CONSCRIPTING STATE LAW TO PROTECT VOLUNTEERS: THE ODD FORMULATION OF FEDERALISM IN "OPT-OUT" PREEMPTION

*Alfred R. Light**

I. VOLUNTEER PROTECTION ACT OF 1997 14
A. *Incomplete Preemption* 17
B. *Jurisdiction* 22
C. *Opt-Out Provision* 29
II. CONSTITUTIONAL ISSUES 35
A. *Beyond the Commerce Power* 37
B. *The Etiquette of Federalism* 39
C. *Federalism as Separation of Powers* 44
D. *Discriminatory "Opt-Out" Preemption* 50
III. CONSTITUTIONAL POLICIES 55
A. *Political Accountability/Cost Internalization* 56
B. *Separation of Powers/Protection of Liberty* 58
IV. CONCLUSION 60

During the summer of 1998, the Acting [now permanent] Commissioner of Major League Baseball met with representatives of players, teams, and umpires in order to explore the prospects for better preventing melees following "bean balls" and similar incidents during the course of the baseball season.[1] Such difficulties also happen on occasion in amateur baseball, even at the Little League level where adolescent and parental tempers interrupt our pastoral pastime.[2] If injuries

* Professor of Law, St. Thomas University School of Law, Miami, Florida. B.A. 1971, The Johns Hopkins University; Ph.D. 1976, University of North Carolina at Chapel Hill; J.D.1981, Harvard. The author thanks the St. Thomas University School of Law for research support during the summer of 1998.

1. Paul White, *Budig Takes a Bite Out of Brawlers*, BASEBALL WKLY., June 10, 1998, at 4, *available in* 1998 WL 8645634; Barry Lewis, *Strict Regulations are Needed in Order to Limit Basebrawls*, TULSA TRIB. & TULSA WORLD, June 7, 1998 at 6, *available in* 1998 WL 11140723.

2. Dave Zweifel, *Little Ballplayers Sue Just Like Grownups*, WIS. ST. J., June

are severe enough, brawls may be torts.[3]

10, 1998, at 8A, *available in* 1998 WL 5873863 (report on lawsuit arising out of dugout assault by one ballplayer against another during Little League game); *Dugout Justice? Suing for the Sake of Suing,* TULSA TRIB. & TULSA WORLD, June 9, 1998, at 8, *available in* 1998 WL 11040879 (editorial on same); *Coach Sues City, Little League,* TAMPA TRIB., June 3, 1998, at 2, *available in* 1998 WL 2777676 (coach struck by bullet during Little League tournament); *Couple Suing Little League President,* RICHMOND TIMES-DISPATCH, May 14, 1998, at B4, *available in* 1998 WL 2035072 (suit against police officer allegedly abusing his authority by kicking couple out of youth baseball and having them arrested when they sought to start their own league); George Wilkens, *Gunshot Halts Little League Game,* TAMPA TRIB., June 10, 1998, at 2, *available in* 1998 WL 2778552 (gunshots fired possibly by individuals unhappy with location of game); Alex Roth, *Officials Propose Sharing of Fields,* L.A. DAILY NEWS, Apr. 22, 1998, at N1, *available in* 1998 WL 3856907 (sex discrimination suit over availability of fields for girls' softball teams); Bret Barrouquere, *Little Leaguers Foul Up Home, Owners Contend,* ST. PETERSBURG TIMES, Apr. 12, 1998, at 4B, *available in* 1998 WL 4256495 (foul balls from practice allegedly damage adjacent property); Molly Sower, *Coach Alleges Defamation in Suit Against District,* SACRAMENTO BEE, Mar. 29, 1998, at N1, *available in* 1998 WL 8817967 (defamation suit by coach refusing to leave field when ordered to do so by umpire); Melissa L Jones, *School Field Lights Hot Issue, Parents, Homeowners at Odds,* ARIZ. REPUBLIC, Mar. 13, 1998, at EV1, *available in* 1998 WL 7757306 (parents considering suit to enjoin installation of lights at Little League field); *Let the Kids Play,* HARTFORD COURANT, Mar. 2, 1998, at A6, *available in* 1998 WL 2341628 (coach cleared in tort action by teen-age umpire who had called off game in which adult coaches disputed his calls); *League Settles Lawsuit, Coach in Wheelchair Called No Hazard,* CIN. ENQUIRER, Feb. 19, 1998, at C04, *available in* 1998 WL 3756699 (coach in wheelchair had been ejected as a safety hazard in Babe Ruth league tournament); Robert S. Wieder, *Irrational Pastime (Little League Baseball Controversy in Lillian, Alabama),* PLAYBOY, Nov. 1, 1997, at 4, *available in* 1997 WL 9309405 (suit to allow players to switch from uniforms with X-rated rental store sponsor's name on them); MaryAnn Spoto, *Kin of Teen Hurt by Pitch Say Coaches Broke League Rules,* STAR LEDGER (Newark), Oct. 24, 1997, at 033, *available in* 1997 WL 12574036 (suit by player injured by pitcher not registered with the league); *Little League Coach Awarded $758,000,* SAN DIEGO UNION & TRIB., Sept. 19, 1997, at A8, *available in* 1997 WL 3155495 (coach assault and battery of another coach resulting in judgment against league); Dave Newbart, *Hofeld Drops Baseball Suit, But it Still May be Felt,* CHI. TRIB., July 3, 1997, at 1, *available in* 1997 WL 3564318 (suit by U.S. Senate candidate over whether candidate's son committed to playing for one team before choosing to play for another); Daniel H. Walsh, *New York's System is out of Control,* TIMES UNION (Albany), June 29, 1997, at B1, *available in* 1997 WL 3500303 (suit over whether son was assigned to appropriate ability level); *A Winner in Court, Not on Field,* L.A. DAILY NEWS, May 11, 1997, at SB1, *available in* 1997 WL 4042478 (suit over effectiveness of late registration of player who had been practicing with team); *Burned Volunteer is Suing Little League Series,* ST. PETERSBURG TIMES, Apr. 24, 1997, at 5B, *available in* 1997 WL 6193773 (volunteer burned while serving food sues league); Kevin McCullen, *Family Sues Little League Girl's Loss of Spot on Team in Dispute Over Boundaries Prompts Cry on Unfairness and Bid for Triple Damages,* ROCKY MTN. NEWS (Denver), Mar, 27, 1997, at 42A, *available in* 1997 WL 6827725.

3. *See* Dylan Carp, *The Case of the Litigious Little Leaguer,* 3 TEX. REV. L. & POL. 171 (1998); Howard B. Benard, *Little League Fun, Big League Liability,* 8

Congress likes baseball, even if the Washington Senators left town long ago.[4] We need look no further for evidence than professional baseball's continuing antitrust exemption.[5] Congress also likes the Little League, and its army of coaches, umpires, and other volunteers.[6] One recent expression of this affinity, and the subject of this Article, is the Volunteer Protection Act of 1997 (VPA).[7] Under certain conditions, the Act is intended to provide individual volunteers with immunity from civil liability claims of ordinary or simple (as opposed to gross) negligence.[8] While the contour of negligence in a specific case is the province of the jury, not a law review article,[9] there is much to discuss.

MARQ. SPORTS L. J. 93 (1997); 143 CONG. REC. S4915, S4918 (daily ed. May 21, 1997) (statement of Senator McConnell, restating former Chief Executive Officer of Little League Baseball, Dr. Creighton Hale) ("[T]he Little League has become the 'Litigation League.' For example, one woman won a cash settlement when she was struck by a ball a player failed to catch. Incidentally, the player was her daughter.").

4. *See* Stephen F. Ross, *Monopoly Sports Leagues*, 73 MINN. L. REV. 643, 761 n.42 (1989); *see generally House Select Comm. on Professional Sports, Inquiry Into Professional Sports*, HR. REP. No. 1786, 94th Cong., at 41 (1977) (criticizing antitrust exemption after departure of the second version of the Washington Senators in the 1970s).

5. *See* Flood v. Kuhn, 407 U.S. 258, 285 (1972) (stating that removal of the judicially-created antitrust exemption must be by the Congress and not the Court); Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953); Federal Baseball Club of Baltimore, Inc. v. National League of Prof'l Baseball Clubs, Inc., 259 U.S. 200 (1922); John W. Guarisco, *"Buy Me Some Peanuts and Cracker Jack," But You Can't Buy the Team: The Scope and Future of Baseball's Antitrust Exemption*, 1994 U. ILL. L. REV. 651.

6. *See* Jamie Brown, *Legislators Strike Out: Volunteer Little League Coaches Should Not be Immune from Tort Liability*, 7 SETON HALL J. SPORT L. 559, 574 (1997) (referring to the "disturbing example" of "the little league coaches sued in Runnymeade, New Jersey," addressed by the Volunteer Protection Act (VPA)); *Volunteer Protection Act of 1987: Hearings on S. 929 Before the Subcomm. on Courts and Administrative Practice of the Senate Comm. on the Judiciary*, 100th Cong., 177 (1989) (statement of Dr. Creighton J. Hale, president and chief executive officer of Little League Baseball).

7. *See* Pub. L. 105-19, 111 Stat. 218 (1997) (*codified at* 42 U.S.C.A. §§ 14501-14505 (West, WESTLAW through 1997 portion of 1997-98 Legis. Sess.)); *see* Henry Cohen, *The Volunteer Protection Act of 1997*, FED. LAW., Apr. 1998, at 40; Frances Fendler Rosenzweig, *Shielding Volunteers from Tort Liability*, ARK. LAW., Fall 1997, at 34.

8. *See infra* notes 46-64 and accompanying text.

9. *See* Davis v. Baltimore & Ohio R.R. Co., 379 U.S. 671 (1965) (interpreting Federal Employees Liability Act (FELA)); Gulledge v. Brown & Root, Inc., 598 So.2d 1325, 1330 (Ala. 1992) ("This Court has often noted that questions of negligence incorporate evaluations that are almost always within the province of the jury.");

Frequently, it is difficult to tell whether federal law has preempted an otherwise applicable state liability standard.[10] Prior to *Erie*,[11] the Supreme Court saw the common law as a "brooding omnipresence," which it was as qualified to define as a state court.[12] After *Erie*, whether federal or state law applies can depend on whether the issue is procedural or substantive. The Supreme Court promulgated uniform procedural rules for the federal courts that are used in adjudication of causes of action arising under state tort law in federal court, notwithstanding contrary state procedures.[13] Conversely, state courts adjudicating federal substantive claims sometimes must use federal procedures for the sake of uniform administration of the substantive federal policies.[14] Where the conflict is not direct, however, sometimes

---

Reid v. Phillips, 452 S.E.2d 708 (W. Va. 1994); Foster v. South Carolina Dept. of Highways and Public Transp., 413 S.E.2d 31, 34 (S.C. 1992) ("Negligence being a mixed question of law and fact, it is the court's duty to define negligence, but it is the jury's province to draw the inference from the facts."); K-Mart Corp. v. Collins, 707 So.2d 753 (Fla. Dist. Ct. App. 1998).

10. Recent Supreme Court decisions in this area include American Tel. & Tel. Co. v. Central Office Tel., Inc., 524 U.S. 214 (1998) (filed rate doctrine effect on state contract and tort claims); Boggs v. Boggs, 520 U.S. 833 (1997) (ERISA preemption of community property laws); Atherton v. FDIC., 519 U.S. 213 (1997) (FIRREA effect on negligence standard for savings and loans officials); Medtronic, Inc v. Lohr, 518 U.S. 470 (1996) (medical devices amendments); Freightliner Corp. v. Myrick, 514 U.S. 280 (1995) (national traffic and motor vehicle safety law); Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246 (1994) (railway act); CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993) (railway safety act); Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) (cigarette labeling regulation); English v. General Elec. Corp., 496 U.S. 72 (1990) (energy reorganization act effect on emotional distress claim); United Steelworkers of Am. v. Rawson, 495 U.S. 362 (1990) (federal labor law effect on wrongful death action); Boyle v. United Tech., Inc., 487 U.S. 500 (1988) (government contract law effect on product liability action); Lingle v. Norge Div., Inc., 486 U.S. 399 (1988) (labor law effect on retaliatory discharge claim); International Paper Co. v. Ouellette, 479 U.S. 481 (1987) (environmental law effect on nuisance law); Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) (nuclear law effect on state law punitive damages).

11. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

12. Swift v. Tyson, 41 U.S. 1 (1842). Justice Holmes critically referred to this pre-*Erie* judicial attitude. *See* Southern Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) ("The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign than can be identified. . . . It always is the law of some State. . . .").

13. *See* Hanna v. Plumer, 380 U.S. 460 (1965).

14. *See* Felder v. Casey, 487 U.S. 131 (1988); Dice v. Akron, Canton, & Youngstown R.R., 342 U.S. 359 (1952).

states need not follow the federal practice.[15] The VPA preempts both substantive and procedural aspects of state tort law.[16]

In 1995, the Supreme Court further complicated the situation by rediscovering constitutional limits on Congress' ability to enact law in areas of traditional state concern. In *United States v. Lopez*,[17] the Court found a federal criminal statute insufficiently related to interstate commerce to justify its legitimacy under the Commerce Power.[18] This signaled that the Supreme Court in future cases might question congressional efforts to preempt or supplement state law in areas of traditional state concern.[19] Members of Congress were aware of these potential constitutional limitations when Congress enacted the VPA.[20] Proponents of the legislation thus appear to have drafted it in a way to avoid constitutional challenges under *Lopez*.[21] Opponents justified proposed amendments, which would have watered down the legislation, on the grounds that the amendments were needed to make the legislation pass constitutional muster.[22]

The law that emerged from the legislative process does raise serious constitutional concerns. Although related to the *Lopez* concerns, which were part of the congressional debate, the statute's "odd formulation of federalism," herein called "opt-out" preemption, presents issues beyond *Lopez*.[23] Part I below describes the Volunteer Protection Act of 1997 and the interpretative confusion that results from its approach.[24] Part II explains constitutional difficulties with the

15. *See* Johnson v. Fankell, 520 U.S. 911, 918 (1997) (refusing to make state court follow federal court judicial practice in adjudicating federal cause of action where contrary state practice is "a neutral state rule regarding the administration of the courts").

16. *See infra* notes 105-108, 122-133 and accompanying text.

17. 514 U.S. 549 (1995).

18. *See id.* at 567.

19. Justice Kennedy's concurring opinion in *Lopez* emphasized that the federal criminal statute involved there "upsets the federal balance to a degree that it renders it an unconstitutional assertion of the commerce power," requiring the Court's intervention. *Lopez*, 514 U.S. at 579 (Kennedy, J., concurring).

20. *See infra* notes 167-168, 185 and accompanying text.

21. *See infra* note 168 and accompanying text.

22. *See infra* note 167 and accompanying text.

23. *See infra* note 131-33 and accompanying text.

24. *See infra* notes 28-154 and accompanying text.

VPA under modern Supreme Court federalism doctrines: the scope of the Commerce Power, the etiquette of federalism, separation of powers and due process.[25] Part III explains how the VPA implicates the policies and political philosophy underlying these constitutional doctrines: political accountability and cost internalization, separation of powers and the protection of individual liberty.[26] The Article concludes that the VPA is more trouble than it is worth and violates principles of federalism in its current form.[27]

I. VOLUNTEER PROTECTION ACT OF 1997

The VPA was not a new idea in 1997. Representative John Edward Porter introduced a Volunteer Protection Act in the House of Representatives in 1985 and re-introduced it annually for many years.[28] In its early versions, however, Porter's bills did not purport to preempt state law.[29] Instead, they merely established incentives, such as a one percent increase in Social Service Block Grants, to states that chose to enact a recommended volunteer protection statute as a matter of state law.[30] During the Bush Administration, the President was unwilling to go along with the approach and simply urged states to adopt a Model State Volunteer Service Protection Act that his Administration developed.[31] Bush did

---

25. *See infra* notes 155-265 and accompanying text.

26. *See infra* notes 266-299 and accompanying text.

27. *See infra* notes 300-327 and accompanying text.

28. *See* John E. Porter, *Volunteer Immunity: Prodding the States, in* STATE CIVIL JUSTICE REFORM 63, 64 (1994); Note, *Developments in the Law—Nonprofit Corporations,* 105 HARV. L. REV. 1677 (1992).

29. This earlier legislation is described in Benard, *supra* note 3, at 123-24. Frequently, reform oriented commentary was directed to the states. *See, e.g.*, Kenneth W. Biedzynski, *Sports Officials Should Only be Liable for Gross Negligence: Is that the Right Call?* 11 U. MIAMI ENT. & SPORTS L. REV. 375 (1994); Daniel Nestel, *"Batter Up!" Are Youth Baseball Leagues Overlooking the Safety of Their Players?* 4 SETON HALL J. SPORT L. 77 (1994); Daniel L. Kurtz, *Protecting Your Volunteer: The Efficacy of Volunteer Protection Statutes and Other Liability Limiting Devices*, C726 ALI-ABA 263 (1992); Charles Robert Tremper, *Compensation for Harm from Charitable Activity*, 76 CORNELL L. REV. 401 (1991); David W. Hartmann, *Volunteer Immunity: Maintaining the Vitality of the Third Sector of Our Economy*, 10 U. BRIDGEPORT L. REV. 63 (1989); Jeffrey D. Kahn, Comment, *Organizations' Liability for Torts of Volunteers*, 133 U. PA. L. REV. 1433 (1985).

