

# FEDERAL POWER TO COMMANDEER STATE COURTS: IMPLICATIONS FOR THE THEORY OF JUDICIAL FEDERALISM

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## INTRODUCTION

Whatever one's views are of the proposed global tobacco settlement on the merits, at least from the perspective of a federal jurisdiction scholar it is truly disappointing that the settlement appears to have collapsed. It would have been fascinating to see how Congress finally resolved the complex problems inherent in having the federal government effectively ordering the state courts not to adjudicate state law tort claims. It would have been even more fascinating to see whether or not the Supreme Court ultimately found Congress' solution unconstitutional.

Unlike the means necessary to implement the settlement, the competing interests of the parties to the settlement are relatively clear. Congress, presumably recognizing that it cannot realistically hope to ban the sale of cigarettes, sought methods both of assuring that tobacco manufacturers compensate those thought to have suffered as a result of smoking and to deter others from taking up the habit in the future. In contrast, the tobacco manufacturers sought a method to place a reasonable ceiling on their potential liability. Thus, in exchange for an agreement either to reduce or cease advertising and to provide substantial compensatory funds, the tobacco industry expected strict outer limits on the amount of damages they could be forced to pay and severe restrictions on the use of multi-party litigation devices, such as class action lawsuits. The problem, however, is that most, if not all, of the product liability litigation against tobacco manufacturers arises under state tort law, and much of it is brought in state court. In order to satisfy the tobacco industry's expectations Congress would somehow have to impose limits on both the nature and substance of state law litigation in state court. While the problems of constitutional federalism to which this task gives rise may not be insurmountable, their solution requires a sophisticated understanding of the issues of textual construction, historical inquiry and political theory that pervade analysis of the federal government's power to commandeer the state judiciaries in order to facilitate the attainment of federal objectives.

The political timeliness of the constitutional issues raised by the tobacco settlement render this an appropriate point at which to reexamine the theoretical rationale for constitutional limitations on and doctrinal implications of the federal government's power to commandeer state judiciaries. Since the Supreme

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Court's decision in *Testa v. Katt*,<sup>1</sup> Congress' power to require state courts to adjudicate issues of federal law and enforce federal claims has been well established. Recently, in *Printz v. United States*,<sup>2</sup> the Court unequivocally reaffirmed the existence of that congressional power, while simultaneously finding unconstitutional a congressional attempt to commandeer state executive officers.<sup>3</sup> A fact that has often gone unnoticed, however, is that the Court in *Testa* never actually grounded such a congressional power within the terms of a specific constitutional grant of authority. Rather, it merely assumed the existence of such a power, and proceeded to focus exclusively on the nature of a state court's constitutional obligation once Congress chooses to exercise its unexplained power.<sup>4</sup>

While in *Printz* the Court did purport to find a constitutional grounding that simultaneously rationalized the existence of a federal power to commandeer state judicial officers and rejected a federal power to commandeer state executive officers,<sup>5</sup> casual analysis demonstrates the incorrectness of the Court's rationale. The Court in *Printz* sought to split the proverbial baby, by grounding the congressional power to commandeer state courts in the "State Judges Clause" of the Supremacy Clause.<sup>6</sup> Because by its terms the provision refers solely to the obligations of state judges to enforce federal law, the Court's reliance on the Clause appears simultaneously to rationalize both of the Court's conclusions in *Printz*. Closer examination, however, reveals that the *Printz* Court misconstrued the State Judges Clause: Both by its individual terms and its broader textual context, the State Judges Clause concerns solely the implementation of an independently authorized congressional power to commandeer. It does not itself provide a constitutional source of congressional power to engage in such commandeering.

We should emphasize that we in no way intend to question the constitutional validity of the congressional power to impress the state courts into the federal judicial army. However, to date the Supreme Court has failed to recognize the proper textual basis for the authorization of such a power: A synthesis of Congress' enumerated powers pursuant to Article I and its power under that same provision to enact laws that are necessary and proper to the exercise of such

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1. 330 U.S. 386 (1947).

2. 117 S. Ct. 2365 (1997).

3. *Id.* at 2384.

4. *Testa*, 330 U.S. at 814.

5. *Printz*, 117 S. Ct. at 2384.

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

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

powers.<sup>7</sup> Recognition of the proper constitutional rationale for the judicial commandeering power inexorably leads to the conclusion that the Court in *Printz* was totally incorrect in drawing a distinction between the federal power to commandeer state courts on the one hand and state executive officers on the other; neither on grounds of constitutional text nor federalism theory may such a distinction be properly drawn. Thus, if Congress possesses constitutional authority to commandeer state judicial officers, it necessarily follows that Congress possesses constitutional authority to commandeer state executive officers, as well.

Although the Court is no doubt correct in its recognition of a federal power to commandeer state judiciaries in order to facilitate the implementation and enforcement of federal law, it has erred in explaining the constitutional and theoretical sources for such power. The Court has failed to recognize the proper doctrinal and conceptual implications that derive from the recognition of the commandeering power. The historical and philosophical factors which dictate the federal power to commandeer state courts lead to the conclusion that the enormous federal deference to state judiciaries that the Supreme Court currently requires from the lower federal courts<sup>8</sup> actually stands the governing theory of judicial federalism on its head.

It is true, as the Supreme Court has assumed in fashioning its theory of deference to state judiciaries,<sup>9</sup> that state courts are fully competent to adjudicate and enforce federal law. However, examination of the history of the federal power to commandeer state judiciaries demonstrates that this state court authority flows, not out of an assumption of parity or equality among state and federal courts as expositors and enforcers of federal law,<sup>10</sup> but rather from recognition of the fact that on occasion, state court enforcement of federal law may be necessary in order to preserve federal supremacy or to facilitate attainment of substantive congressional goals. Thus, the fact that state courts are both empowered and obligated to adjudicate and enforce federal law does not manifest historical concern, theoretical concern or respect for the status or abilities of state judiciaries, but rather manifests the unambiguously subordinate position that state judiciaries hold within the federal system. Therefore, it makes little sense to rely on the inherent authority of state judiciaries to adjudicate federal law as a basis for federal governmental deference to state judicial authority. State courts adjudicate federal law because for them to do so proves convenient for and

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7. U.S. CONST. art. I, § 8, cl. 18 ("To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.").

8. See, e.g., *Younger v. Harris*, 401 U.S. 37, 45 (1971) (requiring that federal courts not enjoin state court actions except "under extraordinary circumstances, where the danger of irreparable loss is both great and immediate").

9. See *Steffel v. Thompson*, 415 U.S. 452 (1972).

10. See Erwin Chemerinsky, *Ending the Parity Debate*, 71 B.U. L. REV. 593 (1991); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); Michael E. Solomine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213 (1983).

beneficial to the federal government. When allowing state courts to adjudicate issues of federal law proves inconvenient or unbeneficial to federal interests, the fact that state courts possess the potential power to expound and enforce federal law, standing alone,<sup>11</sup> provides absolutely no justification for allowing state adjudication.

Recognition of the proper historical and conceptual framework in which the commandeering power has developed also has important implications for determining the proper procedures to be employed in the course of state court adjudication of federal claims. While the Supreme Court has uniformly upheld congressional power to require state court adjudication of federal claims, it has paid surprisingly little attention to the issue of the extent of a state court's obligation to employ federal procedures in the conduct of those adjudications.<sup>12</sup> Yet in other contexts, the Supreme Court has explicitly acknowledged the significant extent to which the use of procedure may affect the scope and nature of the substantive rights and interests that provide the subject for adjudication.<sup>13</sup> Given the theoretical and practical primacy of the federal level of government that is implicit in recognition of the judicial commandeering power, it would seem reasonable for the Court to provide considerably more attention than it has to date to determine the extent to which the state obligation to enforce substantive federal claims should simultaneously dictate an obligation to employ preexisting federal procedures in the course of those adjudications. Devoting proper attention to this question would lead to the conclusion that state courts should be required to employ federal procedures in the adjudication of substantive federal claims considerably more often than currently appears to be the case.

This Article seeks to obtain a full understanding of both the proper constitutional rationale for the federal power to commandeer state courts and the implications of that power for the modern doctrine and theory of judicial federalism. In Part I, this Article discusses the modern doctrinal development of the federal power to commandeer state courts, from its initial exposition in *Testa*<sup>14</sup> through its most recent characterization in *Printz*.<sup>15</sup> In critiquing the logic, if not the conclusion, of this doctrinal evolution, we explore the historical, textual and political rationales for the commandeering power.

In Part II, this Article focuses on the theoretical and doctrinal implications that should be drawn from recognition of the proper historical and philosophical grounding of the commandeering power. Specifically, it explores the implications of the role of state courts within the federal system that derive from

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11. On occasion, there may exist other bases on which to justify federal deference to state courts, such as a concern about unduly disrupting state court adjudication of its state law caseload. It is conceivable that on occasion such concerns could independently justify federal deference to state courts.

12. See, e.g., *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359 (1952).

13. See, e.g., *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958).

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

15. *Printz v. United States*, 117 S. Ct. 2365 (1997).

the commandeering power for modern Supreme Court doctrines dictating far-reaching deference to state courts. Part II also considers the proper implications of the commandeering power for the role of federal procedures in a state court's adjudication of a federal claim. Ultimately, we conclude that while the Court is no doubt correct in recognizing a federal commandeering power, it is totally incorrect in its assessment of the proper constitutional grounding of such a power, as well as the theoretical and doctrinal implications which should logically flow from such recognition.

