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Reverse Abstention

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REVERSE ABSTENTION

Samuel P. Jordan*

ABSTRACT

State courts decide claims based on federal or sister-state law every day. Although the applicable constitutional provisions are different, there are significant similarities in the way the Supreme Court conceptualizes the constraints on how those claims must be treated. One project of this Article is to chart those similarities, providing a unified account of the Court's approach to judicial federalism. The larger project, however, is not to describe the Court's approach, but to replace it. The current emphasis on discrimination and interference imposes burdensome and unwarranted obligations on state courts. A more flexible approach to judicial federalism is needed, and this Article takes important steps in that direction by developing a new analytical framework focused on prejudice. Prejudice may result when a state court renders a decision on the merits that does not adequately respect the law being applied. Or it may result when the same court refuses to entertain a suit in circumstances where no alternative forum is available. Neither result should be countenanced. But when a state court declines to decide a claim, and does so in a way that produces no prejudice to the legal rights involved, the abstention should be tolerated—and perhaps even applauded.

* Assistant Professor of Law, Saint Louis University. This Article benefited from comments received at the Fourth Annual Junior Federal Courts Scholars Conference, the 2012 Legal Scholars Conference at Arizona State University, and a Works in Progress presentation at the University of Akron School of Law. I owe particular thanks for helpful comments to Suzanna Sherry and Martin Redish. Christopher Bader provided exceptional research assistance. Finally, this Article was supported by a summer research grant from Saint Louis University.

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INTRODUCTION

Students typically enter law school with the understandable impression that Missouri courts decide claims based on Missouri law. And in fact, that is primarily what they do. But of course Missouri courts may also decide claims based on the laws of a sister state or the laws of the

United States.[1] As with cases where federal courts decide state law claims, these situations implicate judicial federalism. Unlike those cases, however, the issues surrounding the obligations of state courts remain understudied and undertheorized.[2]

There are significant similarities in the Supreme Court's approach to the way state courts must treat claims derived from the law of another actor within the federal system. The first project of this Article is to develop an account of the current doctrine. To be sure, the applicable constitutional provisions are different. Federal claims, which implicate vertical judicial federalism, are governed primarily by the Supremacy Clause, while sister-state claims, which implicate horizontal judicial federalism, are governed primarily by the Full Faith and Credit clause. But in both the vertical and horizontal contexts, the factors that appear most relevant are discrimination and interference. A state court has limited power to refuse to decide a case that falls within its standard jurisdictional rules, and even those rules may not be applied if they contribute to discrimination or interference. In the horizontal context, doctrines like choice of law and *forum non conveniens* will often provide a route to mitigate the burdens that would otherwise be imposed, but in the vertical context states are obligated to decide the federal claim, and often to apply federal procedures, even if it is burdensome to do so.

The second project of this Article is to argue that the doctrine surrounding judicial federalism should be

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[1] States may also decide claims based on the laws of a foreign country. The application of foreign law does not generally implicate constitutional concerns and is outside the scope of this Article.

[2] Kevin M. Clermont, *Reverse-Erie*, 82 NOTRE DAME L. REV. 1, 2 (2006) (discussing lack of attention paid to reverse-*Erie* doctrine). While it may still be the case that the *Erie* doctrine is undertheorized, it is certainly not for lack of effort. *See, e.g.*, Jay Tidmarsh, *Substance, Procedure, and Erie*, 64 VAND. L. REV. 877 (2011); Craig Green, *Repressing Erie's Myth*, 96 CAL. L. REV. 595 (2008); Joseph P. Bauer, *The Erie Doctrine Revisited: How a Conflicts Perspective Can Aid the Analysis*, 74 NOTRE DAME L. REV. 1235 (1999); John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974).

reconceived. The focus in these cases should be on whether a state court treats legal rights created by other actors within the federal system prejudicially. At various points, the Supreme Court has gestured toward the concept of prejudice, but it has never made it a consistent and explicit factor in its analysis. A focus on prejudice would still capture meaningful interference, but would tolerate and therefore de-emphasize certain forms of discrimination. It would ensure that rights created by other actors in the system are respected, but would provide states with increased flexibility to structure and administer their judicial systems. In the end, it would pave the way for state court authority to decline to decide certain federal or sister-state claims, an authority which this article characterizes as reverse abstention.

I. DESCRIBING THE OLD MODEL

A. Vertical Cases

State courts are involved in vertical federalism when they are asked to decide federal claims. In such cases, the body of law being applied is sourced in an exercise of federal power, and there are constitutional constraints that structure state-court application of federal law. The fundamental constitutional principle in these cases is supremacy. The Supremacy Clause in Article VI provides not only that the laws of the United States "shall be the supreme Law of the Land," but also that "the Judges in every State shall be bound thereby."[3] Those provisions impose obligations on state courts to treat federal law in a particular way.

But the Supremacy Clause has never been read to create an unlimited power by the federal government to control state courts, even with respect to the resolution of

[3] U.S. CONST. art. VI, cl. 2.

federal claims.[4] Instead, the Supreme Court has articulated the contours of the obligations imposed by the Supremacy Clause in a series of cases dating back to *Claflin v. Houseman* in 1876.[5] The defining principles that emerge from those cases is that state courts are constitutionally prohibited from applying rules that discriminate against federal claims, and cannot apply even facially neutral rules if those rules interfere with the vindication of federal interests.

Parts of the antidiscrimination model of vertical federalism are relatively straightforward. *Claflin* established the proposition that state courts should be presumed competent to hear federal claims.[6] That is, absent some affirmative step taken by Congress to strip the state courts of jurisdiction,[7] state courts are assumed to have

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[4] *See* Wendy E. Parmet, *Stealth Preemption: The Proposed Federalization of State Court Procedures*, 44 VILL. L. REV. 1, 14 (1999); Martin H. Redish & Steven G. Sklaver, *Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism*, 32 IND. L. REV. 71, 108 (1998). Parmet and others more forcefully argue against unlimited Congressional control of state-court procedures in the adjudication of state-law claims. Parmet, *supra*, at 39–41, 55; Anthony J. Bellia, Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947, 989 (2001). However, other commentators have found a nearly unlimited power over state courts in the Supremacy Clause. Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 2023 (1993); Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1029–30 (1995).

[5] 93 U.S. (3 Otto) 130 (1876). As discussed *infra* notes 6–7 and accompanying text, *Claflin* deals primarily with the authority rather than the obligation to hear federal claims. The line of cases dealing with the obligation to decide federal claims starts instead with *Mondou v. New York, N. H. & R. H. Co.*, 223 U.S. 1, 57 (1912).

[6] *Id.* at 136.

[7] *Id.* The Court's preemption doctrines inform how Congress may divest state courts of their presumed concurrent jurisdiction. Such jurisdiction stripping may occur by express Congressional directive or by "unmistakable implication" found in the legislative history. Tafflin v. Levitt, 493 U.S. 455, 460–62 (1990). The third option is a finding of "clear incompatibility" between state-court jurisdiction and federal interests. *Id.* at 464. However, this method is fairly unhelpful since it can be overcome by two generally applicable arguments. First, state-court adjudication of federal claims always promotes the federal interest in

authority to hear claims arising out of federal law. But if a state court chooses to exercise that authority, it must do so in a way that respects the supremacy of federal law.

Most fundamentally, a state court cannot choose to disregard the federal law.[8] Deciding a claim that is properly governed by federal law according to the substantive law of the state is the clearest violation of federal supremacy imaginable. The determination of when a claim is properly governed by federal law essentially boils down to a preemption analysis.[9] If that analysis suggests that the federal law creates a particular cause of action, then that federal law must provide the rules of decision by which that cause of action is assessed. The use of some other body of law is fundamentally inconsistent with the status of federal law as the "supreme Law of the Land."[10] Accordingly, a state court is never permitted under the Supremacy Clause to discriminate against the application of substantive federal law by substituting some other law in its place.

A state court is, however, generally permitted to apply its own procedural rules when deciding a federal claim.[11]

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enforcement of its laws. *Id.* at 467. Second, federal interest in uniformity of interpretation is preserved by the structural operations of state-court adjudication of federal claims: state courts are bound by federal decisions, but federal courts are not likewise bound by state-court interpretations of federal law. *Id.* at 464–65.

[8] *See, e.g.*, Mondou v. New York, N. H. & R. H. Co., 223 U.S. 1, 57 (1912); Testa v. Katt, 330 U.S. 386, 392–93 (1947).

[9] Kevin M. Clermont, *Reverse-Erie*, 82 NOTRE DAME L. REV. 1, 40 (2006); *see also* Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2105 (2000) (discussing the weakness of the presumption against preemption in light of *Felder*). As Louise Weinberg has suggested, the inquiry is not necessarily a detailed one. Once a state court finds a federal interest, any countervailing state interests are useless in the face of the Supremacy Clause's mandate. Louise Weinberg, *The Federal-State Conflict of Laws: "Actual" Conflicts*, 70 TEX. L. REV. 1743, 1797 (1992).

[10] Louise Weinberg, *The Federal-State Conflict of Laws: "Actual" Conflicts*, 70 TEX. L. REV. 1743, 1779 (1992).

[11] The classic statement of the state court's right to apply its own procedure comes from Professor Hart: "The general rule, bottomed deeply in belief in the importance of state control of state judicial

This is the subject of the "Reverse Erie" analysis, which is used to determine the circumstances under which a state is obligated to follow federal procedures in the course of enforcing federal substantive rights. The Supreme Court's articulation of the contours of this analysis has not always been a model of clarity,[12] but the consistent focus has been on the substantiality of the federal procedural rule at issue. A federal procedural rule is binding on state courts deciding federal claims if it is valid[13] and substantial in the sense that it is directly related to the vindication of the federal substantive right.

The Supreme Court has developed these principles in four cases decided since *Erie v. Tompkins*.[14] In *Brown*, the Court held that a strict state pleading rule could not be interposed to dismiss a federal claim when the parallel federal pleading rule would have permitted the claim to survive.[15] The Court viewed the local rule as problematic because it "impose[d] unnecessary burdens upon rights of recovery authorized by federal laws."[16] Similarly, *Dice* held that state procedural rules regarding the allocation of factfinding between judge and jury could not be applied to displace the federal guarantee of trial by jury because that guarantee was "too substantial a part of the rights accorded by the Act."[17] More recently, the Court in *Felder* rejected the

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procedure, is that federal law takes the state courts as it finds them." Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954).

[12] Kevin M. Clermont, *Reverse-Erie*, 82 NOTRE DAME L. REV. 1, 2 (2006).

[13] Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 GEO. WASH. L. REV. 91, 99–100 (2003). The validity of procedural rules, at least when it comes to their operation in state courts, is rooted in the Necessary and Proper Clause. Wendy E. Parmet, *Stealth Preemption: The Proposed Federalization of State Court Procedures*, 44 VILL. L. REV. 1, 18 (1999).

[14] 304 U.S. 64 (1938).

[15] Brown v. W. Ry. of Ala., 338 U.S. 294, 298–99 (1949).

[16] *Id.* at 298.

[17] Dice v. Akron, Canton & Youngstown R. Co., 342 U.S. 359, 363 (1952).

application of a state notice-of-claim rule, in part because such a rule would produce different outcomes "based solely on whether the claim is asserted in state or federal court" and in part because it concluded that the state rule would interfere with "the substantial rights of the parties under controlling federal law."[18] But not all cases have found that state procedural rules must give way to competing federal rules. In *Johnson*, the Court found that a state court was entitled to apply its own rules governing the right to appeal in a Section 1983 case.[19] To the extent that the state court undermined a federal interest, the nature of the latter interest was purely procedural.[20] As such, the state rule did not substantially affect the vindication of any substantive federal right, and the state was entitled to apply it.[21]

The results in these cases can be cast in antidiscrimination terms. A state court deciding a federal claim is bound to apply all parts of the federal law that are essential to the vindication of the federal substantive right. Failure to do so—either by applying state substantive law or state procedures that displace substantial federal procedures—results in unacceptable discrimination because the nature of the federal claim is affected by its location in a state court. *Johnson* highlights another dimension of this principle as well. Central to that result was the Court's conclusion that the state procedure at issue was a "neutral state Rule regarding the administration of the state courts."[22] This step in the Court's analysis makes clear that a state procedural rule would be problematic if it applied exclusively to federal claims, even if the competing federal procedural rule would not otherwise be deemed as substantially related to the federal substantive right. Put together, this suggests that state courts are not permitted to discriminate against federal law (by treating it differently

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[18] Felder v. Casey, 487 U.S. 131, 138, 151 (1988).
[19] Johnson v. Fankell, 520 U.S. 911, 922–23 (1997).
[20] *Id.* at 918.
[21] *Id.* at 921-22.
[22] *Id.* at 918.

than it would be treated in federal court) or against federal claims (by treating them differently than state claims).

The discussion thus far has centered around how a state court must treat federal claims once it has decided to hear them. A harder question concerns the circumstances under which a state court is obligated to hear federal claims in the first place. Stated conversely, this is the question of when the federal government is entitled to commandeer state courts for the resolution of federal claims. A discussion of this issue must necessarily begin with *Testa v. Katt*.[23] There, a Rhode Island state court refused to enforce a federal statute that called for treble damages on the grounds that the statute was penal in nature.[24] In overturning that refusal, the Supreme Court held that state courts have not just the power, but also the obligation to hear and enforce federal law claims when they share jurisdiction with the federal courts.[25] Justice Black argued that permitting state courts to decline the enforcement of federal law "disregards the purpose and effect of [the Supremacy Clause]."[26] Therefore, the principles embedded in the Supremacy Clause granted to Congress a constitutional power to require state courts to decide federal claims.

The scope and status of the federal power recognized in *Testa* was brought into question by the Supreme Court's

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[23] 330 U.S. 386 (1947).