30. *See* H.R. 911, 104th Cong. (1995); *See also* Benard, *supra* note 3, at 124-25.

31. Candidate Bush placed tort reform on his political agenda in his accep-

not support a preemptive volunteer protection act despite his well-known "points of light" initiatives.[32] In the Senate, however, Mitch McConnell, the architect of federal product liability legislation, began to offer a preemptive version of a volunteer protection statute in the 1990s.[33] In 1993, Congressman Porter tried unsuccessfully to attach his proposal to President Clinton's National Service Trust Act.[34] By the time VPA was enacted in 1997, practically all of the states had some form of volunteer protection statute, some going beyond the protection of the individual volunteers to the organizations and entities they serve.[35]

Federal involvement in personal injury law obviously did not originate with the VPA. The most notable historic examples are Section 1983,[36] providing for monetary recovery from persons violating a plaintiff's constitutional rights while acting under color of state law, enacted during the Reconstruction Era;[37] and the Federal Employees Liability Act (FELA),[38] creating a federal right against railroads on behalf of railroad workers, enacted during the Great Depression.[39] Operators of nuclear power plants have federal limitations on state tort liability arising out of an "extraordinary nuclear occurrence,"

---

tance speech. *See* George Bush, Acceptance Speech at the Republican National Convention (1992), *reprinted in* CNN Transcripts (Aug. 20, 1992) ("some moms and pops won't even coach Little League anymore. . . . I am fighting to reform our legal system, to put an end to crazy lawsuits. . ."). *See also* Brenda Kimery, *Tort Liability of Nonprofit Corporations and Their Volunteers, Directors, and Officers: Focus on Oklahoma*, 33 TULSA L. J. 683, 692 (1997).

32. *See* Exec. Order No. 12,691, 54 Fed. Reg. 12691 (1989). Senator DeConcini mentioned President Bush's "points of light" initiative upon introducing a volunteer protection act encouraging states to act in 1989. *See also* 135 Cong. Rec. S2257, S2258 (daily ed. Mar. 7, 1989).

33. *See* S. 1435, 104th Cong., 1st Sess. (1995); Benard, *supra* note 3, at 137 n.98.

34. *See* 139 CONG. REC. H6318, H6328 (daily ed. Aug. 6, 1993) (statement of Cong. Porter on Conference Report); 139 CONG. REC. H5370, H5372 (daily ed. July 28, 1993) (proposed amendment); Brown, *supra* note 6, at 559.

35. *See* NONPROFIT RISK MANAGEMENT CENTER, STATE LIABILITY LAWS FOR CHARITABLE ORGANIZATIONS AND VOLUNTEERS (3d ed. 1996); Cohen, *supra* note 7, at 40.

36. *See* 42 U.S.C. § 1983 (1994).

37. *See* Civil Rights Act of 1871, Rev. Stat. § 1979 (1875) (current version at 42 U.S.C. § 1983).

38. *See* 45 U.S.C. §§ 51-60 (1986). *See also* Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1986) (imposing no-fault liability).

39. *See* 35 Stat. 65 (1908), *as amended* 53 Stat. 1404 (1939).

limitations established to encourage the development of nuclear power and the availability of insurance.[40] Congress set these limitations through a statute, the Price-Anderson Act.[41] While comprehensive preemptive federal product liability legislation first proposed in early the 1980s has languished, recent less dramatic legislation addressing personal injury has passed. In the Superfund Amendments and Reauthorization Act of 1986 (SARA),[42] for example, Congress preempted certain features of state statutes of limitations regarding personal injuries caused by environmental exposure to hazardous substances.[43] In the General Aviation Revitalization Act of 1994 (GARA),[44] Congress created a preemptive eighteen-year statute of repose for product liability suits with respect to noncommercial small aircraft.[45] VPA's form of preemption, however, is different.

---

40. Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978) (upholding 42 U.S.C. § 2210(e) as a reasonable substitute for state remedies rationally related to Congress' concern for stimulating private enterprise in nuclear energy); *but see* Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1985) (employees exposed to nuclear radiation may recover punitive damages under state law).

41. *See* Atomic Energy Damages Act, Pub. L. 85-256, 71 Stat. 576 (1957) (codified at 42 U.S.C. §§ 2014 and 2210 (1995)); Michael Trebilcock and Ralph A. Winter, *The Economics of Nuclear Accident Law*, 17 INT'L REV. L & ECON. 215 (1997); Allen R. Ferguson, Jr., *Federal Supremacy versus Legitimate State Interests in Nuclear Regulation: Pacific Gas & Electric and Silkwood*, 33 CATH. U. L. REV. 899 (1984).

42. *See* Pub. L. 99-499, 100 Stat. 1613 (1986).

43. *See* 42 U.S.C. § 9658 (1995); *see* Alfred R. Light, *New Federalism, Old Due Process, and Retroactive Revival: Constitutional Problems with CERCLA's Amendment of State Law*, 40 KAN. L. REV. 365 (1992).

44. *See* Pub. L. 103-298, 108 Stat. 1552 (1994).

45. *See* 49 U.S.C. §§ 40101-40120 (1996). Manufacturers of military equipment who build machines to government specifications do not have ordinary negligence tort liability in tort cases under state law. The Supreme Court inferred this "government contractor defense" without a clear statutory basis. Boyle v. United Tech. Corp., 487 U.S. 500 (1988); Chris Addicott, Note and Comment, *Double Indemnity for Operators of Nuclear Facilities? In re: Hanford Nuclear Reservation Litigation, the Price-Anderson Act, and the Government Contractor Defense*, 72 WASH. L. REV. 505 (1997); R. Joel Ankney, Note, *"But I Was Only Following Orders": The Government Contractor Defense in Environmental Tort Litigation*, 32 WM. & MARY L. REV. 399 (1991); Susan Rousier, Note and Comment, *Hercules v. United States: Government Contractors Beware*, 19 WHITTIER L. REV. 215 (1997). The media also does not have ordinary negligence liability under state tort law with respect to defamation claims against public figures by virtue of the Court's interpretation of the First Amendment. *See* New York Times v. Sullivan, 376 U.S. 254 (1964).

A. Incomplete Preemption

Even without its novel opt-out provision, VPA's form of preemption would be unusual. Its preemption provision begins by stating that the statute only "preempts the laws of any State to the extent that such laws are inconsistent with this chapter, except" for laws further limiting volunteer liability.[46] The incomplete preemption consists primarily of a federally mandated minimum standard of liability for certain volunteers, instructing courts not to find liability where "the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer."[47] Volunteers operating vehicles or volunteers without required licenses or certifications are not covered.[48] The statute also dictates a federal standard of care for the award of punitive damages that must be proved under a "clear and convincing" evidentiary burden.[49] Finally, it abolishes joint and several liability with respect to the award of "noneconomic loss" damages against covered volunteers.[50] This final provision carefully instructs the court as to the method of allocating liability, *i.e.* "in direct proportion to the percentage of responsibility of that defendant" and requires that the court "render a separate judgment against each [volunteer] defendant."[51] The preemption is both substantive and procedural.

The statute contains a number of express exceptions to its liability limitations, which allow for broader volunteer legal responsibility under state law in defined circumstances. These include state laws regulating risk management, including the mandatory training of volunteers;[52] volunteer organization liability for the acts of its volunteers similar to employer liability for the acts of employees;[53] actions brought

46. 42 U.S.C.A. § 14502(a) (West 1999).
47. 42 U.S.C.A. § 14503(a)(3) (West 1999).
48. *See* 42 U.S.C.A. § 14503(a)(2), (4).
49. 42 U.S.C.A. § 14503(e)(1).
50. 42 U.S.C.A. § 14504(a)—(b)(1) (West 1999).
51. 42 U.S.C.A. § 14504(b)(1).
52. *See* 42 U.S.C.A. § 14503(d)(1).
53. *See* 42 U.S.C.A. § 14503(d)(2).

by an officer of state or local government;[54] and laws conditioning limited volunteer liability on the financial responsibility of the volunteer's organization.[55] The VPA's volunteer liability limitations also do not apply where the defendant's "misconduct" constitutes crimes of violence as defined under federal law,[56] hate crimes as that term is used in a federal statute,[57] sexual offenses as defined by state law,[58] civil rights offenses,[59] and alcohol or drug related offenses.[60]

The preemption is also affected by several statutory rules of "construction." One rule, really another exception, eliminates the VPA's liability limitations where the plaintiff suing a volunteer is the volunteer's nonprofit organization or any governmental entity.[61] Another rule of construction eliminates the VPA's protection where the defendant is a nonprofit organization or governmental entity.[62] Courts are instructed not to infer creation or expansion of punitive damages from the VPA.[63] Finally, an obscure provision instructs that exceptions to limitations on volunteer liability do not "effect" the VPA's requirement that there be no volunteer liability unless there is at least gross negligence or the VPA's limitations on punitive damages awards against volunteers.[64]

This complex intermingling of state and federal law regarding volunteers covered by the Act is remarkable. To be sure, there are precedents where the federal courts have used state law to fill in the gaps of a federal statute on the grounds that the use of state law would be less disruptive of

---

54. *See* 42 U.S.C.A. § 14502(d)(3).
55. *See* 42 U.S.C.A. § 14503(d)(4).
56. 42 U.S.C.A. § 14503(f)(1)(A).
57. *See* 42 U.S.C.A. § 14503(f)(1)(B).
58. *See* 42 U.S.C.A. § 14503(f)(1)(C).
59. *See* 42 U.S.C.A. § 14503(f)(1)(D).
60. *See* 42 U.S.C.A. § 14503(f)(1)(E).
61. 42 U.S.C.A. § 14503(b).
62. *See* 42 U.S.C.A. § 14503(c).
63. *See* 42 U.S.C.A. § 14503(e)(2). Congress's fear here may have been that courts might otherwise infer a cause of action for punitive damages based on the duties acknowledged in the statute. *See e.g.*, Cannon v. University of Chicago, 441 U.S. 677 (1979) (citing legislative intent to approve an implied cause of action for damages under federal statute); Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) (approving an implied cause of action for damages as a necessary remedy for violation of plaintiff's Fourth Amendment rights).
64. 42 U.S.C.A. § 14503(f)(2).

settled commercial relations.[65] In such cases, the federal courts have allowed some diversity of interpretation in federal law among the states for areas where national uniformity was neither intended by Congress nor desirable.[66] The VPA turns these principles on their head. VPA leaves it up to the states to fit the federal overlay into the existing body of state tort law.

Federal and state courts alike probably will struggle mightily to avoid finding inconsistency between the VPA and state law principles.[67] However, the state courts will have to resolve numerous interpretative difficulties.[68]

---

65. *See* United States v. Bestfoods, 524 U.S. 51, 64 n.9 (1998) (discussing controversy over whether to borrow state law or craft uniform federal common law on corporate veil concepts under CERCLA); United States v. 92 Buena Vista Ave., 507 U.S. 111, 141-42 (1993) (premature to say whether state law or federal common law governs issue in case); United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979).

66. Sometimes it is difficult to discern whether a court is adopting state law as a matter of applicable federal common law or applying state law rather than federal common law. *See* United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979) (choosing state law as a matter of federal common law on establishing the priority of a federal lien with respect to private liens). *Cf.* Bank of Am. Nat'l Trust & Savings Ass'n v. Parnell, 352 U.S. 29 (1956) (applying state law on the burden of proof on the issue of good faith in the purchase of bearer bonds guaranteed by the United States).

67. This may include application of abstention doctrines and avoidance of federal law questions through interpretation of state law. *See e.g.,* Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 476 (1977). Moreover, there is a presumption against preemption of the historic police powers of the state. *See* Medtronic, Inc. v. Lohr, 518 U.S. 470, 484 (1996). The scope of federal preemption rests upon the Court's analysis of the statutory text, the statutory framework and the structure and purpose of the statute as a whole, to discern a fair understanding of the congressional purpose. *See id.* at 485. Federal courts have avoided similar preemption questions under CERCLA § 309. *See* ABB Indus. Sys., Inc. v. Prime Tech., Inc., 120 F.3d 351, 360 n.5 (2d Cir. 1997); Becton v. Rhone-Poulenc, Inc., 706 So.2d 1134, 1142 (Ala. 1997); Light, *supra* note 43.

68. The critical comments of the McKay Committee, a special American Bar Association committee that evaluated product liability reform proposals in 1983, apply to the VPA:

> [H]aving fifty state interpretations of one . . . liability standard . . . will produce . . . uncertainty. . . . This would be compounded by the fact that there is no body of law, other than the state's own, to aid state courts in applying any federal standard to any given set of facts. . . . [Conflict of law issues] will . . . arise in a judicial vacuum. . . . A federal standard . . . that is inconsistent with a particular state's policy would intensify choice of law problems.

Special Committee to Study Product Liability, Report to the House of Delegates, A.B.A. (December 1982).

In the absence of a federally created remedy or cause of action, the familiar pattern is for state law to govern the potential use of a federal standard within the state's tort law. Violation of federal law regulatory standards may automatically trigger strict liability, establish negligence *per se*, a presumption of negligence, be evidence of negligence, or be of no relevance depending on state law.[69] The VPA reverses this and dictates as a matter of federal law that the federal standard must apply within state tort law.[70] Where there is inconsistency, the VPA preempts and becomes the law of the state.

The VPA's exceptions to its liability limitations present opportunities for considerable mischief. A few potential examples should suffice. Consider for example the *respondeat superior* exception to volunteer liability protection, which reads, "If the laws of a State limit volunteer liability subject to [a condition], such condition[] shall not be construed as inconsistent with this section: . . . [including a] State law that makes the organization or entity liable for the acts or omissions of its volunteers to the same extent as an employer is liable for the acts or omissions of its employees."[71] This provision must be read in *pari materia* with two other statutory rules of construction. The first states, "[n]othing in this [limitation on volunteer liability] section shall be construed to affect any civil action brought by any nonprofit organization or any governmental entity against any volunteer of such organization or entity."[72] The second reads, "[n]othing in this [same] section shall be construed to affect the liability of any nonprofit organization or governmental

69. *See* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 4(b) (1997) ("but such compliance [with safety regulations] does not preclude as a matter of law a finding of product defect"); RESTATEMENT (SECOND) OF TORTS § 874A (1979) (implied rights of action); RESTATEMENT (SECOND) OF TORTS § 288B (1965) (unexcused violation of regulation may define the judicial standard of conduct or may be evidence bearing on the issue of negligent conduct).

70. *See* AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 456-57 (1969) (taking position that state and federal law "together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other as such, but as courts of the same country"). *See also* Light, *supra* note 43, at 387-88.

71. 42 U.S.C.A. §§ 14503(d), (d)(2).

72. 42 U.S.C.A. § 14503(b).

entity with respect to harm caused to any person."[73]

Imagine a state court wishing to vindicate state law principles holding a negligent volunteer liable and, thus, to avoid the federal liability limitations. Might it decide, as a matter of state common law, that (1) a nonprofit organization is liable for its volunteers' actions the same way an employer is liable for its employees' actions; (2) an employer has an implicit common law "right over" against its employee for complete indemnity; and (3) in light of this implied indemnity, an injured plaintiff has a "direct action" against the indemnitor, *i.e.* the negligent volunteer? Under such state tort principles, the effect of the federal statute then would be reduced to the procedural issue of whether, by virtue of the VPA, the nonprofit organization is a "necessary" or "indispensable" party for the action to go forward against the volunteer.[74] The state court seeking to avoid the VPA also might claim that implied indemnity is one of the VPA's recognized "alternative arrangements that satisfy the State that the organization or entity will be able to pay for losses. . . ."[75] Where there are such arrangements, the VPA instructs the state court not to construe the VPA's liability limitation as "inconsistent" with them.[76]

Consider another example. The VPA sets as a condition to its liability protection that "if appropriate or required, the volunteer was properly licensed, certified, or authorized by the appropriate authorities for . . . practice in the State in

---

73. 42 U.S.C.A. § 14503(c).