## I. FEDERAL COMMANDEERING POWER: DOCTRINE, HISTORY, AND THEORY

### A. *Testa v. Katt* and Recognition of the Commandeering Power

The case in which the state court commandeering power is generally thought to have been conceived is *Testa v. Katt*.<sup>16</sup> In *Testa*, the plaintiff sued in Rhode Island state court under the Emergency Price Control Act of 1942 (the "Act")<sup>17</sup> to recover treble damages from a defendant who had sold plaintiff a car at a cost above an imposed price ceiling. The State Supreme Court refused to enforce the federal statute because the Act was "penal" in nature. Even though Rhode Island enforced penal claims under state law, the state court chose not to enforce federal penal law because it is law imposed by the federal government, a government the Rhode Island court considered "foreign in the international sense."<sup>18</sup>

The United States Supreme Court reversed, rejecting the state court's assumption that federal penal law has the same status as the penal law of a foreign nation. "Such a broad assumption," Justice Black wrote for the Court, "flies in the face of the fact that the States of the Union constitute a nation. It disregards the purpose and effect of [the Supremacy Clause]."<sup>19</sup> Any lingering doubts of state court duties to enforce federal law, the Court concluded, vanished after the Civil War and the Court's decision in *Clafin v. Houseman*,<sup>20</sup> which held that state courts are to be presumed competent to adjudicate federal claims.<sup>21</sup>

*Testa* is universally hailed as the decision that formally recognized Congress' power to impose upon state courts a duty to hear federal claims. As the Court

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16. 330 U.S. 386 (1947).

17. 56 Stat. 23-37 (1942). Section 205(e) of the Act authorized any action under the statute to be "brought in any court of competent jurisdiction." *Id.* at 35. Section 205(c) granted concurrent jurisdiction in district, state, and territorial courts for civil suits. *Id.* at 33.

18. *Testa*, 330 U.S. at 388.

19. *Id.* at 389.

20. 93 U.S. 130 (1876). The Court's reliance on *Clafin* as support for state court duties to enforce federal law is questionable since all *Clafin* established was state court power to hear federal cases "where it is not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case." *Id.* at 136; see also Michael Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 49.

21. See *Testa*, 330 U.S. at 390-92. See also Martin H. Redish & John E. Muench, *Adjudication of Federal Causes of Action in State Court*, 75 MICH. L. REV. 311, 313 (1976).

itself subsequently stated, *Testa* held “that Congress could constitutionally require state courts to hear and decide Emergency Price Control Act cases involving the enforcement of federal penal laws.”<sup>22</sup> In a later decision Justice Scalia, speaking for the Court, made a similar, but stronger claim: “*Testa* stands for the proposition that state courts cannot refuse to apply federal law—a conclusion mandated by the terms of the Supremacy Clause.”<sup>23</sup>

Both of these pronouncements by the Court are accurate, as far as they go. But it is as important to emphasize what the *Testa* Court did not decide as much as what it did decide. While the *Testa* Court quite clearly held that the Supremacy Clause required the state courts to obey a valid federal law which obligated them to adjudicate federal claims,<sup>24</sup> at no point did the Court explain why a federal statute commanding the state courts to adjudicate claims arising under that statute is constitutionally valid in the first place.

The question is by no means frivolous. The federal government is a government of limited powers: It may perform only those tasks and accomplish only those objectives which the Constitution authorizes. Unless Congress can properly ground the commandeering of the state judiciaries somewhere within its constitutionally authorized powers, then nothing in the Supremacy Clause itself directs the state courts to obey the federal statute commandeering the state courts.<sup>25</sup> Indeed, in such an event, the Clause would actually dictate that the state courts *not* obey a statutory command to adjudicate federal claims. This is because, by its terms, the Supremacy Clause directs that the Constitution itself be the supreme law of the land,<sup>26</sup> and if a federal statute is not constitutionally authorized, it would violate the Constitution to enforce that statute.

The Supremacy Clause does not provide an independent source of congressional power. It merely requires the state courts to enforce federal laws that find their authorization elsewhere in the Constitution. In *Testa*, the Court merely assumed that Congress possesses the constitutionally authorized power to commandeer.<sup>27</sup> The opinion in no way explains what is the source of this constitutional power.

#### B. *Printz v. United States: The Misguided Search for the Constitutional Source of the Commandeering Power*

In *Printz v. United States*,<sup>28</sup> the Court considered the constitutionality of the

22. *Palmore v. United States*, 411 U.S. 389, 402 (1973); *see also* *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 682 (1982) (“State courts are duty bound to apply federal as well as local ‘uniform rules of conduct.’”) (citing *Testa*, 330 U.S. at 386).

23. *Printz v. United States*, 117 S. Ct. 2365, 2381 (1997).

24. *Testa*, 330 U.S. at 389-90.

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

26. U.S. CONST. art. VI, cl. 2 (“This Constitution . . . shall be the supreme Law of the Land”).

27. *Testa*, 330 U.S. at 392.

28. 117 S. Ct. 2365, 2368 (1997).

Brady Handgun Violence Prevention Act.<sup>29</sup> The statute ordered state and local law enforcement officials to conduct background checks on individuals who sought to purchase handguns.<sup>30</sup> The case turned on whether the Constitution prohibits the federal commandeering of state executive officials.<sup>31</sup> However, Justice Scalia, speaking for the Court, also felt compelled to address the constitutional power of Congress to commandeer state judicial officials.<sup>32</sup> If one were to assume that Congress may impress the state courts into its service, then unless the Court finds a basis for limiting the constitutional source of the commandeering power solely to state judges, it would logically follow that Congress can commandeer state executive officers because at least since its decision in *Testa*<sup>33</sup> the Supreme Court has firmly recognized such a judicial commandeering power. Unless Justice Scalia could adequately distinguish the two situations, he would have to face a serious dilemma. He would either be forced to recognize the validity of *both* forms of commandeering (a conclusion he quite obviously did not wish to reach), or he would have to recognize the validity of *neither* form. Either conclusion would clearly be inconsistent with long established doctrine and practice. In struggling to find a constitutional basis for the distinction he so clearly wished to draw, Justice Scalia did much to confuse understanding of the true source of constitutional authorization for the judicial commandeering power.

Justice Scalia posited three conceivable methods by which to distinguish constitutionally the power to commandeer state courts from the power to commandeer state executive officers. Initially, Justice Scalia pointed to what he considered the unique historical basis supporting the judicial commandeering power.<sup>34</sup> The Constitution, he wrote, was originally understood to allow federal "imposition" on state judges to enforce federal prescriptions appropriately related to matters "for the judicial power."<sup>35</sup> In support of this claim, Justice Scalia cited numerous statutes enacted by the early Congresses.<sup>36</sup> For example, early congressional statutes addressed state court conduct in naturalization proceedings. Congress required state courts to record citizenship applications,<sup>37</sup> to send naturalization records to the Secretary of State,<sup>38</sup> and to register and issue registry certificates to aliens seeking naturalization.<sup>39</sup> Beyond the naturalization realm, Congress required state courts to resolve a particular dispute between a

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29. 18 U.S.C. §§ 922(s)-(t), 925A (1994 & Supp. I 1995 & Supp. II 1996).

30. *Id.* § 922(s).

31. *Printz*, 117 S. Ct. at 2368.

32. *Id.* at 2371.

33. *Testa v. Katz*, 330 U.S. 386 (1947).

34. *Printz*, 117 S. Ct. at 2371.

35. *Id.*

36. *Id.* at 2371-72.

37. Act of Mar. 26, 1790, ch.3, § 1, 1 Stat. 103 (repealed 1795).

38. Act of June 18, 1798, ch. 54, § 2, 1 Stat. 567 (repealed 1802).

39. Act of Apr. 14, 1802, ch. 28 § 2, 2 Stat. 154-55 (repealed 1918).

captain and his crew,<sup>40</sup> to hear slave owner claims regarding seized fugitive slaves,<sup>41</sup> to issue certificates authorizing the forced return of seized fugitive slaves,<sup>42</sup> to take proof of the claims of Canadian refugees who had assisted the United States during the Revolutionary War,<sup>43</sup> and to deport alien enemies during wartime.<sup>44</sup> Justice Scalia reasoned that these statutes established an early congressional understanding that the Constitution permits the federal commandeering of state judicial officials.<sup>45</sup>

This early congressional understanding, Justice Scalia argued, is supported by the Constitution's text, both implicitly and explicitly.<sup>46</sup> The Constitution's implicit support, Scalia asserted, derives from the so-called Madisonian Compromise.<sup>47</sup> That compromise led to the Constitutional Convention's decision to permit, rather than to require, the creation of lower federal courts.<sup>48</sup> Accordingly, Article III, Section 1 of the U.S. Constitution requires creation of the Supreme Court, yet makes the creation of lower federal courts optional, "even though it was obvious that the Supreme Court alone could not hear all federal cases throughout the United States."<sup>49</sup> Justice Scalia reasoned that the Madisonian Compromise, when combined with the "obvious"<sup>50</sup> fact dictated by explicit constitutional text,<sup>51</sup> that the Supreme Court could not hear all federal

40. Act of July 20, 1790, ch. 29, § 3, 1 Stat. 132 (codified as amended at 46 U.S.C. § 654-655 (1994)).

41. Act of Feb. 12, 1793, ch. 7, § 3, 1 Stat. 302-305 (codified as amended at 18 U.S.C. § 658-663 (1994)).

42. *Id.*

43. Act of Apr. 7, 1798, ch. 26 § 3, 1 Stat. 548 (expired).

44. Act of July 6, 1798, ch. 66, § 2, 1 Stat. 577-78 (expired).

45. *Printz v. United States*, 117 S. Ct. 2365, 2371 (1997). In contrast, Justice Scalia found no early (or even pre-Twentieth Century) federal statute compelling state executive officers to administer federal law. *Id.* at 2371 n.2.