[24] *Id.* at 388. Under a stalwart doctrine of choice of law, courts frequently refuse to enforce foreign penal laws. The Rhode Island Supreme Court viewed the case as a straightforward application of that doctrine; Black's response was that the doctrine could not be applied because it is impermissible for a state court to treat federal law as foreign. *Id.* at 389 ("[W]e cannot accept the basic premise on which the Rhode Island Supreme Court held that it has no more obligation to enforce a valid penal law of the United States than it ahs to enforce a penal law of another state or a foreign country. Such a broad assumption flies in the fact of the fact that the States of the Union constitute a nation.").

[25] *Id.* at 390–91. In his dissent in *Haywood*, Justice Thomas went further, arguing that a state's power to adjudicate federal claims did not thereby create a duty to do so. Haywood v. Drown, 129 S. Ct. 2108, 2121 (2009).

[26] *Id.* at 389.

subsequent decisions regarding the power of Congress to require state legislatures and executives to enforce federal law. *New York* imposed significant limits on the federal power to commandeer state legislative officials;[27] *Printz* recognized similar limits on the power to commandeer state executive officials.[28] In both cases, however, the Court went out of its way to distinguish judicial commandeering,[29] and to reaffirm the comparatively broad power with respect to state judicial officials. Thus, even after *Printz* and *New York*, Congress retains the power to impose on the state courts an obligation to hear and decide claims based on federal law.

Though concededly broad, the power to commandeer under *Testa* is not unlimited. Rather, the Court has consistently acknowledged that state courts might decline to hear federal claims if they have a valid excuse for doing so. The question, then, becomes: what constitutes a valid excuse? The response to this question has led first and foremost to the development of a strong antidiscrimination principle.[30] So it is clear that rejecting a claim on the grounds that the applicable law is federal in nature is not defensible on valid excuse grounds.[31] This is hardly surprising; to find otherwise would be to undermine the commandeering power substantially. On the other hand, the Court has often found occasion to repeat Henry Hart's

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[27] New York v. U.S., 505 U.S. 144, 161 (1992).

[28] Printz v. U.S., 521 U.S. 898, 935 (1997).

[29] *Id.* at 907; *New York*, 505 U.S. at 179–80. Justice Scalia in the *Printz* opinion proffered several grounds for the distinction between state-court commandeering and commandeering state executives. First, he claimed that the Framers envisioned state courts as necessary co-arbiters of federal law. Martin H. Redish & Steven G. Sklaver, *Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism*, 32 IND. L. REV. 71, 77 (1998). Second, Scalia noted that the Framers implied in Madisonian Compromise (and ultimately the Constitution's text) the possibility that no lower federal courts would be created. *Id.* at 78–79. This would necessitate state courts as initial fora for federal claims. *Id.* at 79. Finally, Scalia found that the State Judges Clause created a "distinctive" view of state judiciary and compelled their compliance with federal law (and commandeering). *Id.*

[30] *See, e.g.*, *Haywood*, 129 S. Ct. 2108, 2116.

[31] Howlett v. Rose, 496 U.S. 356, 371 (1990).

observation "that federal law takes the state courts as it finds them."[32] Invocation of a "neutral rule of judicial administration" has therefore been upheld, even when the rule has been applied to refuse jurisdiction over a federal claim.[33] In *Herb*, for example, a state court dismissed a FELA case on the grounds that the claim arose outside the court's territorial jurisdiction.[34] The same rule would have led to the dismissal of a parallel state claim,[35] and that neutrality rendered the rule a "valid excuse" to the obligation to hear the federal claim that would otherwise be imposed.

Facial neutrality of that sort does not always immunize a state court refusal to hear federal claims, however. In the most recent decision in this area, the Supreme Court in *Haywood v. Drown* rejected New York's decision to decline jurisdiction over a Section 1983 claim, even though the rule used to reach that result would also have led the court to decline jurisdiction over a parallel claim under state law.[36] While recognizing that past decisions

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[32] *See supra* note 11; *see also* Mondou v. New York, 223 U.S. 1, 56 (1912) (approving that Congress did not, in granting concurrent jurisdiction, attempt to control "[state] modes of procedure"); Howlett v. Rose, 496 U.S. 356, 372 (1990) ("[T]he 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."); Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211, 217 (1916) (finding that the Seventh Amendment jury right does not apply to state adjudications of federal claims); Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 40, 178 (1995) (noting that "there is no ordinary requirement that state courts mimic federal courts procedurally when they hear federal matters").

[33] *See* Douglas v. New York, N.H. & R.H. Co., 279 U.S. 377, 387 (1912), Herb v. Pitcairn, 324 U.S. 117, 123 (1945), Missouri ex rel. Southern Ry. Co. v. Mayfield, 340 U.S. 1, 4–5 (1950).

[34] *Herb*, 324 U.S. at 118–19.

[35] *Id.* at 123.

[36] Haywood v. Drown, 129 S. Ct. 2108, 2112–13 (2009). New York's Correction Law § 24, the statute at issue, divested New York's general-jurisdiction trial courts "of jurisdiction over § 1983 suits that seek money damages from correction officers." *Id.* at 2112.

turned primarily on an assessment of the rule's equal application to both federal and state claims, Justice Stevens concluded that the absence of discrimination was not enough to bring a case within the valid excuse exception.[37] Rather, "equality of treatment is . . . the beginning, not the end, of the Supremacy Clause analysis."[38] To get to the end of the analysis, it is necessary to move beyond equal treatment and consider whether the rule in question is truly jurisdictional in the sense that it "reflect[s] the concerns of power over the person and competence over the subject matter."[39] In other words, the phrase "neutral rule of judicial administration" embodies a requirement not just that the rule be neutral, but also that it be a rule of judicial administration. It was on this latter point that the majority concluded that the New York rule invoked in *Haywood* was problematic. Although framed in terms of jurisdiction, Stevens viewed the rule as a reflection of a desire to provide substantive immunity to prison officials.[40] Viewed that way, the application of the state rule was in clear violation not of the commandeering line of cases, but of the first category of cases discussed above. For federal claims, federal law must provide the rules of decision, and resort to some other body of law is to treat the federal law as something less than supreme.

For all of these decisions, the Court seems motivated by dual concerns about discrimination and interference. A state court almost certainly runs into trouble if it applies a rule to a federal claim that it would not apply to an analogous state claim.[41] This is true whether the rule invoked is procedural or jurisdictional. In either case, the state's behavior is considered discriminatory, and such behavior can never be justified under existing doctrine. But even if the state's behavior is not discriminatory, it may

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[37] *Id.* at 2116.

[38] *Id.*

[39] Howlett v. Rose, 496 U.S. 356, 381 (1990).

[40] *See Haywood*, 129 S. Ct. at 2118 (characterizing the rule as "effectively an immunity statute cloaked in jurisdictional garb" and concluding that the "Supremacy Clause cannot be evaded by formalism").

[41] *See id.* at 2117 n.6.

nevertheless be problematic if it interferes with federal objectives. The use of neutral state rules—whether procedural or jurisdictional as a matter of form—is acceptable only when those rules do not undermine federal interests in either intent or effect.

B. Horizontal Cases

State courts are involved in horizontal federalism when they are asked to decide state law claims involving contacts with sister states.[42] In such cases, the body of law being applied is state law, but there are federal constitutional constraints that structure the way that law is selected and applied. Specifically, Section 1 of Article IV provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[43] This provision imposes obligations on state courts to treat state claims with multistate contacts in a certain way.[44]

For a relatively brief time, the Supreme Court experimented with a reading of the Full Faith and Credit Clause that would have given those obligations significant bite. In *Alaska Packers*, the Court upheld a decision by a California court to apply its own law to an employment dispute involving both California and Alaska contacts.[45] But

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[42] Even if they choose to apply their own law, there is still an element of horizontal federalism present when a state decides a case involving multistate contacts.

[43] U.S. CONST. art. IV, § 1.

[44] The Due Process clause also imposes constraints in this situation. However, because the Court has developed a unified approach to the constitutional constraints on a state's horizontal choice of law—*see* Allstate Ins. Co. v. Hague, 449 U.S. 302, 307–08 (1981)—and because the other constraints discussed here arise out of the Full Faith and Credit Clause, I will focus on Full Faith and Credit. *See* Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2506–07 (1999).

[45] Alaska Packers Ass'n v. Indus. Accident Comm'n of Cal., 294 U.S. 532, 550 (1935). California was the site of the employment contract and

the Court made clear that if its analysis had led it to conclude that Alaska's interest was greater, the choice of California law would have been problematic.[46] In other words, *Alaska Packers* suggested strongly that the Full Faith and Credit Clause mandated the selection of the law of the state with the most significant interest, and that the ultimate responsibility for assessing the competing interests rested with the Court itself.[47]

Almost immediately, however, the Court stepped back from that stance, and the choice-of-law obligations arising from the Full Faith and Credit Clause have been weak ever since.[48] Under the current approach, a horizontal choice of law is constitutionally permissible so long as the state whose law is chosen has a significant interest in the case.[49] As we shall see, this is not an altogether toothless formulation, but it provides states with significant flexibility in their choice of law analysis. In moving from *Alaska Packers* to *Allstate*, the Court "rejected the siren song of balancing for the comfort of

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the domicile of the plaintiff. *Id.* at 537–38. Performance, however, occurred in Alaska, as well as the plaintiff's injuries sued on. *Id.*

[46] *Id.* at 549.

[47] The *Alaska Packers* decision may be seen as a retreat from earlier Court opinions that promoted a more territorial view of state-state conflicts, one that constitutionalized the traditional "vested rights" theory of conflicts. Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2505 (1999). However, if one subscribes fully to the territorial theories of Beale, it becomes clear that *Alaska Packers* was not so much a retreat as a sidestep: it acknowledged that state statutes could conflict in disposing of a case, whereas Beale found that, since no state laws had extraterritorial effects, no conflicts ever truly exist. *Id.* at 2504–05.

[48] *See* Pacific Employers Ins. Co. v. Indus. Accident Comm'n of Cal., 306 U.S. 493, 502–03 (1939) (finding "little room for [the full faith and credit compulsion to recognize or enforce a sister state's law] when the statute of the forum is the expression of domestic policy, in terms declared to be exclusive in its application to persons and events within the state"); Cardillo v. Liberty Mut. Ins. Co., 330 U.S. 469, 476 (1947) (requiring only "some substantial connection between the [state] and the particular employee-employer relationship" governed by the statute at issue, and rejecting the necessity of "the fortuitous circumstance" that the forum state be "the place of [the plaintiff's] work or injury").

[49] *Allstate*, 449 U.S. at 312–13.

minimal scrutiny."[50] The scrutiny under the modern approach may be fairly characterized as minimal in part because it is weak. Any "significant contact or significant aggregation of contacts, creating state interests" will do.[51] But the scrutiny is also minimal in the sense that it is focused exclusively on the ultimate results of the choice of law analysis. That is, the Court applies its weak test only to assess the relationship between the case and the state whose law is chosen.[52] But as to the process by which that initial choice is made, the Court has essentially declared that the Constitution is uninterested.[53]

One of the implications of this framework is that the public policy exception, a choice of law doctrine that looks facially suspicious, escapes constitutional scrutiny. Public policy exceptions have long been stalwarts of choice of law analysis, and they were folded into state practice in the United States without much consideration or controversy.[54] They operate essentially to override a choice of law that would otherwise be made on the grounds that the law selected is somehow offensive or undesirable.[55] And although the classic formulation of the doctrine resulted in dismissal

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[50] Richman & Reynolds, *Full Faith and Credit* 43

[51] *Allstate*, 449 U.S. at 313.

[52] *Id.*; *compare* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 819–820, 822 (1985) (reversing Kansas Supreme Court's application of Kansas law where the state lacked sufficient "interest" in the case), *with* Sun Oil Co. v. Wortman, 486 U.S. 717, 730 (1988) (concluding that Kansas courts may apply their own statute of limitations to multistate claims because of Kansas's interest in "regulating the work load of its courts and determining when a claim is too stale to be adjudicated").

[53] *Allstate*, 449 U.S. at 307 (concluding that it was "not for this Court" to assess the "choice-of-law analysis," but instead focusing on whether the "choice" made comported with constitutional limits).

[54] Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1971–72 (1997).

[55] Loucks v. Standard Oil Co., 120 N.E. 198, 202 (N.Y. 1918) (finding that a law may be refused under the public policy exception where its application "would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal").

on jurisdictional grounds,[56] it has long been common for states to invoke the doctrine to justify a substitution of some other law—almost always forum law.[57] It at least has an appearance of oddity for one state of our union to refuse application of the law of another state based on a judgment about the competing law's content.[58] Indeed, Larry Kramer has provocatively suggested that such a refusal is not simply odd, but is in fundamental and unavoidable tension with the core of what the Full Faith and Credit Clause was designed to accomplish.[59] Even so, the Supreme Court has never seriously questioned the exception. Under the current approach, the mechanism of the public policy doctrine is never directly assessed because it is considered merely a part of the analysis that produces the choice. And the choice itself is all that matters; mechanisms are outside the scope of the Court's concern.[60]

Despite the minimal nature of the Court's review of horizontal choice of law decisions, some limitations have emerged. The most straightforward and predictable of these is that the selection of the law of a state that has no significant relationship to a claim will be rejected. So in *Shutts*, a Kansas state court violated constitutional

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[56] *Id.* (courts cannot "close their doors" unless the offensive law violates public policy).

[57] Monrad G. Paulsen & Michael I. Sovern, *"Public Policy" in the Conflict of Laws*, 56 COLUM. L. REV. 969, 979–80 (1956).

[58] Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1972 (1997) (emphasizing that the doctrine is "a content-based principle").

[59] *Id.* at 1980; Monrad G. Paulsen & Michael I. Sovern, *"Public Policy" in the Conflict of Laws*, 56 COLUM. L. REV. 969, 1008–10 (1956) (noting that using the public policy exception as a residual equity principle to avoid injustice in individual cases is "dangerous"); *but see* Richard S. Myers, *Same-Sex "Marriage" and the Public Policy Doctrine*, 32 CREIGHTON L. REV. 45, 56–57 (1998).