74. *See generally* FED. R. CIV. P. 19; CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1604 (R. 19) (1986). Good examples of the complexity hinted at here are: Bennie v. Pastor, 393 F.2d 1 (10th Cir. 1968) (active tortfeasor need not be joined in suit against passive tortfeasor in federal court under Rule 19 in light of New Mexico law); Blue Dane Simmental Corp. v. American Simmental Corp., 952 F. Supp. 1399 (D. Neb. 1997) (exercising the federal district court's discretion not to exercise supplemental jurisdiction under 28 U.S.C. § 1367 over state law claims because of complex issues of state law relating to compulsory counterclaims and choice of law that the federal court would have to resolve); Whyham v. Piper Aircraft Corp., 96 F.R.D. 557 (M.D. Pa. 1982) ("Scottish companies that owned and maintained plane were indispensable parties" in an action brought by administrator of the estate of a deceased pilot against the manufacturer of the plane). Under the VPA, there also might be the related question or whether the VPA precludes a "direct action" under state tort law, complicating the form of the state court's ultimate judgment, if not the result.

75. 42 U.S.C.A. § 14503(d)(4).

76. 42 U.S.C.A. § 14503(d).

which the harm occurred."[77] Suppose a state court were to craft, as a matter of state common law, a principle reminiscent of the Supreme Court's *Ex parte Young* "fiction,"[78] *i.e.* that as a matter of equity a volunteer's negligent activity or practice is never "authorized." Might it then conclude that the VPA's liability limitations never apply in the state? Analogous state judicial approaches to avoid the VPA may be possible in specific contexts, such as cases involving sexual behavior,[79] civil rights,[80] or alcohol or drugs.[81]

B. Jurisdiction

In several respects, the VPA departs from the earliest examples of federal tort liability reform. Significantly, the Act does not seem to create a federal cause of action that preempts or supplements State law operating in the area.[82] In some significant areas of federal influence, Congress has provided for exclusive original jurisdiction in the federal courts to adjudicate federal causes of action.[83] These include admiralty, antitrust, patent and environmental cleanup laws.[84] In other areas, Congress has created federal rights and remedies but has not provided an exclusive federal forum.[85] Where Congress is silent, claims arising under fed-

77. 42 U.S.C.A. § 14503(a)(2).

78. *See Ex parte* Young, 209 U.S. 123 (1908). *See also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-27 (2d ed. 1988)

79. *See* 42 U.S.C.A. § 14503(f)(1)(C) (excepting misconduct that "involves a sexual offense, as defined by applicable State law").

80. *See* 42 U.S.C.A. § 14503(f)(1)(D) (excepting "misconduct for which the defendant has been found to have violated a . . . State civil rights law").

81. *See* 42 U.S.C.A. § 14503(f)(1)(E) (excepting misconduct "where the defendant was under the influence (as determined pursuant to applicable State law) of intoxicating alcohol or any drug at the time of the misconduct").

82. *See supra* notes 46-60 and accompanying text.

83. *See* FLEMMING JAMES, JR. ET AL., CIVIL PROCEDURE § 2.25 at 100-1 (4th ed. 1992) (referring to "special federal question" jurisdiction).

84. *See* 28 U.S.C. § 1333 (1993) (antitrust law); 28 U.S.C. § 1337 (1993) (antitrust, exclusive by implication); 28 U.S.C. § 1338(a) (1993) (patent, plant variety protection, and copyright); 42 U.S.C. § 9613(a) (1988) (CERCLA); *see also* Michael E. Solimine, *Rethinking Exclusive Jurisdiction*, 52 U. PITT. L. REV. 383 (1991); Note, *Exclusive Jurisdiction of the Federal Courts in Private Civil Actions*, 70 HARV. L. REV. 509 (1957).

85. Early in the nation's history, federal district courts usually only heard diversity cases, and federal question jurisdiction contained monetary thresholds until fairly late in the twentieth century. *See* Act of March 3, 1875, ch. 137, 18 Stat. 470 (current version 28 U.S.C. § 1331 (1988) (as amended Oct. 19, 1996));

eral law presumptively may be brought in federal district court under 28 U.S.C. § 1331 or in state court.[86] Under the Supremacy Clause, state judges have the responsibility to adjudicate cases in accordance with that law, even if contrary to state law or custom.[87]

For example, Section 1983 creates a federal cause of action to vindicate the national interest in protecting civil rights.[88] Congress provided federal court jurisdiction to hear Section 1983 claims, placing the initial decision as to whether a claim would be heard in federal or state court in the hands of the plaintiff.[89] Congress reinforced federal judicial control over these cases by establishing a special provision authorizing removal to federal court of cases brought in state court[90] and providing for a special judicial review of federal court orders remanding such cases to state court.[91]

In FELA cases, Congress created an even more plaintiff oriented system in which plaintiffs might choose to sue in either state or federal court, but defendants could not remove cases brought in state court to the federal system.[92] A similar preclusion on removal was included in the Violence Against Women Act of 1994,[93] which creates a federal cause action for persons injured by persons who commit a crime of

---

RICHARD L. MARCUS ET AL., CIVIL PROCEDURE: A MODERN APPROACH 847-48 (2d ed. 1995); GENE R. SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE § 24, at 104.

86. *See* Merrell Dow Pharm. Corp. v. Thompson, 478 U.S. 804 (1986) (explaining federal question jurisdiction); Testa v. Katt, 330 U.S. 386 (1947) (obligating state courts to adjudicate federal claims).

87. *See* U.S. CONST. art. VI, § 2, cl. 3 ("the Judges in every State shall be bound thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding").

88. *See* 42 U.S.C. § 1983.

89. *See* 28 U.S.C. § 1343 (1993) (civil rights jurisdiction).

90. *See* 28 U.S.C. § 1443 (1994).

91. *See* 28 U.S.C. § 1447(d) (1994).

92. 28 U.S.C. § 1445(a) (1994). FELA creates a private federal cause of action against state-owned (as well as privately-owned) railroads, but a state may not be sued in federal court by virtue of the Eleventh Amendment. *See* Hilton v. South Carolina Public Rys. Comm'n, 502 U.S. 197 (1991). This creates the "remarkable anomaly" in cases against state-owned railroads of "a statutory scheme in which state courts are the exclusive avenue for obtaining recovery under a federal statute." *Id.* at 210 (O'Connor, J., dissenting).

93. *See* Civil Rights Remedies for Gender-Motivated Violence Act, Pub. L. 103-322, 108 Stat. 1941 (1994) (codified as 42 U.S.C. § 13981 (1995)).

violence motivated by gender.[94] A woman's choice as to the court system in which she wishes to sue must be honored.[95]

Some modern examples of federal preemption of state tort law limit the federal influence to creation or modification of affirmative defenses not a part of the plaintiff's *prima facie* case. SARA establishes a "federally required commencement date" to be used in state tort cases caused by exposure to hazardous substances.[96] Similarly, GARA created an eighteen-year statute of repose from product liability suits for noncommercial small aircraft.[97] Federal procedure requires that a plaintiff establish a statutory basis for subject matter jurisdiction in order to bring an action in federal court.[98] Complaints that make reference to federal law do not necessarily give rise to such jurisdiction.[99] In general, a federal question must be a part of the plaintiff's *prima facie* cause of action in order for the action to "arise under" federal law for the purpose of federal question jurisdiction under 28 U.S.C. § 1331. Because statutes of limitations are affirmative defenses, federal statutes such as SARA and GARA do not invoke federal question jurisdiction in situations where the federally-affected defenses apply.[100]

---

94. *See* 42 U.S.C. § 13981(c).

95. *See* 28 U.S.C. § 1445(d).

96. 42 U.S.C. § 9658.

97. *See* Pub. L. 103-298, § 2, 108 Stat. 1552 (1994), *as amended by* Pub. L. 105-102, § 3(e), 111 Stat. 2216 (1997) (codified as 49 U.S.C. §§ 40101-40120 (1996)); Thomas H. Kister, *General Aviation Revitalization Act: Its Effect on Manufacturers*, 65 DEF. COUNS. J. 109 (1998).

98. *See* Fed. R. Civ. P. 8(a)(1) (requiring the affirmative pleading of a basis for subject matter jurisdiction).

99. *See* Gully v. First Nat'l Bank, 299 U.S. 109, 112 (1936) ("A right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action (Cardozo, J.)"); American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916) (Holmes, J.) ("[a] suit arises under the law that creates the cause of action"); JAMES ET AL., *supra* note 83, § 2.27 ("To rest on federal law, the plaintiff's right of action must be expressly conferred by federal statute or implied from a statute or provision of the Constitution creating a duty that benefits plaintiff."); SHREVE & RAVEN-HANSEN, *supra* note 85, § 25.

100. *See* Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983); Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908) (well-pleaded complaint rule); SHREVE & RAVEN-HANSEN, *supra* note 85, § 2[B]; JAMES ET AL., *supra* note 83, § 2.27, at 106. The same result would also apply with respect to the "government contractor defense" created by the Supreme Court. *See supra* note 45.

The unenacted federal product liability reform bills that Republicans have sponsored over the years propose broad changes in tort law, preempting features of the liability and damages rules that are part of the plaintiff's *prima facie* case as well as creating defenses not presently existing in most states.[101] The most recent versions of these disclaim the establishment of a federal cause of action in product liability cases to supplant pre-existing state causes of action.[102] These bills typically have addressed the federal question jurisdiction issue expressly through a provision negating such jurisdiction in cases arising under the Act.[103] Through this mechanism, Congress would dictate the content of some (but not all) product liability law while declining to burden the federal courts with adjudications under the Act except in diversity cases.[104]

The VPA, while targeted narrowly to the protection of volunteers from certain forms of state tort liability, bears a considerable resemblance to the product liability reform approach. With certain exceptions set forth in the statute, the

---

101. *See* Victor E. Schwartz and Mark A. Behrens, *Federal Product Liability Reform in 1997: History and Public Policy Support its Enactment Now*, 64 TENN. L. REV. 595 (1997); Robert M. Ackerman, *Tort Law and Federalism: Whatever Happened to Devolution?* 14 YALE J. ON REG. 429, 455 (1996). President Clinton vetoed federal product liability legislation in 1996. *See* H.R. DOC. NO. 104-207, at 2 (1996) (veto of H.R. 956).

102. *See, e.g.*, S. 648, 105th Cong. § 102 (1997):

> This action governs any product liability action brought in any State or Federal court on any theory for harm caused by a product. . . . Any issue that is not governed by this title, including any standard of liability applicable to a manufacturer, shall be governed by otherwise applicable State or Federal law.

Id.; *see also id.* § 203(d) ("Nothing in this title may be construed . . . to create a cause of action. . . ."); *see also* S. 5, 105th Cong., §§ 102, 204 (1997).

103. *See, e.g.*, S. 648, 105th Cong. § 302 (1997) ("The district courts of the United States shall not have jurisdiction pursuant to this Act based on section 1331 or 1337 of title 28, United States Code."). A committee report explains, "The resolution of claims subject to this Act is left to state courts or to federal courts that currently have jurisdiction over those claims." S. Rep. No. 105-32 (1997) (reporting on S. 648) *available in* 1997 WL 346260.

104. *See generally* Light, *Federalism, FERC v. Mississippi, and Federal Product Liability Reform*, 13 PUBLIUS J. FEDERALISM 85 (1983). The avoidance of federal responsibility to adjudicate cases under a federal statute is the converse of the "federalization" problem, *i.e.* proposals to have federal courts adjudicate mass tort and complex criminal cases for the sake of judicial economy. *See* William W. Schwarzer and Russell R. Wheeler, *On the Federalization of the Administration of Civil and Criminal Justice*, 23 STETSON L. REV. 651 (1994).

Act generally abolishes liability "for harm caused by an act or omission of the volunteer on behalf of the organization or entity" which does not rise to the level of gross negligence or worse.[105] The Act also generally limits punitive damages based on the actions of volunteers except where the claimant establishes "by clear and convincing evidence" that "the harm was proximately caused by an action of such volunteer which constitutes willful or criminal misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed."[106] Like the proposed product liability reforms, the Act leaves state law intact on issues Congress chose not to address or which are not "inconsistent" with the Act or which "provide[] additional protection from liability relating to volunteers. . . ."[107]

Like the product liability proposals, the VPA does not expressly create a federal cause of action, but unlike these proposals it also does not expressly negate the use of federal question jurisdiction where the Act is being applied. This makes closer the question of whether a plaintiff bringing a cause of action against a volunteer arguably covered by the Act may invoke federal question jurisdiction. More seriously, it confuses the issue of whether a defendant may remove an action brought in state court in the same situation.[108]

---

105. 42 U.S.C.A. § 14503(a)(3).

106. 42 U.S.C.A. § 14503(e)(1).

107. 42 U.S.C.A. § 14502.

108. In *American Red Cross v. S.G.*, 505 U.S. 247 (1992), the Supreme Court found federal jurisdiction in a case brought against the Red Cross, a federally chartered corporation and probably the best known volunteer organization in this country, because its charter authorized it "to sue or be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States." *Id.* at 248. The Court found that the "sue or be sued" provision had provided federal question jurisdiction within Article III of the Constitution. *See id.* at 264. The Court found jurisdiction, although in most cases involving congressional chartered corporations, federal jurisdiction has been limited by statute to corporations in which the United States owns more than one-half the capital stock. *See* 28 U.S.C. § 1349 (1993). The *Red Cross* opinion does not affect most cases where the VPA applies since most volunteer organizations are not federally chartered corporations. Moreover, the Act's liability limitations affect only the liability of volunteers, not the organizations under which they have acted as volunteers. *See* 42 U.S.C.A. § 14503(c). On the other hand, the case might imply federal jurisdiction in actions involving the Little League, which like the Red Cross and fifty or so other nonprofit organizations, has a congressional charter. *See* 36 U.S.C.A. §§ 10101-2, 130501-130513 (West 1999); *see* Christina Maistrellis, *American Red Cross v. S.G. & A.I.: An Open Door to the Federal Courts for Federally Chartered Corporations*, 45 EMORY

In *Merrell Dow Pharmaceuticals, Inc. v. Thompson*,[109] the Supreme Court came very close to saying that there is no federal question jurisdiction under Section 1331 unless federal law creates the cause of action under which the plaintiff sues. The Court failed to find federal question jurisdiction even though violation of federal law created a rebuttable presumption of negligence permitting recovery under state law.[110] The case, however, distinguished and cited with approval the Court's earlier decision in *Smith v. Kansas City Title & Trust Co.*,[111] which found federal question jurisdiction in a securities case under a state law prohibiting directors from investing in illegally issued securities, because directors invested in securities that had allegedly been issued in violation of federal law.[112] The *Smith* case presented an important federal constitutional question regarding the validity of the federal statute authorizing issuance of the securities that the plaintiff alleged were illegally issued, while *Merrell Dow* did not.[113]

One might distinguish *Merrell Dow* from *Smith* on the grounds that federal law was less essential and directly related to the plaintiff's right of action in *Merrell Dow*. That is, the plaintiff could recover under state law in *Merrell Dow* without establishing a federal violation, and any federal violation, if established, only created a presumption of negligence under state law.[114] The VPA may fall into the gray area between *Merrell Dow* and *Smith*.[115] The VPA contains no pro-

---

L.J. 771 (1996); Lorretta Shaw, *A Comprehensive Theory of Protective Jurisdiction: The Missing "Ingredient" of "Arising Under" Jurisdiction*, 61 FORDHAM L. REV. 1235 (1993).

109. 478 U.S. 804 (1986).

110. *See id.* at 812.

111. 255 U.S. 180 (1921).

112. *See* 478 U.S. at 814 n.12.

113. *See id.* The *Merrell Dow* Court emphasized that *Smith* was also distinguishable from its decision in *Moore v. Chesapeake & Ohio R. Co.*, 291 U.S. 205, 216-17 (1934), because in *Moore* "the violation of the federal standard as an element of state tort recovery did not fundamentally change the state tort nature of the action." *Id.*

114. *See* LARRY L. TEPLY & RALPH U. WHITTEN, UNDERSTANDING CIVIL PROCEDURE 71 (1994).

115. *Merrell Dow* makes the availability of federal question jurisdiction turn on "an evaluation of the nature of the federal interest at stake," 478 U.S. at 814 n.12; there is no jurisdiction if the federal question is "insufficiently substantial." *Id.* at 814. Professors Shreve and Raven-Hansen have argued that *Merrell Dow* may be

vision expressly endorsing concurrent jurisdiction or, alternatively, precluding the exercise of federal question jurisdiction for claims within the Act's scope. The Act does not expressly establish a federal cause of action to preempt state tort law. On the other hand, the Act contains a strong congressional findings and purpose provision explaining the federal interest in protecting volunteers.[116] These findings speak eloquently of federal funds expended on useful and cost-effective social service programs dependent on volunteer participation;[117] the service and goods provided by volunteers that otherwise would be provided by private entities operating in interstate commerce;[118] affected interstate insurance markets;[119] and the relationships between volunteerism, the federal tax system, and the limited capacity of the federal government to carry out services.[120]

Like the statute in *Smith*, the VPA also presents several substantial constitutional questions. Implicitly, the statute acknowledges the existence of one of these in its findings and purposes section. The Act's elaborate findings are, at least in part, directed to the statutory conclusion set forth that "liability reform is an appropriate use of the powers contained in Article 1, Section 8, Clause 3 of the United States Constitution, and the Fourteenth Amendment to the United States Constitution."[121] Moreover, the express federal liability standards and limitations set forth in the statute go beyond the state law presumption of negligence at issue in *Merrell Dow*. The Act expressly "preempts the laws of any State to the ex-

---

distinguished because the plaintiff might have prevailed on its state law negligence claim even if the defendant had not violated federal law. *See* SHREVE & RAVENHANSEN, *supra* note 85, at 108. They would find federal question jurisdiction when plaintiff's state law claim "includes a pivotal federal question." *Id.* Since the liability of volunteers turns on federal questions presented by the VPA where the statute applies, these commentators probably would find federal question jurisdiction.