46. *Id.* at 2371.

47. *Id.*

48. See generally CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 327 (1928); Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1610 (1990); Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 46 (1975).

But see Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 819 (1984). Despite the plain language of Article III, some scholars have argued that the creation of lower federal courts is a constitutional necessity. Lawrence G. Sager, *The Supreme Court 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 34 (1981). But see Martin H. Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U. L. REV. 143, 145 (1982).

49. *Printz*, 117 S. Ct. at 2371.

50. *Id.*

51. See U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power of the United States, shall be



cases, necessarily implies that if Congress were to choose not to create lower federal courts, out of necessity state courts would be required to adjudicate federal causes of action.<sup>52</sup> Thus, Justice Scalia reasoned in *Printz*, a logical corollary of the Madisonian Compromise must be that the Constitution permits federal conscription of state courts as at least initial adjudicators and enforcers of federal law.<sup>53</sup>

The Constitution's explicit textual support for federal commandeering, Justice Scalia stated, is found in the so-called "State Judges Clause," included within the Supremacy Clause, which provides: "The Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."<sup>54</sup> The State Judges Clause, Scalia argued, views state courts "distinctively."<sup>55</sup> This view of the distinctive nature of state judiciaries, he reasoned, establishes a power to commandeer state judges that does not similarly apply to state executive officers.<sup>56</sup> The Constitution's distinction of state courts from state executive officers is "understandable," Justice Scalia added, because only state courts have "applied the law of other sovereigns all the time."<sup>57</sup> In sum, the Court in *Printz* read the Madisonian Compromise as implicit constitutional authorization and the State Judges Clause as explicit constitutional authorization for the congressional power to commandeer state judicial officials.<sup>58</sup>

By expressly grounding the judicial commandeering power in the

vested in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.").

52. *Printz*, 117 S.Ct. at 2371. Justice Scalia, however, failed to explicitly elaborate upon this constitutionally implicit argument. Justice Scalia's argument, in its entirety, is as follows: "In accord with the so-called Madisonian Compromise, Article III, § 1, established only a Supreme Court, and made the creation of lower federal courts optional with the Congress—even though it was obvious that the Supreme Court alone could not hear all federal cases throughout the United States." *Id.* (citing WARREN, *supra* note 48, at 325-27 (1928)).

53. *Id.*; see also Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan*, 86 COLUM. L. REV. 1515, 1618 n.257 (1986) ("[S]tate courts could entertain cases within the judicial power of the United States."); Nicole A. Gordon & Douglas Gross, *Justiciability of Federal Claims in State Court*, 59 NOTRE DAME L. REV. 1145, 1156 (1984) ("State courts have a general obligation to hear federal claims."). *But see* Collins, *supra* note 20, at 43 ("[S]tate courts were thought to be able to entertain Article III business only because of powers granted to them under state law, rather than because of powers or duties expressly or impliedly conferred on them by federal law or the Constitution.").

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

55. *Printz*, 117 S. Ct. at 2371.

56. *Id.*

57. *Id.*

58. *Id.* Prior to *Printz*, in *New York v. United States*, 505 U.S. 144, 178-79 (1992), the Court had suggested reliance on the State Judges Clause as the basis for distinguishing the judicial commandeering power from the power to commandeer state legislatures.

Madisonian Compromise and the State Judges Clause, Justice Scalia in *Printz* could effectively draw a dichotomy between the executive and judicial commandeering authorities, because these constitutional rationales uniquely concerned the power to commandeer state judiciaries. The validity of the Court's conclusion that the judicial commandeering power is properly grounded in the Madisonian Compromise and the State Judges Clause, however, is subject to serious question.

Initially, the implications that the Court draws from the Madisonian Compromise extend considerably further than is logically permissible. It is reasonable to infer from the history of the Madisonian Compromise that the framers proceeded under the assumption that if Congress chose not to create lower federal courts, the state courts would somehow have to be made available to provide an initial forum for the adjudication of federal claims. However, an implicit assumption on the part of the framers is not a constitutional authorization. It merely means that the framers would necessarily have recognized their obligation to establish such federal authority somewhere else within the Constitution's text.

Thus, the fact that the framers apparently assumed the existence of a commandeering power says absolutely nothing about exactly where in the Constitution's text that commandeering power is authorized. If the power is ultimately found to have been lodged in a provision or combination of provisions which establish a federal authority that is, by its terms, not limited to the commandeering of state judicial officers,<sup>59</sup> then reliance on the Madisonian Compromise does not justify the *Printz* Court's conclusion that the commandeering power is confined to state judicial officers.

Additionally, as a matter of logic, there appears to be no reason why the exact same rationale used to commandeer state judicial officials cannot be utilized to support federal authority to commandeer state executive officers. While the Constitution dictates the existence of the executive branch, it says nothing about the existence of federal executive officers beneath the President and Vice-President.<sup>60</sup> Could not the federal government, then, decide that instead of creating a separate federal executive sub-branch, the President could perform the tasks of the executive branch more effectively using state executive officers? If so, the power to commandeer state executive officers would be directly analogous to the rationale used to justify the power to commandeer state judges.

The *Printz* Court's reliance on the State Judges Clause within the Supremacy Clause as the textual source of the federal power to commandeer the state courts is not persuasive. The Supremacy Clause performs a significant role in assuring state judicial compliance with constitutionally valid federal laws. However, by its explicit terms the Clause does not itself create federal authority; it simply requires that state officials generally and state judges in particular obey valid

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59. As we argue, that power is appropriately found in Article I, which does not confine the federal commandeering power to state judicial officers. See discussion accompanying *infra* notes 93-94.

60. U.S. CONST. art. II.

exercises of federal authority.<sup>61</sup> Thus, nothing in the Supremacy Clause in general or the State Judges Clause in particular says anything about the actual constitutional source of the federal government's authority to act in the first place.<sup>62</sup> It would, then, constitute wholly improper bootstrapping to rely on a provision that on its face does nothing more than bind state courts to enforce only those federal laws enacted pursuant to an independent constitutional source of power to commandeer state courts. It is the congressional statutes which the state courts must enforce that require state courts to enforce federal claims. Surely, the provision that obligates state courts to enforce valid federal laws does not tell us whether those laws are constitutionally valid. The Supremacy Clause, then, deems validly enacted federal laws to be supreme, but the Clause itself does not grant Congress the power to adopt those laws in the first place. In other words, other provisions of the Constitution must initially authorize Congress to enact a particular law; the Supremacy Clause orders state officers to obey that valid federal law.<sup>63</sup>

There are, then, two entirely distinct issues to be resolved: (1) the constitutional source of the federal power to commandeer, and (2) the constitutional source of the obligation of state officials to obey the exercise of the federal commandeering power. The Supremacy and State Judges Clauses deal only with the latter question. This vital distinction appears to have been completely ignored or misunderstood by the *Printz* Court.<sup>64</sup>

61. U.S. CONST. art. IV, cl. 2.

62. Professor Hoke has suggested a slightly different perspective on the Supremacy Clause. S. Candice Hoke, *Transcending Conventional Supremacy: A Reconstruction of the Supremacy Clause*, 24 CONN. L. REV. 829, 845 (1992). She wrote:

The Clause [] creates a favored class of law, that which is denominated "supreme Law." By its terms, the only government that has the opportunity to convert its legal norms into "supreme Laws" is the national government, and the Clause mandates that the judges "in every State" are bound by this national law. To guard against any misconceptions as to the meaning of "supreme Law," the paragraph details that state law "Contrary" to the Constitution shall not stand. The one threshold that national law must traverse on the way to obtaining the brass ring of supremacy is that the law in question must be "in Pursuance" of, or consistent with, the Constitution.

*Id.* (footnotes omitted).

63. See also Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 774 (1994) ("The Supremacy Clause does not empower, but rather resolves a particular problem arising out of the powers granted by other parts of the Constitution: namely, conflicts resulting from concurrent state and federal powers.").

64. The Court had similarly assumed the existence of federal power to commandeer state courts in *New York v. United States*, 505 U.S. 144 (1992). In *New York*, the Court struck down the "take title" provision of a radioactive waste disposal statute because the statute unconstitutionally commandeered state legislative officials. *Id.* at 180. Faced with the fact that the Court previously had authorized federal directives to state courts, the *New York* Court was forced to distinguish commandeering of state courts from state legislatures. The Court distinguished the "well established power of Congress to pass laws enforceable in state courts," by stating: "Federal

Justice Scalia's opinion in *Printz* reads only the first part of the Supremacy Clause as exclusively an implementational clause.<sup>65</sup> He construes the State Judges Clause, on the other hand, to provide Congress with a free-standing power to commandeering state judges. This reading of the State Judges Clause, however, is fraught with errors.

Most significantly, *Printz*'s construction of the State Judges Clause undermines the overall structure of the Supremacy Clause. The Court's interpretation of the State Judges Clause finds the power to commandeer state courts to be *sui generis*, and therefore, the Court holds that when the Constitution dictates that state judges be "bound" by "supreme Law," it is granting Congress the power to order state judges, but no other state officials, to enforce federal prescriptions.<sup>66</sup> This reading, however, destroys the structure of the Supremacy Clause by arbitrarily divorcing the State Judges Clause from its broader context.<sup>67</sup>

statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause. No comparable constitutional provision authorizes Congress to command state legislatures to legislate." *Id.* at 178-79.