[60] *See supra* note 53. Indeed, the Court was unwilling to call the public policy exception into question even when it embraced balancing. *Alaska Packers* simultaneously concluded that a decision to apply forum law could be sustained on a finding that the foreign law was offensive to forum policy. Alaska Packers Ass'n v. Indus. Accident Comm'n of Cal., 294 U.S. 532, 547 (1935).

constraints when it applied its own law to certain claims brought by non-Kansans against a Delaware defendant to recover interest on royalty payments arising from the ownership of land outside Kansas.[61] Aside from the fact that they had been filed there, Kansas had no connection at all to those out-of-state claims, and thus the selection failed even a weak test applied only to the results of the choice of law process.[62] But *Shutts* is notable not just for its enforcement of the constitutional constraint on choice of law; it is also noteworthy for the rarity of that result.[63]

The second limitation is somewhat more complex. In a series of cases—most notably *Hughes v. Fetter*—the Court has read the Full Faith and Credit Clause to constrain a state court's power to reject claims that arise out of the law of another state.[64] *Hughes* is a confusing case, and it is frequently viewed as enigmatic or a sport.[65] Nevertheless, an understanding of the case helps to clarify the underlying principle that the Court has developed in cases implicating horizontal federalism. Hughes and Fetter were in a car

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[61] Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 799–803 (1985).

[62] *Id.* at 822.

[63] *See, e.g.*, In re K.M.H., 169 P.3d 1025, 1031–32 (Kan. 2007) (finding under *Shutts* and *Allstate* that Kansas, as the domicile of both parties, had contacts sufficient to warrant application of its own law); Vanderbilt Mortg. & Fin., Inc. v. Posey, 146 S.W.3d 302, 317 (Tex. App. 2004) (finding that Texas had sufficient contacts to satisfy full faith and credit because the plaintiffs were Texas residents and the contract was executed there); *see also* Olmstead v. Anderson, 400 N.W.2d 292, 305 n.13 (Mich. 1987) (noting that the limitations on choice of law imposed by *Allstate* and *Shutts* are "rather meager"); Arons v. Rite Aid Corp., 2005 WL 975462 (N.J. 2005)(unpublished opinion).

[64] Hughes v. Fetter, 341 U.S. 609, 612–13 (1951); Broderick v. Rosner, 294 U.S. 629, 642–43 (1935); First Nat'l Bank of Chi. v. United Air Lines, Inc., 342 U.S. 396, 307–98 (1952).

[65] *See* Brainerd Currie, *The Constitution and the "Transitory" Cause of Action*, 73 HARV. L. REV. 36, 36 (1959); Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1980–81 (1997) (labeling Justice Black's opinion "short" and "impressionistic"); Lea Brilmayer, *Credit Due Judgments and Credit Due Laws: The Respective Roles of Due Process and Full Faith and Credit in the Interstate Context*, 70 IOWA L. REV. 95, 109 (1984).

accident in Illinois; Hughes died, and the administrator of his estate filed a wrongful death action against Fetter (and his insurer) in Wisconsin.[66] Wisconsin was an understandable forum because all relevant parties were from there. Even so, recovery was sought under the Illinois wrongful death statute, primarily because the Wisconsin statute permitted recovery only for deaths within the state.[67] But recovery was denied, and the case was dismissed on the merits, because the Wisconsin state court interpreted its wrongful death statute as establishing "a local public policy against Wisconsin's entertaining suits brought under the wrongful death statutes of other states."[68]

Justice Black might have concluded that the dismissal in *Hughes* was problematic because the interest of Illinois was greater than the interest of Wisconsin, and thus full faith and credit precluded Wisconsin from applying its own law to the claim. But by the time *Hughes* was decided, the Supreme Court had abandoned a balancing approach to full faith and credit, and the proper question would therefore have been whether Wisconsin had a significant interest in the case. The answer to that question was certainly yes; indeed, Black conceded as much.[69] But if Wisconsin had an interest that justified the application of its own law, what precisely was the problem with the dismissal? The problem was that Wisconsin did not actually apply its own law to the claim. Instead, it invoked the Wisconsin wrongful death statute only as evidence of a state policy against deciding claims arising under foreign law. It was that state policy, and not the substantive limitations of Wisconsin's statute, that mandated dismissal. Put differently, Wisconsin's conclusion was not that its own law should be applied, but that the law of Illinois could not be.

At this point, one can begin to understand the confusion wrought by *Hughes*. It seems strange that the full

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[66] *Hughes*, 341 U.S. at 610.
[67] *Id.* at 610 n.2.
[68] *Id.* at 610.
[69] *Id.* at 611–12, 612 n. 10.

faith and credit problem stems not from the result—dismissal—but from the means by which the result was reached. It seems stranger still that the use of a public policy exception to support the selection of Wisconsin law would have been sustained, while the use of what is essentially a jurisdictional rule rooted in public policy was rejected.[70] But properly understood, the case is not as strange as it seems. What cases like *Pacific Employers* established was that the Supreme Court is unwilling to police the mechanics of the choice of law process; it will focus merely on outputs. But the output of the choice of law process in *Hughes* was that Illinois should govern. Wisconsin then refused to heed the outcome of its own choice-of-law analysis based on a separate policy that required the rejection of non-Wisconsin claims. It was precisely the separate, or exogenous, nature of the Wisconsin policy that triggered the constitutional defect.[71] What *Hughes* stands for, then—and what it adds to the framework established above—is that the use of such a separate policy to override a choice of law is unacceptable. If Wisconsin's choice-of-law analysis had concluded with a selection of Wisconsin law, the court would have heard the claim. But since Wisconsin's analysis concluded with a selection of non-Wisconsin law, the court rejected the claim. These results create a "basic conflict" with the "strong unifying principle embodied in the Full Faith and Credit Clause."[72] So it remains true even after *Hughes* that the Supreme Court will look only at the result of the choice of law analysis, and will not venture into a consideration of choice-of-law mechanisms. At the same time, once the analysis yields a result, the state is compelled

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[70] *See* Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1983–84 (1997) (arguing that *Hughes* supports a conclusion that the public policy doctrine is constitutionally suspect because it is discriminatory).

[71] That makes *Hughes* quite different from a case where public policy is considered in a way that is endogenous to the choice-of-law analysis.

[72] *Hughes*, 341 U.S. at 612.

to follow it, and the application of an exogenous rule that is sensitive to the result is constitutionally suspect.[73]

It is in this sense that *Hughes* embodies an antidiscrimination principle.[74] Indeed, the Court has characterized its opinion in precisely those terms. Just two years after *Hughes*, the Court described as its "crucial factor" that "the forum laid an uneven hand on causes of action arising within and without the forum state. Causes of action arising in sister states were discriminated against."[75] As such, *Hughes* is a kindred spirit to the cases in the vertical federalism setting that limit the ability of states to refuse to hear federal cases based on rules that are not equally applicable to federal and non-federal claims.[76] Stating the

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[73] Moreover, it does not matter whether the exogenous rule is framed in terms of affecting jurisdiction (as in *Hughes*) or available remedies. Broderick v. Rosner, 294 U.S. 629, 642–43 (1935) (finding that a state "may not, under the guise of merely affecting the remedy, deny the enforcement of claims otherwise within the protection of the full faith and credit clause"). At the very least, if it does make its selection on the basis of such a rule, that decision must pass something akin to an intermediate scrutiny. *See* Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1984 (1997). The application of an exogenous rule that applies equally regardless of the outcome of the choice-of-law analysis would not trigger the same constitutional concerns. Then again, if such a rule were in place, it would not be necessary for the state to even conduct a choice-of-law analysis before applying it.

[74] Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1984 (1997) (describing Hughes in antidiscrimination terms); Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2511–15 (1999) (same).

[75] Wells v. Simons Abrasive Co., 345 U.S. 514, 518–19 (1953). This formulation can be read to support a distinction between *Hughes* and cases based on the public policy exception, at least insofar as the latter would lead the state to conclude that the cause of action actually arose under its own law.

[76] *See supra* note 31 and accompanying text. The antidiscrimination principle in the vertical setting is clearly stronger. Whereas a facially neutral jurisdictional rule would likely pass muster in the horizontal setting, cases like *Haywood* make clear that even facially neutral rules may pose constitutional problems if they discriminate against federal law in their effect. *See supra* notes 37–39 and accompanying text.

rule broadly to encompass both situations, we might say that if a state opens its courts to a certain type of claim, those courts must be open to hearing that claim regardless of the source of law.[77]

II. QUESTIONING THE OLD MODEL

The model of judicial federalism that the Supreme Court has developed is based almost exclusively on considerations of discrimination and interference. This is not to say that the analysis is identical in the horizontal and vertical contexts. The constitutional provisions associated with those two contexts are different, and the analysis is understandably sensitive to that difference. But both lines of

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[77] It may be unclear whether the constitutional obligations to apply federal procedure in the vertical context also apply in the horizontal context. Sistare v. Sistare, 218 U.S. 1, 24 (1910) ("[A]lthough mere modes of execution provided by the laws of a state in which a judgment is rendered are not, by operation of the full faith and credit clause, obligatory upon the courts of another state in which the judgment is sought to be enforced, nevertheless, if the judgment be an enforceable judgment in the state where rendered, the duty to give effect to it in another state clearly results from the full faith and credit clause, although the modes of procedure to enforce the collection may not be the same in both states."); Bowles v. J.J. Schmitt & Co., 170 F.2d 617, 622 n.6 (2d Cir. 1948) (finding that sister-state judgments should be enforced "whatever the local procedure"). However, modern discussion by the Court and Circuits seems to find that the obligation does not apply to the horizontal arena. *See* Sun Oil Co. v. Wortman, 486 U.S. 717, 726–29 (1988) (holding that constitutionalizing choice-of-law rules would be undesirable and that even if certain substance/procedure characterizations under state law may be "unwise," they are not thereby "unconstitutional"); Baker by Thomas v. General Motors Corp., 522 U.S. 222, 235 (1998) ("Full faith and credit, however, does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments. Enforcement measures do not travel with the sister state judgment as preclusive effects do; such measures remain subject to the evenhanded control of forum law."); Pearson v. Northeast Airlines, Inc., 309 F.2d 553, 560 (2d Cir. 1962) (rejecting the notion that the "incidents" of a sister state's claim must be enforced when the forum gives full faith and credit to the claim itself).

cases can be usefully cast in terms of discrimination and interference. In this Part, I question the continuing emphasis on those two factors. A decision to refuse a case—whether state or federal—has long been considered a form of interference that raises constitutional concerns. But while it may at one point have been true that such a refusal would result in meaningful interference, there are reasons to think that that may no longer be the case. In terms of discrimination, the Court has been generally unwilling to accept jurisdictional or procedural rules that distinguish between forum-based claims and other claims. Recently, however, Justice Thomas has articulated a vision of the Supremacy Clause in the vertical context that suggests that, at least for jurisdictional rules, discrimination should be tolerated.[78] That vision is not wholly persuasive, but it points the way toward a new thinking of judicial federalism that might better balance the power of states to control their judicial systems and the need to respect federal and sister state claims.

A. Rethinking Interference

1. Vertical Cases

Much of the discussion concerning the federal power to commandeer state courts centers around the original understanding of the authority given to Congress in the "ordain and establish" clause of the Constitution.[79] This clause is the product of the so-called Madisonian Compromise, struck between those like Madison who wanted

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[78] *See* Haywood v. Drown, 129 S. Ct. 2108, 2132 (2009) (Thomas, J., dissenting).

[79] U.S. CONST. art. III, § 1. The State Judges Clause has also been cited as a basis for commandeering, though perhaps with less persuasive force. U.S. CONST. art. VI, cl. 2; *compare* Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 Va. L. Rev. 1957, 2011–13 (1993), *with* Martin H. Redish & Steven G. Sklaver, *Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism*, 32 IND. L. REV. 71, 81 (1998).

to create lower federal courts and those like Rutledge who viewed their creation as unnecessary and even dangerous.[80] Rather than resolve that disagreement definitively, the Constitution as ratified created only one federal court—the Supreme Court—but gave Congress power to create others.[81] In essence, then, the question of whether a system of inferior federal courts should be established was deferred and de-constitutionalized with the inclusion of the "ordain and establish" language.[82]

At the same time, the Constitution conferred original jurisdiction on the Supreme Court that was quite limited.[83] This meant that many cases falling within the "judicial Power of the United States" described in Article III, and particularly those "arising under . . . the Laws of the United States," did not fall within the Court's original jurisdiction.[84] The fact that the Constitution provided no guarantee that federal claims could be adjudicated in a federal forum has led to an assertion that the Framers must have contemplated that state courts would be available for those claims.[85]

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[80] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 124 (Max Farrand ed., 1937).

[81] *See* U.S. CONST. art. III, § 1.

[82] Beyond the fact of their creation, some constitutional concerns remain in play when considering Article III courts. For instance, the old adage that "the greater power includes the lesser" has been used to argue that Congress may strip jurisdiction from lower federal courts merely because it gave them the power in the first place. Peter J. Smith, *Textualism and Jurisdiction*, 108 COLUM. L. REV. 1883, 1892–93 (2008). However, this structural argument is fundamentally misguided, particularly when considering important remedies associated with vital constitutional rights. *See* Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1134 (2010) ("Congress cannot use its power to control jurisdiction to preclude constitutionally necessary remedies for the violation of constitutional rights.").

[83] Louise Weinberg, *Our Marbury*, 89 VA. L. REV. 1235, 1363 (2003).

[84] *See* U.S. Const. art. III, § 2, cl. 1.

[85] Matthew I. Hall, *Asymmetrical Jurisdiction*, 58 UCLA L. REV. 1257, 1263 (2011); Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 2021 (1993); *see also* James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 NW. U. L. REV. 191, 216 (concluding that Hamilton held Article III to allow Congress to

Indeed, the claim is even stronger than that, for it encompasses not just the idea that state courts would be available, but that state courts could be made to be available.[86] In short, the argument is that the original design of the Constitution contains within it a provision for the commandeering of state courts.[87]

Building on claims rooted in constitutional design, supporters of a broad commandeering power next move to early Congressional practice. Congress quickly exercised its power to create lower federal courts, but the jurisdiction conferred on those courts was initially limited.[88] Congress did not see fit to confer general federal question jurisdiction on the lower federal courts until 1875.[89] This is said to provide additional evidence for the proposition that state

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"constitute" the state courts as inferior federal tribunals); *but see* Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 40, 55 (1995) (arguing that these jurisdictional gaps represented "enclaves" of exclusively federal jurisdiction that compelled the creation of lower federal courts).