116. *See* 42 U.S.C.A. § 14501 (West 1999).

117. *See* 42 U.S.C.A. § 14501(a)(4).

118. *See* 42 U.S.C.A. § 14501(a)(5).

119. *See* 42 U.S.C.A. § 1401(a)(6).

120. *See* 42 U.S.C.A. § 14501(a)(7).

121. 42 U.S.C.A. § 14501(a)(7)(D)(ii). The reference to the Fourteenth Amendment is ironic in light of the differential effects of the "opt-out" provision. *See infra* notes 248-267 and accompanying text.

tent that such laws are inconsistent" with the Act.[122] Thus, unlike the situation in *Merrell Dow*, the Act's elimination of ordinary negligence liability,[123] modification of joint and several liability,[124] and limitations on the award of punitive damages[125] for volunteers is not subject to any sort of rebuttal in the individual state tort action.

By its own terms, the Act does not "preempt any State law that provides additional protection from liability relating to volunteers or to any category of volunteers in the performance of services for a nonprofit organization or governmental entity."[126] As a result, the most likely scenario under which the federal question jurisdiction issue will arise is one in which a plaintiff sues in a state court in a state that has a more plaintiff-oriented standard of volunteer liability. Defendants may seek to remove the action to federal district court on the grounds that the action could have been brought in federal district court under federal question jurisdiction.[127] Plaintiffs then will move to remand on the grounds that no federal question jurisdiction exists.[128] Resolution of this issue might also be affected by the VPA's very unusual "election of State nonapplicability" provision.[129]

C. Opt-Out Provision

VPA's preemption of state law is subject to a very unusual qualification. The Act provides,

> This Act shall not apply to any civil action in a State court against a volunteer in which all parties are citizens of the State if such State enacts a statute in accordance with State requirements for enacting legislation—

---

122. 42 U.S.C.A. § 14502(a).

123. *See* 42 U.S.C.A. § 14503(a).

124. *See* 42 U.S.C.A. § 14504 (eliminating joint and several liability with respect to "noneconomic loss").

125. *See* 42 U.S.C.A. § 14503(e).

126. 42 U.S.C.A. § 14502(a).

127. *See* 28 U.S.C. § 1441(a) (1994).

128. *See* 28 U.S.C. § 1447 (1994). Of course, in some circumstances such defendants may not need to rely on federal question jurisdiction. For example, if there is complete diversity of citizenship between plaintiff and defendants, and no defendant is a citizen of the state in which the action was brought originally, there would be alternative means for removal. *See* 28 U.S.C. §§ 1332, 1441(b).

129. 42 U.S.C.A. § 14502(b).

> (1) citing the authority of this subsection;
>
> (2) declaring the election of such State that this chapter shall not apply, as of a date certain, to such civil action in the State; and
>
> (3) containing no other provisions.[130]

The House Judiciary Committee report on the provision restates its features and explains, "This permits States to elect to apply their own legal rules in cases involving more purely State interests."[131] In their dissenting views on the legislation in this committee, Congressmen Conyers, Lofgren, Nadler and Scott commented with respect to this provision: "It is an odd formulation of federalism which grants all powers to Congress unless the states affirmatively act to protect their interests."[132] Among their other criticisms, they noted that "the opt-out provision is unduly narrow in that it would only allow states to preserve their laws if all the parties are residents of the state."[133]

The provision presents a number of difficulties. The VPA applies to any claim for harm caused by an act or omission of a volunteer where that claim is filed on or after June 18,

---

130. 42 U.S.C.A. § 14502(b). An "opt-out" provision is not entirely unprecedented. In the Department of Transportation Appropriation Act, 104 Stat. 2185 (1990), the Congress mandated that each state revoke the driver's license of a person convicted of a drug-related crime, except where the state legislature adopted an "opt-out" resolution in opposition to such a policy and the governor posted a letter of concurrence with the Secretary of Transportation. Pub. L. No. 101-516, § 333 (1990), 104 Stat. 2155, 2184 (*adding* 23 U.S.C. § 104 (1990)). Pub. L. 102-143, § 333(d) (1991), 105 Stat. 917, 947, substituted an amended provision and directed that the earlier amendments be treated as "having not been enacted into law." The new statute is found at 23 U.S.C.A. § 159 (West 1999); *see* 57 Fed. Reg. 35,989 (Aug. 12, 1992) (agency characterizing the amended statute as "virtually the same" as the prior version). Since under both provisions the only sanction for a non-compliant state (which does not either enact the revocation requirement or opt-out) is the withholding of funds, there is no preemption of state law as with the VPA. *Cf. infra* note 169 and accompanying text regarding Congressman Conyers' proposed amendment to the VPA.

131. H.R. REP. NO. 105-101, pt. 1, at 14 (1997), *reprinted in* 1997 U.S.C.C.A.N. 152, 162.

132. H.R. REP. NO. 105-101, pt. 1, at 19 (1997), *reprinted in* 1997 U.S.C.C.A.N. 152, 166 ("It is an odd formulation of federalism which grants all power to Congress unless the states affirmatively act to protect their interests." *Id.* at 37 (dissenting views of Congressmen Conyers, Lofgren, Nadler, and Scott)).

133. *Id.* at 19.

1997, so long as the harm that is the subject of the claim "occurred" after that date.[134] Thus, even if a state acts promptly to negate the statute, there could be prior "purely state" claims with respect to which the Act may apply in state court. The statute states that in order to opt out, the state legislature must "declare the election of such State that this [chapter] shall not apply, as of a date certain, to such civil action in the State."[135] Whether a state may select a date opting out retroactively, perhaps to the effective date of the federal legislation, is unclear.[136] Congress was also fairly specific as to the method that must be used to opt out. An opt-out provision in state legislation broadly reforming state tort law or enacting its own state volunteer protection statute, for example, would seem ineffective because the state must opt out in a "free standing bill."[137] And as the House dissenters noted, state legislative processes can be ponderous, particularly where state legislatures meet on a biennial basis.[138]

Additional difficulties arise if a state does eventually decide to opt out under the procedures set forth in the provision. Under its terms, the provision only allows a state to declare state tort law standards for civil actions in "state court" in which "all parties are citizens of the State."[139] Interestingly, the partial reinstatement authorized is expressed in terms of a "civil action" though the application in the statute's effective date provision is stated in terms of a "claim."[140] When viewed against the background of the conflict of law principles that usually apply to actions under state tort law, confusion is likely.

Though state conflicts of law principles vary from state to state, the modern approach generally to resolve the matter of which state's law applies is decided by determining which of a number of states has "the most significant relationship to

134. *See* Pub. L. 105-19, 105th Cong. § 7(b) (1997).

135. 42 U.S.C.A. § 14502(b)(2).

136. Defendants might argue that such a retroactive revival of a claim barred by the VPA would violate their due process rights. *See* Light, *supra* note 43.

137. H.R. REP. NO. 105-101, pt. 1, at 14 (1997), *reprinted in* 1997 U.S.C.C.A.N. 152, 162.

138. *See id.*

139. 42 U.S.C.A. § 14502(b).

140. Pub. L. 105-19, § 7(b), 111 Stat. 218, 223 (1997).

the occurrence and the parties" with respect to each "issue."[141] Since *Erie*, it has been clear that federal courts must follow state substantive law, including state common law, rather than inconsistent federal common law principles in diversity cases where the cause of action arises under state law.[142] Where a plaintiff is able to sue in federal court because the stakes are large and the defendant is from a different state,[143] the federal court applies the choice of law rules of the state in which it sits, which could, in a few isolated cases, diverge from the "multistate" black letter rule.[144] Even if no federal law has supplanted state tort liability, sometimes there may be a special federal "choice of law" rule to determine which state's tort law applies where a defendant's conduct is regulated under a comprehensive federal regime.[145]

How the VPA appears to affect these principles is indeed "odd." For example, in cases where a federal court sitting in diversity decides a state tort case, by its terms the VPA affects only claims assessing the liability of volunteers.[146] State principles apply to claims against other defendants, including the volunteer's organization.[147] Even where a state

141. RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 145 (1971).

142. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); *see also* the Rules of Decision Act, 28 U.S.C. § 1652 (1994).

143. *See* 28 U.S.C. § 1332 (1993).

144. *See* Klaxon Co. v. Stentor Elec. Mfg., 313 U.S. 487 (1941); E. SCOLES & P. HAY, CONFLICTS OF LAWS §§ 2.05-2.17 (2d ed. 1992); Herma Hill Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521 (1983); Gene R. Shreve, *In Search of a Choice of Law Reviewing Standard— Reflections on Allstate Insurance Co. v. Hague*, 66 MINN. L. REV. 327 (1982).

145. *See* International Paper Co. v. Ouellette, 479 U.S. 481 (1987); Andrew Jackson Heimert, *Keeping Pigs Out of Parlors: Using Nuisance Law to Affect the Location of Pollution*, 27 ENVTL. L. 403, 468-73 (1997). The Federal Rules of Civil Procedure specify a special choice of law rule for cases in federal court on the issue of whether a corporation has the capacity to sue or be sued. *See* FED. R. CIV. P. 17(b).

146. The limitations on liability are expressed in terms of declarations about the "volunteer of a nonprofit organization or governmental entity." 42 U.S.C.A. § 14502(a). The punitive damages limitation refers to such awards "against a volunteer in an action brought for harm based on the action of a volunteer. . . ." 42 U.S.C.A. § 14503(e)(1). The provision abolishing joint and several liability with respect to noneconomic damages is limited to "any civil action against a volunteer." 42 U.S.C.A. § 14504.

147. *See* 42 U.S.C.A. § 14503(c) ("Nothing in this section shall be construed to affect the liability of any nonprofit organization or governmental entity with respect to harm caused to any person.").

has opted out of the Act, it would seem that a federal court is supposed to apply the Act to claims against a volunteer notwithstanding the state's nullification.[148] The same analysis seems to apply even if the plaintiff decides to bring the action in a more plaintiff-oriented state court and the defendants remove the case to federal district court.[149] Normally, the federal court would apply the same choice of law rules that the state would have used, *i.e.* state conflicts law, in cases adjudicating a state cause of action.[150] But the VPA seems to require the federal court to apply the VPA because the action is not being adjudicated in "state court."[151]

Even stranger, if an out-of-state plaintiff sues originally in state court and the defendants do not seek removal, the state court still would likely have to apply the VPA because the opt-out only applies to a civil action in which "all parties are citizens of the State."[152] Thus, even in cases where there is no federal diversity jurisdiction, volunteer defendants might seek to join out-of-state parties to the litigation in order to avail themselves of the liability limitations of the federal statute. Incentives are quite peculiar. For example, an out-of-state volunteer organization's presence in a case in an opt-out state's court would make the VPA applicable to claims against its volunteers not otherwise applicable.[153]

Consider some additional factual scenarios likely to be

148. *See* 42 U.S.C.A. § 14502 (limiting the state election regarding nonapplicability to "any civil action in a State court against a volunteer in which all parties are citizens of the State. . ."). This is, of course, contrary to the "considerations that urge adjudication by the same law in all courts within a State when enforcing a right created by that State." Holmberg v. Armbrecht, 327 U.S. 392, 394 (1946) (distinguishing borrowing of state statutes of limitations as federal law under a federal cause of action from requirement that federal courts apply state statute of limitations to state cause of action under *Erie*).

149. This scenario assumes that no defendant is a resident of the state in which the action was brought. *See* 28 U.S.C. § 1441(b).

150. *See* Klaxon v. Stentor Elec. Mfg., 313 U.S. 487 (1941); SHREVE & RAVEN-HANSEN, *supra* note 85, § 41.

151. Plaintiffs probably would not be able to defeat removal jurisdiction on the grounds that the law applied in federal court would be more favorable to defendants. In *Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381 (1998), the Court allowed removal of a case arising under federal law even though, once removed, the state defendant had the defense of Eleventh Amendment immunity, which only applies to claims against the state in federal court.

152. 42 U.S.C.A. § 14502(b).

153. This is because the action would not be an action in which "all parties are citizens of the State" under 42 U.S.C.A. § 14502(b).

rare but far from fanciful. Imagine an accident involving a plaintiff and a volunteer defendant from state B on a project conducted for Habitat for Humanity International in the neighboring state of A.[154] Imagine further that state A has opted out of the VPA statute, while state B has not. Under the VPA's language, it would seem that the VPA's liability limitations would apply to plaintiff's action against defendant whether the case was brought in A's state court or B's state court because the opt-out provision only applies to actions "in which all parties are citizens of the State" which has opted out. Should an A state plaintiff sue an A state volunteer, the VPA's applicability would depend upon whether the plaintiff sued in the courts of state A or the courts of state B. More plaintiff-friendly A's law would apply in A court, but the VPA would apply to the A state citizens' dispute if adjudicated in B court. This would be so even though B would have applied A state law to liability issues in the case under the "most significant relationship" choice of law approach, had the VPA never been enacted.

Now imagine the reverse situation, in which all the facts are the same except that it is state B that has opted out and state A which has not. Now, the action in state B court would not apply the VPA because "all parties are citizens" of state B. Under the "most significant relationship" approach, state B normally would have applied the law of state A to the claims of its citizens against each other had the VPA not been enacted. Since state A has not opted out of the VPA, there seem to be two possibilities under the VPA's language. First, state B might apply the VPA, because the VPA partially preempts the law of state A and thus the VPA constitutes part of the law of state A. Second, state B might not apply the VPA on the grounds that state B's opt-out of the VPA means what the VPA states literally, that the VPA "does not apply to any civil action in a State court against a volunteer in which all parties are citizens of *the* State" where the state has opted out. Under this second approach, state B might even take the position that this provision of the VPA, Section

154. Habitat for Humanity International, headquartered in Americus, Georgia, conducts housing projects throughout the United States as well as in other countries. *See* MILLARD FULLER AND LINDA FULLER, THE EXCITEMENT IS BUILDING (1990).

14502(b), has preempted state B's choice of law rules and thereby prevents it from applying state A's law, including state A's adoption or acquiescence in the VPA's liability limitations.

II. CONSTITUTIONAL ISSUES

In *United States v. Lopez*,[155] for the first or second time since the advent of the New Deal, the Supreme Court struck down congressional legislation on the grounds that it went beyond the scope of the Commerce Clause.[156] It struck down a federal criminal statute addressing the problem of guns near schools because it did not demonstrably affect interstate commerce.[157] *Lopez* has precipitated numerous constitutional challenges to other federal statutes, practically all of which have been unsuccessful.[158] For example, most

155. 514 U.S. 549 (1995).

156. *See* United States v. Lopez, 514 U.S. at 567-68. The only other arguable time was *National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); *see* TRIBE, *supra* note 78 § 5-22, at 308 ("Although the Court conceded that the regulations at issue were 'undoubtedly within the scope of the Commerce Clause,' it found that wage and hour determinations . . . [as applied to states were] beyond the reach of the congressional power under the commerce clause."); *contra* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICY § 3.3.5 (1997) ("Between 1936 and April 26, 1995, the Supreme Court did not find one federal law unconstitutional as exceeding the scope of Congress's commerce power.").

157. *See Lopez*, 514 U.S. at 551.

