose *not* to regulate X but to grant federal courts 'arising under' jurisdiction over cases involving X, even though those cases will be decided under state laws and do not arise between citizens of different states." The Court has never read a congressional statute to confer such jurisdiction, but arguments against the theory, couched though they may be in terms of "obliterating the limitations of Article III," depend on the distinction between regulation and enforcement and deny the proposition that the latter is a lesser-included part of the former.

30. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986); Thomas v. Union Carbide Agric. Prod. Co., 473 U.S. 568 (1985); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

31. 456 U.S. 742 (1982).

New York v. United States, 112 S. Ct. 2408 (1992), logically casts doubt on *FERC*, although the majority opinion carefully distinguished it. Failure to consider congressionally proposed regulations in *FERC* would have resulted in preemption of state law in the area; failure of New York to provide for a radioactive waste disposal site or to form a compact with other states to do so would have resulted in New York's taking title to (and becoming legally liable for all damages caused by) such waste in the state. Encouragement, the Court stated, is constitutional; coercion may not be. The

uncontroversial statements that Congress could directly regulate the kind of commerce there involved and that such regulation could preempt any state regulation, the Court permitted Congress to condition continued state regulation on state consideration of federally proposed regulations under certain "procedural minima."[32] State arguments that federal regulation of state regulation of commerce did not constitute regulation of commerce and that federal use of state machinery to advance federal goals violated the Tenth Amendment were rejected. Setting a state's legislative agenda would seem as intrusive as imposing procedural rules on its judiciary, so to the extent federalism provides the justification for denying federal authority, *FERC* constitutes a recognized road-block. It does not, however, necessarily weaken the argument that regulation and enforcement are separate powers. While the legislation involved in that case did require state enforcement of certain federal regulations, it was not in that context that the "procedural minima" were imposed. Rather, those requirements were addressed to the process by which federally proposed regulations were to be considered by the state.[33] Given congressional authority under the Commerce Clause to compel such state consideration, it is unsurprising that some control over the "how" is "necessary and proper" to the regulation of the "what." It is precisely the argued *lack* of congressional power under the Commerce Clause to compel state enforcement which leads to consideration of the Supremacy Clause.

Constitutionally proper federal law must be followed and not discriminated against by states. The line of cases culminating in *Dice* seems to indicate the Court's belief that the "law" referred to in the Supremacy Clause is substantive law and whatever attendant procedural law Congress finds it necessary for the states to follow. But if the source of congressional authority to promulgate procedural law is its authority to create inferior *federal* courts, rather than its various grants of regulatory authority, the *Dice* result is belied by the wording of the Supremacy Clause itself: laws of the U.S. passed "pursuant to" the Constitution are supreme, *i.e.* laws which the Constitution empowers Congress to pass.

Commerce Clause (or perhaps the Tenth Amendment) does not permit Congress to "commandeer" state governments into the service of federal regulatory purposes. *Id.* at 2420. If the thrust of the opinion is that the federal system ought not ordinarily use the state systems to do federal work, the result in *FERC* seems dubious. Of course, the Supremacy Clause itself "coerces" the states to use their judicial resources to enforce federal substantive law, but the issue is the extent to which Congress may further coerce them to change otherwise proper procedures.

32. *FERC*, 456 U.S. at 771.

33. The requirements were neither particularly burdensome nor unusual; indeed, it was argued that they simply parallelled the requirements of due process, providing for notice and hearings.

The clause of its own force does not increase congressional power; it only provides the hierarchy between exercises of the power elsewhere granted and contrary state enactments or policies.

The one brave voice *is* constitutionally correct.