[86] States could not escape this compulsion even by the extreme measure of abolishing their judiciary entirely. Vicki C. Jackson, Printz *and* Testa*: The Infrastructure of Federal Supremacy*, 32 IND. L. REV. 111, 113 (1998); *see also* Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 2012 (1993) (arguing that the Constitution forces state judges to serve as instruments of federal government). Thus Hart's refrain that Congress takes state courts as it finds them may not actually reach its furthest logical extension.

[87] Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 2022 (1993) ("Our Constitution, since it presumes federal jurisdiction for state courts, itself commandeers state courts.").

[88] Perhaps clearest example is the limited nature of federal jurisdiction granted in the Judiciary Act of 1789, in which Congress created jurisdictional gaps that denied federal review of federal questions in certain cases, imposed an amount-in-controversy requirement, and rejected any notion of general federal question jurisdiction. Paul Taylor, *Congress's Power to Regulate the Federal Judiciary: What the First Congress and the First Federal Courts Can Teach Today's Congress and Courts*, 37 PEPP. L. REV. 847, 861–63, 876–80 (2010).

[89] Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470. The Midnight Judges Act of 1801 attempted to create federal-question jurisdiction, see Act of Feb. 13, 1801, ch. 4, § 11, 2 Stat. 89, 92, but it was soon repealed by the Jeffersonian Republican Congress, which was distrustful of a powerful federal government. See Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132, 132.

courts were understood to be both competent and obligated to hear federal claims.[90] If state courts did not hear federal claims not included within a federal jurisdictional statute, no court would. As a matter of necessity, then, Congress must have had the power to allocate certain federal claims to state courts. And if that power existed prior to the creation of general federal question jurisdiction, then it must also exist now.[91]

The vestiges of the Madisonian Compromise have carried over to modern discussions about the scope of the federal commandeering power. In *Printz*, for example, Justice Scalia rehearsed many of the arguments associated with constitutional structure and early congressional practice to support his assertion that federal commandeering of state judiciaries could be easily distinguished from federal commandeering of state legislatures or executives.[92] But the Madisonian Compromise grew out of uncertainty that has been resolved definitively for more than a century.[93] That

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[90] Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 47 (1995) (since federal courts are merely optional under the Constitution, "there was a possibility that state courts would be the exclusive adjudicators of federal questions and enforcers of federal rights in the first instance.").

[91] *See* Martin v. Hunter's Lessee, 14 U.S. 304, 339 (1816) (noting that state courts must logically hear federal claims if Congress decided not to constitute lower federal courts and the Supreme Court would have only appellate jurisdiction in the case); Lawrence Gene Sager, *Constitutional Limitations on Congress's Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17, 21–22 (1981) (acknowledging Congress's power to strip jurisdiction from federal tribunals, but noting the sometimes serious constitutional considerations that limit its discretion in jurisdiction stripping).

[92] Printz v. United States, 521 U.S. 898, 907-08 (1997). Justice Scalia's constitutional argument emphasized the "state judges" language in the Supremacy Clause. *Id.* at 907.

[93] Indeed, the Framers themselves anticipated and welcomed the eventual resolution of their misgivings embodied in the Madisonian Compromise. *See* THE FEDERALIST No. 38 (James Madison) (Jacob E. Cooke ed., 1961) (urging that the answers to the errors inherent in the Constitution "will not be ascertained until an actual trial shall have pointed them out"); THE FEDERALIST No. 82 (Alexander Hamilton) (Jacob

resolution may alter the way that we should think about the interaction of state and federal courts today. Put differently, it may be true that the system of lower federal courts took time to develop, and that Congress did not confer general federal question jurisdiction on those lower courts until 1875. But it is also true that the system of lower federal courts is now firmly established, that their jurisdiction is stable, and that it is difficult to imagine that that state of affairs will change anytime soon.[94]

The existence of a developed and secure system of federal courts has implications for the effects produced by the treatment (or mistreatment) of federal claims by state courts. In the nineteenth century, a decision by a state court to refuse a case rooted in federal law would seriously undermine a plaintiff's ability to pursue the federal claim. A plaintiff in that position might have been able to take the claim to the courts of a different state that was more amenable to federal cases. But territorial restrictions on personal jurisdiction would have made that a difficult proposition in many cases,[95] and even where such a move was possible, the burden imposed on the plaintiff would often be severe.[96] In terms of practical effect, then, a state court's refusal to entertain a federal claim would often be the equivalent of a decision to extinguish the claim altogether. Today, by contrast, the same refusal has far less pernicious consequences. If a federal claim is refused by a state court, a plaintiff may take the action to federal court, and the subject

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E. Cooke ed., 1961) (observing that "'[t]is time only that can mature and perfect so compound a system").

[94] Modern jurisdiction-stripping bills do not challenge the federal courts' broad and entrenched federal-question jurisdiction. Howard M. Wasserman, *Jurisdiction, Merits, and Non-Extant Rights*, 56 U. KAN. L. REV. 227, 229 (2008).

[95] Broad minimum-contacts doctrines, established later in *International Shoe*, would not have been available to the litigious nineteenth-century American. *See generally* Pennoyer v. Neff, 95 U.S. 714 (1877) (requiring consent, domicile, or service of process in the forum state to gain personal jurisdiction over a defendant).

[96] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 124 (Max Farrand ed., 1937).

matter jurisdiction provided by 28 U.S.C. § 1331, together with the personal jurisdiction provided by Rule 4(k)(1)(A), all but ensures that the doors of the federal court will be open.[97] To be sure, the move from state to federal court may carry with it some inconvenience.[98] But it is almost inconceivable that a non-prejudicial dismissal of a federal claim by a state court would have the practical effect of rendering the federal claim unenforceable.

2. Horizontal Cases

Perhaps the most well-known formulation of the public policy exception in choice of law comes from then-Judge Cardozo in *Loucks v. Standard Oil Co.*[99] Loucks was from New York, but was killed while traveling in Massachusetts.[100] His relatives brought an action in New York seeking recovery, and argued that a Massachusetts statute limiting recovery should not be applied.[101] Cardozo conceded that as the place of injury, the law of

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[97] *See* 28 U.S.C. § 1331 (2006); FED. R. CIV. P. 4(k)(1)(A). If for some reason the plaintiff is determined to remain in state court, then the more flexible personal jurisdiction doctrines under the regime initiated by *International Shoe* make it more likely that another state court could acquire personal jurisdiction over the defendant and decide the federal claim. *See, e.g.*, Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292–94 (1980); Asahi Metal Indus. Co., Ltd. v. Super. Ct., 480 U.S. 102, 112 (1987). For further discussion of the role of developments in the domain of personal jurisdiction, see *infra* notes 110–111 and accompanying text.

[98] These inconveniences primarily involve the burden of refiling, but may include increased burdens on plaintiffs in the areas of pleading and summary judgment. See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555–56 (2007); Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949–50 (2009); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587–88 (1986); Bias v. Advantage Intern., Inc., 905 F.2d 1558, 1561 (D.C. Cir. 1990). However, they do not categorically rule out a plaintiff's claim, and every day plaintiffs meet and overcome these obstacles in asserting rights in federal courts.

[99] 120 N.E. 198 (1918).

[100] *Id.*

[101] *Id.*

Massachusetts would normally be selected, and he acknowledged that Massachusetts law differed from that of New York, which had no cap on damages.[102] But he then concluded that it would nevertheless be inappropriate to refuse the application of the Massachusetts law on grounds of public policy.[103] In his words, such a refusal should occur only when the application of foreign law "would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."[104]

Loucks is notable in part because it articulates an exception that is narrow and would be triggered only rarely.[105] Mere disagreements with the policy choices made by sister states are insufficient under his formulation. But it is notable also because it frames the exception explicitly as one that implicates the court's jurisdiction.[106] That is, a finding that a foreign law violates the public policy of the forum state would result in a dismissal of the case on jurisdictional grounds. To Cardozo, the choice in *Loucks* was to apply Massachusetts law or to decline the case altogether.

At the time that *Loucks* was decided, the jurisdictional nature of the public policy exception meant that its invocation would often have serious implications for the status of the claim. Obviously, dismissal would mean that the claim could not be brought in the forum state. But due to the territorial nature of the personal jurisdiction doctrine,[107] it could also mean that the claim could not be brought at all. *Loucks* is illustrative here. The plaintiffs, administrators of Loucks's estate, were undoubtedly attracted to New York as

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[102] *Id.* at 201.

[103] *Id.* at 202.

[104] *Loucks*, 120 N.E. at 202.

[105] Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1972–73 (1997).

[106] *Loucks*, 120 N.E. at 200 ("Even though the statute is not penal, it differs from our own. We must determine whether the difference is a sufficient reason for declining jurisdiction.")

[107] *See supra* note 95.

a convenient forum for the suit. But New York was a proper forum only because the defendant, Standard Oil, was also from New York and so could be served there. Were the New York courts to refuse to hear the claim, the resulting dismissal would have been without prejudice, leaving the plaintiffs free to take the claim to a state willing to apply the Massachusetts law. Massachusetts, of course, would be the most likely candidate, but acquiring personal jurisdiction over the defendant there may have presented a challenge. Perhaps Massachusetts would have been willing to bend *Pennoyer's* "presence" or "consent" requirements in an effort to reach Standard Oil,[108] but it is at least conceivable that jurisdiction would be found lacking.

Indeed, in cases involving individuals rather than corporations, it is even easier to imagine that the state of the defendant's residence would be the only available forum from the standpoint of personal jurisdiction. To use an example familiar to conflicts scholars, consider a suit by an injured West Virginia passenger against a West Virginia driver stemming from an automobile accident occurring in Indiana. Indiana permits recoveries by guests, but West Virginia does not. Under the First Restatement, Indiana law should apply as the place of injury, but West Virginia might conclude that permitting recovery would violate the public policy of the forum.[109] If the court dismissed jurisdictionally, it would essentially be delivering the message that although West Virginia would play no part, Indiana remains free to enforce its own law and vindicate the claim. But unless the defendant returned to Indiana (and based on how the first trip went, return might be unlikely), that resolution provides

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[108] *See* Hess v. Pawloski, 274 U.S. 352, 356 (1927) (allowing implied consent in an automobile accident case to suffice under *Pennoyer* and Fourteenth-Amendment due process).

[109] This conclusion would not appear to be consistent with Judge Cardozo's formulation of a narrow public policy exception in *Loucks*. But for an example of a West Virginia court reaching such a conclusion on the basis of the reverse legal situation, see Paul v. Nat'l Life, 352 S.E.2d 550, 556 (W. Va. 1986) (refusing to apply an Indiana guest statute on the basis of public policy).

little relief to the injured plaintiff. In terms of practical effect, the public policy dismissal is a death knell. The plaintiff would be released to take the claim elsewhere, but that is cold comfort when there is nowhere else to go.

Another way of putting this point is that the limited scope of the prevailing personal jurisdiction doctrine in the early twentieth century meant that there was a very practical need for states to be willing to enforce claims based on the laws of other states. Causes of action needed to be transitory because they would otherwise not be subject to enforcement in many cases. This strong practical need has diminished over time, however. With the advent of the modern "minimum contacts" approach to personal jurisdiction,[110] the case where a cause of action rejected on public policy grounds could not be re-filed in the state whose law was refused is increasingly rare.[111] Both cases described above demonstrate the point. In *Loucks*, the decision by Standard Oil to send an employee into Massachusetts would almost be certain to create a basis for the exercise of personal jurisdiction there. And in the hypothetical guest statute case, the defendant's vehicular misadventures in the state of Indiana would certainly be enough to permit the plaintiff's suit to be re-filed there.

B. Rethinking Discrimination

Since at least 1934, the Supreme Court has consistently found that a state may not discriminate against federal claims, regardless of whether the discrimination

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[110] *See supra* note 97.

[111] Rare, but perhaps not non-existent. To the contrary, there still may from time to time be situations where a dismissal by one state would threaten the plaintiff's ability to bring the action. *See, e.g.*, Shaffer v. Heitner, 433 U.S. 186, 215 (1977); Kulko v. Superior Court, 436 U.S. 84, 98 (1978); some cases involving a forum selection clause; renvoi situations (where each state would choose the other but invoke public policy exception).

takes a substantive, procedural, or jurisdictional form.[112] In *Haywood v. Drown*, Justice Thomas wrote a lengthy solo dissent arguing that this strong antidiscrimination principle is misguided.[113] According to Thomas, two separate areas of the Constitution—the definition of federal judicial power in Article III and the Supremacy Clause in Article VI—have been relied on to establish the rule applied in cases like *McKnett, Testa,* and *Haywood* itself.[114] But properly understood, neither upsets the fundamental sovereign power of each state to define for itself which cases its courts will hear and decide.[115] To the extent that states introduce rules in the form of a jurisdictional bar, "it is the end of the matter as far as the Constitution is concerned."[116] And that is true even if the trigger for the jurisdictional bar is the federal nature of the claim.

Begin then with Article III. For Thomas, the Madisonian Compromise concerns the creation of lower federal courts, and does not affect the scope of state power.[117] The power to ordain and establish lower federal courts does not imply that state courts are automatically incompetent to decide claims arising under federal law, and the decisions confirming the presumption of concurrent jurisdiction correctly reflect that understanding.[118] But it is just as true that the power to ordain and establish lower federal courts does not imply that state courts are automatically competent to decide claims arising under federal law. That is so for a simple reason–state courts are not lower federal courts, and

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[112] *See generally* McKnett v. St. Louis & S.F. Ry. Co., 292 U.S. 230 (overturning an Alabama procedural rule that deprived its courts of jurisdiction over claims arising in other jurisdictions).

[113] 129 S. Ct. 2108, 2131 (Thomas, J., dissenting) ("To read the Supremacy Clause to include an anti-discrimination principle undermines the compromise that shaped Article III and contradicts the original understanding of the Constitution.")