158. *See, e.g.*, Hoffman v. Hunt, 126 F.3d 575, 582-88 (4th Cir. 1997) (upholding 18 U.S.C. § 248, which prohibits interference with access to reproductive health clinics); United States v. Soderna, 82 F.3d 1370, 1373-74 (7th Cir. 1996), *cert. denied*, 117 S.Ct. 507 (1996) (same);United States v. Dinwiddie, 76 F.3d 913, 919-21 (8th Cir. 1996) (same); Terry v. Reno, 101 F.3d 1412, 1415-18 (D.C. Cir. 1996) (same); United States v. Wilson, 73 F.3d 675, 679-87 (7th Cir. 1995) (same); Cheffer v. Reno, 55 F.3d 1517, 1519-21 (11th Cir. 1995) (same); United States v. Wright, 117 F.3d 1265, 1268-71 (11th Cir. 1997) (upholding 18 U.S.C. § 922(o), which prohibits intrastate possession of a machine gun, and noting that every circuit to consider the question had so held); United States v. Crump, 120 F.3d 462, 465-66 (4th Cir. 1997) (upholding 18 U.S.C § 924(c)(1), which prohibits use and carrying of a firearm during and in relation to a drug trafficking crime, and noting "all of the circuits that have considered the question" had upheld the statute in the face of a *Lopez* challenge); United States v. Olin Corp., 107 F.3d 1506, 1509-11 (11th Cir. 1997) (upholding CERCLA, 42 U.S.C. §§ 9601-9675); United States v. Allen, 106 F.3d 695, 700-01 (6th Cir. 1997), *cert. denied*, 117 S.Ct. 2467 (1997) (upholding 21 U.S.C. § 860(a), the Drug Free School-Zones Act); United States v. Hawkins, 104 F.3d 437, 439-40 (D.C. Cir. 1997), *cert. denied*, 118 S.Ct. 126 (1997) (upholding constitutionality of 21 U.S.C. § 846);United States v. Wells, 98 F.3d 808, 810-11 (4th Cir. 1996) (upholding 18 U.S.C. § 922(g), which

lower federal courts have upheld the Violence Against Women Act as distinguishable from *Lopez*.[159] Other than the Fourth Circuit, "courts have resisted urgings to extend *Lopez* beyond" the precise provision involved in the case itself.[160] *Lopez* cites with approval *Wickard v. Filburn*,[161] which elaborates a generous "cumulative effects" test for deciding whether a regulated activity substantially affects interstate commerce.[162] Few activities appear beyond the Commerce Power under this test.[163] Indeed, Congress has even attempted to reverse the result for the very provision involved in *Lopez*, drafting around the constitutional defect to limit the statute to firearms that "ha[ve] moved in or that otherwise affects interstate or foreign commerce."[164]

---

prohibits possession of a firearm by a felon, and noting ten other circuits that had upheld its constitutionality under *Lopez*); United States v. Genao, 79 F.3d 1333, 1335-37 (2d Cir. 1996) (same); United States v. Tisor, 96 F.3d 370, 373-75 (9th Cir. 1996), *cert. denied*, 117 S.Ct. 1012 (1997) (upholding congressional authority to prohibit intrastate possession or sale of narcotics); United States v. Leshuk, 65 F.3d 1105, 1111-12 (4th Cir. 1995) (same); United States v. Bramble, 103 F.3d 1475 1479-82 (9th Cir. 1996) (upholding the Eagle Protection Act, 16 U.S.C. § 668); United States v. Michael R., 90 F.3d 340, 343-45 (9th Cir. 1996) (upholding 18 U.S.C. § 922(x)(2), which prohibits knowing and intentional possession of a handgun by a juvenile); United States v. Lomayaoma, 86 F.3d 142, 144- 46 (9th Cir. 1996), *cert. denied*, 117 S.Ct. 272 (1996) (upholding the Indian Major Crimes Act, 18 U.S.C. § 1153).

159. *See* Brzonkala v. Virginia Polytechnic Inst. and State Univ., 132 F.3d 949 (4th Cir. 1997), *vacated* 169 F.3d 820 (4th Cir. 1999) (en banc), *cert. granted* United States v. Morrison, ____ U.S. ____, 120 S.Ct. 11 (1999); United States v. Bailey, 112 F.3d 758 (4th Cir. 1997); Crisonino v. New York City Housing Auth., 985 F. Supp. 385 (S.D.N.Y. 1997); Anisimov v. Lake, 982 F. Supp. 531 (N.D. Ill. 1997); Seaton v. Seaton, 971 F. Supp. 1188 (E.D. Tenn. 1997); Doe v. Hartz, 970 F. Supp. 1375 (N.D. Iowa 1997); Doe v. Doe, 929 F. Supp. 608, 613 (D. Conn. 1996) (congressional findings in VAWA "demonstrate the substantial effect on interstate commerce of gender-based violence, in marked distinction to the Gun Free Zone Act challenged in *Lopez* which lacked such analysis, only theoretical impact arguments").

160. Brzonkala v. Virginia Polytechnic Inst. and State Univ., 132 F.3d 949, 969 n.13 (4th Cir. 1997) *vacated* 169 F.3d 820 (4th Cir. 1999) (en banc), *cert. granted* United States v. Morrison, ____ U.S. ____, 120 S.Ct. 11 (1999) (Violence Against Women Act).

161. 317 U.S. 111 (1942).

162. *Brzonkala*, 132 F.3d at 972.

163. *See* Patrick Hoopes, *Tort Reform in the Wake of United States v. Lopez*, 24 HASTINGS CONST. L. Q. 785 (1997).

164. *See e.g.*, 18 U.S.C. § 922(q)(2)(A) (1996), added by Pub. L. 104-208, § 101(f), 110 Stat. 3009, 3009-370 (1996) ("It shall be unlawful . . . to discharge a firearm . . . that has moved in or otherwise affects interstate or foreign commerce at a place the person knows is a school zone.").

A. Beyond the Commerce Power

Ironically, volunteer protection proposals that pre-date *Lopez* would have avoided any constitutional issue under the Commerce Power altogether. These proposals would only have encouraged states to enact volunteer protection statutes by providing additional block grants for those states that enacted the recommended provisions.[165] Congress may induce states to take action not within the scope of the Commerce Power through financial incentives enacted pursuant to its Spending Power.[166] Congressman Conyers unsuccessfully sought to amend the VPA in committee to make the provisions of the Act voluntary for the states but to provide a financial incentive or reward for states that enacted them.[167] The Justice Department Office of Legal Counsel fully expected constitutional challenges to the VPA's preemptive approach under the *Lopez* decision.[168] The history of litigation challenging federal statutes after *Lopez* does suggest that there will be challenges, though ultimately, these challenges will likely prove unsuccessful. The viability of *Lopez* attacks on the constitutional underpinnings of federal statutes will turn on the Supreme Court's elaboration of that approach in the pending case of *Brzonkala v. Virginia Poly-*

---

165. This was the approach taken by Rep. Porter in seven Congresses, an approach approved by the 103rd Congress as an amendment to the National and Community Service Act of 1990. *See* H.R. REP. NO. 105-110, pt. 1, at 19 n.13 (1997), *reprinted in* 1997 U.S.C.C.A.N. 152, 166 n.13; *see* 139 CONG. REC. P860 (1993) (daily ed. July 28, 1993) (statement by Rep. Porter).

166. *See e.g.*, South Dakota v. Dole, 483 U.S. 203 (1987) (upholding a federal statute that directed the Secretary of Transportation to withhold federal highway funds from states that do not prohibit the purchase of alcohol by people under twenty-one years of age); United States v. Butler, 297 U.S. 1 (1936) (power to tax and spend is a distinct constitutional power, fully effective without reference to other granted powers); *see* Lynn A. Baker, *Conditional Spending After Lopez*, 95 COLUM. L. REV. 1911 (1995); Richard A. Epstein, *Forward: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989). *Cf.* Note, *Taking Federalism Seriously: Limiting State Acceptance of National Grants*, 90 YALE L. J. 1694, 1712 (1982) ("Only a requirement that states make all decisions on matters falling within exclusive state powers free from all influence of national grants provides a workable standard for preserving the values of Federalism.").

167. *See* H.R. REP. NO. 105-101, pt. 1, at 19 (1997), *reprinted in* 1997 U.S.C.C.A.N. 152, 166.

168. *See* H.R. REP. NO. 105-101, pt. 1, at 19 n.13 (1997), *reprinted in* 1997 U.S.C.C.A.N. News 152, 166, 166 n.13.

technic Institute and State University.[169]

The VPA's opt-out provision appears intended to ameliorate the preemptive effect of the VPA. Its logic, however, is flawed to the extent the attempt is to avoid a constitutional challenge under *Lopez.* Assume for the moment that some applications of the VPA are beyond the Commerce Power, as members of Congress feared. The VPA, after all, bears only a remote "connection or identification with commercial concerns that are central to the Commerce Clause."[170] If so, the preemption would remain invalid despite the opt-out provision. "State officials . . . cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution."[171] The VPA does not induce states to enact federal proposals as a matter of state law; indeed, the VPA bypasses state legislative processes altogether, placing the onus on states to enact legislation in a specific form to move back toward the *status quo ante.* Moreover, there is no positive inducement for a state *not* to act under the VPA. Thus, the VPA simply does not involve the exercise of the Taxing or Spending Power. However, since the cumulative effect of volunteer service as an empirical matter probably does substantially affect interstate commerce, there also probably is no constitutional problem with the VPA under a pre-*Brzonkala – Lopez* test.[172]

---

169. *See* Brzonkala v. Virginia Polytechnic Inst. and State Univ., 132 F.3d 949, 949 (4th Cir. 1997) *vacated* 169 F.3d 820 (4th Cir. 1999) (en banc), *cert. granted* United States v. Morrison, ____ U.S. ____, 120 S.Ct. 11 (1999) ; *see also* United States v. Olin Corp., 107 F.3d 1506, 1509-10 (11th Cir. 1997) (rejecting Commerce Clause challenge to CERCLA).

170. *Lopez,* 514 U.S. at 583 (Kennedy, J., concurring).

171. New York v. United States, 505 U.S. 144, 182 (1992) (O'Connor, J.).

172. *See* Schwartz and Behrens, *supra* note 101, at 606-07. The statute also cites the Fourteenth Amendment as a possible constitutional basis for the Act in addition to the Commerce Clause. This approach is problematic in light of *City of Boerne v. Flores,* 51 U.S. 507 (1997), but the argument seems less plausible in the VPA context in contrast to VAWA. *But see* Brzonkala v. Virginia Polytechnic Inst. and State Univ., 169 F.3d 820, 862-89 (4th Cir. 1999) (rejecting Fourteenth Amendment argument in VAWA context). Moreover, if VPA is justified under the Commerce Clause, inquiry into the Fourteenth Amendment approach would be unnecessary. Further discussion of the approach is beyond the scope of this article.

B. The Etiquette of Federalism

Even if the VPA falls within the scope of the Commerce Power, the opt-out provision presents additional constitutional difficulty because it resembles "a case where the etiquette of federalism has been violated by a formal command from the National Government directing the State to enact a certain policy."[173] The key precedents here are *Federal Energy Regulatory Commission v. Mississippi*[174] and *New York v. United States.*[175] In the former case, the Supreme Court upheld a mechanism through which Congress required states to consider certain federal conservation policies. The Court viewed the forced consideration as a "choice" in which a state could "consider" the policies, or, alternatively, abandon the field of public utility regulation altogether.[176] In the later case, however, the Court found a provision of the Low Level Radioactive Waste Policy Amendments Act of 1985[177] to go beyond constitutional inducement into unconstitutional coercion.[178] It found the Act's take title provision offering state governments a "choice" of either accepting ownership of waste or regulating according to the instructions of Congress to be "no choice at all."[179]

The politics of the VPA resembles those involved in *FERC* and *New York*. In *FERC*, *New York*, and the VPA, congressional sponsors of the legislation faced stiff opposition based on concerns involving new federal intrusion into areas of traditional state responsibility.[180] In all these cases, sponsors adopted "compromises" to accommodate states' rights objections.[181] In the *FERC* case, this took the form of a retreat from a federal mandate that state utility commissions adopt specific federal policies to a requirement that they "consider" them.[182] In the *New York* case, Congress crafted several sets

173. *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring).
174. 456 U.S. 742 (1982) [hereinafter *FERC*].
175. 505 U.S. 144 (1992).
176. *FERC*, 456 U.S. at 766.
177. Pub. L. 99-240, 99 Stat. 1842 (1986).
178. *See New York*, 505 U.S. at 174-5.
179. *Id.* at 176.
180. *See FERC*, 456 U.S. at 786 n.15 (O'Connor, J., dissenting); *New York*, 505 U.S. at 151.
181. *FERC*, 456 U.S. at 745-50.
182. *Id.*

of incentives to encourage states to follow a federal scheme for regional responsibility for disposal of low level radioactive waste it felt unable to mandate.[183] These included monetary incentives, the threat of direct federal regulation in states that did not cooperate, and the so-called take title provision.[184] In the VPA case, states' rights concerns precipitated the opt-out provision of the statute's otherwise preemptive effect.[185]

The VPA's "opt-out" preemption is quite similar to the scheme the Court approved in *FERC*'s five—four decision over vigorous dissents by Justices O'Connor and Powell. O'Connor's dissent was quite blunt, "[T]here is nothing 'cooperative' about a federal program that compels state agencies either to function as bureaucratic puppets of the Federal Government or to abandon regulation of an entire field traditionally reserved to state authority."[186] Justice Powell argued that the statute involved violated the Tenth Amendment to the extent that it "prescribes administrative and judicial procedures that States must follow in deciding whether to adopt

183. *See New York*, 505 U.S. at 169-704

184. *See id.*

185. *See* 143 Cong. Rec. H3096, H3099 (daily ed. May 21, 1997) (statement of Cong. Manzullo) (opposing bill); H3100 (Cong. Watt) (opposing bill as "taking over all the rights of the State"); H3100 (Cong. Bryant) ("I think with volunteers serving both from within and without their home State, a Federal, consistent law is certainly needed. If a State strongly disagrees with this, then that State . . . has the option to opt out completely.") H3101 (Cong. Bereuter) (resting support for legislation in part on the "State opt out provisions"); H3101-2 (Cong. Porter) (noting that Senate, protector of states' rights, added the opt out provision); H3103 (Cong. Conyers) (repeating charge made in Committee that "opt-out provision is unduly narrow"); 143 Cong. Rec. S4915, S4917 (Sen. Leahy) (daily ed. May 21, 1997) (supports bill while troubled with preemption, comforted that "State legislatures may pass legislation to opt out of the bill's coverage" and noting that a voluntary approach "was not acceptable to the majority"); S4918 (Sen. Abraham) (It was "important to include [the opt out] provision out of respect for principles of federalism."); 143 Cong. Rec. S3824, S3830 (daily ed. Apr. 30, 1997) (Sen. Coverdell) (important not to allow opt out when volunteers from more than one state, *e.g.* national disasters); 143 Cong. Rec. S3778, S3781 (Sen. McConnell) ("States have the ability to opt out of this if they choose to do so."); 143 Cong. Rec. S3784, S3785 (Sen. Gramm) (The VPA does "recognize the role of the States. And in those cases in which all the parties are of a single State, the State has the option and authority to opt out of this legislation if the case is at all related to citizens of the same State."); S3796 (Sen. Abraham) (opt-out provision written to ensure that before opting out "without the appropriate consideration of the issue by the State").