Interestingly, the Court in considering the *Dice* problem has spoken more in terms of rather amorphous policy than in the language usual to constitutional construction. The FELA line of cases demonstrate a Court-found congressional intent to make it at least as easy for employees to recover against their employers in state courts as it would be in the federal system. Assuming the accuracy of the intention, given its argued unconstitutionality, consideration of the evils of the alternative world view might reopen the constitutional inquiry. If federalism is undercut by the recognition of state procedural supremacy, perhaps one should argue that any federal law, constitutional when applied in the federal system, may be, in the discretion of Congress, considered supreme as compared to state law.[34]

The clear concern of the Court in a *Dice* fact pattern is that state procedures may eviscerate constitutionally required state enforcement of federal substantive law. The placement of "unnecessary burdens" is avoided by demanding that those burdens be replaced by federal procedural choices.

Certainly the fear of state attempts to overcome state obligations imposed by the Constitution but contrary to the particular political climate of the state is historically well-grounded in various contexts. Indeed, it is in the context of federal civil rights actions under 42 U.S.C. § 1983 that the Court has most recently (and most appealingly) precluded a state from utilizing its own arguably procedural law. In *Felder v. Casey*,[35] Wisconsin was barred from insisting that a plaintiff comply with a notice-of-claim statute, which required anyone desiring to sue any governmental subdivision, agency or officer to provide written notice of the claim within 120 days and wait 120 days thereafter before filing suit. Casting the issue as one of preemption, none of the three opinions focused on the theoretical issue of congressional power to engage in procedural preemption. The majority's argument is two-fold. First, the notice-of-claim requirement conflicts with the broad remedial purpose of § 1983 and, by carving out a subset of tort defendants that parallels those covered by § 1983, discriminates against the federal substantive claim.

34. The argument is vaguely illogical, however; to separate the issue of constitutionality from the issue of scope of applicability is hardly traditional analysis.

35. 487 U.S. 131 (1988).

To the extent that the decision rests on the assertion that Wisconsin cannot make it more difficult to recover against state actors whom it wishes to protect from federally created liability than it is to recover against other similarly-situated defendants,[36] it parallels cases insisting that states utilize federal burdens of proof and is uncontroversial.[37] The second prong of the majority's opinion, however, is much more troublesome. "Unnecessary burdens" cannot impede enforcement of federal rights; apparently a burden is "unnecessary" if it makes it more difficult for the plaintiff to recover; apparently as well the plaintiff need not (at least if Congress decides the plaintiff need not) play by the rules of the forum she selects.[38] In an attempt, presumably, to bolster this much more general allegation, reliance is placed on *Erie* and the notion of impermissibly altered outcomes.[39] Oddly enough, *Dice* is not cited.

Given the narrow applicability of the Wisconsin statute and the logic of the first part of the majority opinion, the result in *Felder* is defensible. But to extrapolate from that case the general proposition that Congress may always over-set state procedures in federal question cases because otherwise states could preclude the effective enforcement of federal substantive law in state courts goes too far. Fear of such attempts made via generally applicable rules of civil procedure[40] is simply impractical, as the *Felder* Court itself recognized.[41] In the first place, while states might favor employers while Congress favors employees, it is not clear whether employers or employees would benefit from general rules of pleading favoring plaintiffs over defendants; in some situations each is more likely to play either role. Secondly, general procedural rules are just that—general. Even if one could conclude that employees are most likely to be plaintiffs in disputes with their employers, rules of construction burdening plaintiffs burden all plaintiffs, not just employees. It seems politically absurd to make such procedural choices in an attempt to affect substantive outcomes. A scatter-gun is a poor weapon with which to kill a fly. Furthermore, procedural choices which place severe burdens on any specified group of litigants are politically dangerous as

36. *Id.* at 144.

37. *See supra* note 11 and accompanying text.

38. *Felder*, 487 U.S. at 150. The extent to which the *Felder* Court is ready to accept the supremacy of federal procedural rules in state courts is reflected by its reliance on Brown v. Western Ry. of Ala., 338 U.S. 294 (1949), the case in the FELA group requiring that a complaint be construed in accordance with federal rather than state standards.

39. *See supra* note 19.