This proffered distinction between state courts and state legislative conscription is erroneous. As the previous discussion of *Testa v. Katt*, 330 U.S. 386 (1947), illustrates, there is a huge difference between the Constitution's authorization of the power to commandeer and the Constitution's authorization of the power to enforce a commandeering directive (or any other constitutionally enacted statute). *New York* appears only to have dealt with the latter.

The Court in *New York* stated that the Supremacy Clause contained the authorization of power that directed state judges to enforce federal statutes. *New York*, 505 U.S. at 178-79. This is an uncontroverted point. When a valid federal law is enacted, the Supremacy Clause orders state judges to enforce that valid federal law. On the other hand, the Court never made the more dubious assertion that it did in *Printz* that the Supremacy Clause (and its State Judges Clause component) renders a commandeering statute constitutional. The way to determine if a commandeering statute is constitutional is to review Congress' Article I enumerated powers and the Necessary and Proper Clause. The Court in *New York* was right to read the Supremacy Clause as an implementing provision, but wrong to use that as a distinguishing factor to permit state court commandeering but prohibit state legislature commandeering. After all, if supremacy is to have any meaning, federal law must be supreme for state courts, state executive officers, and state legislatures alike.

65. *Printz v. United States*, 117 S. Ct. 2365, 2379 (1997). Justice Scalia stated:

The Supremacy Clause, however, makes "Law of the Land" only "Laws of the United States which shall be made in Pursuance [of the Constitution];" so the Supremacy Clause merely brings us back to the question discussed earlier, whether laws conscripting state officers violate state sovereignty and are thus not in accord with the Constitution.

*Id.* (quoting U.S. CONST. art. VI, cl. 2).

66. See generally discussion accompanying *supra* notes 57-58.

67. Some might argue that separating the State Judges Clause from the remainder of the Supremacy Clause is appropriate since the State Judges Clause proceeds after a semi-colon; since semi-colons divide separate clauses that otherwise could be complete sentences on their own, see TEXAS LAW REVIEW, TEXAS MANUAL ON USAGE & STYLE B:11:1 (8th ed. 1995) (semi-colons

The Supremacy Clause, in its entirety, requires judges to be “bound” only by “supreme Law,” and the only federal laws that are “supreme” are the ones “made in Pursuance” of the Constitution.<sup>68</sup> The threshold inquiry should therefore be: Is a federal law that commandeers state courts “made in Pursuance” of the Constitution? If the answer is no, then state courts are not “bound” by federal commandeering. If the answer is yes, then state courts are bound, no matter what their state law says. Either way, one point is clear: The State Judges Clause tells a state judge what to do with a constitutionally enacted law,<sup>69</sup> but does not transform a law that otherwise exceeds enumerated federal powers into a constitutionally valid law.<sup>70</sup>

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separate independent clause), the State Judges Clause is properly considered separate from the rest of the Supremacy Clause. This argument fails for two reasons. First, it ignores other uses of semi-colons in the Constitution that do not demark separate sentences. *See, e.g.*, U.S. CONST. art. IV, § 4 (“; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”); U.S. CONST. art. III, § 2, cl. 1 (“;—to all Cases affecting Ambassadors, other public Ministers and Consuls;”); U.S. CONST. art. II, § 1, cl. 4 (“; which Day shall be the same throughout the United States.”). Second, this argument ignores the actual words of the State Judges Clause, which orders state judges to be “bound thereby.” What is it that state judges are to be “bound thereby”? That answer lies in the part of the Supremacy Clause that precedes the semi-colon.

68. U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof”).

69. *See also* JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1833, at 697 (1833). Justice Story writes:

It is melancholy to reflect, that, conclusive as this view of the subject is in favour of the supremacy clause, it was assailed with great vehemence and zeal by the adversaries of the constitution; and especially the concluding clause, which declared the supremacy, “any thing in the constitution or laws of any state to the contrary notwithstanding.” And yet *this very clause was but an expression of the necessary meaning of the former clause, introduced from abundant caution, to make its obligation more strongly felt by the state judges.* The very circumstance, that any objection was made, demonstrated the utility, nay the necessity of the clause, since it removed every pretence, under which ingenuity could, by its miserable subterfuges, escape from the controlling power of the constitution.

*Id.* (emphasis added).

70. The same point emerges from *Howlett v. Rose*, 496 U.S. 356 (1990), the first Supreme Court case ever to mention the State Judges Clause as a specific source of state court duty to enforce federal law. *See also* Evan H. Caminker, *State Sovereignty and Subordinancy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM L. REV. 1001, 1035 (1995) (arguing that previous Supreme Court cases before *Howlett*, like *Testa v. Katt*, 330 U.S. 386 (1947), had only relied upon general terms and principles underlying the Supremacy Clause). The Court in *Howlett* stated that the State Judges Clause “confirm[s] that state courts have the coordinate authority and consequent responsibility to enforce the supreme law of the land.” *Howlett*, 496 U.S. at 369-70 n.16. (emphasis added). (The Court actually stated that it was referring to the “language of the Supremacy Clause,” and not necessarily the State Judges Clause, but that

As the Constitution's source for the assurance of federal supremacy over conflicting state law, the Supremacy Clause binds state executive officers and legislatures in exactly the same manner in which it binds state judicial officers: All three groups of state officers are constitutionally disabled from ignoring or subverting applicable federal law. State courts, of course, must enforce applicable federal law over conflicting state law.

The *Printz* Court's construction of the State Judges Clause as the exclusive authorization of a federal power to commandeer might be defended on the basis of the well accepted canon of construction that language contained in an authoritative text should not be construed in a manner that renders it superfluous. If the Supremacy Clause as a whole were construed to do nothing more than bind all state officers, including state judges, to obey valid and controlling federal law, then what purpose is served by inserting additional language in the State Judges Clause? After all, under a construction of the Supremacy Clause that draws no distinction between the State Judges Clause and the remainder of the Supremacy Clause, the legal impact on state courts would be the same, whether or not the specific reference to state judges had been included. Thus, it could be argued, insertion of the specific reference to the obligations of state judges must have the effect of binding state judges in an exclusive manner, otherwise the words of the State Judges Clause would be rendered entirely superfluous. Under this argument of construction, construing the State Judges Clause to establish an exclusive federal power to commandeer, as the Court in *Printz* did,<sup>71</sup> provides an acceptable explanation of the unique function performed by inclusion of the State Judges Clause.

This redundancy objection, however, is unpersuasive. Initially, it should be noted that nothing in this argument alters the indisputable fact that by its express and unambiguous language, the State Judges Clause cannot reasonably be construed as an independent authorization of federal power. Instead, by its terms, the Clause provides merely that state judges are bound by supreme federal law, including the Constitution.<sup>72</sup> It says absolutely nothing about how one determines whether a federal statute is in fact authorized by that Constitution. If a federal statute is not so authorized, then the state courts are obligated to ignore its directives, because of all federal law the Constitution is supreme.

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language is the State Judges Clause. *Id.* The Court stated, in full, "The language of the Supremacy Clause—which directs that 'the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.'" *Id.*) The only laws that are the "supreme Law of the Land" are those passed pursuant to the Constitution. U.S. CONST. art. VI, cl. 2. To see if federal commandeering statutes are passed pursuant to the Constitution requires us to look elsewhere in the Constitution. The provisions in the Constitution that answer the threshold question of whether or not commandeering statutes should be deemed valid federal law is in the enumeration of powers in Article I and the Necessary and Proper Clause. *See* discussion *infra* Part I.C.

71. *See generally* discussion accompanying *supra* notes 51-56.

72. U.S. CONST. art. VI, cl. 2 ("This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby.").

While the interpretational canon creating a presumption against textual redundancy may reasonably influence which of two or more textually conceivable constructions may be adopted, it cannot authorize adoption of an interpretation that is unambiguously inconsistent with the plain meaning of the textual provision.

In any event, the redundancy in the text of the Supremacy Clause could conceivably have been intended to serve a vital political function of providing emphasis and avoiding any conceivable future interpretational ambiguity. As Professors Calabresi and Prakash have persuasively argued, on occasion “[r]edundancy . . . is built in to reiterate an important point—to make sure that the point does not get lost.”<sup>73</sup> In just this manner, both the State Judges Clause and the Supremacy Clause work together to emphasize both the primacy of federal law over conflicting state law and the obligation of the state courts to recognize that primacy.<sup>74</sup>

Even a casual examination of the political circumstances surrounding the Constitution’s framing demonstrates why the framers might have wanted textually to underscore the state judicial obligation to enforce federal law, at the expense of otherwise applicable state constitutional provisions and statutes. As Edmund Randolph stated, “The National authority needs every support we can give it . . . . We are erecting a supreme national government; ought it not be supported, and can we give it too many sinews?”<sup>75</sup> The Supremacy Clause defines federal law as supreme and the State Judges Clause provides the exclamation point on this directive.<sup>76</sup> Additionally, Professor Rakove has

73. Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 585 (1994).

