

# The Problem of Purely Procedural Preemption Presented by the Federal HEAR Act

William L. Charron

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# THE PROBLEM OF PURELY PROCEDURAL PREEMPTION PRESENTED BY THE FEDERAL HEAR ACT

William L. Charron\*

## ABSTRACT

*The underlying purpose of the Holocaust Expropriated Art Recovery Act of 2016 (the HEAR Act), which is to return Nazi-looted artwork to victims or their families, is undeniably laudable. Restituting Nazi-looted artwork is and has been a moral objective of this country since the conclusion of World War II. It is equally clear that victims and their families can often face obstacles to gathering evidence from the war that would demonstrate Nazi theft in court. The HEAR Act strives to address these concerns by imposing a federal statute of limitations over all state law causes of action that would enable restitution of Nazi-stolen art.*

*Notwithstanding the important purposes that the HEAR Act aims to serve, courts should hold that the HEAR act violates the Tenth Amendment and principles of federalism because it purports to preempt state causes of action on a purely procedural basis. The HEAR Act does not itself provide a federal*

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*cause of action or remedy and does not present a basis for federal question jurisdiction. Rather, the HEAR Act purports merely to engraft a federal statute of limitations on all the various state law civil claims of general applicability that enable the restitution of alleged Nazi-stolen art (e.g., for replevin, declaratory judgment, or conversion). The purely procedural preemption imposed by the HEAR Act would appear to be an unprecedented—and unconstitutional—interference with state rights.*

TABLE OF CONTENTS

I.	INTRODUCTION .....	23
II.	BACKGROUND.....	26
	A. <i>Congress May Preempt State Laws to Establish Federal Substantive Rights and Causes of Action</i> .....	26
	B. <i>Congress May Establish Preemptive Federal Procedural Rules to Implement and Vindicate Substantive Federal Rights</i> .....	27
	C. <i>The HEAR Act’s Relevant Text</i> .....	30
	1. <i>Von Saher</i> .....	32
	2. <i>Garamendi</i> .....	34
	3. <i>The HEAR Act’s Preemptive Statute of Limitations</i> .....	36
III.	CURRENT STATE OF THE LAW .....	38
	A. <i>The U.S. Justice Department’s Opinions in 1989</i> .....	38
	1. <i>Garcia and Baker</i> .....	40
	2. <i>F.E.R.C.</i> .....	41
	B. <i>The Justice Department’s Opinion in 1999</i> .....	42
IV.	ANALYSIS: THE PROBLEMS WITH PURELY PROCEDURAL PREEMPTION .....	44
	A. <i>The Justice Department’s 1989 Opinions Are Not Compelling</i> .....	44
	1. <i>Garcia and Baker</i> No Longer Reflect Governing Tenth Amendment Jurisprudence .....	44
	2. <i>The Department’s 1989 Opinion Misconstrued F.E.R.C.</i> ....	46
	B. <i>Purely Procedural Preemption Offends Federalism</i> .....	48
	C. <i>The Second Circuit’s 2002 Decision in Freier</i> .....	51
	1. <i>Burnett</i> .....	53
	2. <i>Stewart</i> .....	54
	3. <i>Woods</i> .....	55
	4. <i>Jinks</i> .....	56
	D. <i>Partial Preemption of State Laws on Procedural Grounds Fails to Accord with the Primary Purpose of Creating “Uniformity” Among the States</i> .....	59
	E. <i>The “Substance/Procedure” Dichotomy Traditionally Helps Define the Boundaries for Federalism Questions</i> .....	59

V. IMPACT ON THE HEAR ACT .....	61
A. <i>The HEAR Act Provides No Substantive Federal Cause of Action</i> .....	61
B. <i>The HEAR Act Would Not Provide Federal Question Jurisdiction</i> .....	63
C. <i>The Federal Statute of Limitations Proposed by The HEAR Act Is Purely Procedural in Nature, Not Substantive</i> .....	65
VI. CONCLUSION.....	67

## I. INTRODUCTION

As the international art market has skyrocketed since the early-2000s, the field of “art law” has grown with it.<sup>1</sup> The world is “flat” and small—and the art world is flatter and smaller still.<sup>2</sup> Art, like any movable chattel, can easily be transported and easily concealed.<sup>3</sup>

It is now well known that the Nazis plundered art from Jewish families throughout World War II to an enormous extent.<sup>4</sup> As Nazi archives began to open and become more accessible in the late-1990s, the extent of Nazi art-looting was revealed.<sup>5</sup> And as the art market became more active and public, stolen or allegedly stolen works were brought to the market and discovered.<sup>6</sup> Consequently, restitution claims by victims or their heirs and families have grown substantially in the 2000s.<sup>7</sup>

Oftentimes, however, World War II-era restitution claimants will

1. Christine Steiner and Bee-Seon Keum, *Art Law: Looking Back, Looking Forward*, 20 CHAP. L. REV. 119, 119 (2017) (noting that art law has grown as a recognized area of the law); *2017 Summary - The Art Market Enters a New Phase*, ARTPRICE, <https://www.artprice.com/artprice-reports/the-art-market-in-2017/2017-summary-the-art-market-enters-a-new-phase> (last visited June 9, 2017) (highlighting recent growth in the global art market).

2. Thomas L. Friedman, *It's a Flat World, After All*, N.Y. TIMES (Apr. 3, 2005), <https://www.nytimes.com/2005/04/03/magazine/its-a-flat-world-after-all.html> (describing how patterns of globalization have made the world “flat”).

3. See, e.g., Anthony Faiola, *Art Looted by the Nazis Could Be Hiding in Plain Sight on the Walls of Europe's Great Museums*, WASH. POST (June 15, 2014), [https://www.washingtonpost.com/world/art-looted-by-the-nazis-could-be-hiding-in-plain-sight-on-the-walls-of-europes-great-museums/2014/06/14/f3a8843c-ef02-4ca0-b30e-88add45d90f\\_story.html](https://www.washingtonpost.com/world/art-looted-by-the-nazis-could-be-hiding-in-plain-sight-on-the-walls-of-europes-great-museums/2014/06/14/f3a8843c-ef02-4ca0-b30e-88add45d90f_story.html) (“Since the discovery of a long-hidden trove of masterworks in Germany last year, advocates have sought to shine a spotlight on looted artworks hiding in plain sight.”).

4. Benjamin E. Pollock, *Out of the Night and Fog: Permitting Litigation to Prompt an International Resolution to Nazi-Looted Art Claims*, 43 HOUS. L. REV. 193, 196–97 (2006) (“The Nazi confiscation of property was meticulously planned and carried out with ruthless efficiency on an unprecedented scale. . . . In this vein, the link between the looted art and the Holocaust cannot be overlooked: eradicating an entire people and their cultural heritage went hand in hand.”).

5. *Id.* at 206 (“Two books published in the mid-1990s caused a stir with their detailed documentation of the Nazis’ systematic looting, providing a body of research to potential claimants.”).

6. See *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 958 (9th Cir. 2010) (“In recent years, a number of the world’s most prominent museums have discovered their collections include art stolen during World War II.”).

7. See generally Pollock, *supra* note 4, at 206 (stating how in recent years, many pieces of Nazi-stolen art have been discovered and returned to the rightful owners).

encounter time-based legal defenses (e.g., statutes of limitations) that bar their claims.<sup>8</sup> Notwithstanding Nazi archives, many times these cases present situations where documents have been lost or destroyed and witnesses have passed away.<sup>9</sup> This creates a serious evidentiary problem, particularly for current, bona fide owners of allegedly stolen art who are disadvantaged in rebutting assertions of prior Nazi theft.<sup>10</sup> As a general principle, statutes of limitations are enacted with these kinds of problems in mind; at a point, claims simply become too stale to fairly prosecute or defend.<sup>11</sup>

The art market itself is largely unregulated.<sup>12</sup> In the United States, for example, provisions of the Uniform Commercial Code (U.C.C.) for the sales of goods, as adopted by the individual states, generally and often crudely apply to transactions involving art.<sup>13</sup> The U.C.C. establishes duties of diligence and assigns risks of loss as between buyers and sellers.<sup>14</sup> Other nations apply their own sales laws and regulations.<sup>15</sup>

The Holocaust Expropriated Art Recovery Act of 2016 (the HEAR Act),

8. See Kelly Ann Falconer, *When Honor Will Not Suffice: The Need for a Legally Binding International Agreement Regarding Ownership of Nazi-looted Art*, 21 U. PA. J. INT'L ECON. L. 383, 408 (2000) (“[O]ften the greatest barrier to Holocaust plaintiffs’ claim of ownership is the statute of limitations.”).

9. Pollock, *supra* note 4, at 225–26 (explaining how claimants’ challenges include destroyed or missing ownership records as well as the fact that they are elderly or heirs of original owners).

10. See *id.* at 226 (“Litigation presents serious drawbacks to the museum, dealer, or private collector who possesses the art as well. Courts may find themselves placed in the unenviable position of allocating rights and burdens between an original owner and a good-faith purchaser.”).

11. See *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 349 (1944) (“The theory [of statutes of limitations] is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.”).

12. Cf. Kenny Ackerman, *Art Market Regulation: Why It Is Badly Needed*, THE ACKERMAN BLOG (Nov. 8, 2017), <http://ackermansfineart.com/art-market-regulation-badly-needed/> (explaining why art industry regulation is needed to lower fraud).

13. See, e.g., *Davis v. Carroll*, 937 F. Supp. 2d 390, 434–36 (S.D.N.Y. 2013) (applying provisions of the U.C.C. to determine an art dealer’s duty of heightened inquiry).

14. U.C.C. §§ 1-202, -302, -304 (Am. Law Inst. & Unif. Law Comm’n 2017) (establishing duties of good faith and diligence among sellers); U.C.C. §§ 2-509 to -510 (dividing risk of loss between buyers and sellers depending on whether there is a breach).

15. See generally Deborah A. DeMott, *Artful Good Faith: An Essay on Law, Custom, and Intermediaries in Art Markets*, 62 DUKE L.J. 607, 632–33 (2012) (comparing how various countries apply their laws to determine whether a good-faith purchaser of stolen works acquires title).

which was enacted in the final days of the Obama administration with bipartisan support, offers a nationwide statute of limitations for restitution claims based upon allegations of Nazi looting specifically.<sup>16</sup> The purpose of the HEAR Act is to reduce the number of claims that are dismissed on statute of limitations grounds; the stated policy of the U.S. is to decide such claims on the merits.<sup>17</sup>

The HEAR Act does not, however, alter or amend any substantive state law that would apply to resolve such claims.<sup>18</sup> The HEAR Act offers purely procedural preemption of the states' various and differing statutes of limitations, without offering any substantive law preemption and without creating any substantive federal cause of action or form of relief.<sup>19</sup>

As discussed in this article, the HEAR Act's laudable purposes do not outweigh its conflict with the Tenth Amendment and this country's principles of federalism.<sup>20</sup> The HEAR Act's purely procedural preemption is an unconstitutional experimental doctrine.<sup>21</sup> If Congress wishes to regulate the particular field of World War II-era art restitution claims, it must do so substantively as well as procedurally according to typical preemption doctrine.<sup>22</sup>

Part II of this article discusses the background and justification of federal preemption, followed by a discussion of the HEAR Act and its preemptive quality. Part III discusses the current state of the law concerning whether

16. Holocaust Expropriated Art Recovery (HEAR) Act of 2016, Pub. L. No. 114-308, § 5, 130 Stat. 1524, 1526 (codified as amended at 22 U.S.C. § 1621 (2016)) (“Notwithstanding any other provision of Federal or State law or any defense at law relating to the passage of time, and except as otherwise provided in this section, a civil claim or cause of action against a defendant to recover any artwork or other property that was lost during the covered period because of Nazi persecution may be commenced not later than 6 years after the actual discovery by the claimant or the agent of the claimant of—(1) the identity and location of the artwork or other property; and (2) a possessory interest of the claimant in the artwork or other property.”).

17. *Id.* § 2(8) (expressing the preference of Congress that claims to recover Nazi-stolen art be resolved on the merits and through alternative dispute resolution).

18. *Id.* § 5(f) (“Nothing in this Act shall be construed to create a civil claim or cause of action under Federal or State law.”).

19. *See id.* § 5 (imposing a national statute of limitations on civil claims).

20. *See infra* Part V (applying Tenth Amendment preemption doctrine in finding the HEAR Act invalid).

21. *See infra* Section IV.B (explaining purely procedural preemption).

22. *See infra* Section IV.E (concluding that Congress must establish a substantive cause of action so as to not constitutionally preempt state law claims in actions to recover Nazi-looted art).

Congress may only procedurally preempt state laws without also enacting substantive rights and causes of action. Part IV analyzes the problem of allowing Congress to engage in purely procedural preemption. Part V explains that the HEAR Act should be held to be unconstitutional because it offers purely procedural preemption. Part VI provides a conclusion.