40. Criminal procedures might more easily lend themselves to bias; the state would obviously be able to make assumptions about which party it preferred to favor, knowing as a general matter whether that party was more likely to be victim or defendant.

41. *Felder*, 487 U.S. at 141, 144-45.

well as absurd. The inability of states to discriminate against federal cases means that the choices governing them also govern state cases and affect more than those parties whose claims are hypothetically systemically unpopular. Finally, irrational state procedural choices would certainly run afoul of the due process clause; if there is no judgment call involved in determining that a procedural burden is "unnecessary," it should not be imposed on any litigant. If there is a judgment call involved, it belongs to the state.

Setting aside unlikely concerns of procedural hostility, there remains a more theoretical argument in favor of *Dice*: federalism is best served when states act as full partners in the enforcement of federal law, but such partnership is dependent upon litigant choice.[42] That choice, in turn, may well depend on the degree to which burdens imposed on the parties by each system are equivalent. A plaintiff who perceives the federal rules of pleading to be less burdensome than the states' might well choose federal court; a defendant sued in the state system with the same perception might well remove the case to the federal court. To foster state participation, reduction of procedural cost of state choice is a reasonable method, arguably sanctioned by the authority of Congress to "make all Laws necessary and proper for carrying into Execution . . . all other Powers [including the power to protect the federal structure] vested by this Constitution in the Government of the United States . . . ."[43] The fact that increasing the attractiveness of state fora to potential federal litigants also may serve to lower federal judicial costs and case load is a politically pleasing side effect.

For those with a dim memory of cases following *Erie*, the notion that the federal system might have legitimate reasons to promote forum shopping may set off alarm bells. Forum shopping is wrong, right?[44] Not exactly.[45] Shopping for "better" outcomes when the only reason the federal "store" is open is to provide a non-biased forum is frowned upon because not all parties are allowed in. But the reasons for providing a federal "store" in federal question cases go far beyond neutrality and themselves encompass the search for "better" outcomes in the context of expertise, maintenance of federal supremacy, etc. And in any event, to encourage use of the *state* store is to direct litigants to the systems to

42. This assumes, of course, that Congress has granted federal courts subject matter jurisdiction over the case at issue.

43. U.S. CONST., art. I, § 8.

44. *See* Guaranty Trust Co. v. York, 326 U.S. 99 (1945).

45. Technically, it's clear that *York* isn't relevant here; it provides part of the definition of what state law is a "rule of decision" to be applied by federal courts pursuant to 28 U.S.C. § 1652 in the absence of contrary federal law, *i.e.* primarily in diversity cases.

which all have access, thus again precluding discrimination against those denied entry to the store.

There is, however, a real difficulty with the argument, itself also based on notions of federalism. State judiciaries are currently perhaps the most autonomous branch of state governments. The U.S. Constitution prevents them from discriminating on the basis of the legal source of a claim and, particularly in the area of criminal law, imposes on them certain procedural minima. Congress occasionally removes their jurisdiction over certain kinds of federal question cases. Federal questions decided by them may be reviewed by the U.S. Supreme Court. But their independence today is not notably diminished from that which they enjoyed in the nineteenth century. The functional independence of other branches of state government, however, has been seriously undercut by radically changed notions of the appropriate (or possible) balance of regulatory authority between the federal and state governments since the New Deal. Given the breadth of federal authority under the Commerce Clause and the nearly complete politicization of the Tenth Amendment, state judiciaries remain possibly the last bastion of judicially enforced federalism. The procedural choices those systems make remain varied and changing, supporting the classic argument that the states serve as laboratories for less-than-nation-wide experiments. The sacrifice of such autonomy in order to lure parties to choose state court is simply too high a price to pay. The lack of express attempts by Congress to exact it, and the infrequent Court cases finding it, may provide the most eloquent argument against it. Yet the implication of *Dice* stands, throwing a shadow across judicial protection of state judicial independence—and continuing to bewilder my class each spring.