[114] *Id.* at 2118.

[115] *Id.* at 2122, 2126.

[116] *Id.* at 2122.

[117] *Id.* at 2120.

[118] *See, e.g.*, Claflin v. Houseman, 90 U.S. 130, 136 (1876); Tafflin v. Levitt, 493 U.S. 455, 458 (1990).

the decision to exercise (or not) the powers created under Article III therefore do not reach them. In short, the Madisonian Compromise grants to Congress power to develop the lower federal courts, but it leaves in place the existing right of states to develop their own courts.[119] Because that latter power includes the power to close courts to certain claims, "States have unfettered authority to determine whether their local courts may entertain a federal cause of action."[120]

Nor is this understanding inconsistent with the Supremacy Clause. The Supremacy Clause requires that federal law be applied as a rule of decision when courts decide federal claims.[121] That is, it provides the authority for preemption and serves to "disable state laws that are substantively inconsistent with federal law."[122] But the Supremacy Clause says nothing about when courts must hear federal claims.[123] In essence, it is a choice of law rule rather than a jurisdictional one. This does not mean that any non-prejudicial dismissal of a federal claim is permissible, however. Once a state extends its normal jurisdiction to a federal claim, the state is bound to exercise the jurisdiction it provided. A case-specific decision not to hear the federal claim amounts to a disagreement with the federal law, and that kind of decision violates supremacy principles.[124] But so long as a state declines a federal claim based on its own jurisdictional rules, the supremacy of federal law is not implicated.[125] Whether the jurisdictional

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[119] Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 821 (1824); Stearns v. United States, 22 F. Cas. 1188, 1192 (1835); Mitchell v. Great Works Milling & Mfg. Co., 17 F. Cas. 496, 499 (1843); 1 J. KENT, COMMENTARIES ON AMERICAN LAW 374–375 (1826).

[120] *Haywood*, 129 S. Ct. at 2122 (Thomas, J., dissenting).

[121] Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 144, 178 (1995)

[122] *Haywood*, 129 S. Ct. at 2124 (Thomas, J., dissenting).

[123] *Id.* at 2123.

[124] Mondou v. New York, N.H. & H.R. Co., 223 U.S. 1, 55 (1912); Testa v. Katt, 330 U.S. 386, 393 (1947).

[125] There is still a significant amount of theoretical difficulty in distinguishing jurisdictional rules of the *Douglas* variety, Douglas v. New

rule singles out federal law or discriminates with respect to federal claims is beside the point.[126]

According to Thomas, this understanding of state power changed when the Supreme Court decided *McKnett*.[127] Unlike *Mondou*, the state court in *McKnett* did not have subject matter jurisdiction to hear FELA claims.[128] On Thomas's understanding, that fact alone should have determined the case. "Alabama had exercised its sovereign right to establish the subject-matter jurisdiction of its courts," and "that legislative judgment should have been upheld."[129] Instead, the Court imposed an antidiscrimination principle and struck down the jurisdictional limitation because it was "based solely upon the source of law sought to be enforced."[130] After *McKnett*, the idea that "[a] state may not discriminate against rights arising under federal laws" became standard fare in cases involving federal claims in state courts, even in cases where it was not strictly necessary.[131] Ultimately, that idea played a central role in overruling the New York jurisdictional rule in *Haywood*.[132] Preserving New York's sovereign power—as understood by Thomas—would have required that the jurisdictional bar be

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York, N.H. & H.R. Co., 279 U.S. 377, 387–88 (1929), and discretionary rules such as the one rejected in *Mondou*. Thomas seems to appreciate the importance of that conceptual task, arguing extensively that a rule should be respected as jurisdictional when it "operate[s] jurisidictionally." *Haywood*, 129 S. Ct. at 2134–36 (Thomas, J., dissenting) (emphasis omitted).

[126] This is a point of a distinction between the Supremacy and Full Faith and Credit Clauses. As Thomas notes, the "textual prohibition on discrimination" in the Full Faith and Credit Clause actively prohibits states from discriminating against sister-state claims. *Haywood*, 129 S. Ct. at 2125 n.5 (Thomas, J., dissenting). However, the Supremacy Clause simultaneously allows jurisdictional discrimination while it prohibits interference with proper disposition according to federal law once jurisdiction is accepted.

[127] *McKnett v. St. Louis & S.F. Ry. Co.,* 292 U.S. 230 (1934).

[128] *Id.* at 230.

[129] *Haywood*, 129 S. Ct. at 2128 (Thomas, J., dissenting).

[130] *McKnett*, 292 U.S. at 233–34.

[131] *Id.* at 234; see *Testa, Howlett, Johnson v. Fankell*.

[132] *See Haywood*, 129 S. Ct. at 2117.

upheld, even if it were motivated by hostility to the policies embedded in federal law.

Toward the end of his *Haywood* dissent, Thomas also suggests a different way of thinking about procedural rules. Unlike jurisdictional rules, the Supremacy Clause does provide authority for federally created procedures to preempt state procedures.[133] Once a state decides to open its doors to hear a federal claim, it must do so in a way that honors the supremacy of federal law. But procedural preemption should not be triggered merely because the use of a state procedure would impose a burden on the exercise of a federal right.[134] Thus, the line of cases including *Felder* that turn on the degree of interference with federal claims should be eliminated.[135] In its place, the Court should employ an analysis that focuses on whether a federal procedure was created to further particular substantive federal rights. Such procedures should carry over from federal court to state court if the federal right to which they are attached is implicated in state court. But procedures lacking a specific connection to substantive federal rights or a specific direction regarding their applicability in state courts should be understood as applicable only in the federal courts.[136] A decision to infer

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[133] *See, e.g.*, Brown v. W. Ry., 338 U.S. 294, 298–99 (1949); Dice v. Akron, Canton & Youngstown R.R., 342 U.S. 359, 363 (1952); *see also* Martin H. Redish & Steven G. Sklaver, *Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism*, 32 IND. L. REV. 71, 105–108 (1998) (suggesting a strong presumption in favor federal procedure, except where such procedure would require a "significant attenuation in the structure of the state judicial system").

[134] *Haywood*, 129 S. Ct.. at 2133 (Thomas, J., dissenting) ("[T]he Supremacy Clause supplies this Court with no authority to pre-empt a state procedural law merely because it 'burdens the exercise' of a federal right in state court.").

[135] *See* Felder v. Casey, 487 U.S. 131, 138–141 (1988).

[136] Vicki C. Jackson, Printz *and* Testa*: The Infrastructure of Federal Supremacy*, 32 IND. L. REV. 111, 129–30 (1998) (arguing that federal procedures "bound up with" the federal right may apply, but that this does not necessitate that Congress may impose any procedure on the states, which would be an impermissible application of Congress's Necessary and Proper power to the states).

preemption with respect to those procedures would be "illegitimate—and unconstitutional."[137]

In sum, Thomas's view of vertical judicial federalism largely de-emphasizes discrimination in favor of a formalistic focus on the nature of the rules in question. When a federal claim is filed in state court, the ability of the state court to apply its rules rather than federal rules depends on whether the rule in question is substantive, procedural, or jurisdictional. If the rule is substantive, the federal rule must be applied, at least in cases where the federal law preempts competing state laws. If the rule is procedural, then a state should be free to apply its own procedures unless Congress provides a specific and valid direction that a federally created procedure must be applied. The fact that state and federal procedures differ, or that the application of the state procedure will burden the federal right, is not enough. Finally, if the state rule is jurisdictional, the state rule may always be applied.

III. DEVELOPING THE NEW MODEL

The previous Part questioned the factors that motivate the Supreme Court's current approach to questions of judicial federalism. This Part asks what factors should be used instead. Taking cues from Justice Thomas's dissent in *Haywood* and from earlier decisions, I suggest that the Court should focus exclusively on prejudice. This represents a shift in two key respects. First, discrimination is de-emphasized and tolerated. It is not automatically suspect for a state to treat federal or sister state claims differently from local claims. Second, interference is assessed in light of the effect of the court's action on the continuing viability of the claim. Dismissals need not meaningfully interfere if they are non-prejudicial and if an alternative forum is available.

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[137] *Haywood*, 129 S. Ct. at 2133 (Thomas, J., dissenting) (quoting Wyeth v. Levine, 555 U.S. 555, 604 (2009) (Thomas, J., concurring in the judgment)); also need to discuss AT&T v. Concepcion here.

A. Vertical Cases

1. Jurisdiction

When a state declines to hear a federal claim based on a jurisdictional rule, the dismissal will usually come early in the litigation process and be non-prejudicial in nature. The combination of those two factors suggests that dismissals of this sort will result in only mild interference with the underlying federal rights. Of course, any dismissal is disruptive at some level. But so long as the dismissal does not infringe on the ability of the parties to pursue the claim elsewhere, that disruption should not be considered to rise to the level of constitutional concern. And this should be true even if the jurisdictional rule applies only to, or primarily to, federal claims.

Previous decisions involving vertical judicial federalism have not been sensitive to the practical effect of dismissal on the federal rights involved. Instead, the Court's approach has been formalistic, and has viewed any refusal to hear a federal claim as an impermissible form of interference with federal law.[138] But Justice Thomas was onto something in *Haywood* when he noted that "because the dismissal . . . is for lack of subject-matter jurisdiction, it has no preclusive effect on claims refiled in federal court and thus does not alter the substance of the federal claim."[139] This goes beyond a mere claim that under an original understanding of the

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[138] *See supra* notes 23–29 and accompanying text. In this sense, these cases are kindred spirits with other recent decisions by the Court that have been characterized as formalistic. *See, e.g.,* Stern v. Marshall, 131 S.Ct. 2594 (2011); Erwin Chemerinsky, *Formalism Without a Foundation: Stern v. Marshall*, __ SUP. CT. REV. __ (forthcoming 2012); Free Enterprise Fund v. Public Co. Accounting Oversight Bd., 130 S. Ct. 3138 (2010); Kent Barnett, *Avoiding Independent Agency Armageddon*, 87 NOTRE DAME L. REV. __ (forthcoming 2012)(characterizing *Free Enterprise Fund* as a "foray into formalism").

[139] *Haywood*, 129 S. Ct. at 2132 (Thomas, J., dissenting) (citations omitted); *see also* Felder v. Casey, 487 U.S. 131, 160 (1988) (O'Connor, J., dissenting) ("Every plaintiff has the option of proceeding in federal court, and the Wisconsin statute has not the slightest effect on that right.").

Supremacy Clause, the definition of jurisdiction remains within the sovereign power of the states. Instead, it is a functional argument about the extent of interference that results from state action with respect to federal claims.

Under this sort of functional inquiry, whether prejudice attaches to a state court dismissal becomes crucially important. If a state chooses to structure a jurisdictional dismissal as a final decision on the merits, then the dismissal has dramatic effects for the ability of the parties to pursue the claim elsewhere. This is a decision that cannot be countenanced under the Supremacy Clause. Even though the dismissal is jurisdictional in a formal sense, the result demonstrates hostility to federal law. In essence, the state is applying some other body of law to the merits of the claim—namely, the state's jurisdictional law that becomes a basis for the prejudicial action. To apply some other law besides federal law to determine the merits of a federal claim is impermissible under any theory of vertical judicial federalism.

But when a state court dismisses a federal claim without prejudice, as in *Haywood*, the dismissal "does not alter the substance of the federal claim" because a federal forum will almost always be available to hear the claim after dismissal.[140] This is true for two reasons. First, as a matter of personal jurisdiction, the federal courts track the personal jurisdiction of the states in which they sit.[141] Therefore, if personal jurisdiction was proper in the state court that issues the dismissal, it will also be proper in a federal court within the same state. Second, as a matter of subject matter jurisdiction, the dismissal of a claim that raises a federal question will permit re-filing in federal court under the jurisdictional grant in 28 U.S.C. § 1331.[142] In *Haywood*, Justice Thomas rightly emphasized that "Congress has created inferior federal courts that have the power to adjudicate all § 1983 claims" as part of his conclusion that

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[140] *Haywood*, 129 S. Ct. at 2132.

[141] FED. R. CIV. P. 4(k)(1)(A).

[142] 28 U.S.C. § 1331 (2006).

the "substance of the federal claim" would not be altered by a state court dismissal.[143] Because of concurrent personal jurisdiction and the availability of general federal question jurisdiction, non-prejudicial dismissals by a state court will generally affect only the location of the suit, but not the substance of the claim. While the jurisdictional rule might reflect hostility to the federal claim, it does not result in hostile action with respect to federal law.[144]

That may not always be true, however. In limited situations, a dismissal that is non-prejudicial in form may nevertheless result in meaningful interference. One example of this is when federal law is presented as a defense to a state-law claim. Clearly, if the state court simply ignored the federal defense or refused to apply it, the result would be constitutionally problematic.[145] But could the state court decline jurisdiction over the entire claim based on the presence of the federal defense? The answer here should be no, for the reason that such a dismissal would seriously impair the status of the suit. The parties would not be permitted to re-file the case in federal court because the presence of the federal defense would not be sufficient to trigger the availability of federal jurisdiction under a basic application of the principle established in *Mottley*.[146] A second, and far less common, example would occur if Congress created exclusive jurisdiction over federal claims in the state courts. In that situation, a state court dismissal, even if non-prejudicial in form, would be prejudicial in effect, and that effect would be enough to trigger constitutional concerns. In a case decided just this term, Justice Ginsburg

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[143] *Haywood*, 129 S. Ct. at 2132.

[144] *See id.* at 2131 ("Resolving a federal claim with preclusive effect based on a state-law defense is far different from simply closing the door of the state courthouse to that federal claim.").

[145] Bradford Elec. Light Co. v. Clapper, 286 U.S. 145, 160 (1932).

[146] Louisville & N.R. Co. v. Mottley, 211 U.S. 149, 152 (1908). Perhaps it may be argued that this result would not offend any federal interest because a dismissal would not grant any recovery in the face of a potential federal defense. In other words, it is the plaintiff here, who is asserting state rights, whose claim is hindered by the state court's decision.

emphasized that congressional intent to divest the federal courts of jurisdiction must be clear, and that an affirmative grant of jurisdiction to the state courts is not sufficient.[147] While conceptually interesting, this is an empty set of cases, and is likely to remain so.