186. *FERC*, 456 U.S. at 783 (O'Connor, J., concurring in part and dissenting in part).

the proposed standards."[187] The constitutional requirement violated was that "Congress must respect the state institution's own decisionmaking and structure."[188] In a subsequent decision, *Printz v. United States*,[189] Justice Scalia, writing for a five—four majority that included Justice O'Connor, distinguished *FERC*, writing that the Court there had "upheld the statutory provisions at issue precisely because they did not commandeer state government, but merely imposed preconditions to continued state regulation of an otherwise pre-empted field."[190]

In some respects, VPA's "opt-out" preemption might be viewed as less intrusive on state governmental institutions than that the provisions at issue in *FERC*. In *FERC*, if a state did not "consider" the federal proposals, Congress had put forward "no alternative regulatory scheme to govern this very important area."[191] The implicit alternative, "ceasing regulation in the field," was "realistically foreclosed."[192] The alternative put to the state in the VPA appears more reasonable, either (1) opt-out for actions involving only state citizens in state court, or (2) apply the VPA to those cases as you must in all other cases covered by the statute. In other respects, however, the VPA goes beyond *FERC*. Even where a state opposes the VPA's policies, it must apply the statute to cases involving its citizens in state court wherever non-state citizens are parties.[193] Unlike *FERC*, the legislature may not "consider" and then reject the federal policy in these situations. Moreover, the *FERC* dissenter's objections to the congressional specification of procedures state legislatures must follow also applies to the VPA. A state may opt out only where it exercises the option in free-standing legislation that makes reference to the specific opt-out provision of the federal statute.[194]

The relevance of *New York* is also complex. In *New York*, Justice O'Connor struck down the take-title provision as *de*

187. *Id.* at 771 (Powell, J., concurring in part and dissenting in part).
188. *Id.* at 773 n.4 (Powell, J., concurring in part and dissenting in part).
189. 521 U.S. 898 (1997).
190. *Id.* at 926.
191. *Id.* at 965 (Stevens, J., dissenting).
192. *Id.*
193. *See supra* notes 139-153 and accompanying text.
194. *See* 42 U.S.C.A. § 14502(b)(1).

facto commandeering of the institutions of state government because it presented state legislatures with a false choice: either regulate according to federal specifications or take title to and possession of all waste within its borders, including liability for all damages waste generators suffer as a result of the state's failure to do so promptly.[195] As Justice O'Connor explained, "In this provision, Congress has crossed the line distinguishing encouragement from coercion. . . ."[196] The unconstitutionality of the provision rested upon O'Connor's conclusion that either option, an instruction to the state to take title to waste or a direct order to regulate, "would be beyond the authority of Congress."[197] In the VPA situation, obviously members of Congress feared that preemption of state tort law regarding volunteers might be beyond the authority of Congress under the Commerce Power as explained in *Lopez*.[198]

The opt-out provision only makes the statute's preemption "voluntary" in local cases.[199] Assuming that some cases covered by the VPA actually are beyond the scope of the Commerce Power, the constitutionality of the opt-out alternative would turn on whether those cases for which Congress did not allow states to opt out, i.e. otherwise local cases involving out-of-state citizens, are not among those beyond the Commerce Power. Whether a state enacts opt-out legislation or not, it in no way voluntarily consents to the application of the VPA's standards in other cases. The statute simply provides no option in this regard. The VPA does not envision that a state enact its provisions as a matter of state law in order to make the VPA's liability rules enforceable. Should a state's legislature refuse or fail to act, the VPA contemplates that the more protective federal law must be applied in the courts of that state.[200] The VPA is therefore unlike the many federal regulatory regimes under which

195. *See New York*, 505 U.S. at 175-76.
196. *Id.* at 175.
197. *Id.* at 176.
198. *See supra* notes 165-172 and accompanying text.
199. Thus, it is ironic that President Clinton signed this legislation in the mistaken belief that it gave states the "ability to opt out of the bill's provisions in most cases. . . ." Statement by President Bill Clinton Upon Signing S. 543, 1997 U.S.C.C.A.N. 169.
200. *See* 42 U.S.C.A. § 14502(a); *see also supra* text accompanying note 46.

states may choose to accept delegated enforcement authority or, alternatively, allow the federal government to regulate within the state directly.[201] State courts must apply the VPA in many cases even if a state has enacted opt out legislation.[202] In this sense, there is no more of a state "choice" under the VPA than under the take title provision disapproved of in *New York*.[203]

On the other hand, the VPA's preemption requires the state "to apply federal law while acting in a judicial capacity."[204] The doctrine of *Testa v. Katt*[205] "stands for the proposition that state courts cannot refuse to apply federal law - a conclusion mandated by the terms of the Supremacy Clause ('the Judges in every State shall be bound [by federal law]')."[206] In *Printz*, the Court disapproved of a federal mandate that state law enforcement officials apply federal law but distinguished federal mandates to state "officers who conduct adjudications similar to those traditionally performed by state judges."[207] The Court distinguished its holding in *FERC* on the grounds that *FERC*'s mandate to public utility commissions had involved adjudicatory responsibilities.[208] The Court understood laws enacted at the dawning of the Republic "to permit imposition of an obligation on state judges to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power."[209] State courts throughout our nation's history have been "viewed distinctively in this regard; unlike legislatures and executives, they [have] applied the law of other sover-

201. *See e.g.*, 42 U.S.C. § 7410 (1995) (Clean Air Act); 33 U.S.C. § 1342 (1986) (amended 1987) (Clean Water Act); 7 U.S.C. §§ 136w-1, 136w-2 (1999) (Federal Insecticide, Fungicide, and Rodenticide Act); 42 U.S.C. § 300h-1(c) (1991) (Safe Drinking Water Act); 42 U.S.C. § 6926 (1995) (Solid Waste Disposal Act); 30 U.S.C. § 1254 (1986) (Surface Mining and Reclamation Act); *see* Light, *He Who Pays the Piper Should Call the Tune: Dual Sovereignty in U.S. Environmental Law*, 4 ENVT'L LAW. 779, 813 (1998).

202. *See supra* notes 139-153 and accompanying text.

203. *See supra* notes 195-197 and accompanying text.

204. *Printz*, 521 U.S. at 929.

205. 330 U.S. 386 (1947).

206. *Printz*, 521 U.S. at 929.

207. *Id.* at 929 n.14.

208. *See id.* ("We have no doubt that FERC would not have been decided the way it was if non adjudicative responsibilities of the state agency were at issue.").

209. *Printz*, 521 U.S. at 899.

eigns all the time."[210]

C. Federalism as Separation of Powers

So long as it is exercising one of its enumerated powers, federal preemption of contrary state tort law is in general not very troubling. To be sure, the presumption is that "in a field which the states have traditionally occupied" we "'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'"[211] The VPA does intend some preemption. The real federalism difficulties with the VPA do not result from the preemption *per se* but from the complicated way that the statute intermingles state and federal law and confuses legislative and judicial roles.

After the so-called "Revolution of 1937," the Supreme Court permitted Congress to legislate in areas previously considered the province of the states.[212] But the New Deal pattern of federal intervention relied on federal enforcement tools, executive branch agencies, independent regulatory commissions, and the federal courts.[213] With its abandonment of the non-delegation doctrine as a constraint on the transfer of congressional power, open-ended grants of authority were legion.[214] Agencies received mandates to regulate in the "public interest."[215] The Supreme Court re-

---

210. *Id.*; *see* THE FEDERALIST NO. 82 (A. Hamilton) (Random House ed.), at 493 ("The judicial power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all the subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe.").

211. Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

212. *See* TRIBE, *supra* note 78, § 5-22 at 386; MELVIN I. UROFSKY, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES 668-69, 679 (1988).

213. *See generally,* Robert L. Rabin, *Federal Regulation in Historical Perspective,* 38 STAN. L. REV. 1189 (1986).

214. *See* David Schoenbrod, *The Delegation Doctrine: Could the Court Give it Substance?,* 83 MICH. L. REV. 1223 (1985).

215. *See, e.g.*, National Broad. Co. v. United States, 319 U.S. 190, 225-26 (1943) (upholding broadcast licensing regulation "in the public interest"); *cf.* Lichter v. United States, 334 U.S. 742, 785-86 (1948) (agency to determine "excessive profits"); FPC v. Hope Natural Gas Co., 320 U.S. 591, 600 (1944) (agency to set "just and reasonable rates").

ceived a mandate to develop a uniform collective bargaining law consistent with the National Labor Relations Act with very little detailed instruction as to that law's content.[216] Because the states had "failed," Congress and the President looked to federal resolution of the problems associated with the Great Depression.[217] Congress may command a federal agency or the federal courts to develop federal regulations to flesh out federal statutory policies, which may change over time within the constraints the statute imposes.[218]

Congress, however, may not invade the exclusively judicial province. Thus, the Court has found ineffective a congressional attempt to reopen final judgments rendered by a court.[219] In *City of Boerne v. Flores*,[220] the Court also recently refused to allow Congress to dictate the method or standard by which the Court is to construe the Constitution.[221]Such cases follow the historic tradition of *United States v. Klein*[222] in which the Court boldly declared that Congress may not "prescribe rules of decision to the Judicial Department of the government in cases pending before it."[223]

Judicial interpretation of a statute violates separation of powers when it crosses into "judicial legislation."[224] Where

---

216. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

217. *See generally*, Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975); *cf.* United States v. Darby, 312 U.S. 300 (1941) (Tenth Amendment no independent limitation on Commerce Power).

218. *See* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989); Stephen G. Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986).

219. *See* Plaut v. Spendthrift Farms, Inc., 514 U.S. 211 (1995); *cf.* C & S Air Lines v. Waterman Corp., 333 U.S. 103 (1948) (federal courts may not review CAB decisions about international air routes because its decision could be disregarded or modified by President); Hayburn's Case, 2 U.S. 408 (1792) (court cannot make recommendations regarding pensions because decision could be rendered ineffective by legislature or executive).

220. 521 U.S. 507 (1997).

221. *See id.* at 523 ("The power to interpret the Constitution in a case or controversy remains in the Judiciary.").

222. 80 U.S. 128 (1872).

223. *Id.*, at 146.

224. United States v. National Treasury Employees Union, 513 U.S. 454, 479 (1995) (referring to Court's "obligation to avoid judicial legislation"); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 340 (1897) ("If the act ought to read as contended for by defendants, Congress is the body to amend it, and not this court, by a process of judicial legislation wholly unjustifiable.").

the judiciary goes beyond interpretation, Congress may amend its work product to more carefully circumscribe interpretation, at least prospectively.[225] Where Congress dictates canons of construction for the courts rather than legislating substantive legal standards, the remedy for the offense is relatively more elusive.[226] The basic problem, however, is straightforward. Only a judge faced with the facts and circumstances of the specific case is in a position to interpret the statute with respect to its application in that case.[227]

The Plimsoll line between legislation and interpretation can be difficult to define.[228] It is also far too late in light of the New Deal to claim that Congress may not delegate legislative power to the other branches of the federal government,

---

225. *See* Rivers v. Roadway Express, Inc., 511 U.S. 298, 313 (1994) ("Congress, of course, has the power to amend a statute that it believes we have misconstrued."); *see* Hughes Aircraft Corp. v. United States, 520 U.S. 939 (1997) (refusing to apply jurisdictional amendment establishing new liability retroactively). Note that Congress has sought to supersede the effect of the *Lopez* decision by limiting application of the statute involved to situations affecting interstate commerce. *See Brzonkala*, 132 F.3d at 972.

226. Where Congress' work product is incomplete, federal courts often say that the legislative gaps may be filled authoritatively by the agency to whom responsibility has been delegated within the bounds of reason, which can diverge over time in light of the changing policies of presidential administrations. *See Textile Workers Union*, 353 U.S. 448. Perhaps the VPA will precipitate a similar principle, *i.e.* federal courts must defer to any reasonable interpretation of the federal statute that a state legislature or state court enunciates. If so, the interesting cases under the VPA may not involve the clear statutory "interstices," where state law plainly governs, but rather the VPA's substantive liability provisions themselves, where the Court might require a uniform interpretation or, alternatively, might allow diverse reasonable state interpretation.

227. There may be different readings of the federal law in the context of different state tort systems. *See supra* notes 67-68 and accompanying text. Would the Supreme Court require uniformity here, or would it allow diverse reasonable interpretations among the states? Recall *Marek v. Chaney*, 479 U.S. 1 (1985), where the Court allowed varying meanings of "costs" on a case-by-case basis under FED. R. CIV. P. 68 depending on the underlying federal cause of action and accompanying fee shifting provision. Even worse, in an "opt out" state, courts applying the VPA may have to view state law one way (shaping it to fit the VPA regime) while state courts may develop a different independent state law in cases where all parties are citizens of the state.

228. The Plimsoll line is a nautical term that refers to the load-line required to be placed upon the hull to indicate how far they may be loaded. In *Fikes v. Alabama*, Justice Frankfurter used the term to refer to the line of unconstitutionality reached by the cumulative loading of otherwise individually constitutional actions. *See* Fikes v. Alabama, 352 U.S. 191, 199 (1957) (Frankfurter, J., concurring).

whatever the enlightenment philosophy upon which the Framers grounded the Constitution's approach.[229] Somehow, however, congressional aggrandizement of the judicial function seems more offensive than the conferral of legislative power on the other branches.[230] The Court's prohibition on aggrandizement appears more categorical than its evaluation of other potential violations of the required separation of powers.[231]

---

229. *See infra* note 300.

230. Plaintiffs' lawyers have argued, at times successfully, that tort reforms such as liability caps constitutes a legislative usurpation of judicial power and thus violates the more stringent doctrines of separation of powers under state constitutions. *See, e.g.*, State *ex rel.* Ohio Academy of Trial Lawyers v. Sheward, 715 N.E.2d 1062 (Ohio 1999) (striking down tort reforms on separation of powers and due process grounds); Best v. Taylor Machine Works, 689 N.E.2d 1057 (Ill. 1997) (striking down tort reform, partially on grounds that reforms interfere with judicial prerogatives regarding excessive verdicts in individual cases); Estate of Macos v. Wisconsin Masons Health Care Fund, 564 N.W.2d 662 (Wis. 1997) (new statute of repose that bars medical malpractice actions violates the state constitution's "right to remedy" clause); Hazine v. Montgomery Elevator Co., 861 P.2d 625 (Ariz. 1993) (interpreting Arizona Constitution to preclude tort reform statute of repose); Sofie v. Fireboard Corp., 654, 771 P.2d 711, 721 (Wash. 1989) ("any legislative attempt to mandate legal conclusions violates separation of powers," thereby suggesting in dictum that liability cap violated state constitutional right to trial by jury). In most states, this probably is untrue. *See* Robinson v. Charleston Area Medical Center, Inc., 414 S.E.2d 877 (W. Va. 1991) (liability cap not precluded by "certain remedy" provision of state constitution); Etheridge v. Medical Center Hosps., 376 S.E.2d 525 (Va. 1990) (liability cap not precluded by state constitution's required separation of powers); Edmonds v. Murphy, 579 A.2d 853 (Md. 1990) *aff'd* 601 A.2d 102 (Md. 1990) (damages cap does not violate separation of powers in state constitution); Victor E. Schwartz, et al., *Illinois Tort Law: A Rich History of Cooperation and Respect Between the Courts and the Legislature*, 28 LOY. U. CHI. L. J. 745 (1997). However, these cases suggest the considerable difficulty some state courts may have in reconciling the VPA's preemption and state constitutional principle. *Cf.*, Light, *supra* note 43, at 406-10 (urging limited construction of CERCLA's toxic tort preemption to avoid conflict with state constitutional due process doctrines).

231. *See e.g.*, Neil Kinkopf, *Of Devolution, Privatization, and Globalization: Separation of Powers Limits on Congressional Authority to Assign Federal Power to Non-Federal Actors*, 50 RUTGERS L. REV. 331 (1998) (referring to the Supreme Court's "categorical" anti-aggrandizement principle and a more general separation of powers principle that prevents congressional interference with another branch's "constitutional role"). Justice Scalia recently has taken a somewhat different linguistic approach to describe the correct distinction. In *Printz*, he described "the line that separates proper congressional conferral of *Executive power* from unconstitutional delegation of *legislative authority* for federal separation-of-powers purposes." *Printz*, 521 U.S. at 927 (emphasis added). To Justice Scalia, congressional delegation of rulemaking responsibilities to an administrative agency is conferral of an executive, not a legislative function. *See* Loving v. United States, 517 U.S. 748, 776-77 (1996) (Scalia, J., concurring) ("Legislative power is non-delegable. . . .

The mid-twentieth century witnessed Congress's increasing reliance upon the institutions of state government to supplement, implement, and enforce federal laws, including entitlements and various regulatory areas.[232] Involvement of the states tempered political difficulties within the intrusion of federal regulation into areas of their historic responsibility, such as highways, education, and land use regulation.[233] Frequently during the 1960s and 1970s, Congress offered financial inducements and other incentives to encourage state participation without absolutely requiring it.[234] A number of regimes included a "threat" that the federal government would regulate a state's citizens directly unless the state voluntarily chose to do so by incorporating and enforcing federal standards as a matter of state law.[235]

The VPA requires state judges to do more than merely enforce or apply federal law in state proceedings. The Act implicitly directs states to alter or shape state tort law to ac-

---

What Congress does is to assign responsibilities to the Executive; and when the Executive undertakes those responsibilities it acts, not as the "delegate" of Congress, but as the agent of the People."); *cf.*, Freytag v. Commissioner, 501 U.S. 868, 909 (1991) (Scalia, J., concurring) ("There is nothing 'inherently judicial' about 'adjudication.'"); *id.* at 912 (Scalia, J., concurring) ("It seems to me entirely obvious that the Tax Court, like the Internal Revenue Service, the FCC, and the [National Labor Relations Board], exercises executive power."). An administrative agency's rulemaking activity is constitutional only as an adjunct to that agency's execution of its enabling act. Thus, it would violate separation of powers for Congress to delegate only legislative power to the judicial branch, a sort of "junior varsity Congress." Mistretta v. United States, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting).

232. *See generally*, ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, REGULATORY FEDERALISM: POLICY, PROCESS, IMPACT, AND REFORM (Pub. No. A-95 1984).

233. *See, e.g.*, Motor Vehicle Act of 1960, Pub. L. No. 86-493, 74 Stat. 162 (1960) (highways); Coastal Zone Management Act of 1972, Pub. L. No. 92-583, 86 Stat. 1280 (1972) (land use regulation).

234. *See* ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *supra* note 232, at 1.