74. The Oath or Affirmations Clause, U.S. CONST. art. VI, cl. 3., similarly emphasizes the dominance of federal law over conflicting state law. The Oath or Affirmations Clause binds State judges “by Oath or Affirmation, to support this Constitution.” *Id.* No new power has been granted to any branch of the federal government. Instead, the Oath or Affirmations Clause strengthens the Supremacy and State Judges Clause by asking state officers to guarantee, on their word, that they will follow the commands of validly enacted federal law. *See also* THE FEDERALIST No. 27, at 174-75 (Alexander Hamilton) (Jacob E. Cooke, ed., 1961). Hamilton argued:

It merits particular attention in this place, that the laws of the confederation, will become the SUPREME LAW of the land; to the observance of which, all officers legislative, executive and judicial in each State, will be bound by sanctity of an oath. Thus the Legislatures, Courts and Magistrates of the respective members will be incorporated into the operations of the national government, *as far as its just and constitutional authority extends*; and will be rendered auxiliary to the enforcement of its laws.

*Id.*

75. Records of the Federal Convention, Mr. Randolph, June 11, 1787 (1:203; Madison).

76. Professor Caminker calls this the “nullification rule.” Caminker, *supra* note 70, at 1036 (“[The State Judges] Clause operates more narrowly as a simple conflict-of-law provision requiring state judges to nullify provisions of state law that conflict with federal law.”). Professor Prakash wrote that the Supremacy Clause and State Judges Clause tell state judges, “these new federal laws

recently documented the framers' concerns that state judges, who lacked the prophylactic protections of their independence from the political branches of government which their federal counterparts were about to receive,<sup>77</sup> would be unable to resist the political pressures from the state legislative and executive branches to enforce applicable state law, even when it conflicted with federal law.<sup>78</sup> The obligation explicitly imposed on state judiciaries by the State Judges Clause to disregard even state constitutional provisions when they conflict with applicable federal law, then, can be seen as an attempt to provide the state courts with textual fortification against those internal political pressures.<sup>79</sup> Nothing in this reasoning, however, in any way supports a construction of the State Judges Clause—in direct contradiction to the Clause's explicit terms—as an independent constitutional source of federal power to commandeer state courts.

In sum, the text, structure and history of the Supremacy Clause as a whole clearly establish that one clause functions exclusively as a “dispute resolution mechanism.”<sup>80</sup> When a constitutionally valid federal law contradicts otherwise applicable state law, then federal law controls. To remove the middle few words of the Supremacy Clause from their broader context is to ignore the clearly limited purposes served by the Supremacy Clause as a whole.<sup>81</sup>

It should be recalled that in grounding the federal power to commandeer state courts in the State Judges Clause, the Court in *Printz* sought to draw a constitutionally based distinction between the federal power to commandeer state judicial officers and the federal power to commandeer state executive officers.<sup>82</sup> The *Printz* court sought to draw such a distinction in order to prohibit the exercise of federal power over state executive officers, while simultaneously

are the laws of your state; enforce them as you would any other, making sure that federal law is always vindicated when a conflict with state law arises.” Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 2011 (1993); see also Hoke, *supra* note 62, at 879 (“The second aspect [of the Supremacy Clause] explicitly instructs judges to apply the supreme law as the operative rules of decision, and to set aside any contrary state law.”).

77. See U.S. CONST. art. III, § 1: “The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuation in Office.”

78. JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 173-74*, 177 (1996).

79. See *id.*

80. Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 804 (1996).

81. Professor Caminker rightfully rejects a construction of the State Judges Clause as the textual source for federal commandeering power. However, he argues that the “broader principle of the Supremacy Clause,” which is that “every congressional law establishes policy for the states no less than laws enacted by state legislatures,” authorizes the commandeering of state courts. Evan H. Caminker, *Printz, State Sovereignty, and the Limits of Federalism*, 1997 SUP. CT. REV. 199, 215. This reading of the Supremacy Clause—like the Court’s—erroneously reads the Supremacy Clause to be something more than a mere implementing provision.

82. *Printz v. United States*, 117 S. Ct. 2365, 2371 (1997).



preserving the established federal authority over state judiciaries.<sup>83</sup> The Court's purpose, in short, was to protect the states against at least one form of potential federal interference with the states' exercise of their sovereign power. Ironically, however, by grounding the judicial commandeering power in the State Judges Clause, the *Printz* Court may actually, albeit unwittingly, have expanded federal power to disrupt the exercise of state sovereign power.

Under the Court's construction of the State Judges Clause, the federal government appears to possess unlimited power to commandeer state courts, regardless of the severity of the resultant burdens on the courts. This conclusion follows because there is absolutely nothing in the language of the State Judges Clause that could be construed to authorize the imposition of such a limitation. Had the Court instead chosen to ground the commandeering power within a combination of Congress' enumerated powers and the Necessary and Proper Clause of Article I, as we argue it must be, whatever limits on federal power that might be inferred from the language of that Clause<sup>84</sup> would naturally have applied to any federal commandeering of state judges.

In addition to the serious textual, logical and political flaws in the *Printz* Court's explanation of the federal power to commandeer state courts, it is also impossible to reconcile the Court's acceptance of such a power with the political theory of federalism which the *Printz* Court expressly adopts. In rejecting federal power to commandeer state executive officers, the *Printz* Court expressly adopted a theory of "dual federalism,"<sup>85</sup> pursuant to which the state and federal political structures and jurisdictions are deemed mutually exclusive.<sup>86</sup>

The *Printz* Court relied on the theory of dual federalism in order to support its rejection of a federal power to commandeer state executive officers. Under a dual federalism model, federal officers may not exercise state power and state officers may not exercise federal power.<sup>87</sup> This conclusion follows logically

83. *Id.*

84. See Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993) (arguing that use of word "proper" dictates significant limitations on congressional power under the Necessary and Proper Clause).

85. *Printz*, 117 S. Ct. at 2376 (stating that dual federalism is an "essential postulate []" of Constitution). It should be noted that the theory of dual federalism is subject to serious normative and historical doubt. See MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* 26-33 (1995).

86. According to famed political scientist Edward Corwin, the theory of dual federalism represents the synthesis of four axioms:

1. The national government is one of enumerated powers only;
2. Also the purposes which it may constitutionally promote are few;
3. Within their respective spheres the two centers of government are "sovereign" and hence "equal";
4. The relation of the two centers with each other is one of tension rather than collaboration.

Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 4 (1950).

87. See Alphens Mason, *Federalism: The Role of the Court*, in *FEDERALISM: INFINITE VARIETY IN THEORY AND PRACTICE* 24-25 (Valerie A. Earle ed. 1968) ("[Dual federalism] envisions

from the essential premise of dual federalism, that the powers of the two governmental systems are mutually exclusive. If that is so, however, then the Court's acceptance of a federal power to commandeer state judicial officers is puzzling, because the exercise of federal power by state judicial officers would appear to be as impermissible under a dual federalism model, as would the exercise of federal power by state executive officers. Under such a theory, a federal power to commandeer any branch of state government, legislative, executive or judicial, would be impermissible, for the simple reason that under a theory of dual federalism no unit of state government may legitimately exercise federal authority. Thus, the Court in *Printz* failed completely to explore the full theoretical ramifications of its adopted dual sovereignty model for the recognized federal power to commandeer state courts.

To be sure, Justice Scalia in *Printz* purported to find what he considered explicit *textual* support for a judicial commandeering power, in the language of the State Judges Clause.<sup>88</sup> While we have rejected this conclusion purely as a matter of textual interpretation,<sup>89</sup> the Court might reason that if one assumes the correctness of its textual interpretation, that provision exempts state courts from the otherwise pervasive reach of the dual federalism model. However, by its nature, the theory of dual federalism inherently precludes such piecemeal exemption.<sup>90</sup> Simply stated, there can be no such thing as partial mutual exclusivity. Thus, acceptance of the Court's construction of the State Judges Clause renders dubious the Court's adoption of the dual federalism model in the first place. Yet it was only by reliance on this very theory that the Court was able to reject the existence of a federal power to commandeer state executive officials.

### C. *Article I as an Authorization of the Federal Power to Commandeer State Courts*

As the previous section has demonstrated, constitutional text, structure, and history demonstrate that the State Judges Clause cannot serve as the source of federal power to commandeer state courts. This does not mean, however, that the Supreme Court was incorrect in either *Testa*<sup>91</sup> or *Printz*<sup>92</sup> when it found that the federal government could constitutionally commandeer the state judiciaries as interpreters of federal law and enforcers of federal claims. It is true that no other constitutional provision explicitly authorizes the commandeering of state courts. The proper constitutional source of the federal commandeering power, however,

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two mutually exclusive, reciprocally limiting fields of power—that of the national government and of the States. The two authorities confront each other as equals across a precise constitutional line, defining their respective jurisdictions.”).

88. *Printz*, 117 S. Ct. at 2371.

89. See discussion accompanying *supra* notes 61-62.

90. See REDISH, *supra* note 85, at 27.

91. *Testa v. Katt*, 330 U.S. 386 (1941).