2. Procedure

The current Supreme Court doctrine recognizes that the application of state procedures may in certain circumstances result in interference with federal interests.[148] In cases where such interference would result, the Court has concluded that the federal procedures are supreme and that state courts have an obligation to apply them. There are essentially two categories of cases here. First, the federal law might specifically define procedures that are associated with substantive federal rights.[149] Second, the federal law might say nothing about the procedures that should be applied, but the Court may nevertheless conclude that the regularly applicable federal procedures are in some sense

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[147] *See* Mims v. Arrow Fin. Servs., LLC, __ S.Ct. __, 2012 WL 125429 (Jan. 18, 2012).

[148] *See supra* Part I.A.

[149] *See, e.g.*, Cent. Vt. Ry. v. White, 238 U.S. 507, 512 (1915) (requiring defendants to carry the burden of proof for contributory negligence under FELA, contrary to the Vermont rule); Dice v. Akron, Canton & Youngstown R.R., 342 U.S. 359, 363 (1952) (finding that the "right to trial by jury is too substantial a part of the rights accorded by [FELA] to permit it to be classified as a mere 'local rule of procedure' for denial [by the states]"). As Anthony Bellia has noted, these procedures are not explicitly contained in FELA but have been implied as a matter of statutory construction. Anthony J. Bellia, Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947, 959 (2001). Thus the line between express, Congressional-mandated procedure accompanying a federal right and procedures intertwined with federal rights may be a bit blurry. In any case, express federal procedures would likely preempt state procedures without much fuss. *See* Kevin M. Clermont, *Reverse-Erie*, 82 NOTRE DAME L. REV. 1, 20 (2006) (noting the clear preemption where Congress "expressly…ma[kes] federal law applicable in state court").

essential to the vindication of the federal substantive interest.[150]

There is a similarity here to the standard *Erie* context, where federal courts are directed by the Rules of Decision Act[151] to apply state rules of decision, which can sometimes include state procedural rules that are related to the definition of state substantive rights.[152] But of course, under *Hanna* federal procedural rules supported by the Rules Enabling Act[153] may be applied if found to be on point and valid,[154] even when the result is to displace a state rule that is at least partially substantive in nature.[155] And state procedural rules that are not clearly substantive in nature, but that may nevertheless affect the outcome of litigation, may in certain instances be disregarded in favor of federal rules if the competing federal interest in defining its own

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[150] *See, e.g.*, Brown v. W. Ry. of Ala., 338 U.S. 294, 298–99 (1949) (requiring states to apply more liberal federal pleading standards, as opposed to stricter local rules, in FELA actions); *but see* Johnson v. Fankell, 520 U.S. 911, 915 (1997) (refusing to require states to allow interlocutory appeals upon denial of qualified immunity under §1983). Even the absence of a certain defense in federal court can lead to disallowing such a defense in a state court hearing a federal claim. Howlett v. Rose, 496 U.S. 356 (1990) (refusing to allow a Florida school board to assert a state sovereign immunity defense).

In a related vein, a state law may act as an obstacle to vindication of the federal right, regardless of the existence of a regularly applicable, conflicting federal procedure. *See, e.g.*, Russell v. CSX Trans., 689 So.2d 1354, 1358 (La. 1997) (finding state *forum non conveniens* law discriminatory in a FELA case); Bunch v. Robinson, 712 A.2d 585, 588–89 (Md. App. 1998) (finding state common-law immunity defense discriminatory in an FLSA case), *rev'd on other grounds*, 788 A.2d 636 (Md. 2002).

[151] 28 U.S.C. § 1652 (2006).

[152] Byrd v. Blue Ridge Rural Elec. Co-op, Inc., 356 U.S. 525, 535 (1958) (concluding that federal courts must apply state rules if those rules are "bound up" with the state-created substantive right).

[153] 28 U.S.C. § 2072 (2006).

[154] *See* Hanna v. Plumer, 380 U.S. 460, 464 (1965).

[155] *See, e.g.,* Burlington Northern R. Co. v. Woods, 480 U.S. 1, 7 (1987) (overturning a state mandatory affirmance penalty statute in favor of Federal Rule of Civil Procedure 38).

procedures is sufficiently great.[156] States have no parallel mechanisms that would permit them to deny the enforcement of federal procedures that the Supreme Court defines as essential to the vindication of federal rights.[157] As a result, the burdens imposed by the reverse *Erie* cases are potentially much greater. When combined with the cases that require state courts to take jurisdiction over federal claims, a state court may find itself forced to hear a federal claim and to apply burdensome federal procedures.

In *Haywood*, Justice Thomas proposed to reduce these burdens by requiring express preemption of state procedures before a federal procedure would become binding in state court—in other words, by eliminating the second category of cases described above. I am generally sympathetic to the impulse to acknowledge the burdens that may be imposed by federal procedures that attend a federal claim. But the model that he proposes presents thorny characterization problems because the scope of the state's power is directly sensitive to whether a particular rule is jurisdictional, procedural, or substantive.[158]

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[156] *See* Gasperini v. Ctr. For Humanities, Inc., 518 U.S. 415, 438 (1996).

[157] Not only do states lack any parallel refusal power, it would not be overstating the obvious to note that the Supremacy Clause forces federal procedure into the state courts far more pervasively than state procedure makes its way into federal courts via *Erie* analysis. Kevin M. Clermont, *Reverse-Erie*, 82 NOTRE DAME L. REV. 1, 40 (2006).

[158] This question is not easy to answer, and is generally associated with unforeseen baggage. *See* Scott Dodson, *In Search of Removal Jurisdiction*, 102 NW. U. L. REV. 55, 66 (2008) (creating a four-factor analysis for determining whether a rule is procedural or jurisdictional); Howard M. Wasserman, *Jurisdiction, Merits, and Procedure: Thoughts on a Trichotomy*, 102 NW. U. L. REV. 1547, 1553 (2008) (noting the importance of characterization as a merits rule, which cannot be applied until jurisdictional or procedural questions are resolved); Karen Petroski, *Statutory Genres: Substance, Procedure, Jurisdiction* at 67 (2012) (draft under submission) (concluding that the jurisdictional-characterization doctrines are better developed and more function-oriented than the substance-procedure dichotomy of *Erie* fame); Bowles v. Russell, 551 U.S. 205, 210 (2007) (describing some of the consequences of characterization as either a "claims-processing" or "jurisdictional" rule);

A different way to reduce these burdens would be to expand the state court's ability to refuse jurisdiction over a federal claim when that claim carries with it a set of federal procedures that the states cannot easily implement.[159] This would equalize the treatment of dismissals rooted in jurisdiction and procedure. As with the pure jurisdictional decisions discussed in the previous section, the state court must ensure that a federal court is available to hear the claim once dismissed, and must structure the dismissal so that it produces no prejudice to the federal rights involved. Moreover, the state court should ensure that any dismissal occurs early in the litigation process. Unlike questions relating to subject matter jurisdiction, procedural issues may not naturally arise in the course of litigation until significant time and resources have been expended. At some point, the disruption and delay stemming from a dismissal based on the difficulty of applying federal procedural rules may be effectively prejudicial to the legal rights of the parties. State courts should therefore consider the procedural difficulties presented by the presence of a federal claim when the case is filed, and should reach decisions relating to abstention promptly.

B. Horizontal Cases

1. Dismissals

As discussed in Part II, the public policy exception was traditionally conceived as both narrow and jurisdictional. Thus understood, it is not a part of the choice of law process. That is, public policy is not a factor that contributes to the

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Arbaugh v. Y&H Corp., 546 U.S. 500, 514–15 (2006) (concluding that Congress could have, but did not, characterize the employee-numerosity requirement of Title VII as jurisdictional).

[159] Wendy Parmet makes a similar argument when she points out that Congressional "federalization" of state procedure can carry with it "heavy burdens" for state courts. Wendy E. Parmet, *Stealth Preemption: The Proposed Federalization of State Court Procedures*, 44 VILLANOVA L. REV. 1, 15 (1999).

choice of a particular law to be applied, but is considered only after that initial choice had been made. The question asked in cases like *Loucks* is whether the law selected through the traditional choice of law process should be enforced by the forum. But precisely because the selection has already occurred, the potential answers to that question are limited. A court may decide to apply the law, or it may decide not to. Even in that latter circumstance, the court's determination of what law should be applied to the claim is unaffected. Instead, the conclusion is that the claim is still governed by the selected law, but that the forum court should not or cannot be the one to apply it.

Understood this way, it is difficult to sustain a distinction between the public policy exception and rules like those at issue in *Hughes*. The difference that appears implicit in the way that the contexts have been treated is that *Hughes* involves a post-choice of law decision to refuse enforcement of a sister-state law, while the public policy exception operates within the choice of law process itself. Because the Court is unwilling to delve into the particulars of a state's choice of law methodology, the public policy exception escapes scrutiny.[160] But the public policy analysis performed in cases like *Loucks* takes place after the traditional jurisdiction-selection has been completed, and it is therefore an error to treat it as part of the selection itself. If the exception is triggered, it operates to override the choice of law produced by the system that the state has adopted, and it does so precisely based on a public policy in the state that demands that result. In that sense, it is no different from the rule at issue in *Hughes*, which was read to create a public policy that required the refusal of a sister state law.[161]

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[160] Louise Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. CHI. L. REV. 440, 448 (1982) (arguing that the Court's choice of law analysis in horizontal contexts, such as *Allstate Ins. Co. v. Hague*, requires only a "minimum of fairness and reasonableness" which "will always be assured by a process that weeds out the arbitrary and unreasonable").

[161] Of course, the rule at issue in *Hughes* was statutory and categorical, while the public policy exception is invoked by judges on a case-by-case basis. It is difficult to see why the distinction in terms of the

From the standpoint of discrimination, both results are equally offensive.[162]

What does distinguish *Loucks* and *Hughes* is the nature of the resulting dismissal. To be clear, *Loucks* itself did not result in a dismissal at all. But the formulation developed by Cardozo would result in a jurisdictional dismissal if the court had concluded that the foreign law violated local public policy.[163] On the other hand, the Wisconsin court in *Hughes* not only refused to apply the competing law of Illinois, but read the statute to require a dismissal of the claim on the merits. The public policy dismissal is disruptive and inconvenient, to be sure. But no prejudicial action is taken, and the plaintiff may seek an alternative venue in which to press the claim. Moreover, because of the increased flexibility in the law of personal jurisdiction, an alternative venue is almost certainly available.[164] In *Hughes*, on the other hand, the dismissal is prejudicial, and efforts to revive the claim in an alternative

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source of the rule should matter. In other contexts, the Court has rejected attempts to introduce distinctions based on whether a state's action takes the form of statute or common-law activity. But the difference between a categorical rule and a discretionary one is relevant. *See* Scott Dodson, *Mandatory Rules*, 61 STAN. L. REV. 1, 9 (2008) (arguing that the real question in the jurisdictional characterization inquiry should be whether the rule is mandatory because such a categorization carries with it important litigation consequences).

[162] This is Larry Kramer's point, and to the extent his argument is based on a claim that both are discriminatory, I agree. *See* Larry Kramer, Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception, 106 YALE L.J. 1965, 1998 (1997).

[163] *See, e.g.*, Ciampittiello v. Campitello, 54 A.2d 669, 671 (Conn. 1947) (finding in a case involving a horse-race betting contract that "the claim here presented, although valid under the law of another jurisdiction, contravenes the ancient and deep-rooted public policy of this state and therefore cannot be enforced in our courts"); Republic of Iraq v. First Nat'l City Bank, 241 F. Supp. 567, 575 (S.D.N.Y. 1965) (dismissing a foreign plaintiff's claim to recover confiscated goods as offensive to New York public policy). Note that the decision in *First National* might be more prejudicial than *Ciampittiello*—the foreign plaintiff would likely be just as unsuccessful in trying to obtain and then enforce a foreign judgment in New York.

[164] *See supra* notes 97, 110–111 and accompanying text.

forum would be unsuccessful.[165] From the standpoint of interference, then, the two cases are very different.

In *Hughes* itself, Justice Black noted but did not emphasize the prejudicial nature of the dismissal.[166] But that fact should properly be viewed as central to the result. To dismiss a claim on the merits because it is based on the law of a sister state is a result that is fundamentally inconsistent with any concept of full faith and credit, even one focused primarily on undue interference. The prejudice that attaches to the resulting judgment creates a virtually insurmountable barrier to vindicating the claim. Had the rule in *Hughes* been applied to refuse the claim altogether, however, the analysis should be different. In that case, the legitimate interests of the state in structuring the way that it devotes resources to claims pursued within its court system are implicated. These are the procedural interests urged by Justice Frankfurter in his *Hughes* dissent.[167] But even if Frankfurter's discussion of the state's interests is persuasive, his conclusion is misguided. A state should be permitted to further its procedural interests in structuring its judicial processes only when doing so does not significantly interfere with the substantive rights of a sister state. A prejudicial dismissal never passes that test; a non-prejudicial dismissal might.[168]

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[165] An alternative forum would not have power to deny the Wisconsin judgment full faith and credit based on its assessment that the policy embedded in the judgment was undesirable. Baker v. Gen. Motors Corp., 522 U.S. 222, 233 (1998); Morris v. Jones, 329 U.S. 545, 551 (1947); Roche v. McDonald, 275 U.S. 449, 452 (1928).

[166] *See* Hughes v. Fetter, 341 U.S. 609, 613 (1951). Black's ignorance (genuine or intended) of the serious topic of prejudice is part of what makes the opinion difficult to understand.

[167] *See id.* at 618–19 (Frankfurter, J., dissenting).

[168] It is difficult to be categorical about the acceptability of a non-prejudicial dismissal because there may be circumstances where such a dismissal will have practical effects beyond necessitating a change of venue. Indeed, a court applying the exception in this manner should be required to think in those terms. *See infra* note 171 and accompanying text.