235. *See e.g.*, FIFRA §§ 26, 27, 7 U.S.C. §§ 136w-1, 136w-2; SMCRA § 504, 30 U.S.C. § 1254; CWA § 402, 33 U.S.C. § 1342; SDWA § 1422(c), 42 U.S.C. § 300h-1(c); SWDA § 3006, 42 U.S.C. § 6926; CAA § 110(c)(1), 42 U.S.C. § 7410(c)(1). On occasion, a few, but very few, states have declined or turned back such "delegation." 59 Fed. Reg. 1733 (Jan. 12, 1994) (rescission of certain permitting authority to California agency); 52 Fed. Reg. 43903 (Nov. 17, 1987) (proceeding to consider withdrawal of hazardous waste program approval in North Carolina); 50 Fed. Reg. 13021 (1985) (California NSPS air permit program withdrawal).

commodate federal policies.[236] It does not provide them the alternative of ignoring the federal standards in most cases.[237] It directs state courts as to the standard of care for volunteers, the circumstances and procedures under which punitive damages may be awarded, and the methodology for allocating noneconomic damages.[238] More seriously, the statute also prescribes how state judges are to relate the statute's substantive provisions to the rest of state law for which the statute establishes no uniform federal rule of decision; for example, not to affect organizational liability; not to affect responsibility of volunteers to their organization; not to be inconsistent with state risk management, *respondeat superior*, insurance or other types of state law; and not to be applicable to various forms of identified "misconduct."[239]

In each of these areas, Congress does *not* specify federal rules that are to apply; instead it simply instructs state judges as to how they are to relate the state's legal principles to other federal rules it has legislated. On matters of state law, the United States Supreme Court is bound to follow the statutes and judicial decisions of the state.[240] Federal courts do not have independent authority to construe state legislation.[241] A congressional instruction to a federal court to construe state law in a certain way should be just as ineffective as the VPA's instruction directed primarily to state courts.

---

236. *Cf.* Cynthia C. Lebow, *Federalism and Federal Product Liability Reform: Warning Not Heeded*, 64 TENN. L. REV. 665, 689 (1997) (discussing federal product liability proposal's similar form of preemption).

237. *See supra* notes 139-153.

238. *See supra* notes 46-51 and accompanying text.

239. *See supra* notes 52-64 and accompanying text.

240. *See* Exxon Corp. v. Eagerton, 462 U.S. 176, 181 n.3 (1983). *See also* Commissioner v. Estate of Bosch, 387 U.S. 456, 465 (1987); *cf.* 28 U.S.C. § 1652 ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."). The Supreme Court looks to the state courts for an "authoritative construction" of state law. *See* Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 308 (1979).

241. *See Johnson*, 520 U.S. at 916 ("This proposition, fundamental to our system of federalism, is applicable to procedural, as well as substantive rules."). *See also* New York v. Ferber, 458 U.S. 747, 766 (1982) (construction that a state court gives a state statute "is not a matter subject to our review"); Gooding v. Wilson, 405 U.S. 518, 520 (1972); United States v. Thirty Seven Photographs, 402 U.S. 363, 369 (1971).

As one recent commentator viewed the matter, this incomplete form of preemption is a congressional "attempt to conscript the state courts as agents of reform in contravention of fundamental notions of federalism."[242]

This separation of powers problem is similar to that which the *Printz* Court identifies in connection with the congressional conscription of state law enforcement officials to enforce a federal firearms registration law. In *Printz*, the Court reaffirmed *New York's* conclusion that the Commerce Clause "authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce."[243] "The Supremacy Clause makes 'Law of the Land' only 'Laws of the United States which shall be made in Pursuance [of the Constitution]'"[244] Accordingly, the Court found a congressional interference with the powers of the President in Congress' attempt to delegate executive functions to state law enforcement officers.[245] Similarly, in the VPA, Congress is interfering with the judicial powers of state courts by dictating the rules of construction they are to use to accommodate federal and state policies in the context of a state law cause of action and remedy.

D. Discriminatory "Opt-Out" Preemption

The VPA's unique opt-out provision creates additional constitutional difficulties.[246] One may question the "volun-

---

242. Lebow, *supra* note 236, at 690.

243. *Printz*, 521 U.S. at 924 (quoting *New York*, 505 U.S. at 166).

244. *Id.*

245. *See id.* at 922:

> The insistence of the Framers upon unity in the Federal Executive—to insure both vigor and accountability—is well known. That unity would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws.

Id.

246. Interestingly, the VPA contains no severability clause. In light of the legislative history indicating that the "opt out" provision may have been necessary to ameliorate constitutional concerns about the statute and that the statute might not have been enacted in its absence, it may be that the unconstitutionality of the provision would require that the entire statute be held invalid. The Supreme Court will sever invalid portions of a statute "'unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently

tariness" of a state's acquiescence in the VPA's preemption in light of the statute's requirement that the state affirmatively enact legislation according to federal specifications in order to reject the VPA's standards. On the other hand, one may also question whether there really is preemption where a state can opt out of the federal legislation, subjecting the applicability of federal law in each state to the vagaries of state legislative and gubernatorial processes. The statute goes beyond coercion of a state's legislative processes, disapproved in *New York*, to an assumption of agreement in the absence of state nullification. If a state actually does enact such a nullification, that act might further enhance the constitutional challenges to the VPA's consistency with the Commerce Power, etiquette of federalism, and constitutional separations of powers, by sharpening the policy dispute between the levels of government.[247]

"Opting out" raises other problems, too. As discussed above, the plain language of the opt-out section has bizarre, perhaps unintended, consequences for courts in a state that has exercised the provision.[248] Whether the VPA's liability limitations apply in a "civil action" will turn on whether "all parties are citizens of the State" within the meaning of the provision.[249] This presents the prospect of vertical "forum shopping," because a defendant may obtain the application of the VPA in federal court even if the state has opted out for state courts.[250] This forum shopping will be attended by substantial jurisdictional complexities.[251] It also may encourage plaintiffs to structure their cases to avoid the VPA's application. For example, they may explore opportunities to sue in federal court or courts in other states on some claims while preserving claims against volunteers for the "opt-out" state courts.[252] The provision might even encourage state legislatures that opt out of the VPA to provide for less liberal

---

of that which is not. . . .'" INS v. Chadha, 462 U.S. 919, 931-32 (1983) (quoting Buckley v. Valeo, 424 U.S. 1, 108 (1976)).

247. *See supra* notes 155-245 and accompanying text.

248. *See supra* notes 71-81 and accompanying text.

249. *See supra* notes 139-140 and accompanying text.

250. *See supra* notes 146-153 and accompanying text.

251. *See supra* notes 82-129 and accompanying text.

252. *See supra* note 153 and accompanying text.

joinder in cases involving volunteers.[253]

As a result, where plaintiffs are unable to avoid the VPA's liability limitations because of the presence of out-of-state parties in the litigation, the VPA may precipitate a different sort of constitutional challenge. It seems obvious that a state could not enact the VPA's "opt-out" regime as a matter of state law. The regime plainly discriminates against out-of-state plaintiffs or plaintiffs who have claims against out-of-state defendants. In these situations, the law applied is less favorable to plaintiffs than where the claims involve only state citizens.[254] In the absence of congressional action, such facial discrimination in a state statute would violate the Dormant Commerce Clause.[255] It also might violate the Privileges and Immunities Clause of Article IV.[256] Congress may authorize discrimination against interstate commerce otherwise prohibited by the Dormant Commerce Clause, but

253. *See supra* note 74. Under the VPA's terms, the legislature would have to modify its state judicial procedures in legislation separate from the Act in which it opts out of the statute. *See* 42 U.S.C.A. § 14502(b)(3). *See supra* note 137 and accompanying text.

254. It can only be less favorable to plaintiffs by virtue of 42 U.S.C.A. § 14502(a) ("This Act . . . shall not preempt any State law that provides additional protection from liability relating to volunteers or to any category of volunteers. . . .").

255. *See* U.S. CONST., art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."); *see* Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 893 (1988) (declaring unconstitutional a state law that allowed a longer tolling period for the statute of limitations for suits against out-of-staters than for suits against in-staters under Dormant Commerce Clause); Reynoldsville Casket Co. v. Hyde, 514 U.S. 749 (1995) (requiring Ohio courts to apply *Bendix* decision to torts occurring prior to *Bendix* decision); *cf.* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997) (striking down state property tax exemption that singled out institutions serving mostly state residents and penalized institutions that did mostly interstate business); Coons v. American Honda Motor Co., 463 A.2d 921 (N.J. 1983) (similar conclusion to *Bendix* by New Jersey Supreme Court) (on rehearing, holding given prospective effect only, 476 A.2d 763 (N.J. 1984)); Toomer v. Witsell, 334 U.S. 385, 396 (1948) (privileges and immunities clause bars discrimination against nonresidents "where there is no reason for the discrimination beyond mere fact that they are citizens of other states"); Hicklin v. Orbeck, 437 U.S. 518, 525 (1978) (same).

256. *See* CHEMERINSKY, *supra* note 156, § 5.5. at 354 (state cannot deny out-of-staters meaningful access to its courts); *but see* Canadian Northern Ry. Co. v. Eggen, 252 U.S. 553, 563 (1920) (allowing statute imposing longer statute of limitations for suits that arose out-of-state where that state's statute of limitations had expired under Privileges and Immunities Clause); *cf.* Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985) (limiting bar admission to state residents violates Privileges and Immunities Clause).

such legislation is subject to the constraints of substantive Due Process and Equal Protection.[257] Further, the legislation may not be arbitrary or irrational.[258]

The purported "rational basis" for the VPA's discrimination against interstate commerce is suspect. The VPA's legislative history indicates that the opt-out provision was included because Congress feared that preemption of state law in tort cases involving in-state residents in state court was beyond the scope of the Commerce Power.[259] In addition to probably being incorrect, that reason does not justify the discrimination against out-of-state plaintiffs. If a civil action among in-state citizens in a state court is beyond the scope of the Commerce Power, why should the happenstance that the plaintiff is not a citizen of the state change the result? Whether the plaintiff is a citizen of the forum state does not determine whether volunteer activity within the state "substantially affects" interstate commerce.[260] Similarly, the fact that all the parties are citizens of the forum state does not dictate whether voluntary activity is within the channels of interstate commerce or involves an instrumentality of inter-

257. For example, the McCarren-Ferguson Act authorized states to impose taxes discriminating against out-of-state insurance companies. *See* Western & Southern Life Ins. Co. v. State Board of Equalization, 451 U.S. 648, 653 (1981). The regulatory scheme approved in *New York* (except for the take-title provision) for regional disposal of low level radioactive wastes probably is another example. *See New York*, 505 U.S. 144 (1992). Discriminatory legislation authorized by Congress, and therefore not subject to the Dormant Commerce Clause, was struck down on Equal Protection grounds. *See* Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985) (tax imposed more heavily on out-of-state insurance companies); *see also* Shapiro v. Thompson, 394 U.S. 618, 641 (1969). Equal protection principles apply to the federal government under the Due Process Clause of the Fifth Amendment. *See* United States v. Armstrong, 517 U.S. 456, 464 (1996); Davis v. Passman, 442 U.S. 228, 234 (1979); Bolling v. Sharpe, 347 U.S. 497 (1954).

258. *See* Eastern Enters. v. Apfel, 524 U.S. 498, 537 (1998); *id.*, 524 U.S. at 554 (Breyer, J. , dissenting); *id.* 524 U.S. at 539 (Kennedy, J., concurring in the judgment and dissenting); BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1986) (striking down "grossly excessive" punitive damages award under state tort law); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) (upholding rationality of Black Lung liability scheme).

259. *See supra* notes 131-133, 185 and accompanying text.

260. *See Lopez*, 514 U.S. at 549 (no substantial effect of firearms violation near school); Perez v. United States, 402 U.S. 146 (1971) (criminalization of extortionate credit approved because of cumulative effect of such transactions on commerce); Wickard v. Filburn, 317 U.S. 111 (1942) (substantial effect of local farming activity because of cumulative effect of all farming activities on commerce).

state commerce.[261] To a plaintiff, therefore, the state citizen test for permitting states to opt out of federal standards is "unduly narrow."[262] On the other hand, just because Congress's rationale is suspect does not necessarily mean that the statute violates due process.[263]

The "opt-out" provision might seem just as arbitrary and irrational to an in-state volunteer who cannot avail himself of the VPA's provisions because the state has opted out. Again, the happenstance that there is no out-of-state party involved in the litigation means that the defendant cannot take advantage of uniform federal tort law principles that Congress has legislated "to promote the interests of social service program beneficiaries and taxpayers and to sustain the availability of programs, nonprofit organizations, and governmental entities that depend on volunteer contributions by reforming the laws to provide certain protections from liability abuses related to volunteers serving nonprofit organizations and governmental entities."[264] To such a defendant, application of the "opt-out" provision may seem particularly unfair in light of the announced federal policies and the applicability of the VPA within the state until the state opt-out legislation was enacted.[265]

---

261. *See* United States v. Darby, 312 U.S. 100 (1941) (endorsing restriction on the intrastate production of goods for commerce); Stafford v. Wallace, 258 U.S. 495 (1922) (stockyards a "throat" within which the current of commerce flows subject to regulation); Houston, E. and W. Tex. Ry. Co. v. U.S. (Shreveport Rate Cases), 234 U.S. 342 (1914) (authority to regulate instrumentalities of interstate commerce); Swift & Co. v. United States, 196 U.S. 375 (1905) (intrastate stockyard can be regulated because it is in a current of commerce among the states).

262. *See supra* notes 133, 146-153 and accompanying text.

263. *See* FCC v. Beach Communications, Inc., 508 U.S. 307, 315 (1993) ("those attacking [a] legislative classification have the burden to negative every conceivable basis that might support it"); Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973) (same). In his dissenting opinion in *Lopez*, Justice Breyer collapsed the test for whether an action is beyond the scope of the Commerce Power and a "rational basis" test, stating, "the specific question before us . . . is not whether the 'regulated activity sufficiently affected interstate commerce,' but, rather, whether Congress could have had '*a rational basis*' for so concluding." *Lopez*, 514 U.S. at 617 (Breyer, J., dissenting) (emphasis in original). Justice Souter, in his separate dissenting opinion, shows the historical linkage between the due process "rational basis" test and the similar relaxed test under the Commerce Clause. *See* 514 U.S. at 606 (Souter, J., dissenting).

264. 42 U.S.C.A. § 14501(b).

265. *See* Pub. L. 105-19, 105th Cong., 1st Sess. § 7 (making Act effective 90 days after enactment and applying law to any claim filed after the date of enact-

III. CONSTITUTIONAL POLICIES

The Supreme Court's recent articulation of dual sovereignty doctrines has been rightly criticized as unduly categorical and "formalistic."[266] The Court's categorical distinctions between state executive branch functions, which are beyond congressional conscription, and state adjudicative functions, which may not be; and between induced cooperation of state legislatures, which is constitutional, and their coercion, which is not, seem quite artificial.[267] Lying behind the doctrines are constitutional policies dual sovereignty is said to protect— political accountability/cost internalization and separation of powers/preservation of liberty.[268] In some areas of constitutional jurisprudence related to federalism, the Court has assessed the extent to which federal and state statutes implicate these policies. For example, the Court assessed the "special sovereignty interests" of states in deciding whether the *Ex parte Young* exception to Eleventh Amendment immunity of state officials applies.[269] The Court appraised the relationship of a state's judicial procedure to federal substantive policies in deciding whether the state court can follow its usual procedures in adjudicating federal claims.[270] The Court also has balanced state and federal interests and policies under *Erie* in diversity cases.[271] Similarly, in separation of powers cases, the Court has rejected "formalistic and unbending rules" in examining the "extent to which a congressional decision to authorize the adjudication of Article III business in a non-Article III tribunal impermissibly threatens the institutional integrity of the Judicial

---

ment "if the harm that is the subject of the claim or the conduct that caused such harm occurred after such effective date").

266. Erwin Chemerinsky, *Formalism and Functionalism in Federalism Analysis*, 13 GA. ST. U. L. REV. 959 (1997); Evan H. Camicker, *Printz, State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 245 (1997); Note, *Compelling State Officials to Enforce Federal Regulatory Regimes*, 111 HARV. L. REV. 207 (1997).

267. *See supra* notes 204-210 and accompanying text.

268. *See supra* notes 273-299 and accompanying text.

269. Idaho v. Couer d'Alene Tribe, 521 U.S. 261, 281 (1997).

270. *See Johnson*, 520 U.S. 911.

271. Byrd v. Blue Ridge Rural Elec. Coop. Inc., 356 U.S. 525 (1958); Dice v. Akron, Canton, & Youngstown R.R., 342 U.S. 359 (1952) (balancing state and federal interests to decide right to trial by jury in state court under federal cause of action).

Branch."[272] It is therefore worthwhile to examine the VPA in light of the constitutional themes underlying federalism.