## II. BACKGROUND

### *A. Congress May Preempt State Laws to Establish Federal Substantive Rights and Causes of Action*

There is no question that Congress can preempt state laws with substantive federal causes of action pursuant to the Supremacy Clause of Article VI of the Constitution.<sup>23</sup> The Supremacy Clause states: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”<sup>24</sup>

Under Supremacy Clause jurisprudence, it has long been established that substantive state laws that conflict with substantive federal statutes “must yield to the regulation of Congress within the sphere of its delegated power.”<sup>25</sup> Congress identifies and creates federal substantive rights under Article I, Section Eight of the Constitution.<sup>26</sup> That section gives Congress the power to make substantive policy determinations to regulate interstate commerce, to “lay and collect Taxes,” and to “provide for the . . . general Welfare of the United States”—among other specifically enumerated powers.<sup>27</sup> The Supremacy Clause elevates Congress’s substantive policy choices on matters within its purview above those of the states.<sup>28</sup>

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

24. *Id.*

25. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (quoting *Savage v. Jones*, 225 U.S. 501, 533 (1912)).

26. U.S. CONST. art I, § 8 (enumerating the powers of Congress).

27. *Id.*

28. *E.g.*, *Free v. Bland*, 369 U.S. 663, 666 (1962) (“The relative importance to the State of its own

Federal preemption doctrine thus involves a conflict of laws analysis that asks whether a state law “so interferes with and frustrates [a] substantive right Congress created that, under the Supremacy Clause, it must yield to the federal interest.”<sup>29</sup>

*B. Congress May Establish Preemptive Federal Procedural Rules to Implement and Vindicate Substantive Federal Rights*

It is equally settled that Congress can mandate certain procedural rules to implement substantive federal rights and causes of action that Congress has created, and Congress may likewise preempt any conflicting state procedural rules that could frustrate the federal right.<sup>30</sup> The question in such cases is whether the procedural rule is “part and parcel of the remedy afforded” by the federal cause of action itself.<sup>31</sup>

For example, in *Dice v. Akron, Canton & Youngstown Railroad*, the Supreme Court considered whether federal or Ohio state law controlled the resolution of claims brought under the Federal Employers’ Liability Act.<sup>32</sup> The Court found that where Congress had set a “federally declared standard” of “federal rights” available to injured employees under the statute, “uniform application throughout the country [was] essential to effectuate its purposes.”<sup>33</sup> This meant that the states could not “have the final say as to what defenses

law is not material when there is a conflict with a valid federal law, for . . . any state law, however clearly within a State’s acknowledged power, which interferes with or is contrary to federal law, must yield.”); *Testa v. Katt*, 330 U.S. 386, 393 (1947) (“For the policy of the federal Act is the prevailing policy in every state. . . [A] state court cannot ‘refuse to enforce the right arising from the law of the United States because of conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers.’” (quoting *Minneapolis & St. Louis R.R. v. Bombolis*, 241 U.S. 211, 222 (1916))); *Mondou v. N.Y., New Haven, & Hartford R.R.*, 223 U.S. 1, 57 (1912) (“When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the states, and thereby established a policy for all.”).

29. *Felder v. Casey*, 487 U.S. 131, 151 (1988) (applying federalism principles to § 1983 actions brought in state courts).

30. *E.g.*, *Brown v. W. Ry. of Ala.*, 338 U.S. 294, 296 (1949) (“This federal right cannot be defeated by the forms of local practice.”).

31. *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 363 (1952) (quoting *Bailey v. Cent. Vt. Ry.* 319 U.S. 350, 354 (1943)).

32. *Id.* at 361; *see* 45 U.S.C. §§ 51–55 (2012).

33. 342 U.S. at 361.

could and could not be properly interposed for suits under the Act.”<sup>34</sup>

In addition, the Court in *Dice* held that the states could not “eliminate trial by jury” of such claims because “[t]he right to trial by jury is a basic and fundamental feature of our system of federal jurisprudence,” and . . . is ‘part and parcel of the remedy afforded . . . workers under the Employers’ Liability Act.’”<sup>35</sup> The Court found that “the right to trial by jury is *too substantial a part of the rights accorded by the Act to permit it to be classified as a mere ‘local rule of procedure.’*”<sup>36</sup>

Another instructive decision is *Felder v. Casey*.<sup>37</sup> In that case, the Supreme Court considered whether Wisconsin’s notice of claim procedure for federal civil rights actions brought under 42 U.S.C. § 1983 in Wisconsin’s state courts was preempted by the federal statute’s non-inclusion of such a procedure.<sup>38</sup> The Wisconsin Supreme Court found that “while Congress may establish the procedural framework under which claims are heard in federal courts, States retain the authority under the Constitution to prescribe the rules and procedures that govern actions in their own tribunals.”<sup>39</sup> The U.S. Supreme Court reversed.<sup>40</sup>

The Court in *Felder* found that the question presented was:

[E]ssentially one of pre-emption: is the application of the State’s notice of claim provision to § 1983 actions brought in state courts consistent with the goals of the federal civil rights laws, or does the enforcement of such a requirement instead “stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”?<sup>41</sup>

34. *Id.*; see also *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 177 (2003) (“The implementation of the Act is a matter of federal common law, and it is for the Court to develop and administer a fair and workable rule of decision.”) (citations omitted).

35. *Dice*, 342 U.S. at 363 (quoting *Bailey*, 319 U.S. at 354).

36. *Id.* (emphasis added) (citing *Brown v. W. Ry. of Ala.*, 338 U.S. 294 (1949)).

37. *Felder v. Casey*, 487 U.S. 131 (1988).

38. *Id.* at 137–38.

39. *Id.* at 137.

40. *Id.* at 153.

41. *Id.* at 138 (quoting *Perez v. Campbell*, 402 U.S. 637, 649 (1971)).

The Court explained that “[s]tates may not apply . . . an outcome-determinative law when entertaining substantive federal rights in their courts” and found that Wisconsin’s “notice-of-claim statute is more than a mere rule of procedure . . . [because it] is a substantive condition on the right to sue . . . .”<sup>42</sup> Thus, “Wisconsin’s notice-of-claim statute undermine[d] [a] ‘uniquely federal remedy’” by creating impediments to relief that Congress did not impose.<sup>43</sup> The Court held that:

[E]nforcement of the notice-of-claim statute in § 1983 actions brought in state court so interferes with and frustrates the substantive right Congress created that, under the Supremacy Clause, it must yield to the federal interest.

. . . .  
 . . . State courts simply are not free to vindicate the substantive interests underlying a state rule of decision at the expense of the federal right.<sup>44</sup>

The import of *Dice* and *Felder* is that when Congress expresses the existence of substantive federal rights, Congress may also preempt state procedural rules that stand in the way of those rights.<sup>45</sup>

As discussed below, the HEAR Act expressly provides no substantive federal cause of action or remedy.<sup>46</sup> The act does not purport to preempt all state law claims for replevin, declaratory judgment, or conversion of allegedly stolen Holocaust-era art with a new federal claim for relief.<sup>47</sup> Rather, the

42. *Id.* at 141, 152.

43. *Id.* at 141 (quoting *Mitchum v. Foster*, 407 U.S. 225, 239 (1972)). The Court in *Mitchum* used the phrase “uniquely federal remedy” to describe how § 1983 allows citizens to bring claims against states that infringe upon individual rights guaranteed by the United States Constitution and federal law. *Mitchum*, 407 U.S. at 239.

44. *Id.* at 151–52 (emphasis added).

45. See also *South Dakota v. Dole*, 483 U.S. 203, 210 (1987) (“[A] perceived Tenth Amendment limitation on congressional regulation of state affairs [does] not concomitantly limit the range of conditions legitimately placed on federal grants.”).

46. Holocaust Expropriated Art Recovery (HEAR) Act of 2016, Pub. L. No. 114-308, § 5(f), 130 Stat. 1524, 1527 (codified as amended at 22 U.S.C. § 1621 (2016)).

47. See *id.* § 5(d) (“Subsection (a) shall apply to any civil claim or cause of action that is . . . pending in any court on the date of enactment of this Act . . .”). The Act itself purports to apply to

HEAR Act embraces state law claims of general applicability for their substance while imposing a nationwide statute of limitations over such claims when they are used in the particular context of Holocaust-era art.<sup>48</sup> The question is whether Congress can partially, and only procedurally, preempt state laws in this manner.

### C. *The HEAR Act's Relevant Text*

The HEAR Act was enacted on December 16, 2016 as “[an act] [t]o provide the victims of Holocaust-era persecution and their heirs a fair opportunity to recover works of art confiscated or misappropriated by the Nazis.”<sup>49</sup> The first stated purpose of the HEAR Act is to “ensure that laws governing claims to Nazi-confiscated art . . . further United States policy as set forth in”<sup>50</sup>: (a) the 1998 Washington Conference Principles on Nazi-Confiscated Art (the Washington Conference Principles), including the principle that “‘steps should be taken expeditiously to achieve a just and fair solution’ to claims involving such art that has not been restituted if the owners or their heirs can be identified”;<sup>51</sup> (b) the 1998 Holocaust Victims Redress Act (HVRA),<sup>52</sup>

which expressed the sense of Congress that “all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful

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state causes of action in general and does not enumerate any particular claims. *Id.* § 5.

48. See Press Release, Congressman Hadler, Goodlatte and Nadler Introduce Legislation to Help Recover Art Confiscated During the Holocaust (Sept. 22, 2016), <https://nadler.house.gov/press-release/goodlatte-and-nadler-introduce-legislation-help-recover-art-confiscated-during> (“By establishing a six-year federal statute of limitations for these claims, the bill will help facilitate the return of Nazi-confiscated artwork to its rightful owners or heirs.”).

49. Holocaust Expropriated Art Recovery Act pmbll., cl. 1.

50. *Id.* § 3(1).

51. *Id.* § 2(3) (quoting U.S. Department of State, Bureau of European and Eurasian Affairs, Washington Conference Principles on Nazi-Confiscated Art § 8 (1998), <https://www.state.gov/p/eur/rt/hlcst/270431.htm> (last visited August 12, 2018)).

52. Holocaust Victims Redress Act (HVRA) of 1998, Pub. L. No. 105-158, 112 Stat. 15 (1998).

owner;<sup>53</sup>

and (c) the 2009 Terezin Declaration on Holocaust Era Assets and Related Issues (the Terezin Declaration), issued by participants of the Holocaust Era Assets Conference in Prague, Czech Republic, which

reaffirmed the 1998 Washington Conference Principles on Nazi-Confiscated Art and urged all participants “to ensure that their legal systems or alternative processes, while taking into account the different legal traditions, facilitate just and fair solutions with regard to Nazi-confiscated and looted art, and to make certain that claims to recover such art are resolved expeditiously and based on the facts and merits of the claims and all the relevant documents submitted by all parties.”<sup>54</sup>

The Washington Conference Principles and the Terezin Declaration are aspirational but legally “non-binding” documents.<sup>55</sup> In addition, the HVRA includes a precatory “Sense of the Congress” provision but includes no “mandatory” language and no “enforceable law.”<sup>56</sup>

The second stated purpose of the HEAR Act is “[t]o ensure that claims to artwork and other property stolen or misappropriated by the Nazis are not unfairly barred by statutes of limitations but are resolved in a just and fair manner.”<sup>57</sup> This purpose is premised on the finding that lawsuits to recover alleged Nazi-looted art

53. Holocaust Expropriated Art Recovery Act § 2(4) (quoting Holocaust Victims Redress Act § 202).

54. *Id.* § 2(5) (quoting Terezin Declaration, Holocaust Era Assets Conference (June 30, 2009), [http://www.holocausteraassets.eu/files/200000215-35d8ef1a36/TEREZIN\\_DECLARATION\\_FINAL.pdf](http://www.holocausteraassets.eu/files/200000215-35d8ef1a36/TEREZIN_DECLARATION_FINAL.pdf) (last visited Aug. 24, 2018)).

55. See *Dunbar v. Seger-Thomschitz*, 615 F.3d 574, 577 n.1 (5th Cir. 2010) (stating that the Terezin Declaration is “legally non-binding”); U.S. Department of State, *supra* note 51 (stating that the Washington Conference Principles are “non-binding principles to assist in resolving issues relating to Nazi-confiscated art”).

56. Holocaust Victims Redress Act § 202; *Orkin v. Taylor*, 487 F.3d 734, 739 (9th Cir. 2007) (finding that the “Sense of Congress” provision in section 202 of the HVRA is precatory and includes no enforceable or mandatory language).