92. *Printz v. United States*, 117 S. Ct. 2365 (1997).

is the enumerated congressional powers contained in Article I, Section 8,<sup>93</sup> read in conjunction with the Necessary and Proper Clause. The Necessary and Proper Clause provides that Congress may “make all Laws which shall be necessary and proper for carrying into execution the foregoing [Article I] Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”<sup>94</sup> As such, the Clause provides Congress with ancillary authority to facilitate enumerated powers.<sup>95</sup> For example, although the Commerce Clause grants Congress authority to regulate only commerce among the several states or with foreign nations,<sup>96</sup> the Court has construed the Necessary and Proper Clause to authorize Congress to regulate intrastate commerce when to do so will facilitate Congress’ regulation of interstate commerce.<sup>97</sup>

Similarly, federal power to commandeer state courts is appropriately grounded in a combination of an enumerated power and auxiliary authority under the Necessary and Proper Clause. Thus, when Congress enacts a substantive federal statute pursuant to its commerce power, Congress’ decision to require state court enforcement of that statute’s cause of action can readily be seen as a means of perfecting or facilitating attainment of Congress’ substantive regulatory goals embodied in the statute.<sup>98</sup>

The majority opinion in *Printz*, however, openly dismissed the use of the Necessary and Proper clause as a textual basis on which to ground the federal commandeering power.<sup>99</sup> Relying on the theory of dual federalism (which, we

93. U.S. CONST. art. I, § 8.

94. U.S. CONST. art. I, § 8, cl. 18.

95. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 324 (1819) (“Even without the aid of the general clause in the constitution, empowering congress [sic] to pass all necessary and proper laws for carrying out its powers into execution, the grant of powers itself necessarily implies the grant of all usual and suitable means for the execution of the powers granted.”).

96. U.S. CONST. art. I, § 8, cl. 3.

97. *See, e.g., United States v. Darby*, 312 U.S. 100, 119-20 (1941).

98. Most likely the enumerated power will be the Commerce Clause. However, commandeering of state courts does not have to emanate from that clause. Congress could require state courts to hear certain civil rights cases under Congress’ power in Section 5 of the Fourteenth Amendment. *See Redish & Muench, supra* note 21, at 345. Alternatively, Congress could commandeer, in certain circumstances, pursuant to its enumerated power to make uniform naturalization laws.

99. Despite *Printz*’s invalidation of the Brady Act, it is arguable that a majority of the Court actually endorses the Commerce and Necessary and Proper Clauses as the textual source for federal commandeering power. All four dissenting Justices in *Printz* found the Commerce Clause and the “additional grant of authority” in the Necessary and Proper Clause as adequate textual support for state executive commandeering. *Printz v. United States*, 117 S. Ct. 2365, 2387 (1997). The crucial fifth vote for the Necessary and Proper reading adopted in this paper might come from Justice Thomas. Justice Thomas wrote a concurrence in *Printz* that arguably followed an enumerated power plus necessary and proper analysis of federal commandeering. Justice Thomas felt that the Brady Act’s regulation of the purchases of handguns did not fall under Congress’ commerce power.

have already shown, undermines the Court's acceptance of a judicial commandeering power),<sup>100</sup> Justice Scalia held that the Brady Act's commandeering of state executive officers violated residual principles of state sovereignty.<sup>101</sup> Even though such principles do not appear in the text of the Constitution, Justice Scalia's opinion deemed laws which violated them not to be proper, pursuant to the requirements of the Necessary and Proper Clause.<sup>102</sup>

So radical a construction of the Necessary and Proper Clause is unsupported by either precedent or constitutional structure.<sup>103</sup> Such an open-ended construction of the limitations inherent in the Necessary and Proper Clause would effectively authorize judicial reliance on ill-defined principles of natural law and the personal ideologies of the judges, a result wholly inconsistent with Justice Scalia's staunch criticism of such freewheeling judicial lawmaking in other contexts.<sup>104</sup>

Indeed, the *Printz* Court's rejection of the federal power to commandeer state executive officers perfectly illustrates such improper judicial lawmaking. Because executive commandeering is apparently inconsistent with the Court's vague notions of dual federalism, a theory that has at best extremely questionable grounding in the nation's history<sup>105</sup> and is in any event inherently inconsistent with the very practice of judicial commandeering which the Court so willingly accepts,<sup>106</sup> the Court concludes that such commandeering is "improper" and therefore unconstitutional.<sup>107</sup> If the judiciary is able to restrict congressional power on the basis of such an ill-defined, unguided constitutional directive, then no meaningful limit on uncontrolled judicial activism remains. It is ironic that such a result is reached in an opinion authored by the Justice who purports to be staunchly opposed to such improper judicial behavior.

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*Id.* at 2385 (Thomas, J., concurring) ("In my 'revisionist' view, the Federal Government's authority under the Commerce Clause . . . does not extend to the regulation of wholly intra state, point-of-sale transactions."). Without Article I power to regulate firearm sales, Thomas continued, Congress "surely lacks the corollary power" to commandeer state executive officials into regulating firearm sales. *Id.* This looks like a Necessary and Proper inquiry. The Necessary and Proper Clause can never transform a congressional regulation of a purely intrastate transaction into a constitutionally valid regulation—which is why the Commerce Clause, even when combined with the Necessary and Proper Clause, simply does not reach the regulation of firearms set forth in the Brady Act.

100. See discussion accompanying *supra* notes 85-90.

101. *Printz*, 117 S. Ct. at 2379.

102. *Id.*

103. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

104. See *Planned Parenthood v. Casey*, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in part, dissenting in part) (criticizing courts which find abortion permissible when the Constitution does not require them to do so).

105. See discussion accompanying *supra* notes 85-90.

106. See discussion accompanying *supra* notes 85-90.

107. *Printz v. United States*, 117 S. Ct. 2365, 2384 (1997).

## II. THE IMPLICATIONS OF THE COMMANDEERING POWER FOR JUDICIAL FEDERALISM: CONFUSING DEPLOYMENT WITH DEFERENCE

We have so far sought to establish two points. First, there exists no legitimate constitutional basis for distinguishing the federal power to commandeer state executive officers from the power to commandeer state courts. Under appropriate circumstances, Congress may reasonably conclude that reliance on either or both state executive and judicial officers is an appropriate means of facilitating attainment of constitutionally authorized goals.<sup>108</sup> Second, the Constitution authorizes Congress to commandeer state officials solely through a combination of Article I enumerated powers and the Necessary and Proper Clause.

While the Supreme Court has rejected both our suggested rationale for the judicial commandeering power and our conclusion that the rationale dictates the existence of a federal power to commandeer state executive offices, the Court does agree with the fundamental conclusion that the Constitution authorizes a federal power to commandeer state judges in order to aid in the interpretation and enforcement of federal law.<sup>109</sup> What the Court has never fully recognized, however, are the political, constitutional and logical implications behind the theory of judicial federalism from which acceptance of the commandeering power necessarily rises. Hence, in this Part we consider the broader theoretical implications that the judicial commandeering power, regardless of its constitutional source, has for the philosophy of judicial federalism.

### *A. The Commandeering Power, Judicial Federalism, and the Principle of Federal Dominance*

Whatever one thinks of the historical or normative validity of the dual federalism model,<sup>110</sup> there can be no question that recognition of the federal power to commandeer state courts undermines any claim that the theory represents our nation's historical tradition. The commandeering power inescapably crosses systemic lines, authorizing, indeed requiring, one sovereign level of governmental authority to exercise the power of the other sovereign level within the federal system, in direct contravention of the precept of mutual exclusivity of sovereign power inherent in the theory of dual federalism.<sup>111</sup> Ironically, much of the nation's history of judicial federalism similarly supports rejection of any principle of mutual exclusivity of sovereign power. Since the

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108. *But see* Prakash, *supra* note 76. Professor Prakash has presented a historical basis for distinguishing legislative commandeering from both executive and court commandeering.

109. *Printz*, 117 S. Ct. at 2371.

110. Compare Harry N. Scheiber, *American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives*, 9 U. TOL. L. REV. 619 (1978) (arguing in support of dual federalism model), with DANIEL ELAZAR, *THE AMERICAN PARTNERSHIP* (1962) (favoring model of cooperative federalism over dual federalism model as historically controlling theory of American federalism).

111. *See supra* notes 85-90.

Madisonian Compromise, it has been understood that state courts necessarily possessed at least the potential authority to adjudicate federal law.<sup>112</sup> The framers' inclusion of the federal courts' diversity jurisdiction within the categories of cases to which the federal judicial power extends via Article III, Section 2<sup>113</sup> demonstrates that federal courts are empowered to adjudicate claims that derive entirely from state law.

As a general matter, the Supreme Court has gleaned from this jurisdictional intersection precepts of respect for state court abilities to interpret federal law and federal deference to state judicial enforcement of federal law.<sup>114</sup> Scholars and jurists have synthesized these principles of respect and deference under the heading of "parity," the belief that state courts are to be deemed fungible with the federal courts as interpreters and enforcers of federal law,<sup>115</sup> and that any suggestion to the contrary constitutes an insult to the state judiciaries.<sup>116</sup> While the commandeering power has long coexisted with this principle of parity, no one appears to have recognized the troubling implications of the commandeering power for the irrebuttable presumption of parity which the Supreme Court has universally imposed.<sup>117</sup>

The principle of parity seems to derive, at least in part, from the reasoning that because state courts are just as competent to adjudicate and enforce federal law as are the federal courts, state courts must, therefore, be deemed equivalent to the federal courts as expositors of federal law. Existence of the commandeering power, however, demonstrates that recognition of state court power to adjudicate and enforce federal law derives, not from a concern over avoiding a federal slight to the state judiciaries, but rather from a desire to facilitate the enforcement of federal law and assure federal supremacy.<sup>118</sup> If the federal government were unable to commandeer the state courts as enforcers and interpreters of federal law, then state courts could easily circumvent federal law, merely by ignoring conflicting and controlling federal legal standards in the course of their adjudication of state law claims. Moreover, the federal government would be forced to impose the entire burden of the enforcement and adjudication of federal claims on the federal courts.

By requiring state courts to adjudicate federal claims, Congress may spread both the financial and physical efforts required to ensure protection of federal rights between the state and federal systems. In short, governing principles of

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112. See discussion accompanying *supra* notes 49-55.