None of this means that the use of a public policy exception is always acceptable. Instead, the argument presented here supports only a narrower assertion that the public policy exception as articulated in *Loucks* is not categorically objectionable, at least not on an interference-based theory of full faith and credit. This distinction is important because the public policy exception is not always applied consistently with the *Loucks* formulation. Courts frequently use the exception not as a basis for dismissal, but as a basis for substituting and applying the forum law.[169] When it takes this form, the public policy exception is very close to *Hughes* because it results in a prejudicial action with respect to the claim. By definition, the forum law is different from the foreign law that would otherwise be selected through traditional choice of law rules, and the difference is a significant one.[170] To apply the forum law, and to ultimately decide the claim on the merits, thus displaces the foreign law entirely and precludes its enforcement elsewhere. The first step of the analysis under a prejudice-based theory of full faith and credit must be that if a state refuses to apply the law of a sister state on the grounds that it is foreign, the

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[169] *See, e.g.*, Farmers' & Merchs.' Nat'l Bank v. Anderson, 250 N.W. 214, 219–220 (Iowa 1933) (finding Texas law unjust but seemingly dismissing on the merits by concluding "the petition does not state a cause of action against the defendants"); Owen v. Owen, 444 N.W.2d 710, 713 (S.D. 1989) (applying South Dakota guest statute because Indiana's law was offensive forum public policy); *See* DeSantis v. Wackenhut Corp., 793 S.W.2d 670. 678–79 (Tex. 1990) (holding that Texas law applied to a contract dispute notwithstanding terms that expressly designated chose Florida law as governing). Paulsen and Sovern also recognized the harmful effects of widespread merits-level dismissals based on public policy, finding that few cases actually upheld the principle that public policy dismissals left other states, lacking the policy scruples of the forum, open for the plaintiff to pursue his claim. Monrad G. Paulsen & Michael I. Sovern, *"Public Policy" in the Conflict of Laws*, 56 COLUM. L. REV. 969, 1010–11 (1956).

[170] Courts invoke the exception on the basis of policy differences that are much less fundamental than those imagined by Cardozo in *Loucks*, *see, e.g.*, Ciampittiello v. Campitello, 54 A.2d 669, 671 (Conn. 1947) (barring a case involving horse-race betting), but to trigger the exception, the difference must be significant.

refusal to do so must take a non-prejudicial form. As with *Hughes*, this form of a public policy exception does not survive that first step.

Refusals that do survive that first step should not always be viewed as permissible, however. Instead, a decision to refuse a claim rooted in the law of another state, even when structured as a non-prejudicial dismissal, should be permitted only if the dismissal will not unduly interfere with the claim. Undue interference means something other than the inconvenience of having to re-file in an alternative forum. Rather, courts should do something along the lines of what is done in the context of a *forum non conveniens* analysis. There, a court must convince itself that a competent alternative forum is available to hear the claim before it dismisses the claim.[171] The same should be true here. The primary barrier to the availability of an alternative forum will be personal jurisdiction in the courts of a sister state, and courts should ensure that personal jurisdiction may be sustained there, either through a minimum contacts and long arm analysis or through consent of the defendant. One of the implications of this requirement is that a categorical rule barring a claim rooted in sister state law will be suspect. Courts must have the discretion to hear the claim if necessary to support the interstate system of justice. But if a state court concludes that it is unwilling to apply the law of a sister state, and if in response to that conclusion it dismisses the claim without prejudice after assuring that the courts of a sister state are competent to

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[171] Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 n.22 (1981); *see also* Joel H. Samuels, *When is An Alternative Forum Available? Rethinking the Forum Non Conveniens Analysis*, 85 IND. L.J. 1059, 1081–82 (2010) (arguing that *forum non conveniens* is a useful doctrine, but that courts impermissibly downplay the importance of whether another forum can and will hear a claim before dismissing for *forum non conveniens*); *but see* Margaret G. Stewart, *Forum Non Conveniens: A Doctrine in Search of a Role*, 74 CAL. L. REV. 1259, 1263–65 (1986) (arguing that jurisdictional doctrines can and should subsume the functions of *forum non conveniens*, thus eliminating it entirely).

hear it, the interstate system should be willing to tolerate that result.

2. Defenses

A second implication of a focus on interference is that states should not be permitted to reject the application of a defense on the grounds that it is foreign. The distinction between claims and defenses was first articulated by Justice Brandeis in *Bradford Electric Co. v. Clapper*.[172] There, in a worker's compensation action, a federal court sitting in diversity chose to apply the law of New Hampshire, where the death being sued on occurred, rather than the law of Vermont, where all relevant parties were from.[173] The Supreme Court rejected that choice, and Brandeis explained the problem this way:

> But the company is in a position different from that of a plaintiff who seeks to enforce a cause of action conferred by the laws of another state. The right which it claims should be given effect is set up by way of defense to an asserted liability; and to a defense different considerations apply. A state may, on occasion, decline to enforce a foreign cause of action. In so doing, it merely denies a remedy, leaving unimpaired the plaintiff's substantive right, so that he is free to enforce it elsewhere. But to refuse to give effect to a substantive defense under the applicable law of another state . . . subjects the defendant to irremediable liability. This may not be done.[174]

Clapper has generally fallen out of favor, largely because it was decided in a period when the Supreme Court took the constraints imposed by the constitution on the choice of law process more seriously than it does today.[175] Brandeis's

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[172] 236 U.S. 145 (1932).

[173] *Id.* at 151.

[174] *Id.* at 160.

[175] *See id.* at 161 (comparing interests of states); Alaska Packers Ass'n v. Indus. Accident Comm'n, 294 U.S. 532, 547–50 (1935) (giving great deference to the rights of states to apply their own laws in their

conclusion that full faith and credit principles required the application of Vermont law is not consistent with the constitutional choice of law principles established by more modern cases.[176] But from the standpoint of interference, the distinction between claims and defenses remains a sensible and useful one. As discussed in the previous section, a refusal to decide a sister state claim might be discriminatory in some sense, but it will rarely result in meaningful interference with state-created rights.[177] Put differently, refusing a claim is non-prejudicial, at least when there is an alternative forum available to decide the claim.

But refusing a defense is quite different. Consider *Paul v. National Life*.[178] Suit was filed in West Virginia based on a fatal car accident that killed two West Virginia residents in Indiana.[179] Application of the traditional choice of law approach led to the selection of Indiana law, which included a guest statute that limited recovery by guests against their hosts.[180] When that decision was appealed, the state supreme court firmly rejected the suggestion that it

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own courts and not finding Alaska's interest "superior" such that it need be applied in place of California law); Pacific Emp'rs Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493, 501 (1939) ("To the extent that California is required to give full faith and credit to the conflicting Massachusetts statute it must be denied the right to apply in its own courts its own statute, constitutionally enacted in pursuance of its policy to provide compensation for employees injured in their employment within the state. It must withhold the remedy given by its own statute to its residents by way of compensation for medical, hospital and nursing services rendered to the injured employee, and it must remit him to Massachusetts to secure the administrative remedy which that state has provided. We cannot say that the full faith and credit clause goes so far."

[176] *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 312 (1981) (requiring only that a "State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair"); *see also* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985) (noting that *Allstate* recognized only "modest restrictions on the application of forum law" under full faith and credit).

[177] *See supra* Part III.B.1.

[178] Paul v. National Life, 352 S.E.2d 550 (W. Va. 1986).

[179] *Id.* at 550.

[180] *Id.* at 550–51.

should reconsider its devotion to the traditional choice of law regime.[181] That portion of the opinion, which contains many memorable and pithy turns of phrase, has earned the case a place in many conflict of laws casebooks. But *Paul* is also an example of a modern use of the public policy exception. At the end of the opinion, the court found that guest statutes violate the public policy of West Virginia, and therefore concluded that "we will no longer enforce the automobile guest passenger statutes of foreign jurisdictions in our courts."[182] But the court did not follow that statement with a jurisdictional dismissal of the claim under review, and instead remanded the case "for further proceedings not inconsistent with this opinion."[183]

Precisely what those proceedings would look like is somewhat unclear. One possibility is that the application of the public policy doctrine would require dismissal of the suit, in accordance with cases like *Loucks*. But that result could have been achieved by the supreme court directly; further proceedings would not have been required. A second possibility is that the application of the public policy doctrine would lead to the substitution of West Virginia law. That application of the public policy doctrine would be problematic for the reasons described in the prior section.[184] A final possibility is that the application of the public policy doctrine would lead to the continued application of Indiana law, but without the availability of the guest statute. This third option runs afoul of *Clapper*. At one level, it might be viewed as more respectful to Indiana to continue to apply as much of that state's law as is consistent with West Virginia's public policy. But Indiana's guest statute acts as a partial immunity to liability that can be set up as a defense in cases where something less than willfulness is proven. For West Virginia to ignore that defense results in a prejudicial—or, to

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[181] *Id.* at 556 ("Having mastered marble, we decline an apprenticeship in bronze. We therefore reaffirm our adherence to the doctrine of *lex loci delicti* today.").

[182] *Paul*, 352 S.E.2d at 556.

[183] *Id.*

[184] *See supra* notes 169–170 and accompanying text.

use Brandeis's term, "irremediable"—determination of the claim that directly interferes with legal rights established by Indiana. To apply something less than all of Indiana's law is in some sense not to apply to Indiana's law at all. West Virginia may choose to apply Indiana's law, or it may choose not to. It should not be free, however, to apply Indiana's law selectively.[185]

IV. JUSTIFYING THE NEW MODEL

A. Trust

If adopted, the model developed in Part III would increase the authority of state courts. The contemplated increase is not unconstrained: state courts would always be required to ensure that their actions do not result in prejudice to the legal claims presented to them. But it is an increase nonetheless. For that reason, the model is bound to trigger anxieties among those who harbor a deep and abiding distrust of state courts.

Such distrust is an established pastime, and one that is particularly salient in the context of vertical federalism.[186]

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[185] In *Sun Oil Co. v. Wortman*, Justice Scalia, writing for the Court, upheld the minimalist approach to evaluating states' choice of law doctrines. 486 U.S. 717, 730 (1988). There, he noted that Kansas properly applied the laws of other states, in compliance with the Court's *Shutts* ruling. *Id.* Solidifying the Court's hands-off attitude to state choice of law, he concluded that a state cannot violate full faith and credit or due process by simple misconstruction of a sister state's law. *Id.* at 730–31. Rather, "the misconstruction must contradict law of the other State that is clearly established and that has been brought to the court's attention" for it to raise constitutional concerns. *Id.* at 731. From the perspective of *Paul*, a decision by West Virginia to apply an Indiana claim but not an Indiana defense might qualify as a judgment that reflects just such a contradiction of clearly-established law.

[186] While the trust argument has been invoked most frequently in the context of vertical federalism, some of the underlying claims apply with equal force in the horizontal context. Admittedly, not all of the claims translate. For example, although judicial selection mechanisms vary from state to state, the protections accorded Article III judges in the federal system are unique, and the institutional advantages that flow

The Supreme Court itself has never directly questioned the ability of state courts to handle federal business,[187] but academic commentators have not been so shy. Most famously, Burt Neuborne argued in 1977 that federal courts are "institutionally preferable to state appellate courts as

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from those protections are similarly unique. But the argument that state judges will be unfamiliar with federal law and will therefore be less competent to interpret and apply that law retains force when a state applies the law of another state. Perhaps competing state laws are more familiar than federal law, but certainly both are outside the domain of the court's natural expertise. Indeed, the competence concerns may be even greater in the horizontal context because there is less opportunity for error correction. When a state court mistakenly applies federal law, that decision is subject to review and correction by the United States Supreme Court. But when a court in State X mistakenly applies the law of State Y, the availability of review is much weaker. Certainly the decision may not be collaterally reviewed by the only courts not subject to disadvantages associated with lack of familiarity: those of State Y. Instead, State Y is bound by the judgment issued by State X, even if it rests on a misapplication of State Y law. *See, e.g.,* Fauntleroy v. Lum, 210 U.S. 230, 237 (1908) ("Whether the award would or would not have been conclusive, and whether the ruling of the Missouri court upon that matter was right or wrong, there can be no question that the judgment was conclusive in Missouri on the validity of the cause of action."); MGM Desert Inn, Inc. v. Holz, 411 S.E.2d 399, 402–03 (N.C. Ct. App. 1991) (upholding Nevada judgment related to gaming debt notwithstanding North Carolina anti-gambling statute that would prevent enforcement of the debt in its courts in the first instance). On the other hand, the United States Supreme Court is empowered to review the decision on the grounds that State X's decision failed to give full faith and credit to the law of State Y. But the standard of review in those cases is exceedingly weak. *See supra* note 185. And even if the Supreme Court were entitled to do more, there is no reason to think that it would not suffer from the same competence deficiencies as did the State X courts.

[187] Stone v. Powell, 428 U.S. 465, 493–94 n.35 (1976); Haywood v. Drown, 129 S. Ct. 2018, 2114 (2009); Howlett v. Rose, 496 U.S. 356, 367–68 (1990)). But on at least one occasion, the Court has been charged with questioning state courts indirectly. *See* Dombrowski v. Pfister, 380 U.S. 479, 499 (1965) (Harlan, J., dissenting) (chiding the majority for their "unarticulated assumption that state courts will not be as prone as federal courts to vindicate constitutional rights promptly and effectively").

forums in which to raise federal constitutional claims."[188] That assertion rested on a set of three claims about the comparative advantages of federal judges as arbiters of federal rights: (1) that federal judges have superior technical competence in dealing with federal rights, (2) that federal judges are psychologically more open to federal claims, and (3) that federal judges are insulated from majoritarian pressures that might constrain the enforcement of federal rights.[189] Although not universally accepted,[190] these claims quickly became commonplace in the academic literature and have remained so ever since.[191]

That said, the standard trust-based criticisms have increasingly come under attack in recent years. Twenty years ago, Erwin Chemerinsky noted that Neuborne's contention that federal judges would be more solicitous of federal rights claims, or at least particular federal rights claims, might be related to the domination of federal courts by Democratic appointees.[192] If so, then the shifting composition of federal courts toward Republican appointees

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[188] Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1116 (1977).