57. Holocaust Expropriated Art Recovery Act § 3(2).

face significant procedural obstacles partly due to State statutes of limitations, which typically bar claims within some limited number of years from either the date of the loss or the date that the claim should have been discovered . . . . The unique and horrific circumstances of World War II and the Holocaust make statutes of limitations especially burdensome to the victims and their heirs. Those seeking recovery of Nazi-confiscated art must painstakingly piece together their cases from a fragmentary historical record ravaged by persecution, war, and genocide. This costly process often cannot be done within the time constraints imposed by existing law.<sup>58</sup>

The HEAR Act does not recite any provision of Article I of the Constitution as its source of legislative power.<sup>59</sup> Instead, citing a 2010 Ninth Circuit decision, *Von Saher v. Norton Simon Museum of Art at Pasadena*,<sup>60</sup> the HEAR Act finds that “[f]ederal legislation is needed because the only court that has considered the question held that the Constitution prohibits States from making exceptions to their statutes of limitations to accommodate claims involving the recovery of Nazi-confiscated art.”<sup>61</sup>

### 1. *Von Saher*

*Von Saher* struck down a California statute that “create[d] a new cause of action” to “recover Holocaust-era artwork from . . . any museum or gallery that displays, exhibits, or sells any article of historical, interpretive, scientific, or artistic significance.”<sup>62</sup>

The court found that the California statute was unconstitutional under the doctrine of “foreign affairs field preemption” because it “establishe[d] a remedy for wartime injuries” and thereby “infringe[d] upon the federal government’s exclusive power to conduct foreign affairs, even though the law [did]

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58. *Id.* § 2(6).

59. *See id.* §§ 1–5; *see also* U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States . . .”).

60. 592 F.3d 954 (9th Cir. 2010).

61. Holocaust Expropriated Art Recovery Act § 2(7).

62. 592 F.3d at 958, 966 (quoting CAL. CIV. PROC. CODE § 354.3(a)–(b) (West 2018)).

not conflict with a federal law or policy.”<sup>63</sup> Specifically, the court found that, even though the California statute “purports to regulate property, an area traditionally left to the states, [the statute’s] real purpose is to provide relief to Holocaust victims and their heirs.”<sup>64</sup> The court explained:

By opening its doors as a forum to all Holocaust victims and their heirs to bring Holocaust claims in California against “any museum or gallery” whether located in the state or not, California has expressed its dissatisfaction with the federal government’s resolution (or lack thereof) of restitution claims arising out of World War II. In so doing, California can make “no serious claim to be addressing a traditional state responsibility.”

....

... Here, the relevant question is whether the power to wage and resolve war, including the power to legislate restitution and reparation claims, is one that has been exclusively reserved to the national government by the Constitution. We conclude that it has.<sup>65</sup>

Thus, the Ninth Circuit in *Von Saher* found that California could not establish a special remedial apparatus for Holocaust-era art claims.<sup>66</sup> The court instead concluded that any such remedial apparatus—if any—must be established by the federal government under the doctrine of foreign affairs field

63. *Id.* at 963–64, 966.

64. *Id.* at 964.

65. *Id.* at 965, 967 (quoting *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 419 n.11 (2003)). Much Nazi theft occurred in the 1930s and early 1940s before Congress had exercised its power under Article I, Section 8, Clause 10 to “declare war” on Germany (which occurred on December 11, 1941). See Anne Rothfeld, *Nazi Looted Art: The Holocaust Records Preservation Project*, 34 PROLOGUE MAG. 127 (2002), <https://www.archives.gov/publications/prologue/2002/summer/nazi-looted-art-1.html> (last visited Aug. 24, 2018). It is an open question as to whether, and to what extent, Congress’s right to regulate the “aftermath” of World War II is appurtenant to that substantive Article I power. *Von Saher*, 592 F.3d at 963. *Von Saher* may not constitute compelling authority to dictate “foreign affairs field preemption” by Congress in this particular area. *Id.* at 964.

66. *Von Saher*, 592 F.3d at 967; see § 2(7) (stating that the court in *Von Saher* held that the California law that made the exception to the statute of limitations for Nazi-looted art claims was unconstitutional).

preemption.<sup>67</sup> The *Von Saher* court based its decision in this regard in large part on the Supreme Court's decision in *American Insurance Association v. Garamendi*.<sup>68</sup>

## 2. *Garamendi*

*Garamendi* concerned California's Holocaust Victim Insurance Relief Act of 1999 (the HVIRA), which required any insurer doing business in the state to disclose information in aid of another California statute that "made it an unfair business practice for any insurer operating in the State to 'fail[] to pay any valid claim from Holocaust survivors.'"<sup>69</sup> Insurance companies and the federal government complained that the HVIRA undermined a negotiated agreement between the U.S. and Germany, signed by the U.S. President and the German Chancellor in 2000, for both countries to work with the International Commission on Holocaust Era Insurance Claims (the Commission).<sup>70</sup> That Commission was formed to handle "negotiation[s] with European insurers to provide information about unpaid insurance policies issued to Holocaust victims and settlement of claims brought under them."<sup>71</sup> The Court agreed that the HVIRA was preempted by the President's authority to conduct foreign relations.<sup>72</sup>

The Court first found that the Constitution allocates "the foreign relations power to the [n]ational [g]overnment" out of "concern for uniformity in this country's dealings with foreign nations."<sup>73</sup> The Court next found no "question generally that there is executive authority to decide what that policy should be."<sup>74</sup> The Court observed that:

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67. *Von Saher*, 592 F.3d at 967–68 ("[T]he federal government has initiated discussions with other countries, which will hopefully yield a comprehensive remedy for all Holocaust victims and their heirs. No organization comparable to the International Commission on Holocaust Era Insurance Claims has been established yet to resolve Holocaust-era art claims. This does not, however, justify California's intrusion into a field occupied exclusively by the federal government.") (citation omitted).

68. 539 U.S. 396 (2003).

69. *Id.* at 408–09 (quoting CAL. INS. CODE ANN. § 790.15(a) (West Cum. Supp. 2003)).

70. *Id.* at 405–07.

71. *Id.* at 407.

72. *Id.* at 427.

73. *Id.* at 413 (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964)).

74. *Id.* at 414.

[R]esolving Holocaust-era insurance claims that may be held by residents of this country is a matter well within the Executive's responsibility for foreign affairs. Since claims remaining in the aftermath of hostilities may be "sources of friction" acting as an "impediment to resumption of friendly relations" between the countries involved, there is a "longstanding practice" of the national Executive to settle them in discharging its responsibility to maintain the Nation's relationships with other countries.<sup>75</sup>

Accordingly, the Court explained that "[t]he exercise of the federal executive authority means that state law must give way where, as here, there is evidence of clear conflict between the policies adopted by the two."<sup>76</sup> In particular, the Court found that "HVIRA's economic compulsion to make public disclosure, of far more information about far more policies than [the Commission] rules require, employs 'a different, state system of economic pressure,' and in doing so undercuts the President's diplomatic discretion and the choice he has made exercising it."<sup>77</sup> The HVIRA therefore contravened the President's ability to speak for the United States with a single voice in resolving World War II-era claims.<sup>78</sup>

The President thus has the power to set diplomatic objectives for the nation in foreign relations and to preempt state laws that may conflict with the President's substantive policy judgments.<sup>79</sup> *Garamendi* also posited, in footnoted dictum, that "field preemption might be the appropriate doctrine" to invalidate a state law "[i]f a State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility . . . whether the National Government had acted and, if it had,

75. *Id.* at 420 (citations omitted) (first quoting *United States v. Pink*, 315 U.S. 203, 225 (1942); and then quoting *Dames & Moore v. Regan*, 453 U.S. 654, 679 (1981)). In *Dames & Moore*, the Court found that the President had the authority to suspend claims of U.S. nationals against Iran because of the longstanding precedent of negotiating settlements with foreign states. 453 U.S. at 654, 679, 686.

76. *Garamendi*, 539 U.S. at 421.

77. *Id.* at 423–24 (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 376 (2000)).

78. *Id.* at 424.

79. *Id.* at 427 ("The basic fact is that California seeks to use an iron fist where the President has consistently chosen kid gloves.").

without reference to the degree of any conflict . . . .”<sup>80</sup>

### 3. The HEAR Act’s Preemptive Statute of Limitations

*Garamendi* and *Von Saher* support the proposition that the federal government (through the Executive and Legislative Branches) may substantively preempt state laws dealing with Holocaust-era restitution claims under their respective foreign affairs powers<sup>81</sup> Both decisions contemplate substantive policy- and rule-making by those Branches.<sup>82</sup> Neither decision, however, constitutes express authority for Congress to purely procedurally preempt state laws in the Holocaust-era context.<sup>83</sup>

Nevertheless, the HEAR Act describes the decision in *Von Saher* as holding that a California law that extended the statute of limitations for claims involving Holocaust-era art “was an unconstitutional infringement of the Federal Government’s exclusive authority over foreign affairs, which includes the resolution of war-related disputes.”<sup>84</sup> The HEAR Act states that: “In light of this precedent, the enactment of a Federal law is necessary to ensure that claims to Nazi-confiscated art are adjudicated in accordance with the United States policy as expressed in the Washington Conference Principles on Nazi-Confiscated Art, the Holocaust Victims Redress Act, and the Terezin Declaration.”<sup>85</sup>

Based on its stated purpose, the HEAR Act imposes a preemptive statute of limitations for all existing civil claims or causes of action recognized by

80. *Id.* at 419 n.11.

81. *See supra* Sections II.C.1–2.

82. *Id.*

83. The HEAR Act takes no account of the Ninth Circuit’s subsequent decision in *Von Saher v. Norton Simon Museum of Art (Von Saher II)*, 754 F.3d 712 (9th Cir. 2014). *See* Holocaust Expropriated Art Recovery (HEAR) Act of 2016, Pub. L. No. 114-308, 130 Stat. 1524 (codified as amended at 22 U.S.C. § 1621 (2016)) (failing to mention *Von Saher II*). The court in *Von Saher II* held that a claim for restitution asserted against a private party (not against a foreign government), under “a state statute of general applicability” (such as for replevin) rather than under “Holocaust-specific legislation,” raises no foreign policy conflicts sufficient to trigger foreign affairs preemption. 754 F.3d at 719, 723.

84. § 2(7).

85. *Id.*

the various states' laws that enable the recovery of Holocaust-era art.<sup>86</sup> The HEAR Act specifically provides:

(a) . . . Notwithstanding any other provision of Federal or State law or any defense at law relating to the passage of time, and except as otherwise provided in this section, a civil claim or cause of action against a defendant to recover any artwork or other property that was lost during the covered period because of Nazi persecution may be commenced not later than 6 years after the actual discovery by the claimant or the agent of the claimant of—

(1) the identity and location of the artwork or other property; and

(2) a possessory interest of the claimant in the artwork or other property.<sup>87</sup>

The term “actual discovery” is defined to mean “knowledge,” where “knowledge” is further defined to mean “actual knowledge of a fact or circumstance or sufficient information with regard to a relevant fact or circumstance to amount to actual knowledge thereof.”<sup>88</sup> The term “Nazi persecution” is defined to mean “any persecution of a specific group of individuals based on Nazi ideology by the Government of Germany, its allies or agents, members of the Nazi Party, or their agents or associates, during the covered period.”<sup>89</sup> The “covered period” is defined to mean “the period beginning on January 1, 1933, and ending on December 31, 1945.”<sup>90</sup> The Act has a sunset date of January 1, 2027.<sup>91</sup>

The HEAR Act also provides that “[n]othing in this Act shall be construed to create a civil claim or cause of action under Federal or State law.”<sup>92</sup> Thus, the HEAR Act prescribes a six-year federal statute of limitations—triggered

86. *Id.* § 5(a).

87. *Id.*

88. *Id.* §§ 4(1), 4(4).

89. *Id.* § 4(5).

90. *Id.* § 4(3).

91. *Id.* § 5(g).

92. *Id.* § 5(f).

upon a showing of actual knowledge by the claimant—over all state law civil claims that seek recovery for the alleged loss of art due to Nazi persecution and that are commenced before January 1, 2027.<sup>93</sup>

### III. CURRENT STATE OF THE LAW

Whether Congress may bypass the enactment of a substantive federal cause of action and may only partially preempt existing state causes of action by changing their implementing procedural rules, is a question that the Supreme Court has yet to answer squarely.<sup>94</sup>

The question pits the Supremacy Clause of the Constitution against the Tenth Amendment of the Bill of Rights, which manifests America's concept of federalism and provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."<sup>95</sup>

#### A. *The U.S. Justice Department's Opinions in 1989*

In 1989, the Office of Legal Counsel to the Department of Justice (the Department) opined on Congress's power to only procedurally preempt state claims in a context similar to that presented by the HEAR Act.<sup>96</sup> Specifically, the Department considered whether Congress could "simply attempt[] to prescribe directly the state court procedures to be followed in products liability cases arising under state law,"<sup>97</sup> including setting the statute of limitations.<sup>98</sup>

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93. *Id.* § 5(a).

94. *See Suesz v. Med-1 Solutions, LLC*, 757 F.3d 636, 651–52 (7th Cir. 2014) (Sykes, J., concurring) ("It's an open question whether Congress has the power to prescribe procedural rules for *state-law* claims in state court. The Supreme Court has twice noted the issue but declined to decide it."); *see also Hewett v. Wells Fargo Bank, N.A.*, 197 So. 3d 1105, 1107–08 (Fla. Dist. Ct. App. 2016) (holding that Congress does not have unlimited power to regulate state practice and procedure).