113. U.S. CONST. art. III, § 2.

114. See *Steffel v. Thompson*, 415 U.S. 452, 460-61 (1974).

115. See *Younger v. Harris*, 401 U.S. 37 (1971); see also *supra* note 10.

116. See *Steffel*, 415 U.S. at 461.

117. One area in which the Supreme Court has imposed such an irrebuttable presumption is in the area of civil rights removal, 28 U.S.C. § 1443 (1994). See, e.g., *Greenwood v. City of Peacock*, 384 U.S. 808 (1966). See generally MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 375-99 (2d ed. 1990) [hereinafter *TENSIONS IN THE ALLOCATION OF JUDICIAL POWER*].

118. See discussion accompanying *supra* notes 66-67.

judicial federalism breach the parallel lines of authority posited by the dual federalism model, in order to ensure preservation of the primacy and dominance of the federal level of authority within the federal structure.

Thus, the Constitution enables Congress to require state courts to interpret federal law and decide federal claims out of concerns for convenience to the federal government and the assurance of federal supremacy, rather than an affirmative notion of deference to or respect for state courts. “[T]he States of the Union constitute a nation,”<sup>119</sup> and state court refusals to enforce federal law splinters the nation. No supreme law could exist if state courts could refuse to enforce valid federal law. Otherwise, the supreme law would be the law that state courts decide to enforce.

There are two conceivable contexts in which the commandeering power could come into play, and both underscore the extent to which the commandeering power reflects the goal of assuring federal supremacy. First, Congress may require state courts to hear suits brought to enforce rights under federal statutes. *Testa* itself provides an illustration of this context.<sup>120</sup> If the state courts were not empowered to conduct such adjudication or if Congress was incapable of commandeering them, then one of two consequences would necessarily follow: Either the entire litigation burden would fall on the federal courts, or those whom Congress sought to protect would be unable to efficiently enforce their federally created rights. The federal government could quite reasonably find both results to be unacceptable. The only way these results could be avoided is by rendering the state courts fully competent to adjudicate federal rights and enabling Congress to commandeer them for that purpose.

It does not necessarily flow from the constitutional and congressional decisions vesting state courts with authority to adjudicate federal claims, however, that state courts are to be deemed the equal of their federal counterparts as interpreters of federal law. Such a conclusion does not inherently follow, just as the assumption that military reserve units, which have been pressed into service, are necessarily the equivalent of the professional soldiers whom they have been directed to assist is doubtful.

The second context in which state courts are called upon to adjudicate federal law concerns cases brought to enforce state law claims in which issues of federal law are raised as a preempting defense. In such situations, unless the state courts are both empowered and required to adjudicate and enforce federal law, the supremacy of federal law would inevitably be substantially undermined. Thus, the fact that state courts are empowered to adjudicate federal law in such circumstances in no way necessarily reflects a positive judgment on the quality, expertise, or ability of state judges in the adjudication of federal law. Rather it merely presumes that a requirement of state court adjudication and interpretation of federal law is essential to maintaining federal supremacy.

This point can best be understood by examination of the Supreme Court’s

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119. *Testa v. Katt*, 330 U.S. 386, 389 (1947).

120. *Id.*

decision in *Lear v. Adkins*.<sup>121</sup> The issue in the case was whether a state court could adjudicate a claim of patent invalidity when the claim was made in defense to a state law breach-of-contract claim.<sup>122</sup> The question was difficult to answer because Congress had rendered jurisdiction in suits brought to enforce the federal patent laws exclusively federal.<sup>123</sup> In essence, Congress statutorily deemed the state courts to be incompetent adjudicators of suits arising under the patent laws. However, where an issue of patent law arises as a defense to a state law cause of action, a federal court lacks federal question jurisdiction to hear the suit.<sup>124</sup> Thus, if a state court's inability to adjudicate issues of federal patent law were to extend to situations in which the patent issues arise in the form of a defense to a state cause of action, the inevitable result, at some point, would be the failure of federal supremacy.

The facts in *Lear* demonstrate this point. The case involved the validity of an issued patent. Adkins had licensed his patent to Lear in exchange for royalties,<sup>125</sup> and Lear had refused to pay the contracted-for royalties. Adkins brought suit in state court for breach-of-contract, and Lear defended by arguing that he was not obligated to pay the royalties because the patent was invalid. Adkins had filed a simple state law breach-of-contract claim. Lear, however, challenged the patent's validity under the federal patent laws.

The validity of a patent often presents complex issues of federal law. The Supreme Court held that the state court had jurisdiction to decide the patent validity claim, despite the fact that the court would have lacked jurisdiction to adjudicate a suit brought directly to enforce the patent laws.<sup>126</sup> In so holding, the Court drew a distinction between suits brought to enforce a patent (over which federal courts have exclusive jurisdiction) and suits brought to enforce a contract involving a patent (where the state court is obligated to interpret and enforce federal patent law). As a result of this distinction, *Lear* "caused a decisive shift" in the division of jurisdiction over patent cases between federal and state courts because patent validity became "a potential issue in literally every action brought in state court for breach of a patent license or assignment."<sup>127</sup>

The Supreme Court's decision to authorize state court interpretation of the

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121. 395 U.S. 653 (1969).

122. *Id.* at 654.

123. See 28 U.S.C. § 1338(a) (1994).

124. This result flows from the premises of the judge-made "well-pleaded complaint" rule, which points that a case can be deemed to "arise under" federal law for purposes of the general federal question jurisdiction statute, 28 U.S.C. § 1331(a) (1994), only when the federal issue appears on the face of the plaintiff's well-pleaded complaint. *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908).

125. See Donald Shelby Chisum, *The Allocation of Jurisdiction Between State and Federal Courts in Patent Litigation*, 46 WASH. L. REV. 633, 645 (1971) ("A license . . . is a contract whereby the owner of the patent (the patentee or an assignee) allows the licensee to make, use, or sell the invention.").

126. *Lear*, 395 U.S. at 675.

127. Chisum, *supra* note 125, at 663.



patent laws under the circumstances in *Lear* effectively illustrates the rationale of necessity that underlies the commandeering power. State courts are authorized to adjudicate federal patent law defenses to state law claims, but not out of federal respect for state judicial abilities to adjudicate the law in that area. Indeed, Congress has, by statute, deemed state courts inherently incompetent to adjudicate federal patent law claims. Rather, state courts are vested with power to adjudicate federal patent law defenses, simply because to deny them such authority would seriously threaten maintaining the supremacy of the federal patent laws.

The existence of the commandeering power, then, derives from an assumption of federal dominance over state courts. This principle of federal dominance leads to recognition of the practical and theoretical needs to have the state courts available in order to serve interests in federal convenience and federal law supremacy maintenance. If state judiciaries were systematically incapable of adjudicating issues of federal law, neither of these results could be achieved. The principle of state-federal court parity, upon which the Supreme Court has based much of its modern jurisprudence of judicial federalism, is—like the commandeering power itself—thought to derive from the indisputable historical fact that since the nation's inception, the state courts were empowered to interpret and enforce federal law. But careful attention to the assumptions and implications of the commandeering power demonstrates that: (1) the empowerment of the state courts as interpreters of federal law in no way necessarily implies an assumption of state-federal court fungibility as effective interpreters and enforcers of federal law; and (2) such empowerment is designed not out of concern for federal deference to state courts, but rather out of recognition of the need for dominance of the federal government over the state judiciaries.

### *B. Reconciling the Principle of Federal Dominance With the Anti-Injunction Statute*

To this point, we have argued that while the federal power to commandeer state courts necessarily assumes state court ability to adjudicate federal law issues, that assumption reflects not a systemic deference to state judiciaries but rather the dominance of the federal level of government and the corresponding subordination of the state judiciaries within the federal system. An examination of related historical practice tends to confirm this conclusion.

One might argue that the very existence of the Anti-Injunction Statute<sup>128</sup> since early in the nation's history contradicts our conclusion of the subordination of the state judiciaries. A form of the Anti-Injunction Statute appeared originally in section 5 of the Judiciary Act of March 2, 1793.<sup>129</sup> It provided that "the writ of injunction shall not be granted by any court of the United States to stay

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128. 28 U.S.C. § 2283 (1994).

129. An Act to Establish the Judicial Courts of the United States § 5, 1 Stat. 335 (1845) (obsolete).

proceedings in any court of a State."<sup>130</sup> The Supreme Court has relied on the Anti-Injunction Statute as proof of a "longstanding public policy" to have state courts work free from federal court interference.<sup>131</sup> It thus might appear that the Anti-Injunction Statute reflects a background understanding of judicial federalism that runs counter to the view that state courts are subordinate to the federal government.