A. Political Accountability/Cost Internalization

Dual sovereignty was an American innovation. The Framers chose a Constitution that "confers upon Congress the power to regulate individuals, not States."[273] As Justice Scalia recently explained, "The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens."[274] In her *FERC* dissent in 1982, Justice O'Connor referred to the problem of "garbled political responsibility," explaining, "Congressional compulsion of state agencies, unlike preemption, blurs the lines of political accountability and leaves citizens feeling that their representatives are no longer responsive to local needs."[275] She feared, "[N]ational officials . . . tend to force state government to administer unpopular programs, thus transferring political liability for those programs to the states."[276]

Taken together, the VPA's peculiar method of incomplete preemption, its jurisdictional complexities, and its "opt-out" provision hopelessly confuse the lines of political accountability among Congress, state legislatures, and state and federal courts. To be sure, the type of conflict preemption that the VPA envisions could never be as clear cut as express or field preemption, in which Congress completely occupies a field of endeavor such as nuclear power or labor relations.[277] On the other hand, conflict preemption can exist where the conflict is not direct but where state law only "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[278] A federal statute

---

272. Commodity Futures Trading Comm. v. Schor, 478 U.S. 833, 851 (1986).

273. *Printz*, 521 U.S. at 920 (quoting *New York*, 505 U.S. at 166).

274. *Id.*

275. *FERC*, 456 U.S. at 787 (O'Connor, J., dissenting in part and concurring in part).

276. *Id.* (citing Advisory Commission on Intergovernmental Relations, *The Federal Role in the Federal System: The Dynamics of Growth, Hearings on the Federal Role* 32 (Oct. 1980)).

277. *See* English v. General Elec. Co., 496 U.S. 72, 78-79 (1990) (express preemption makes the Court's analysis "easy" and field preemption must be "clear and manifest").

278. Gade v. National Solid Waste Management Ass'n, 505 U.S. 88, 98 (1992)

also impliedly preempts state law where the state law "interferes with the methods by which the federal statute was designed to reach" its goal.[279] Through its many rules of construction,[280] however, the VPA instructs courts to depart from these usual canons of statutory interpretation regarding preemption.[281] The statutory rules creating express exceptions and qualifications to the VPA's liability limitations complicate and confuse statutory construction.[282] The VPA's underlying policy, structure and purpose is compromised and internally inconsistent.

Congress has further confused the lines of political accountability by failing to address specifically the matter of whether federal question jurisdiction is available in actions applying the VPA.[283] It is not clear from the VPA whether Congress intends that plaintiffs should be able to choose federal forums in which to proceed (or whether defendants may remove actions to such federal forums) or are to be limited to the state forums that they generally had to use under pre-VPA state tort law.[284] Most probably, the "opt-out" provision implies that federal question jurisdiction is unavailable because otherwise a state legislature's decision to opt out of the VPA's preemption would be ineffective. That is, parties could avoid the opt-out by simply choosing a federal forum under the terms of the provision.[285] Read this way, however, the statute in most cases encourages diverse state court interpretations of its provisions, subject only to certiorari review in the Supreme Court.[286] The matter, however, is not completely free of doubt. Such ambiguity itself further confuses the lines of political accountability.

The seeming lack of federal question jurisdiction to provide a federal forum to adjudicate the complex issues of statutory interpretation and preemption presented by the VPA, also implicates the cost internalization policy dual sov-

---

(quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

279. *Id.* at 103 (quoting International Paper Co., 479 U.S. at 494).
280. *See supra* notes 61-64 and accompanying text.
281. *See supra* notes 236-242 and accompanying text.
282. *See supra* notes 71-81 and accompanying text.
283. *See supra* notes 108-129 and accompanying text.
284. *See supra* notes 148-153 and accompanying text.
285. *See supra* note 151 and accompanying text.
286. *See supra* notes 67-68 and accompanying text.

ereignty intends to foster. The Court's federalism decisions emphasize that "[t]he power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—[agents of the state]."[287] The policy problem is that "[m]embers of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes."[288] Dual sovereignty discourages unfunded mandates.[289] The VPA does not.

B. Separation of Powers/Protection of Liberty

Federalism and separation of powers encourages the protection of individual liberty. Madison wrote that the risk of tyranny and abuse is reduced through the "double security" of federalism and separation of powers because the "different governments will control each other, at the same time that each will be controlled by itself."[290] The security is buttressed by the Framers' complex system of checks and balances, including a bicameral legislature, the veto power, and the limitation of the federal sphere to identified enumerated powers.[291] This philosophy resonates today in a nation with its Democrat President, Republican Congress, and ticket splitting voters.[292] In order to act affirmatively, Con-

---

287. *See Printz*, 521 U.S. at 922 (referring to conscription of the police officers of the fifty states).

288. *See id.* at 930.

289. Congress showed some self-restraint with respect to imposing costs on the states in the Unfunded Mandates Reform Act of 1995, Pub. L. 104-4, 109 Stat. 48 (1995) (codified at 2 U.S.C. §§ 658-658g, 1501-04, 1511-16, 1531-38, 1551-56, 1571 (1997)); *see Recent Legislation, Unfunded Mandates Reform Act of 1995*, 109 HARV. L. REV. 1469 (1996). The legislation only places procedural obstacles to such mandates within the congressional process and does not, however, prevent the imposition of costs. *See Printz*, 521 U.S. at 959 (Stevens, J., dissenting).

290. THE FEDERALIST NO. 51, at 323 (J. Madison); *see* Clinton v. City of New York, 524 U.S. 417, 450 (Kennedy, J., concurring) ("Separation of powers was designed to implement a fundamental insight: concentration of power in the hands of a single branch is a threat to liberty.").

291. *See* U.S. CONST., art. I, §§ 1, 7, 8; THE FEDERALIST NOS. 10, 47, 48, 51, 81 (J. Madison).

292. *See* Ackerman, *supra* note 101, at 463 ("There is something to be said for legislative gridlock."); *Editorial, Gridlock is Good Government*, INV. BUS. DAILY, June 10, 1998, at A32, *available in* 1998 WL 11851104 (approving poll data showing citizen preference for divided government and criticizing unified government of the New Deal); Donald M. Rothberg, *Most Americans Favor Divided Gov't*, ASSOCIATED

gress must have the timely concurrence of the President and the acquiescence of the Supreme Court.[293] The etiquette of federalism requires that state participation in federal regulation be voluntary.[294]

The Framers considered the "one transcendent advantage belonging to the province of the State governments," insuring citizens' loyalty to them as against "the power of the Union," to be "the ordinary administration of criminal and civil justice."[295] The VPA's congressional command to state courts conscripts the time and energy of state courts to complete a federal statute that Congress was unwilling or unable to complete itself. Deliberate creation of gaps in a statutory cause of action, because of the lack of a congressional consensus about how to fill the gaps, permits federal preemption "when a lack of majority support for substantive national legislation might otherwise prevent federal regulation."[296]

The VPA creates "federal" rights that Congress is not even able to bring itself to make enforceable in an overburdened federal court system.[297] The scheme's reliance upon state in-

---

PRESS, June 1, 1998, *available in* 1998 WL 6674141 (reporting that "two thirds of people surveyed prefer to have the parties checking each other").

293. *See* Clinton v. City of New York, 524 U.S. 417 (1998) (striking down line-item veto); INS v. Chadha, 462 U.S. 919 (1983) (striking down legislative veto).

294. *See Printz*, 521 U.S. at 926 (quoting *New York*, 505 U.S. at 178-79 ("this court has never sanctioned a federal command to the States to promulgate and enforce laws and regulations").

295. THE FEDERALIST NO. 17 (A. Hamilton) (Modern Library ed.), at 20. Hamilton explained,

> This, of all others, is the most powerful, most universal, and most attractive source of popular obedience and attachment. It is that which, being the immediate and visible guardian of life and property, having its benefits and its terrors in constant activity before the public eye, regulating all those personal interests and familiar concerns to which the sensibility of individuals is more immediately awake, contributes, more than any other circumstance, to impressing upon the minds of the people, affection, esteem, and reverence towards the government. This great cement of society, which will diffuse itself almost wholly through the channels of the particular governments, independent of all other causes of influence, would insure them so decided an empire over their respective citizens as to render them at all times a complete counterpoise, and, not unfrequently, dangerous rivals to the power of the Union.

Id.

296. Note, *Federal Regulation of State Institutions*, 96 HARV. L. REV. 186, 191 (1982).

297. *Cf.* Southland Corp. v. Keating, 465 U.S. 1, 33 (1984) (O'Connor, J., dissenting) (quoting Henry M. Hart, Jr., *The Relations Between State and Federal*

stitutions, the state legislature in deciding whether to opt out and the state court in interstitial lawmaking, can be viewed as an "easy out" for a Congress unwilling to balance the social costs and benefits of the policies before them.[298] Congress imposes legislative burdens it is unwilling to assume itself, or even to impose on the federal courts, that federal taxpayers must finance.[299] If effective, this procedure would allow national policymaking without an expressed consensus within the Congress. Policymaking without such a consensus eviscerates the protection of individual liberty the doctrine of separation of powers is supposed to guarantee.

V. CONCLUSION

The Volunteer Protection Act in its current form is more trouble than it is worth. Many states already had a modern statute in the area at the time the VPA was enacted.[300] The Republicans who sponsored the Act drafted the statute to avoid any implication that Congress intended to preclude or discourage further protections and limitations under state law.[301] In purpose, therefore, the Act is really a national policy direction rather than a national standard that encourages uniform treatment of volunteers under state tort law. Because the states seem to have been moving in the direction the legislation mandates, the occasions where the Act's preemption makes a difference are likely to be few. Unfortunately, having enacted the VPA, its congressional sponsors

---

Law, 54 COLUM. L. REV. 489, 508 (1954)):

> If the differences [between state and federal courts] become so conspicuous as to affect advance calculations of outcome, and so to induce an undesirable shopping between forums, the remedy does not lie in the sacrifice of the independence of either government. It lies rather in provision by the federal government, confident of the justice of its own procedure, of a federal forum equally accessible to both litigants.

Id.

298. *See* JOHN LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT 141 (1690) ("The power of the legislative . . . which being only to make laws, not to make legislators, the legislative can have no power to transfer their authority of making laws and place it in other hands."); Clinton v. City of New York, 524 U.S. 417, 421 (1998) (Kennedy, J., concurring) ("Failure of political will does not justify unconstitutional remedies.").

299. *See supra* notes 287-288 and accompanying text.

300. *See supra* note 35 and accompanying text.

301. *See* 42 U.S.C.A. § 14502(a).

seem intent on applying the "opt-out" approach in more wide ranging legislation to protect teachers and small businesses from state tort liability.[302] We therefore need to take the VPA's form of preemption seriously.

Had there been a true consensus in the Congress over how to treat volunteer liability, a traditional form of preemption was available, so long as congressional legislation in that area is considered within the scope of the national Commerce Power.[303] If so, the statute could have created a federal cause of action against volunteers, with the uniform liability standards, punitive damages standards, and allocation criteria contained in the VPA.[304] This would supplant inconsistent state laws under the Supremacy Clause, whether the statute contained a statement to that effect in the legislation or not.[305] Moreover, so long as the state courts had "jurisdiction adequate and appropriate under established local law to adjudicate this action,"[306] such courts would have to enforce the federal law.[307]

In the absence of any statement in the statute about federal court jurisdiction, the Congress would be taking the risk that plaintiffs seeking relief would choose federal forums in which to proceed (or that defendants would remove actions to such federal forums) rather than the state forums in which they generally had to proceed under preexisting law.[308] Were it really intent on establishing uniform interpretations of the Act, it could have created exclusive original jurisdiction in the federal district courts for claims arising under the

302. *See, e.g.*, 144 Cong. Rec. S9237 (daily ed. July 26, 1999) (Teacher Liability Protection Act, Title XI of the Juvenile Crime Control and Prevention Act of 1999) (Sen. Lott); 145 Cong. Rec. E319 (daily ed. Mar. 5, 1998) (Rep. Inglis) (Small Business Lawsuit Abuse Protection Act); 143 Cong. Rec. S5346, S5347 (daily ed. June 5, 1997) (Sen. Abraham) (same) ("I do not expect any State will opt out of these provisions, but I feel it is important to include one out of respect for principles of federalism."); 143 Cong. Rec. S8598, S8599 (daily ed. July 31, 1997) (Sen. McConnell) (Trade and Professional Association Free Flow of Information Act); *see* Andrew F. Popper, *A One-Term Tort Reform Tale: Victimizing the Vulnerable*, 35 HARV. J. ON LEGIS. 123 (1998) (criticizing federal tort reform with specific reference to biomaterials producers prospective legislation).

303. *See supra* notes 155-164 and accompanying text.

304. *See supra* notes 82-85 and accompanying text.

305. *See supra* notes 86-95 and accompanying text.

306. Testa v. Katt, 330 U.S. 386, 394 (1947).

307. *See supra* notes 86-87, 203-204 and accompanying text.

308. *See supra* notes 88-95 and accompanying test.

Act.[309] On the other hand, had Congress feared the overburdening of federal courts with such tort actions, Congress possibly could have limited or eliminated federal question jurisdiction for claims arising under the Act.[310] Thus, Congress probably could have left interpretations of the uniform federal statute to state courts in the first instance subject only to Supreme Court review.

Similarly, a fiscal federalism approach would have posed little constitutional difficulty. Under this approach, which Congressman Conyers advocated, Congress could have proposed the national liability standards of the Act for adoption by state legislatures in a "model act."[311] The states could have been offered incentives such as an increase in federal revenue sharing or block grants conditioned on the state's approval of the model act. If the monetary incentive were related to encouragement of volunteer participation "to promote the interests of social service program beneficiaries and taxpayers," there could be little constitutional objection to such an exercise of the national Spending Power.[312] There is precedent for the inducement for state action through monetary incentives even where the incentive and the induced action are only remotely related.[313] This approach may be valid as an exercise of the Spending Power under the Constitution even if volunteer protection were to some degree beyond the scope of the Commerce Power.[314]

Congress chose neither of these traditional approaches. Instead, the VPA embodies an incomplete preemption. The Act expressly preempts certain selected features of state tort law, such as the standard of liability applied to volunteers, the standard and evidentiary rules regarding the award of punitive damages, and the method for allocating noneconomic loss damages to volunteers.[315] Because these preemptive changes affect elements that are part of the plaintiff's *prima facie* case under state tort regimes, the VPA

309. *See supra* notes 83-84 and accompanying text.
310. *See supra* notes 103-104 and accompanying text.
311. *See supra* note 167 and accompanying text.
312. *See* 42 U.S.C.A. § 14501(b) (purpose); *See supra* notes 165-166 and accompanying text.
313. *See supra* note 166.
314. *See supra* note 166.
315. *See supra* notes 46-64 and accompanying text.

creates a number of interpretative and jurisdictional complexities.[316] The statute's mandate that courts use several statutory "rules of construction" to blend federal and state law concepts confuses the application of preemption doctrines in cases where the statute applies.[317]It also implicates the constitutional philosophy behind federalism and separation of powers doctrines.[318] This confusion is further convoluted by the statute's unique "opt-out" provision, which permits a state legislature to nullify the VPA's effect, but only for cases in state courts where all the parties are state citizens.[319] Should a state legislature invoke the "opt-out" provision, the VPA would create unusual opportunities for interstate and intrastate forum shopping and further confuses already complicated conflicts of law principles in effect among the several states.[320]

The VPA's approach is not consistent with the etiquette of federalism that the Supreme Court has prescribed for the Congress, even if volunteer protection is within the scope of the Commerce Power[321] and even though the VPA's commands are mainly directed to state judges adjudicating cases rather than to state legislatures or state law enforcement officials.[322] There is an important distinction here. On the one side, there is the federal courts' proper use of state law and policy to "fill in the details" of a federal statute as a matter of federal common law when applying the statute in discrete contexts.[323] On the other side, there are congressional commands to state courts and state legislatures to create principles of state law to complete a federal statute that Congress was unable or unwilling to complete itself.[324] While Congress may command a federal agency or the federal courts to develop federal regulations to flesh out federal statutory policies,[325] its command to the states (and in particular to state

316. *See supra* Part I.
317. *See supra* notes 67-81 and accompanying text.
318. *See supra* notes 273-299 and accompanying text.
319. *See supra* notes 130-154 and accompanying text.
320. *See supra* notes 130-154 and accompanying text.
321. *See supra* note 155-164 and accompanying text.
322. *See supra* note 204-210 and accompanying text.
323. *See supra* notes 65-66 and accompanying text.
324. *See supra* notes 240-245 and accompanying text.
325. *See supra* notes 218, 226 and accompanying text.

courts) to do so offends the "double security" intended by federalism and separation of powers doctrines.[326]

Moreover, even if the Court might acquiesce in the VPA's strange form of incomplete preemption, perhaps by deferring to various states' reasonable interpretations of the federal statute, the statute's "opt-out" provision pushes the statute over the Plimsoll line into unconstitutionality.[327] There is no reasonable justification for applying different legal standards in the same fact situation based entirely on the state citizenship of the parties in the case. The liability of a Little League coach should not turn entirely on whether an injured parent resides at the player's home or is just visiting from out-of-state. The VPA's arbitrary "opt-out" preemption is not consistent with dual sovereignty.

326. *See supra* notes 290-299 and accompanying text.
327. *See supra* notes 246-265 and accompanying text.