95. U.S. CONST. amend X.

96. *See Congressional Authority to Require State Courts to Use Certain Procedures in Product Liability Cases*, 13 Op. O.L.C. 372, 372–76 (1989) [hereinafter *Congressional Authority*].

97. *Id.* at 373.

98. *See id.* at 376 n.5; *see also* Product Liability Reform Act of 1998, S. 2236, 105th Cong. §§ 106–07 (1998) (proposed successor bill that would have imposed national statute of limitations and statute of repose in certain products liability actions brought under state laws); Uniform Product

The Department began its analysis by observing:

[F]ederal law may properly govern certain procedural issues in state court suits concerning federal causes of action where this is necessary to secure the substantive federal right. . . .

. . . [I]f Congress enacts a substantive federal law of products liability, it may also establish rules of procedure, binding upon the states, that are necessary to effectuate the rights granted under the substantive law.<sup>99</sup>

The Department next explained, however:

Different questions are presented where Congress does not enact a substantive law of products liability to be applied by the states, but simply attempts to prescribe directly the state court procedures to be followed in products liability cases arising under state law. Such an action raises potential constitutional questions under the Tenth Amendment, since state court procedures in applying state law would appear to be an area that is generally within a state's exclusive control.<sup>100</sup>

Finding that “[t]here are no cases directly on point” and that “current Tenth Amendment jurisprudence cannot be said to be entirely settled,” the Department nonetheless opined, on alternative grounds, that Congress may elect only to procedurally preempt existing state laws according to three Supreme Court decisions: *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>101</sup> *South Carolina v. Baker*,<sup>102</sup> and *F.E.R.C. v. Mississippi*.<sup>103</sup>

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Liability Act of 1989, H.R. 1636, 101st Cong. § 9 (1989) (imposing a two-year statute of limitation with respect to state product liability actions).

99. *Congressional Authority*, *supra* note 96, at 373.

100. *Id.* at 373–74 (footnote omitted).

101. 469 U.S. 528 (1985).

102. 485 U.S. 505 (1988).

103. 456 U.S. 742 (1988); *see Congressional Authority*, *supra* note 96, at 374–75.

### 1. *Garcia* and *Baker*

*Garcia* was a 5-4 ruling—decided along ideological lines with the “conservatives” dissenting—that overruled prior Supreme Court precedent<sup>104</sup> issued less than a decade earlier in *National League of Cities v. Usery* (another 5-4 decision determined along ideological lines), which had held that the Tenth Amendment prohibited Congress from preempting state laws in “areas of traditional governmental functions.”<sup>105</sup> Finding the “traditional governmental functions” test to be “unworkable,”<sup>106</sup> the Court in *Garcia* found instead that there are “built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated.”<sup>107</sup>

In *Baker*, the Court explained that, “*Garcia* holds that the [Tenth Amendment’s] limits [on Congress’s power] are structural, not substantive—*i.e.*, that States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity.”<sup>108</sup>

The Department construed *Garcia* and *Baker* to hold that “the only apparent ground for raising a Tenth Amendment challenge to congressional regulation of state activity is to show that there were ‘extraordinary defects in the national political process’ that frustrated the normal procedural safeguards inherent in the federal system.”<sup>109</sup> The Department concluded that it was “difficult to imagine circumstances under which any state could successfully argue that the enactment of national legislation requiring the states to use certain procedures in products liability cases had been adopted pursuant to a process that left the state ‘politically isolated and powerless.’”<sup>110</sup>

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104. *Garcia*, 469 U.S. at 530–31 (overturning the “traditional governmental function” analysis).

105. *Nat’l League of Cities v. Usery*, 426 U.S. 833, 853 (1976).

106. 469 U.S. at 531, 546–47.

107. *Id.* at 556.

108. *South Carolina v. Baker*, 485 U.S. 505, 512 (1988).

109. *Congressional Authority*, *supra* note 96, at 374 (quoting *Baker*, 485 U.S. at 512).

110. *Id.* at 375. (quoting *Baker*, 485 U.S. at 512).

## 2. *F.E.R.C.*

Relying on *F.E.R.C. v. Mississippi*, the Department opined alternatively in 1989 that “it is uncertain whether the proposed legislation [of federal procedural rules governing state law products liability claims] would have been held to violate the Tenth Amendment even under pre-*Garcia* case law.”<sup>111</sup>

At issue in *F.E.R.C.* was the Tenth Amendment constitutionality of the Federal Public Utility Regulatory Policies Act of 1978 (PURPA).<sup>112</sup> Among other things, PURPA directed state utility regulatory commissions to “‘consider’ the adoption and implementation of specific ‘rate design’ and regulatory standards” according to certain federally proposed approaches, and granted a right to individuals to enforce that policy.<sup>113</sup> The Court characterized PURPA as “attempt[ing] to use state regulatory machinery to advance federal goals.”<sup>114</sup> The Court found no Tenth Amendment violation because PURPA:

[R]equire[d] only *consideration* of federal standards. . . . “[T]here can be no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a regulatory program.”

Similarly here, Congress could have pre-empted the field, at least insofar as private rather than state activity is concerned; PURPA should not be invalid simply because, out of deference to state authority, Congress adopted a less intrusive scheme and allowed the States to continue regulating in the area on the condition that they *consider* the suggested federal standards. While the condition here is affirmative in nature—that is, it directs the States to entertain proposals—nothing in this Court’s cases suggests that the nature of the condition makes it a constitutionally improper one. There is nothing in PURPA “directly compelling” the States to enact a legislative

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111. *Id.*

112. *F.E.R.C. v. Mississippi*, 456 U.S. 742, 745 (1982); *see* Public Utility Regulatory Policies Act (PURPA) of 1978, Pub. L. 95-617, 92 Stat. 3117 (1978).

113. *F.E.R.C.*, 456 U.S. at 746–48, 769.

114. *Id.* at 759.

program.<sup>115</sup>

Under the same reasoning, the Court also found that PURPA could “require state commissions to follow certain notice and comment procedures when acting on the proposed federal standards.”<sup>116</sup> The Court explained:

If Congress can require a state administrative body to consider proposed regulations as a condition to its continued involvement in a pre-emptible field—and we hold today that it can—there is nothing unconstitutional about Congress’ requiring certain procedural minima as that body goes about undertaking its tasks. The procedural requirements obviously do not compel the exercise of the State’s sovereign powers, and do not purport to set standards to be followed in all areas of the state commission’s endeavors.<sup>117</sup>

The Department construed *F.E.R.C.* as “suggest[ing] that Congress may choose the lesser course of allowing the states to continue to regulate this field [of products liability rather than completely preempt the states], while conditioning their continued involvement on state use of certain federally prescribed procedures.”<sup>118</sup>

#### *B. The Justice Department’s Opinion in 1999*

The Justice Department offered a contrary, albeit conclusory, opinion in 1999 during hearings over the then-proposed federal Act to Establish Certain Procedures for Civil Actions Brought for Damages Relating to [Y2K Failures]<sup>119</sup> (the Y2K Act).<sup>120</sup>

The Y2K Act arose from a concern by Congress that computers would

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115. *Id.* at 764–65 (footnote omitted) (citation omitted) (quoting *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 288 (1981)).

116. *Id.* at 770.

117. *Id.* at 771.

118. *Congressional Authority*, *supra* note 96, at 375–76.

119. Y2K Act, H.R. 775, 106th Cong. 1999; see Anthony J. Bellia, *Federal Regulation of State Court Procedures*, 110 *YALE L.J.* 947, 953 (2010) (referring to then-proposed title of the Y2K Act).

120. See 15 U.S.C. §§ 6601–17 (2012).

mistakenly fail to process correct dates after December 31, 1999, which could “unnecessarily disrupt interstate commerce.”<sup>121</sup> Among other things, the Y2K Act prescribed a pre-litigation notice requirement with a remediation period, as well as heightened pleading requirements, a heightened burden of proof, and a direction for state courts to follow Federal Rule of Evidence 704 which governs expert opinions.<sup>122</sup>

The technological concerns underpinning the Y2K Act never came to fruition, and thus the Y2K Act is effectively a dead letter.<sup>123</sup> Nevertheless,

[d]uring deliberations on the proposed Y2K Act, both individual senators and the Department of Justice questioned its constitutionality. Senator Patrick Leahy described the bill as “an arrogant dismissal of the basic constitutional principle of federalism” and predicted that the Supreme Court would “strike down this new law as unconstitutional.” Senator Fritz Hollings described the bill as doing away with the Tenth Amendment to the Constitution. *The Department of Justice believed that there was “a serious risk that courts would view [the Y2K Act’s] procedural instructions to State courts as constitutionally impermissible intrusions on State governmental autonomy.”*<sup>124</sup>

The Department’s 1999 opinion apparently was its last consideration of the subject of purely procedural preemption. That opinion indicates that the Department questioned Congress’s power to preempt state causes of action with conflicting procedural rules only.<sup>125</sup> As discussed below, this author agrees.<sup>126</sup>

121. Bellia, *supra* note 119, at 953–55.

122. *Id.* at 954.

123. See Lily Rothman, *Remember Y2K? Here’s How We Prepped for the Non-Disaster*, TIME (DEC. 31, 2014), <http://time.com/3645828/y2k-look-back/> (“Of course, it wasn’t long before it became clear that all the [Y2K] fears associated with the turn of the millennium were for naught.”).

124. *Id.* at 954–55 (emphasis added) (footnotes omitted) (first quoting 145 CONG. REC. S8020 (daily ed. July 1, 1999) (statement of Sen. Leahy); then quoting 145 CONG. REC. S4411 (daily ed. Apr. 29, 1999) (statement of Sen. Hollings); and then quoting H.R. REP. NO. 106-131, at 34 (1999)).

125. H.R. REP. NO. 106-131, at 34 (“We also question whether it is a wise matter of federal policy to preempt the regulatory authority of state agencies.”).

126. See *infra* Part IV.

## IV. ANALYSIS: THE PROBLEMS WITH PURELY PROCEDURAL PREEMPTION

Congress's power under the Supremacy Clause should not be seen to support the ability to superimpose purely procedural federal rules over the procedural rules of existing substantive state law claims and rights.<sup>127</sup> Principles of federalism under the Tenth Amendment should limit Congress's Supremacy Clause authority in this particular regard.<sup>128</sup>

A. *The Justice Department's 1989 Opinions Are Not Compelling*1. *Garcia* and *Baker* No Longer Reflect Governing Tenth Amendment Jurisprudence

As noted above, the rule that developed from *Garcia* and *Baker*, upon which the Justice Department relied in forming its 1989 opinions, was accomplished over a number of separate dissenting opinions by a then-minority of conservative Justices.<sup>129</sup> Indeed, in *Garcia*, Justice Powell dissented and criticized the majority opinion as having "only a single passing reference to the Tenth Amendment," and as "reflect[ing] the Court's unprecedented view that Congress is free under the Commerce Clause to assume a State's traditional sovereign power, and to do so without judicial review of its action."<sup>130</sup> Justice O'Connor similarly dissented and expressed her view that:

[F]ederalism cannot be reduced to the weak "essence" distilled by the majority today. There is more to federalism than the nature of the constraints that can be imposed on the States in "the realm of

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127. See *infra* Sections IV.A–E.

128. See Elizabeth Price Foley, *Revisiting the Constitution: Restore Federalism*, N.Y. TIMES (Oct. 1, 2013, 4:27 PM), <https://www.nytimes.com/roomfordebate/2012/07/08/another-stab-at-the-us-constitution/revisiting-the-constitution-restore-federalism> ([W]hile the 10th Amendment doesn't tell us what powers belong to the states, its message is clear: preserving federalism requires vigilant enforcement of limited and enumerated powers.").

129. See *South Carolina v. Baker*, 485 U.S. 505, 529 (1988) (noting that Justice O'Connor dissented); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557 (1985) (noting that the Court's holding was a 5-4 decision and that Justices Powell, Rehnquist, O'Connor, and Chief Justice Burger filed dissenting opinions).

130. *Garcia*, 469 U.S. at 560, 575.

authority left open to them by the Constitution.” The central issue of federalism, of course, is whether any realm *is* left open to the States by the Constitution—whether any area remains in which a State may act free of federal interference. . . . If federalism so conceived and so carefully cultivated by the Framers of our Constitution is to remain meaningful, this Court cannot abdicate its constitutional responsibility to oversee the Federal Government’s compliance with its duty to respect the legitimate interests of the States.<sup>131</sup>

In the 1990s, the conservative Justices reshaped Tenth Amendment law by holding that Congress may not “commandeer” state lawmaking in two leading decisions: *New York v. United States* (6-3 decision delivered by Justice O’Connor)<sup>132</sup> and *Printz v. United States* (5-4 decision delivered by Justice Scalia).<sup>133</sup>

In *New York*, the Court invalidated a federal radioactive waste disposal statute because Congress sought to “use the States as implements of regulation . . . [by] direct[ing] or otherwise motivat[ing] the States to regulate in a particular field or a particular way.”<sup>134</sup> The Court explained that, “[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; *if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.*”<sup>135</sup> Thus, according to the Court, while Congress has “the ability to encourage a State to regulate in a particular way, or . . . [to] hold out incentives to the States as a method of influencing a State’s policy choices,” Congress “may not simply ‘commande[e]r’ the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.”<sup>136</sup>

While not purporting to overrule *Garcia*, the Court in *New York* nonetheless revived as a rule that “[t]he Tenth Amendment . . . directs us to determine

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131. *Id.* at 580–81.