[189] *Id.* at 1120–21.

[190] William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENT. 599, 600 (1999); Michelle T. Friedland, *Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech*, 104 COLUM. L. REV. 563, 621, 629–30 (2004); Frederic M. Bloom, *State Courts Unbound*, 93 CORNELL L. REV. 501, 550–51 (2008); *see also* Brett Christopher Gerry, *Parity Revisited: An Empirical Comparison of State and Lower Federal Court Interpretations of* Nollan v. California Coastal Commission, 23 HARV. J. L. & PUB. POL'Y 233, 257–58 (1999) (attempting an empirical comparison of state and federal treatment of constitutional questions, showing that there is little meaningful difference).

[191] Justin F. Marceau, *The Fourth Amendment at a Three-Way Stop*, 62 ALA. L. REV. 687, 715 n.129 (2011); Catherine M. Sharkey, *Federalism in Action: FDA Regulatory Preemption in Pharmaceutical Cases in State Versus Federal Courts*, 15 J.L. & POL'Y 1013, 1045–46 (2007) (foreseeing discrepancies based on state-court distaste for federal regulatory agencies); Burt Neuborne, *Parity Revisited: The Uses of a Judicial Forum of Excellence*, 44 DEPAUL L. REV. 797, 799 (1995).

[192] Erwin Chemerinsky, *Ending the Parity Debate*, 71 B.U. L. REV. 593, 599 (1991).

"diminishes any basis for greater trust in federal courts."[193] A few years later, William Rubenstein went a step further, suggesting that—at least in the context of modern gay-rights litigation—federal courts were increasingly being viewed as less trustworthy venues than their state counterparts.[194] Others have since broadened and refined Rubenstein's argument; while some federal claims may be similar to the gay rights account, others are likely to benefit from the same compositional changes.[195] The larger thrust of these arguments is that the parity debate is not about trust at all, at least not entirely so. Instead, claims of parity or its absence often serve to "disguise the expression of nakedly ideological preferences."[196] As a result, the degree to which we are bothered by an increase in the authority of state

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[193] *Id.*; *see also* Edward Purcell, *Reconsidering the Frankfurterian Paradigm: Reflections on Histories of Lower Federal Courts*, 24 LAW & SOC. INQUIRY 679, 712 (1999) ("[I]n spite of the continued salience of local pressures and partisan politics, federal judges ten[d] increasingly to be drawn from the upper echelons of the bar with more pronounced national orientations and stronger commitments to professionally defined norms of law and judicial behavior."). Even Professor Neuborne conceded that these compositional changes affect the relative advantage provided by a federal forum. Burt Neuborne, *Parity Revisited: The Uses of a Judicial Forum of Excellence*, 44 DEPAUL L. REV. 797, 798–99 (1995).

[194] William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENT. 599, 606–11 (1999) (recounting the shift toward state courts in gay rights litigation). Part of Rubenstein's explanation for that phenomenon was context-specific: state judges had particular expertise in family law issues that made them more sympathetic to the claims being presented. *Id.* at 612–14. But part of the argument was structural and compositional, and rested on the assertion that the majoritarian pressures felt by state judges may in certain circumstances lead them to be more sympathetic to rights-based claims than the insulated—and increasingly conservative—judges populating our federal courthouses. *Id.* at 619–21; *see also* DANIEL R. PINELLO, GAY RIGHTS AND AMERICAN LAW 110–13 (2003) (making a similar point).

[195] Gil Seinfeld, *The Federal Courts as a Franchise: Rethinking the Justifications for Federal Question Jurisdiction*, 97 CAL. L. REV. 95, 112 (2009) (arguing that things like second amendment claims may be more favored in a federal forum).

[196] Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1222 (2004).

courts is contingent, both in terms of time and in terms of the nature of the particular federal rights at stake.

Even setting that general point aside, there is a much more specific reason why concerns about trust should not act as a barrier to the proposal being suggested here. Those who lack trust in state courts are generally uncomfortable giving those courts additional power to decide claims. But in this case, the additional power being conferred is a power to decline to decide claims. In this sense, the proposal is consonant with the intuition that state judges may not always be equipped to decide claims based on federal law or the laws of other states. In those circumstances, the best course is not to force the state to render a decision that may contain errors but not be subject to adequate review, or to permit the state to substitute some other law in favor of the law that is either unfamiliar or disagreeable. Rather, it is to provide for the state courts something akin to the abstention doctrines that permit otherwise competent federal courts to decline to decide state claims when certain conditions are satisfied.[197] Those abstention doctrines are invoked not as a way to offend state law, but to respect it. Similarly, this proposal furthers the goal of ensuring that courts deciding claims on the merits are unbiased and competent, and for that reason it should enhance rather than undermine our sense of trust in the judicial system.[198]

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[197] *See generally* Leonard Birdsong, *Comity and Our Federalism in the Twenty-First Century: The Abstention Doctrines Will Always be With Us—Get Over It!!*, 36 CREIGHTON L. REV. 375 (2003) (discussing various forms of federal abstention and their trajectories and usefulness in the twenty-first century); David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985) (arguing that jurisdictional discretion under the abstention doctrines is expansive); Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984) (generally disapproving of federal abstention as violative of separation of powers, namely, undermining Congress's discretion to regulate jurisdiction).

[198] *See* Verity Winship, *Aligning Law and Forum* 19 (draft) (discussing situations where the alignment of law and forum should be encouraged or required).

B. Authority

The fact that a reverse abstention power should enhance trust in the judicial system—or that such a power might be a good idea for any other reason, for that matter—is ultimately irrelevant and unavailing if the power cannot be justified as a matter of constitutional authority. Therefore it is necessary to assess whether the Constitution can sustain a reading that would permit states to decline to decide federal and sister-state claims. What follows here is a sketch of that assessment.[199]

The Supreme Court's inflexible understanding of the constitutional constraints imposed by the Supremacy Clause and to a lesser extent by the Full Faith and Credit Clause should be updated to reflect contemporary realities. While a federal power to impose an unyielding obligation on state courts may be justified as constitutional in the absence of an established system of federal courts, or in a context where a refusal to decide would result in meaningful interference with the legal rights, the same power may become unjustified once those affiliating circumstances have changed. In other words, the availability of a reverse abstention power may be contextual and contingent both on historical developments and on the practical effects of particular institutional arrangements.

This is an argument that draws on several recent developments in constitutional interpretation and federalism. A starting point is Lawrence Lessig's theory of translation.[200] As a general matter, translation supports the

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[199] A comprehensive account of the authority for reverse abstention is the subject of future work. *See* Samuel P. Jordan, *Polyphonic Abstention* (forthcoming).

[200] *See generally* Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993) (formulating a "translation" theory of constitutional interpretation that accommodates, and indeed requires assessment of, historical context). In Lessig's oft-quoted formulation, "to be faithful to the constitutional structure, the Court must be willing to be unfaithful to the constitutional text." Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 SUP. CT. REV. 125, 193 (1995). One could in fact trace this sort of argument back much further. *See, e.g.*, Theodore

possibility of a flexible understanding of constitutional powers that is informed by constitutional structure, and it has been deployed in the specific domain of federalism to suggest the development of extra-textual constitutional rules that would preserve the balance between federal and state power contemplated by the Constitution.[201] Drawing in part on notions of translation, Robert Schapiro has more recently developed a theory of polyphonic federalism that provides additional authority for a reverse abstention power.[202] Schapiro's work is part of a larger scholarly attack on the dualist nature of Supreme Court doctrine in the area of

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Eisenberg. *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 501 (1974) (arguing that the permanence of lower federal courts in the modern era necessitates reevaluation of Congress's constitutional authority to restrict their jurisdiction).

[201] Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 SUP. CT. REV. 125, 192 (1995) (arguing that the Supreme Court should be free "to craft, to construct, to make-up, limits on regulative authority, both state and federal, so as to check the growth in the commerce power, to the extent that growth has set the original balance [between the federal and state powers] askew"); *see also* Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1175–76 (2005) (advocating for "compensating adjustments" that allow judges to re-work the federalism balance that is broadly and incompletely embodied in the constitutional text); Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1502 (1994) ("The best [constitutional] interpretation is one that accommodates both goals [of federalism] and faithfully transposes them onto modern circumstances."); *but see* John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2040 (2009) (arguing that the constitution did not impose any "balance" that can be maintained by translation); Bradford R. Clark, *Translating Federalism: A Structural Approach*, 66 GEO. WASH. L. REV. 1161, 1162 (1998) (criticizing Lessig's approach for its failure to respect separation of powers). Orin Kerr has put forward an approach to the Fourth Amendment that balances the concerns of originalists, translators, and living constitutionalists by carefully limiting the circumstances that will allow a change in constitutional interpretation. Orin S. Kerr, *An* Equilibrium-Adjustment *Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 531–32 (2011).

[202] *See generally* ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM (2009).

federalism. Under a dualist framework, power "must be allocated to either the national government or state governments."[203] Polyphonic federalism, like other "compatibilist" theories of federalism,[204] focuses instead on the question of "how to harness the dynamic interaction of state and federal power."[205] But Schapiro's work is particularly important because it seeks to move beyond claims of instrumental benefit and situate the argument at the level of constitutional theory.[206] Garrick Pursley has usefully described Schapiro's theory as one that creates space for the consideration of polyphonic values like plurality, dialogue, and redundancy in the development of federalism decision rules.[207] That space and those values can support the right of state courts to decline jurisdiction in a manner that preserves legal rights.

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[203] ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM 82 (2009).

[204] Garrick Pursley, *Federalism Compatibilists*, 89 TEX. L. REV. 1365, 1367 (2011). Other "versions" of compatibilist arguments abound. *See, e.g.*, Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 2020 (2008) (advocating constitutional "realism"); Erwin Chemerinsky, *Empowering States: The Need to Limit Federal Preemption*, 33 PEPP. L. REV. 69, 74–75 (2005) (outlining a theory of "empowerment" federalism that broadly construes federal regulatory powers while narrowing the scope of preemption); Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 665 (2001) (approving Congress's "middle ground solution between the extremes of dual federalism and preemptive federalism" that "outstrip[s] existing constitutional rhetoric which envisions a separation [between state and federal spheres] that does not exist in practice").

[205] ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM 82 (2009).

[206] As such, it attempts to respond to the criticisms lobbed at theories of "new federalism" on the grounds that the theories pay insufficient attention to the limitations imposed by constitutional text. *See, e.g.*, Stuart Minor Benjamin and Ernest A. Young, *Tennis with the Net Down: Administrative Federalism Without Congress,* 57 DUKE L.J. 2111, 2119 (2008); H. Geoffrey Moulton, Jr., *The Quixotic Search for a Judicially Enforceable Federalism*, 83 MINN. L. REV. 849, 895 (1999).

[207] Garrick Pursley, *Federalism Compatibilists*, 89 TEX. L. REV. 1365, 1367, 1383 (2011).

Finally, even if a reverse abstention power is not constitutionally compelled, it may be statutorily created. Congress has a clear source of power to provide states with increased authority in both the horizontal and vertical contexts. With respect to federal claims, Congress is ultimately responsible for choosing which courts will have jurisdictional authority.[208] This means that state courts already rely on federal jurisdictional statutes, and there is no reason why those statutes could not also include a federally approved mechanism that would permit state courts to refuse federal claims in particular contexts and under certain conditions. In other words, the statutory choice facing Congress need not be viewed as a binary one between exclusive and concurrent jurisdiction, but could also include forms of discretionary jurisdiction that would give state courts the authority but not the obligation to decide federal claims. Similarly, with respect to horizontal claims, Congress has the power under Article IV to legislate the effect of the laws of the states.[209] Legislation that requires states to deal with claims based on the laws of sister states in a non-prejudicial manner would easily fit within the scope of that power. In short, even if the constitutional contours of

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[208] *See* Martin v. Hunters' Lessee, 14 U.S. 304, 340 (1816) (finding that state courts are empowered and expected to hear federal claims). Bankruptcy cases are one example of the lower federal courts' exclusive jurisdiction. *See* 11 U.S.C. § 1334 (2006); *see also* 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE JURISDICTION § 3527 (3d ed. 2002) (listing other subject matter within the federal courts' exclusive jurisdiction). The Court generally requires express language from Congress that "affirmatively divest[s] state courts of their presumptively concurrent jurisdiction." Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820, 823 (1990). However, exclusive jurisdiction may also be created "by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981).

[209] U.S. CONST. art. IV ("And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."); *see also* Yarborough v. Yarborough, 290 U.S. 202, (1933) (reasoning that Congressional power over full faith and credit allows the doctrine to be expanded or contracted from its constitutional minimum).

judicial federalism are viewed as both fixed and inconsistent with reverse abstention power, all is not lost.

CONCLUSION

States should have greater flexibility and power to determine the extent to which they decide claims that are rooted in the law of other actors within our federal system. The current approach to these questions is unduly restrictive, particularly with respect to federal claims. Given the current structure of personal jurisdiction and the developed nature of the federal courts, these restrictions are unnecessary. Standard principles of comity will generally encourage a state to entertain federal and sister state claims.[210] But if a state, for whatever reason, decides that it does not want to hear such a claim, the decision to abstain should be respected so long as it does not meaningfully prejudice the claim or the legal rights involved.

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[210] Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 689–90 (2001) (noting that comity promotes cooperative federalism values and state sovereignty); Charlton C. Copeland, *Federal Law in State Court: Judicial Federalism Through a Relational Lens*, 19 WM. & MARY BILL RTS. J. 511, 530, 540 (2011) (disparaging "allocation" of jurisdiction, instead promoting "relational" jurisdiction based on reciprocity and comity concerns). However, Louis Weinberg has argued against comity principles and suggested that multistate policy and "collective advantage" may be better supported by consistently applying forum law. Louise Weinberg, *Against Comity*, 80 GEO. L.J. 53, 58, 70–73 (1991)(arguing against comity principles and suggesting that multistate policy and "collective advantage" may be better supported by consistently applying forum law).