132. *New York v. United States*, 505 U.S. 144, 147 (1992).

133. *Printz v. United States*, 521 U.S. 898, 900–01 (1997).

134. *New York*, 505 U.S. at 161.

135. *Id.* at 156 (emphasis added).

136. *Id.* at 161, 166 (quoting *Hodel v. Va. Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288 (1981)).

... whether an incident of state sovereignty is protected by a limitation on an Article I power.”<sup>137</sup> Therefore, inquiring into whether a “political process defect” led to an overbearing federal law no longer resolves the issue.<sup>138</sup>

The Supreme Court reinforced the “anti-commandeering principle” in *Printz* by invalidating a provision of the Federal Brady Handgun Violence Prevention Act (the Brady Act)<sup>139</sup> that had “command[ed] state and local law enforcement officers to conduct background checks on prospective handgun purchasers and to perform certain related tasks.”<sup>140</sup> In particular, the Court rejected the Federal Government’s argument that the Brady Act was constitutionally permissible because it did “not require state legislative or executive officials to make policy” but rather simply “requir[ed] state officers to perform discrete, ministerial tasks specified by Congress.”<sup>141</sup> In this sense, *Printz* suggests that Congress may not simply command states, as a ministerial matter, to follow federal procedural mandates in the states’ implementation of their own causes of action.<sup>142</sup>

Accordingly, the Department’s reliance in 1989 on *Garcia* and *Baker* in concluding that Congress may procedurally preempt state civil laws without a substantive federal cause of action is stale.<sup>143</sup>

## 2. The Department’s 1989 Opinion Misconstrued *F.E.R.C.*

The Department’s alternative reliance in 1989 on *F.E.R.C.* is also

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137. *Id.* at 157.

138. *See id.* But see *Congressional Authority*, *supra* note 96, at 374 (arguing that the only grounds for raising a Tenth Amendment challenge to congressional regulation of state activity is to show that there were “extraordinary defects in the national political process” (quoting *South Carolina v. Baker*, 485 U.S. 505, 512 (1988))).

139. Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993).

140. *Printz v. United States*, 521 U.S. 898, 902 (1997).

141. *Id.* at 926, 929.

142. *See id.* at 928 (“Preservation of the States as independent and autonomous political entities is arguably less undermined by requiring them to make policy in certain fields than . . . by ‘reduc[ing] [them] to puppets of a ventriloquist Congress.’” (quoting *Brown v. EPA*, 521 F.2d 827, 839 (9th Cir. 1975), *vacated*, 431 U.S. 99, 97 (1977))); *see also* *Reno v. Condon*, 528 U.S. 141, 143 (2000) (explaining that “the federalism principles enunciated in *New York* . . . and *Printz*” control Tenth Amendment analyses).

143. *See supra* Section IV.A.1.

problematic because that decision does not hold that Congress may solely procedurally preempt state laws.<sup>144</sup> The Court in *F.E.R.C.* made it painfully clear that the federal statute's imposition on the states was minimal because it required no more than a "consideration" of the federal standards proposed.<sup>145</sup> Thus, PURPA did not necessarily present an outcome-determinative effect on state action; indeed, PURPA did not necessarily "conflict" with any state laws at all.<sup>146</sup> *F.E.R.C.* is thus questionable authority upon which to conclude that Congress may superimpose conflicting and outcome-determinative procedural rules (such as shorter or lengthier statutes of limitation) on existing state causes of action.<sup>147</sup>

In addition, the statute in *F.E.R.C.* was not purely procedural.<sup>148</sup> Congress had made *substantive* determinations about its proposed rate-setting mechanisms, thereby creating a *substantive* federal right that could be enforced (at least to the extent of requiring states to "consider" the proposed federal standards).<sup>149</sup> PURPA's notice and comment procedures—which the Court also emphasized were "minima"—did not exist in a vacuum of enacted substantive federal rights.<sup>150</sup> Rather, the Court found that those procedures provided the means to ensure that the states demonstrated their "undertaking" of actually "considering" the proposed federal standards.<sup>151</sup> *F.E.R.C.* is

144. See *infra* Section III.A.2.

145. *F.E.R.C. v. Mississippi*, 456 U.S. 742, 764 (1982) ("Titles I and II of PURPA require only *consideration* of federal standards.").

146. *Id.* at 765 ("[B]ecause the two challenged [PURPA] Titles simply condition continued state involvement in a pre-emptible area on the consideration of federal proposals, they do not threaten the States' 'separate and independent existence.'" (first quoting *Lane County v. Oregon*, 74 U.S. 71, 76 (1869); and then quoting *Coyle v. Oklahoma*, 221 U.S. 559, 580 (1911))); see also *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 367, 372 (2000) ("We will find preemption where it is impossible for a private party to comply with both state and federal law.").

147. *Cf. Guar. Tr. Co. of N.Y. v. York*, 326 U.S. 99, 109 (1945) (refusing to answer whether statute of limitations is a procedural or substantive, but holding that in diversity cases, courts should apply the state procedural rules if the federal procedural rules would determine the case differently).

148. See *F.E.R.C.*, 456 U.S. at 772 (Powell, J., dissenting) ("As these utilities normally are given monopoly jurisdiction, they are extensively regulated both substantively and procedurally by state law.").

149. *Id.* at 746 ("PURPA direct[ed] state utility regulatory commissions and nonregulated utilities to 'consider' the adoption and implementation of specific 'rate design' and regulatory standards.").

150. *Id.* at 771.

151. *Id.* ("[T]here is nothing unconstitutional about Congress' requiring certain procedural minima

accordingly akin to *Dice* and *Felder* in holding that Congress may impose procedural rules that are “part and parcel” of the substantive federal right that Congress wants enabled.<sup>152</sup>

For these reasons, the Department’s opinion in 1989 that Congress may elect to procedurally preempt state causes of action without coupling its procedural rules with substantive federal rights is not compelling.<sup>153</sup> Notably, the products liability bills proposed by Congress in 1989 and again in 1998 were never enacted.<sup>154</sup> The HEAR Act appears to be Congress’s next effort to procedurally preempt state causes of action.<sup>155</sup>

### *B. Purely Procedural Preemption Offends Federalism*

Federalism, grounded in the Tenth Amendment, “states but a truism that all is retained which has not been surrendered.”<sup>156</sup> Article I grants Congress the right to create substantive federal rights and causes of action within the expressly enumerated subjects of Section Eight;<sup>157</sup> other substantive policy and rulemaking are reserved to the states.<sup>158</sup>

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as that body goes about undertaking its tasks.”).

152. *See Felder v. Casey* 487 U.S. 131, 153 (1988) (“[E]nforcement of the notice-of-claim statute in § 1983 actions brought in state court so interferes with and frustrates the substantive right Congress created that, under the Supremacy Clause, it must yield to the federal interest.”); *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359 (1952) (“The right to trial by jury is a ‘basic and fundamental feature of our system of federal jurisprudence’ and that it is ‘part and parcel of the remedy afforded railroad workers under the [federal] Employers’ Liability Act.’” (quoting *Bailey v. Cent. Vt. Ry.*, 319 U.S. 350, 354 (1943))).

153. *See supra* Section III.A.

154. *See* Product Liability Reform Act of 1998, S. 2236, 105th Cong. §§ 106–07 (1998); Uniform Product Liability Act of 1989, H.R. 1636, 101st Cong. § 9 (1989); *see also H.R. 1636 (101st): Uniform Product Liability Act of 1989*, GOVTRACK, <https://www.govtrack.us/congress/bills/101/hr/1636> (last visited Sept. 9, 2018) (noting that the Uniform Product Liability Act of 1989 was not enacted); S. 2236 (105<sup>th</sup>): *Product Liability Reform Act of 1998*, GOVTRACK, <https://www.govtrack.us/congress/bills/105/s2236> (last visited Aug. 9, 2018) (noting that the Product Liability Reform Act of 1998 was not enacted).

155. *See infra* Part V.

156. *New York v. United States*, 505 U.S. 144, 156 (1992) (quoting *United States v. Darby*, 312 U.S. 100, 124 (1941)).

157. U.S. Const. art. I, § 8.

158. *See, e.g., New York*, 505 U.S. at 156; *Testa v. Katt*, 330 U.S. 386, 393 (1947) (“[A] state court cannot ‘refuse to enforce the right arising from the law of the United States because of conceptions of

Nothing in Article I expressly grants Congress the right to vary state rules of procedure, and the Court has repeatedly acknowledged the setting of such rules as falling within the sphere of state power.<sup>159</sup>

The notion that Congress can command states to apply their causes of action in a particular field according to federally preferred procedures based on Congress's power to preempt the field by substantive legislation, conflicts with the principles of federalism and state sovereignty, and similarly, conflicts with the rulings in *New York* and *Printz*.<sup>160</sup>

*New York* forbids Congress from directly compelling states "to enact and enforce a federal regulatory program."<sup>161</sup> By engrafting a federal procedure onto state causes of action, Congress effectively compels the states (through their legislatures and judiciaries) to transmogrify their own civil claims.<sup>162</sup> The fact that Congress could have—but did not—completely preempt the field with a substantive law of its own is a *non sequitur* response to this point.<sup>163</sup>

Likewise, *Printz* rejected the proposition that Congress can compel states (through their officers, including state judges) to enforce "discrete" and

impolicy or want of wisdom on the part of Congress in having called into play its lawful powers." (quoting *Minneapolis & St. Louis R.R. v. Bombolis*, 241 U.S. 211, 222 (1916)); *Mondou v. N.Y., New Haven, & Hartford. R.R.* 223 U.S. 1, 57 (1912) ("When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the states, and thereby established a policy for all.").

159. *E.g.*, *Felder v. Casey* 487 U.S. 131, 138 (1988) ("No one disputes the general and unassailable proposition . . . that States may establish the rules of procedure governing litigation in their own courts."); *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988) ("Since the procedural rules of its courts are surely matters on which a State is competent to legislate, it follows that a State may apply its own procedural rules to actions litigated in its courts."); *Bombolis*, 241 U.S. at 219 (explaining that, while the Seventh Amendment right to trial by jury "must . . . be applicable to every right of a Federal character created by Congress," there is "no ground for the proposition that the Amendment is applicable and controlling in proceedings in state courts deriving their authority from state law").

160. *See generally* *Bellia*, *supra* note 119, at 976–83.

161. *New York*, 505 U.S. at 161 (quoting *Hodel v. Va. Surface Mining & Reclamation Assn.*, 452 U.S. 264, 288 (1981)).

162. *See* *Bellia*, *supra* note 119, at 959–63 (discussing Congress's authority to force state courts to follow procedural rules).

163. *See* *NCAA v. Governor of New Jersey*, 730 F.3d 208, 227 (3d Cir. 2013), *abrogated by* *Murphy v. NCAA*, 138 S. Ct. 1461 (2018) ("Stated differently, Congress 'lacks the power directly to compel the States to require or prohibit' acts which Congress itself may require or prohibit." (quoting *New York*, 505 U.S. at 166)).

“ministerial” rules.<sup>164</sup> In fact, the language in *Printz* supports the conclusion that the Court would be skeptical of a rule that would permit Congress to vary procedural rules for state causes of action without the creation of a substantive federal right and cause of action.<sup>165</sup>

The Supreme Court’s pronouncement in *Felder* that “State courts simply are not free to vindicate the substantive interests underlying a state rule of decision at the expense of the federal right” is also instructive.<sup>166</sup> The corollary implication is that Congress may not be free to vindicate the substantive interests underlying a particular federal rule of procedure at the expense of state sovereignty to establish a state right.<sup>167</sup>

164. *Printz v. United States*, 521 U.S. 898, 929 (1997). See also Bellia, *supra* note 119, at 973–76, 976 n.160 (citing the Judges Clause within the Supremacy Clause and explaining: “To say, as the Court did in *Printz*, that federal law imposes mandatory obligations on judges in state courts is not to say that Congress may act outside of its enumerated powers to order state judges to do anything”).

165. See also *Jinks v. Richland County*, 538 U.S. 456, 465 (2003) (“To sustain § 1367(d) in this case, we need not (and do not) hold that Congress has unlimited power to regulate practice and procedure in state courts.”); *Felder v. Casey* 487 U.S. 131, 138 (1988) (“[W]here state courts entertain a federally created cause of action, the ‘federal right cannot be defeated by the forms of local practice.’” (quoting *Brown v. W. Ry. of Ala.*, 338 U.S. 294, 296 (1949))); *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988) (“Since the procedural rules of its courts are surely matters on which a State is competent to legislate, it follows that a State may apply its own procedural rules to actions litigated in its courts.”); *In re Tarble*, 80 U.S. 397, 407 (1871) (“Such being the distinct and independent character of the two governments, within their respective spheres of action, it follows that neither can intrude with its judicial process into the domain of the other, except so far as such intrusion may be necessary on the part of the National government to preserve its rightful supremacy in cases of conflict of authority. In their laws, and mode of enforcement, neither is responsible to the other.”); cf. *Erie R.R. v. Tompkins*, 304 U.S. 64, 79 (1938) (“[Federal] [s]upervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence.”).

166. *Felder*, 487 U.S. at 152.

167. See Bellia, *supra* note 119, at 1001 (“[T]he states should have exclusive authority to regulate state court procedures for enforcing rights of action arising under their own laws. . . . The power to create rights of action should include the power to specify a fitting means of judicial enforcement.”). Professor Bellia’s article posed the following question: “Suppose Congress passed a law providing that, in cases affecting interstate commerce, even in cases arising under state law, state courts must enforce the following rules: Rule 1—An answer or motion to dismiss must be filed within five days after service of a complaint; Rule 2—Discovery must be completed within two weeks after service of a complaint; . . . . The statute states that its purpose is to lessen the economic burden of protracted litigation on interstate commerce. Would such a statute be constitutional?” *Id.* at 953. Professor Bellia concluded that the answer to the question above should be “no.” *Id.* at 1001. His conclusion

C. *The Second Circuit's 2002 Decision in Freier*

Proponents of Congress's power to purely procedurally preempt state laws may point to the Second Circuit's decision in *Freier v. Westinghouse Electric Corp.*<sup>168</sup> As explained below, while that decision appears at first glance to support Congress's right to pass purely procedural laws, a closer analysis, and the need to reconcile *Freier's* holding with pre-existing (and still controlling) Supreme Court precedent, indicates otherwise.<sup>169</sup>

In *Freier*, the Second Circuit considered whether the claim-accrual provision of the Federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA),<sup>170</sup> which requires a plaintiff's actual or constructive knowledge of toxic harm to commence the statute of limitations period,<sup>171</sup> could preempt conflicting state statute of limitation rules.<sup>172</sup> Relying on *New York* and *Printz*, the court concluded that CERCLA's claim-accrual provision

does not conscript into federal service either the state's legislature or its executive branch. Rather, . . . [it] simply requires courts in which state-law toxic tort claims are asserted to recognize that such a claim did not accrue before the plaintiff knew or reasonably should have known the cause of the injury. This is a modest requirement that is squarely within Congress's long established powers under the Supremacy Clause of the Constitution.<sup>173</sup>

Thus, the court appeared to espouse a new rule that Congress may impose

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was based largely on an examination of the "dichotomy between substance and procedure" presented by Supreme Court decisions over time. *Id.* As discussed in Section IV(E) below, the Supreme Court later cited Professor Bellia's article in *Jinks*. 538 U.S. at 464.

168. *Freier v. Westinghouse Elec. Corp.*, 303 F.3d 176, 182 (2d Cir. 2002); *see also* Karen S. Nabolz, *The Tick of the Statute of Limitations Clock: How the FRCD Preempts the State Law Accrual Date in Freier v. Westinghouse Electric Corporation*, 15 VILL. ENVTL. L.J. 41, 63 (2004) ("The Second Circuit correctly interpreted the FRCD.").

169. *See infra* Sections IV.C.1–4.

170. 42 U.S.C. §§ 9601–75 (2012).

171. *See id.* § 9658 (discussing state statutes of limitations).

172. *Freier*, 303 F.3d at 183.

173. *Id.* at 204.

“modest” procedural requirements on state courts adjudicating state law claims in the absence of any federally created and preemptive substantive rights.<sup>174</sup> In the immediately preceding section of its decision, however, the court specifically found that the claim-accrual provision was *not* purely procedural, but was an important part of the overall regulatory scheme that enables plaintiffs to vindicate their substantive rights.<sup>175</sup>

Congress enacted CERCLA as a “comprehensive response to the national problem of controlling and remediating the effects of release of dangerous contaminants.”<sup>176</sup> CERCLA creates a number of substantive federal rights and causes of action.<sup>177</sup> Among other things, CERCLA “authorizes a national plan establishing procedures and standards for responding to releases of hazardous substances.”<sup>178</sup> As part of the national plan, Congress determined that “uniformity in achieving redress in state courts for toxic torts,” including for state law claims arising out of “wholly intrastate releases of hazardous wastes,” was necessary to regulate interstate commerce so as to prevent “competitive imbalances in the hazardous wastes disposal industry based on differing schemes for invoking relevant statutes of repose.”<sup>179</sup> Congress thus included the claim-accrual provision to apply to CERCLA claims as well as to all state toxic tort claims.<sup>180</sup>

In rejecting the contention that CERCLA’s claim-accrual provision exceeded Congress’s Commerce Clause powers, the court in *Freier* found that the provision “is an integral part of the regulatory scheme established by CERCLA.”<sup>181</sup> Specifically, the court found that the provision induces voluntary remediation by polluters by exposing them “to a longer period of liability for the harms [their] sites cause to human health and the environment,” whereas shorter state limitations periods incentivized polluters to gamble that

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174. *Id.*

175. *Id.* at 203 (“In sum, we conclude that the FRCD is an integral part of the regulatory scheme established by CERCLA, furthering CERCLA’s goals in various ways . . .”).

176. *Id.* at 186 (quoting *In re Pfohl Bros. Landfill Litig.*, 26 F. Supp. 2d 512, 543 (W.D.N.Y. 1998), *vacated sub nom. Freier*, 303 F.3d at 176).

177. *E.g.*, 42 U.S.C. § 9607(a) (2012) (imposing liability for environmental remediation).

178. *Freier*, 303 F.3d at 201 (citing 42 U.S.C. § 9605(a)).

179. *Id.* at 186 (quoting *In re Pfohl Bros. Landfill Litig.*, 26 F. Supp. 2d at 543).

180. *Id.* at 203 (“Clearly, CERCLA itself was enacted as a response to a national problem . . .”).

181. *Id.*

victims' claims would be time-barred because they would be unaware of any harm caused.<sup>182</sup> The claim-accrual provision thus furthered the national plan that Congress had created under its Commerce Clause powers.<sup>183</sup>

Accordingly, *Freier* is in line with the holdings in *Dice* and *Felder* which permit preemption by federal procedural rules when they are "part and parcel"<sup>184</sup> of substantive federal rights and causes of action.<sup>185</sup>

### 1. *Burnett*

The Supreme Court reached a similar result in *Burnett v. Grattan*.<sup>186</sup> In *Burnett*, the Supreme Court considered how to apply the Civil Rights Act's statute of limitations "borrowing" provision,<sup>187</sup> and whether Maryland's statute of limitations governing administrative claims for employment discrimination was an appropriate period to apply to federal Civil Rights Act claims asserted in Maryland federal courts.<sup>188</sup> The Court held that Maryland's administrative limitations period was unduly short to vindicate federal civil rights.<sup>189</sup>

The Court in *Burnett* began by explaining that, "[i]n the Civil Rights Act, Congress established causes of action arising out of rights and duties under the Constitution and federal statutes."<sup>190</sup> The Court found that "[a]n appropriate limitations period must be responsive to" the federal rights that

182. *Id.*

183. *Id.* ("CERCLA . . . was within Congress's powers under the Commerce Clause.")

184. *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 368 (1952)

185. See *Freier*, 303 F.3d at 204; *Dice*, 342 U.S. at 363 (1952). The Justice Department's 1989 opinion discussed above includes a parting and non-elucidated footnote observing that Congress has preempted certain state statutes of limitations in the toxic tort context under CERCLA. *Congressional Authority*, *supra* note 96, at 376 n.5. Again, because CERCLA is not a purely procedural preemptive statute, the Department's reliance on the claim-accrual provision of CERCLA was misplaced. See *supra* notes 175–85 and accompanying text.

186. 468 U.S. 42, 45 (1984), *partially overruled on other grounds by* *Wilson v. Garcia*, 471 U.S. 261 (1985), *and* *Owens v. Okure*, 488 U.S. 235 (1989).

187. *Id.* at 55.

188. *Id.* at 143–46.

189. *Id.* at 54–55.

190. *Id.* at 50.

Congress created.<sup>191</sup> The Court also found that, whereas “[i]tigitating a civil rights claim requires considerable preparation,” the goal of Maryland’s administrative procedure was to facilitate “the prompt identification and resolution of employment disputes” and to “encourage[] conciliation and private settlement . . . in live disputes.”<sup>192</sup> The Court concluded that Maryland’s “short statute of limitations” for administrative claims, which was not “devised[] . . . with national interests in mind” and had different “policy goals,” was incongruous with “the implementation of national policies” that Congress created through the Civil Rights Act.<sup>193</sup>

Thus, when Congress creates federal rights and causes of action that are supreme over the states, Congress likewise may dictate the procedures to vindicate those rights and causes of action.<sup>194</sup> States may not rely on conflicting civil procedural rules that could detract from the federal right itself.<sup>195</sup> The Supreme Court has not held, however, that Congress can procedurally preempt state causes of action without an appurtenant federal *substantive* right and remedy.<sup>196</sup>

The *Freier* panel contrarily found that “Congress may, as it has done on occasion, simply extend a state limitations period,” regardless of whether Congress also creates substantive federal rights and remedies.<sup>197</sup> For that proposition, the court cited *Stewart v. Kahn*.<sup>198</sup> Nevertheless, *Stewart* is another decision that is akin to the “part and parcel” rule.<sup>199</sup>

## 2. *Stewart*

The issue in *Stewart* was whether Congress had the power to toll state

191. *Id.*

192. *Id.* at 50, 54.

193. *Id.* at 52–54 (quoting *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367 (1977)).

194. *See id.* at 54–55 (“[We] conclude that borrowing the limitations period from Maryland[ ] . . . was inappropriate.”).

195. *See id.*

196. *Suesz v. Med-1 Sols., LLC*, 757 F.3d 636, 651–52 (7th Cir. 2014) (“The Supreme Court has twice noted the issue but declined to decide it.”).

197. *Freier v. Westinghouse Elec. Corp.*, 303 F.3d 176, 204 (2d Cir. 2002).

198. *Stewart v. Kahn*, 78 U.S. 493, 497 (1870).

199. *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 368 (1952) (using the part and parcel rule); *see Stewart*, 78 U.S. at 507.

statutes of limitations for claims against those who were in the Confederacy during the Civil War and thus unable to be served with process.<sup>200</sup> The Court held that Congress had such a right but *not* as an exercise of purely procedural preemption.<sup>201</sup> Rather, the Court explained that such tolling was necessary to vindicate Congress's substantive power "to declare war."<sup>202</sup> The Court explained that Congress's war power:

[C]arries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress. This [tolling statute] falls within the latter category. *The power to pass it is necessarily implied from the powers to make war and suppress insurrections. It is a beneficent exercise of this authority.* . . . It would be a strange result if those in rebellion, by protracting the conflict, could thus rid themselves of their debts, and Congress, which had the power to wage war and suppress the insurrection, had no power to remedy such an evil, which is one of its consequences.<sup>203</sup>

Thus, because Congress had exercised its substantive power by actually declaring war against the Confederacy, Congress "necessarily" had the concomitant right to impose procedural rules on the states to vindicate Congress's power and decision to have waged war.<sup>204</sup>

### 3. *Woods*

The Supreme Court's decision in *Woods v. Cloyd W. Miller Co.* is also instructive.<sup>205</sup> *Woods* involved Congress's power under the Necessary and

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200. *Stewart*, 78 U.S. at 501–02.

201. *See id.* at 506–07.

202. *Id.* at 506.

203. *Id.* at 507 (emphasis added).

204. *Id.*; accord *Soldiers' and Sailors' Civil Relief Act of 1940*, 50 U.S.C. § 3936(a) (2012). The act was transferred from 50 U.S.C. § 525 to § 3935. 50 App. U.S.C.A. (West 2018); see *Freier v. Westinghouse Elec. Corp.*, 303 F.3d 176, 204 (2d Cir. 2002) (citing § 525 and describing it as "tolling limitations periods for actions by or against persons in active military service").

205. 333 U.S. 138 (1948).

Proper Clause of Article I,<sup>206</sup> to regulate housing rents (due to a perceived shortage of available housing at the time) as an incident to its war power after the conclusion of World War II.<sup>207</sup> The Court found “that the war power sustains this legislation” because it “includes the power ‘to remedy the evils which have arisen from its rise and progress’ and continues for the duration of that emergency.”<sup>208</sup> The Court went on to state that, “[w]hatever may be the consequences when war is officially terminated, the war power does not necessarily end with the cessation of hostilities.”<sup>209</sup>

The Court in *Woods* also noted, however, that tension with the Tenth Amendment could arise were Congress to over-rely on its war power.<sup>210</sup> The Court explained:

We recognize the force of the argument that the effects of war under modern conditions may be felt in the economy for years and years, and that *if the war power can be used in days of peace to treat all the wounds which war inflicts on our society, it may not only swallow up all other powers of Congress but largely obliterate the Ninth and Tenth Amendments as well.* There are no such implications in today’s decision. We deal here with the consequences of a housing deficit greatly intensified during the period of hostilities by the war effort. Any power, of course, can be abused. But we cannot assume that Congress is not alert to its constitutional responsibilities. And the question whether the war power has been properly employed in cases such as this is open to judicial inquiry.<sup>211</sup>

#### 4. *Jinks*

The Court applied a similar analysis in *Jinks v. Richland County*.<sup>212</sup>

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206. U.S. CONST. art. I, § 8, cl. 18.

207. *Woods*, 333 U.S. at 139–43.

208. *Id.* at 141 (quoting *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 161 (1919)).

209. *Id.* (footnote omitted).

210. *Id.* at 143–44.

211. *Id.* at 143–44 (emphasis added).

212. 538 U.S. 456 (2003).

There, the Court examined *Stewart* and found that the statute of limitations tolling rule provided by 28 U.S.C. § 1367(d) (the federal supplemental jurisdiction statute) controls supplemental state law claims asserted in federal courts because, similar to the reasoning in *Stewart*, “§ 1367(d) is necessary and proper for carrying into execution Congress’s power ‘[t]o constitute Tribunals inferior to the [S]upreme Court,’ U.S. Const., Art. I, § 8, cl. 9, and to assure that those tribunals may fairly and efficiently exercise ‘[t]he judicial Power of the United States,’ Art. III, § 1.”<sup>213</sup>

The Court in *Jinks* reasoned that, because Congress has the substantive power to create “inferior” courts, once Congress does so it may also create preemptive procedural rules to give those courts effective jurisdictional power when adjudicating state law claims.<sup>214</sup> The Court found that, without a tolling rule, parties faced three “unattractive options”: they could file supplemental state claims in federal court and risk dismissal of those claims after the limitations period had run; they could file a single state court action and forfeit their right to a federal forum for federal claims; or they could file two concurrent actions and ask the state court to stay the action pending the outcome in federal court.<sup>215</sup> Each option was “obviously inefficient” and produced an “obvious frustration of statutory policy” behind § 1367, which is to create judicial efficiency through the federal courts.<sup>216</sup> The Court also explained that

[t]here is no suggestion . . . that Congress enacted § 1367(d) [(the tolling rule)] as a ‘pretext’ for ‘the accomplishment of objects not entrusted to the [federal] government,’ nor is the connection between § 1367(d) and Congress’s authority over the federal courts so attenuated as to undermine the enumeration of powers set forth in Article I, § 8.<sup>217</sup>

*Jinks*, like *Stewart* and *Woods*, reflects the rule that if Congress creates substantive rights and duties (such as the right to seek relief in federal courts created by Congress, or the duty to fight a war with the right to have “evils”

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213. *Id.* at 462.

214. *Id.*

215. *Id.* at 463.

216. *Id.*

217. *Id.* at 464 (citation omitted).

springing from that duty remedied thereafter), then Congress may accompany those rights with preemptive procedural rules to ensure vindication of the substantive rights.<sup>218</sup>

For these reasons, *Freier* is not compelling authority to support the proposition that Congress may preempt state causes of action by imposing purely procedural requirements.<sup>219</sup> Furthermore, *Freier* fails to explain or reconcile why, if Congress may preempt state causes of action on purely procedural grounds, the Supreme Court has repeatedly gone through the exercise of analyzing whether a federal procedure is “part and parcel”<sup>220</sup> of an accompanying substantive federal right (such as in *Stewart*,<sup>221</sup> *Dice*,<sup>222</sup> *Felder*,<sup>223</sup> *Burnett*,<sup>224</sup> and *Jinks*<sup>225</sup>).<sup>226</sup> The Supreme Court has historically examined whether the procedural rule is tethered to an enacted *substantive* federal right.<sup>227</sup> No such analysis should have been necessary if Congress has carte blanche to superimpose its procedural preferences alone.<sup>228</sup> Nor should one assume that the Supreme Court will find its prior stare decisis rulings in this area to be

218. *Id.* at 461–62 (holding that Congress can toll limitations periods for state-law claims brought in state court and referencing *Stewart*).

219. *See supra* Section IV.C..

220. *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 363 (1952).

221. *Stewart v. Kahn*, 78 U.S. 493, 506–07 (1870).

222. *Dice*, 342 U.S. at 363.

223. *Felder v. Casey*, 487 U.S. 131, 145 (1988).

224. *Burnett v. Grattan*, 468 U.S. 42, 54–55 (1984).

225. *Jinks v. Richland County*, 538 U.S. 456, 462 (2003).

226. *See Freier v. Westinghouse Elec. Corp.*, 303 F.3d 176, 204 (2d Cir. 2002) (deciding that the CERCLA claim accrual provision was valid); *see also Testa v. Katt*, 330 U.S. 386, 394 (1947) (“Our question concerns only the right of a state to deny enforcement to *claims growing out of a valid federal law.*”) (emphasis added).

227. *See, e.g., supra* notes 220–26 and accompanying text.

228. *See, e.g., Suesz v. Med-1 Sols., LLC*, 757 F.3d 636, 651–52 (7th Cir. 2014) (“[T]hese cases involved *federal* claims being adjudicated in state court. It’s an open question whether Congress has the power to prescribe procedural rules for *state-law* claims in state court.”); *Congressional Authority, supra* note 96, at 373–74 (“Different questions are presented where Congress does not enact a substantive law of products liability to be applied by the states, but simply attempts to prescribe directly the state court procedures to be followed in products liability cases arising under state law. Such an action raises potential constitutional questions under the Tenth Amendment, since state court procedures in applying state law would appear to be an area that is generally within a state’s exclusive control.”).

nullities.<sup>229</sup>

*D. Partial Preemption of State Laws on Procedural Grounds Fails to Accord with the Primary Purpose of Creating “Uniformity” Among the States*

The ultimate justification for preemption is the notion of “uniformity” among the 50 states.<sup>230</sup> There is an inconsistency in the idea that Congress may, on the one hand, accept disparate expressions of state substantive rights and causes of action (thereby reflecting Congress’s belief that uniformity is unnecessary), while, on the other hand, rely on the doctrine of preemption (and its justification of “uniformity”) in superimposing only procedural rules to regulate those disparate causes of action.<sup>231</sup>

By not also substantively preempting state laws, Congress acquiesces to the substantive rule-making and policy choices of the states within their local spheres.<sup>232</sup> The acceptance of distinct state substantive laws undermines the justification to require uniformity among the States, and thus undermines Congress’s entitlement to preempt state laws.<sup>233</sup>

*E. The “Substance/Procedure” Dichotomy Traditionally Helps Define the Boundaries for Federalism Questions*

In addressing matters of federal versus state powers, the Supreme Court has historically developed a dichotomy between “substantive” and

229. *See, e.g.*, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557–58 (1985) (Powell, J., dissenting) (“There have been few cases, however, in which the principle of *stare decisis* and the rationale of recent decisions were ignored as abruptly as we now witness.”).

230. *Freier v. Westinghouse Elec. Corp.*, 303 F.3d 176, 186 (2d Cir. 2002).

231. *See, e.g.*, *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 413 (2003) (preemption is based on “concern for uniformity”) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964); *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 361–62 (1952)).

232. *See, e.g.*, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (“So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purposes of Congress.”).

233. *See also* *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 n.6. (2000) (“[F]ield preemption may be understood as a species of conflict pre-emption.”). “What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects.” *Id.* at 373.

“procedural” laws.<sup>234</sup>

The substance/procedure dichotomy should be viewed as similarly effective at demarking federal and state powers in the context of Tenth Amendment disputes: procedural rules governing state law claims should be deemed reserved to the states under the Tenth Amendment and not susceptible to Supremacy Clause preemption.<sup>235</sup>

The Supreme Court offered some analogous consideration of this issue regarding statutes of limitations rules in *Jinks*, where the Court found “that Congress may not, consistent with the Constitution, prescribe procedural rules for state courts’ adjudication of purely state-law claims.”<sup>236</sup> The Court explained that, “[a]ssuming for the sake of argument that a principled dichotomy can be drawn, for purposes of determining whether an Act of Congress is ‘proper,’ between federal laws that regulate state-court ‘procedure’ [for purposes of federal court jurisdictional analysis] and laws that change the ‘substance’ of state-law rights of action, we do not think that state-law limitations periods fall into the category of ‘procedure’ immune from congressional regulation.”<sup>237</sup>

For these reasons, the Tenth Amendment should operate to prohibit Congress from only partially preempting state causes of action with purely procedural federal rules.<sup>238</sup> Congress should be permitted to preempt state procedural rules only when Congress’s rules are part and parcel of substantive federal rights and causes of action that Congress has also created.<sup>239</sup>

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234. *E.g.*, *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938) (finding in context of federal court jurisdictional dispute that statutes of limitations are substantive in nature); *see Jinks v. Richland County*, 538 U.S. 456, 464–65 (2003); *Sun Oil Co. v. Wortman*, 486 U.S. 717, 726–27 (1988) (finding in context of Full Faith and Credit Clause dispute that “[t]he historical record shows conclusively, we think, that the society which adopted the Constitution did not regard statutes of limitations as substantive provisions, akin to the rules governing the validity and effect of contracts, but rather as procedural restrictions fashioned by each jurisdiction for its own courts”). *Erie*, *Jinks*, and *Sun Oil* are discussed further in Part V.

235. *See infra* notes 236–37 and accompanying text.

236. 538 U.S. at 464.

237. *Id.* at 464–65 (first citing *Bellia*, *supra* note 119, at 970–1001 (relying on substance/procedure analysis in concluding that “‘procedural law’ derives exclusively from state authority” for Tenth Amendment purposes); and then citing *Congressional Authority*, *supra* note 96, at 373–74).

238. *See supra* notes 233–37 and accompanying text.

239. *See, e.g.*, *Suesz v. Med-1 Sols., LLC*, 757 F.3d 636, 651 (7th Cir. 2014) (“[W]hen Congress creates a cause of action over which the state courts have concurrent jurisdiction, the state courts are

## V. IMPACT ON THE HEAR ACT

The HEAR Act creates no federal cause of action and articulates no substantive federal rights and remedies.<sup>240</sup> Nor does the HEAR Act purport to base its authority on any provision of Article I, § 8 (such as the Commerce Clause or the War Powers Clause).<sup>241</sup> Rather, the HEAR Act purports only to provide a preemptive statute of limitations period for all state law claims of general applicability when those claims are asserted in the context of the determination of rights in Holocaust-era artworks.<sup>242</sup> Therefore, the HEAR Act should be viewed as a purely procedural proposed statute which, as explained above, would violate the Tenth Amendment.<sup>243</sup>

A. *The HEAR Act Provides No Substantive Federal Cause of Action*

There is no individual right of action inherent in the HEAR Act: the statute specifically provides that “[n]othing in this Act shall be construed to create a civil claim or cause of action under Federal or State law.”<sup>244</sup> In *Orkin v. Taylor*, the Ninth Circuit similarly found that the 1998 HVRA “did not create a private right of action against private art owners.”<sup>245</sup> The HVRA provides in relevant part:

It is the sense of the Congress that consistent with the 1907 Hague Convention, all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner.<sup>246</sup>

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bound by the Supremacy Clause to adjudicate the claim.”).

240. See Holocaust Expropriated Art Recovery (HEAR) Act of 2016, Pub. L. No. 114-308, 130 Stat. 1524(codified as amended at 22 U.S.C. § 1621 (2016)).

241. *Id.*

242. *Id.* § 5.

243. See *supra* Section IV.E.

244. § 5(f).

245. *Orkin v. Taylor*, 487 F.3d 734, 738 (9th Cir. 2007).

246. Holocaust Victims Redress Act (HVRA) of 1998, Pub. L. 105-58, § 202, 112 Stat. 15, 17-18

The Ninth Circuit found that this provision includes no language “that can fairly be characterized as mandatory” and, moreover, creates no “enforceable law.”<sup>247</sup> As the court explained: “There is simply no ‘right- or duty-creating language’ anywhere in the statutory scheme, and [the statute’s] announcement of a ‘sense of the Congress’ cannot, of its own force, imply a private right of action.”<sup>248</sup>

The HEAR Act’s only mandatory language concerns its imposition of a six-year statute of limitations (based upon an “actual discovery” rule) for “a civil claim or cause of action against a defendant to recover any artwork or other property that was lost during the covered period because of Nazi persecution.”<sup>249</sup>

Nevertheless, there is no “right- or duty-creating language” in the HEAR Act that actually constitutes a new preemptive federal civil claim or cause of action against a defendant; instead, the statute relies on existing state laws of general applicability to provide the necessary substantive elements and remedies.<sup>250</sup>

Likewise, the substantive policies that the HEAR Act seeks to “further”—meaning those “set forth” in the Washington Conference Principles, the

(1998).

247. *Orkin*, 487 F.3d at 739.

248. *Id.* (citations omitted) (first quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 690 n.13 (1979); and then quoting *Yang v. Cal. Dep’t of Soc. Servs.*, 183 F.3d 953, 958 (9th Cir. 1999)); accord *Dunbar v. Seger-Thomschitz*, 615 F.3d 574, 577 (5th Cir. 2010) (“Here, no Act of Congress has articulated ‘rights and obligations of the United States’ in regard to these claims; even the HVRA creates no individual cause of action. . . . Further, no interstate or international disputes are implicated in this controversy that require creation of a uniform federal rule of law.”) (citation omitted) (quoting *Orkin*, 487 F.3d at 739).

249. Holocaust Expropriated Art Recovery (HEAR) Act of 2016 § 5(a).

250. See *Dunbar*, 615 F.3d at 576–77 (“No court has ever adopted what Appellant is urging here—some form of special federal limitations period governing all claims involving Nazi-confiscated artwork [in furtherance of the policy underpinning the Terezin Declaration]. In such cases, courts have consistently applied state statutes of limitations.”); *Orkin*, 487 F.3d at 740–41 (“[T]here can be no doubt . . . that state law provides causes of action for restitution of stolen artworks. Furthermore, the torts asserted here are undoubtedly causes of action that are traditionally relegated to state law. Implication of a federal remedy in this case, therefore, would be inappropriate . . . . Congress did not intend to supersede traditional state-law remedies when it passed the Act. . . . Given the absence of congressional intent to create a private right of action, the [plaintiffs’] assertion of a federal right of action must fail.”) (citation omitted).

HVRA, and the Terezin Declaration—are all legally “non-binding” and non-enforceable.<sup>251</sup> Accordingly, the HEAR Act creates no enforceable, substantive federal rights or remedies.<sup>252</sup>

### B. The HEAR Act Would Not Provide Federal Question Jurisdiction

The HEAR Act also should not be understood to create federal question jurisdiction under 28 U.S.C. § 1331.<sup>253</sup> “[T]he absence of a federal private right of action [is] evidence relevant to, but not dispositive of, the ‘sensitive judgments about congressional intent’ that § 1331 requires.”<sup>254</sup> In “certain cases federal-question jurisdiction will lie over state-law claims that implicate significant federal issues . . . turn[ing] on substantial questions of federal law, [which] thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues.”<sup>255</sup>

The *Grable* Court’s discussion of the decision in *Merrell Dow*

251. § 3(1); see *Orkin*, 487 F.3d at 741–42; see also *Dunbar*, 615 F.3d at 576–77.

252. *Orkin*, 487 F.3d at 739–40 (noting that HVRA “do not in themselves create individual rights or, for that matter, any enforceable law.”). The HEAR Act applies to works of art “lost” during the Holocaust era, where the term “lost” is undefined by the statute. See § 5(a). State law should govern the substantive question of whether a “voluntary” sale during the Holocaust era did or did not occur; and, furthermore, whether a voluntary sale may or may not be actionable and subject to rescission or restitution. See, e.g., *Bakalar v. Vavra*, 619 F.3d 136, 148 (2d Cir. 2010) (Korman, J., concurring) (“Under American law and the law of many foreign states there is only one scenario in which a good-faith purchaser’s claim of title is immediately recognized over that of the original owner. This scenario arises when the owner voluntarily parts with possession by the creation of a bailment, the bailee converts the chattel, and the nature of the bailment allows a reasonable buyer to conclude that the bailee is empowered to pass the owner’s title.” Patricia Youngblood Reyhan, *A Chaotic Palette: Conflict of Laws in Litigation Between Original Owners and Good-Faith Purchasers of Stolen Art*, 50 DUKE L.J. 955, 971 (2001) (emphasis added). The principle to which Professor Reyhan alludes is codified in more limited form in section 2-403(2) of the Uniform Commercial Code, which was adopted by New York, and which provides that “[a]ny entrusting of possession of goods to a merchant who deals in goods of that kind gives him the power to transfer all rights of the entruster to a buyer in ordinary course of business.”). The HEAR Act does not purport to preempt the various state enactments of the Uniform Commercial Code in this or any other regard.

253. 28 U.S.C. § 1331 (2012) (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”).

254. *Grable & Sons Metal Prods. Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 321 (2005) (quoting *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 810 (1986)).

255. *Id.* at 312 (citation omitted).

*Pharmaceuticals., Inc. v. Thompson*<sup>256</sup> is instructive:

The absence of any federal cause of action affected *Merrell Dow's* result two ways. The Court saw the fact as worth some consideration in the assessment of substantiality. But its primary importance emerged when the Court treated the combination of no federal cause of action and no preemption of state remedies for misbranding as an important clue to Congress's conception of the scope of jurisdiction to be exercised under § 1331. The Court saw the missing cause of action not as a missing federal door key, always required, but as a missing welcome mat, required in the circumstances, when exercising federal jurisdiction over a state misbranding action would have attracted a horde of original filings and removal cases raising other state claims with embedded federal issues. *For if the federal labeling standard without a federal cause of action could get a state claim into federal court, so could any other federal standard without a federal cause of action. And that would have meant a tremendous number of cases.*

. . . In this situation, no welcome mat meant keep out.<sup>257</sup>

There are no “significant federal issues” or “substantial questions of federal law” raised by the HEAR Act.<sup>258</sup> The HEAR Act relies on aspirational but non-binding principles, embraces state causes of action and all of their various substantive provisions and elements of proof, and imposes a federal limitations period for claims brought during the next ten years.<sup>259</sup> Given the absence of substantive federal issues that could require resolution, the HEAR Act should not be viewed as opening the doors of the federal courts to “horde[s]” of state law claims under § 1331.<sup>260</sup>

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256. *Thompson*, 478 U.S. at 804.

257. *Grable*, 545 U.S. at 318–19 (emphasis added).

258. *Id.* at 312.

259. See Holocaust Expropriated Art Recovery (HEAR) Act of 2016, Pub. L. No. 114-308, §§ 1–5 130 Stat. 1524, 1524–27 (codified as amended at 22 U.S.C. § 1621 (2016)).

260. See *Grable*, 545 U.S. at 318 (“The Court saw the missing cause of action not as a missing federal door key, always required, but as a missing welcome mat, required in the circumstances, when exercising federal jurisdiction over a state misbranding action would have attracted a horde of original

C. *The Federal Statute of Limitations Proposed by The HEAR Act Is Purely Procedural in Nature, Not Substantive*

As discussed above, purely procedural preemption should be barred by the Tenth Amendment.<sup>261</sup> “To what extent rules of practice and procedure may themselves dig into ‘substantive rights’ is a troublesome question at best.”<sup>262</sup> Nevertheless, the Supreme Court has developed a dichotomy in its jurisprudence that recognizes statutes of limitations as substantive when viewed in the context of questions concerning federal court jurisdiction, and as procedural when viewed in the context of questions concerning conflicts of laws.<sup>263</sup>

The ability to obtain federal jurisdiction over state court claims raises the primary policy concern of forum-shopping.<sup>264</sup> For example, “[t]he nub of the policy that underlies *Erie* . . . is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away, should not lead to a substantially different result.”<sup>265</sup> A federal court sitting in diversity should be like another state court; a fundamentally different substantive outcome should not result in a federal court because of its particular procedural rules.<sup>266</sup> Accordingly, when viewed in the context of determining diversity jurisdiction questions, state statutes of limitations are viewed as substantive and must be applied by the federal courts to better ensure uniform outcomes.<sup>267</sup> The same analysis applies to cases involving

filings and removal cases raising other state claims with embedded federal issues.”).

261. See *supra* notes 234–35 and accompanying text.

262. *Brown v. W. Ry.*, 338 U.S. 294, 296 (1949); *accord Guar. Tr. Co. of N.Y. v. York*, 326 U.S. 99, 109 (1945) (“And so the question is not whether a statute of limitations is deemed a matter of ‘procedure’ in some sense. The question is whether such a statute concerns merely the manner and the means by which a right to recover, as recognized by the State, is enforced, or whether such statutory limitation is a matter of substance . . . namely, does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?”).

263. See *supra* Section IV.E.

264. See Elizabeth T. Lear, *Federalism, Forum Shopping, and the Foreign Injury Paradox*, 51 WM. & MARY L. REV. 87, 95–96 (2009) (“Attempts by domestic litigants to shop vertically in the post-*Erie* environment . . . have met with overt hostility from the federal judiciary.”).

265. *York*, 326 U.S. at 109.

266. *Id.*

267. *Id.*; *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938) (“Congress has no power to declare

federal supplemental jurisdiction and the concomitant tolling of limitations periods over state law claims pursuant to 28 U.S.C. § 1367(d).<sup>268</sup>

In contrast, in cases involving Full Faith and Credit Clause questions, the Court has found that statutes of limitations are procedural.<sup>269</sup> In *Sun Oil*, the Court reiterated that, “[e]xcept at the extremes, the terms ‘substance’ and ‘procedure’ precisely describe very little except a dichotomy, and what they mean in a particular context is largely determined by the purposes for which the dichotomy is drawn.”<sup>270</sup> The Court explained that, “[i]n the context of our *Erie* jurisprudence, that purpose is to establish . . . substantial uniformity of predictable outcome between cases tried in a federal court and cases tried in the courts of the State in which the federal court sits.”<sup>271</sup> The Court then further explained: “The purpose of the substance-procedure dichotomy in the context of the Full Faith and Credit Clause, by contrast, is *not to establish uniformity but to delimit spheres of state legislative competence.*”<sup>272</sup>

As in cases concerning the Full Faith and Credit Clause, cases concerning tension between the Tenth Amendment and the Supremacy Clause raise “spheres of . . . legislative competence” and conflict of laws issues—as between federal and state legal preferences and regimes.<sup>273</sup> Viewed in that context, statutes of limitations are “procedural restrictions fashioned by each jurisdiction for its own courts.”<sup>274</sup>

Furthermore, the HEAR Act identifies statute of limitations defenses as

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substantive rules of common law applicable in a state whether they be local in their nature or ‘general,’ be they commercial law or a part of the law of torts.”).

268. *Jinks v. Richland County*, 538 U.S. 456, 464–65 (2003) (relying on *Erie* and *York* as “provid[ing] ample support for the proposition that—if the substance-procedure dichotomy posited by respondent is valid—the tolling of limitations periods falls on the ‘substantive’ side of the line.”).

269. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722–23 (1988).

270. *Id.* at 726.

271. *Id.* at 726–27 (citations omitted).

272. *Id.* at 727 (emphasis added); accord *Jinks*, 538 U.S. at 465 (reconciling holding that statutes of limitations are substantive for federal court jurisdictional issues with *Sun Oil*’s holding that statutes of limitations are procedural for Full Faith and Credit issues).

273. See Seth P. Waxman, *Federalism, Law Enforcement, and the Supremacy Clause: The Strange Case of Ruby Ridge*, 51 U. KAN. L. REV. 141, 142–43 (2002) (discussing the relationship between the Supremacy Clause and the Tenth Amendment to delineate federal and state powers).

274. *Sun Oil*, 486 U.S. at 726.

“procedural obstacles,” not as substantive rights.<sup>275</sup> The HEAR Act’s own characterization of statutes of limitations as procedural defenses, and not as substantive rights of defendants, should be confirmed by the courts, and the Act’s purely procedural preemption—as to limitations defenses only—should be held unconstitutional.<sup>276</sup>

## VI. CONCLUSION

The HEAR Act only procedurally preempts state laws of general applicability in the context of Holocaust-era art restitution, without creating any substantive and binding federal rights or causes of action.<sup>277</sup> Thus, the HEAR Act constitutes a novel attempt to expand Congress’s power. Although the Supreme Court has yet to rule whether Congress can engage in purely procedural preemption, its existing precedents and the policies underlying federalism support the conclusion that the HEAR Act should be invalidated under the Tenth Amendment.<sup>278</sup>

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275. Holocaust Expropriated Art Recovery (HEAR) Act of 2016, Pub. L. No. 114-308, § 2(6) 130 Stat. 1524,1524–27 (codified as amended at 22 U.S.C. § 1621 (2016)).

276. *See id.*

277. *See supra* Section V.C.

278. *See, e.g., supra* note 201. Congress could try to enact a federal law that substantively preempts all state law claims in this particular area, with a concomitant statute of limitations, in a more traditional display of federal preemption. Nevertheless, Congress has not done so with the HEAR Act.