Closer examination, however, reveals that the existence of the Anti-Injunction Statute does little to undermine the historical foundations of federal dominance within the structure of judicial federalism. First, in enacting the Anti-Injunction Statute, Congress left untouched federal court power to employ non-injunctive means to effect stays of state court actions. At the time Congress enacted the Anti-Injunction Statute, federal courts employed common-law writs of certiorari, supersedas, habeas corpus, and prohibition to interfere with state court actions.<sup>132</sup> Thus, even after enactment of the Anti-Injunction Statute, federal courts retained authority to disrupt state court proceedings. Second, the very same Judiciary Act which included the Anti-Injunction Statute also authorized removal to federal court of specified diversity cases.<sup>133</sup> Moreover, in certain instances removal statutes provided litigants with an option to disrupt an ongoing state court proceeding, by transferring venues to a federal court.<sup>134</sup> The removal statute expressly provided that when a case is removed, "it shall then be the duty of the state court to . . . proceed no farther with the cause."<sup>135</sup>

Finally, the dearth of substantive federal statutes enacted at the time the Anti-Injunction Statute was adopted seriously dilutes any argument that the statute's existence was intended to reflect federal deference to state judicial ability to adjudicate issues of substantive federal law. Since few federal statutes existed at the time of the statute's initial enactment, state courts at that time would rarely have been called upon to interpret substantive federal law. Thus, enactment of the Anti-Injunction Statute did not necessarily signal federal respect for state judicial autonomy. It is quite probably no coincidence that exceptions to the Anti-Injunction Statute developed when the amount of substantive federal law

130. *Id.* See generally Redish & Muench, *supra* note 21, at 311-36.

131. *Younger v. Harris*, 401 U.S. 37, 43 (1971). See also *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988) ("Due in no small part to the fundamental constitutional independence of the States, Congress adopted a general policy under which state proceedings 'should normally be allowed to continue unimpaired by intervention of the lower federal courts.'") (quoting *Atlantic Coast Line R.R. v. Locomotive Eng'rs*, 398 U.S. 281, 287 (1970)).

132. See Note, *Federal Court Stays of State Court Proceedings: A Re-examination of Original Intent*, 38 U. CHI. L. REV. 612 (1971); see also William Mayton, *Ersatz Federalism Under the Anti-Injunction Statute*, 78 COLUM. L. REV. 330, 336 (1978).

133. Judiciary Act of 1789, § 12, 1 Stat. 79. See also Note, *supra* note 132, at 615.

134. See TENSIONS IN THE ALLOCATION OF JUDICIAL POWER, *supra* note 117, at 346 n.76 ("If state and federal courts were historically considered fungible, one may wonder why, since the relatively early days of the nation's history, Congress has found it necessary to allow federal officers to remove to federal court suits brought against them in state court.").

135. Judiciary Act of 1789, § 12, 1 Stat. 79.

expanded.<sup>136</sup> For example, the first judicially-created exception to the Anti-Injunction Statute occurred in 1875,<sup>137</sup> the same year in which Congress enacted the first general federal question statute.<sup>138</sup> Thus, the Anti-Injunction Statute was probably not about limiting federal interference with state courts in state court interpretation of federal law. Instead, the Anti-Injunction Statute at most represented concern for federal court interference with state court interpretation of *state* law, the subject matter of the majority of cases in which the statute's bar would have come into play at the time of the statute's enactment. Hence, the original enactment of the Anti-Injunction Statute does not inherently undermine the framework of federal dominance which we have inferred from the existence of the commandeering principle.<sup>139</sup>

### C. *Implications of the Federal Dominance Principle for the Doctrine of "Our Federalism"*

Just as state courts are obligated to adjudicate possible preempting patent law defenses in state breach-of-contract actions,<sup>140</sup> so too, are they obligated to adjudicate claims of preempting federal constitutional defenses that may be raised in the course of state criminal prosecutions. In such contexts, the Supreme Court established an all-but-total principle of federal judicial deference to state court adjudication of such federal defenses under the heading of "Our Federalism" in its well known and controversial decision in *Younger v. Harris*.<sup>141</sup>

In *Younger*, Harris had been indicted in a California state court for violating the California Penal Code. In response, Harris asked a federal district court to enjoin the Los Angeles District Attorney from prosecuting Harris because any such prosecution would violate certain constitutional rights. The district court agreed to enjoin the prosecution, but the Supreme Court reversed.<sup>142</sup> The Court

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136. Moreover, a "double standard" developed because state court prohibitions on enjoining federal courts remained exception free while the prohibition on federal court enjoinder of state courts loosened. See Note, *Anti-Suit Injunctions Between State and Federal Courts*, 32 U. CHI. L. REV. 471, 472 (1965).

137. *French v. Hay*, 89 U.S. 250 (1874).

138. Judiciary Act of 1875, 18 Stat. 470.

139. For an additional argument that supports a construction of the Anti-Injunction Statute in a manner consistent with a pro-federal understanding of judicial federalism, see Mayton, *supra* note 132. Professor Mayton construes the plain language of the Anti-Injunction Statute to mean something radically different than a prohibition of federal court injunctions against state court proceedings. Professor Mayton has argued that the Anti-Injunction Statute only prohibits a single Justice of the Supreme Court from interfering with state court proceedings while riding circuit. *Id.* at 332.

140. See, e.g., *Lear v. Adkins*, 395 U.S. 653 (1969).

141. 401 U.S. 37 (1971).

142. *Younger's* companion case also prohibited federal court declaratory judgments against a pending state criminal prosecution. *Samuels v. Mackell*, 401 U.S. 66, 73 (1971).

held that, except in extremely rare circumstances,<sup>143</sup> the judge-made doctrine of "Our Federalism" prohibited a federal court from enjoining an ongoing state criminal prosecution.<sup>144</sup>

This is not the place to rehearse all of the normative and institutional arguments either for or against *Younger* abstention—issues which have already been the subject of considerable scholarly debate.<sup>145</sup> Our concern with *Younger*, for present purposes, is exclusively with the assumptions inherent in the doctrine of judicial federalism adopted in that decision and its progeny concerning the role of state courts as adjudicators of federal law. At least in part, the deference dictated in *Younger* flowed from recognition of the need to avoid the "unseemly failure to give effect to the principle that state courts have the solemn responsibility, equally with the federal courts 'to guard, enforce, and protect every right granted or secured by the constitution [sic] of the United States.'"<sup>146</sup>

Inherently intertwined with the *Younger* Court's concern that permitting a federal injunction of a state criminal prosecution would necessarily cast unwarranted aspersions on the ability of state judges to interpret and enforce federal law was the *Younger* Court's focus on principles of equity. A fundamental precept of equity jurisprudence is that equity will not act when an adequate remedy at law exists.<sup>147</sup> Because state courts are historically deemed fully competent to adjudicate issues of federal law, the Court reasoned that this precept of equity precludes federal injunction of a state court criminal proceeding: A litigant has a full opportunity to obtain equivalent adjudication and protection of his federal rights in the course of the existing state court adjudication.<sup>148</sup>

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143. The Court held that the bar to federal injunctive relief did not apply where the prosecution had been brought in bad faith, as part of a plan of harassment, or to enforce a patently unconstitutional law. *Younger*, 401 U.S. at 47-49. In addition, the doctrine will be inapplicable if the state judicial forum is somehow inherently incapable of providing an adequate forum. See, e.g., *Gibson v. Berryhill*, 411 U.S. 564 (1973).

144. *Younger*, 401 U.S. at 44-49. In subsequent decisions, the Court extended the bar of "Our Federalism" to certain state civil actions. See, e.g., *Juidice v. Vail*, 430 U.S. 327 (1977); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975).

145. One of us has previously criticized the *Younger* doctrine, on grounds of both separation of powers and federalism policy. See Martin H. Redish, *Abstention, Separation of Powers, and the Limits of Judicial Function*, 94 YALE L.J. 71 (1984) [hereinafter *Limits of Judicial Function*]; Martin H. Redish, *The Doctrine of Younger v. Harris: Deference in Search of a Rationale*, 63 CORNELL L. REV. 463 (1978).

146. *Steffel v. Thompson*, 415 U.S. 452, 460-61 (1974) (quoting *Robb v. Connolly*, 111 U.S. 624, 637 (1884)). See also *Huffman*, 420 U.S. at 604. For expression of a similar view prior to *Younger*, see Justice Harlan's dissenting opinion in *Dombrowski v. Pfister*, 380 U.S. 479, 499 (1965) (Harlan, J., dissenting), criticizing the majority for making the "unarticulated assumption that state courts will not be as prone as federal courts to vindicate constitutional rights promptly and effectively."

147. See *Younger*, 401 U.S. at 43-44.

148. *Id.* But see Anthony J. Dennis, *The Illegitimate Founds of the Younger Abstention*

As our review of the commandeering principle demonstrates, in its *Younger* line of decisions the Court has completely misunderstood the proper implications to be drawn from the recognition of the state courts' ability to construe federal law. The fact that the framers vested state courts with authority to interpret and enforce federal law does not necessarily imply solicitousness for state judges or necessarily reflect the belief that state courts are the equal of the federal courts as interpreters of federal law. Rather, state courts have been vested with such authority in order to ensure federal supremacy and facilitate the enforcement of federal law. Thus, the fact that state courts are, as a technical matter, competent to adjudicate federal constitutional defenses in the course of a state criminal prosecution in no way necessarily implies an assumption of state court equivalence with the federal courts as interpreters of federal law any more than the decision in *Lear* necessarily implied an assumption of state-federal court equivalence as interpreters of federal patent law. Thus, a federal court's decision to enjoin a state criminal prosecution, thereby preempting the state court's opportunity to resolve issues raised by federal constitutional defenses, should not be precluded simply because the state court is technically competent to adjudicate the federal issues.<sup>149</sup>

#### *D. Implications of the Federal Dominance Principle for State Court Use of Federal Procedures*

The existence of the commandeering power, we have argued, grows out of a theory of judicial federalism that reflects the dominance of federal power and the utilization of state courts to facilitate attainment of substantive and administrative federal goals. Once one reaches this conclusion, a natural question that arises concerns the extent to which state courts, in adjudicating federal claims, should be required to employ federal procedures. The Court has given relatively little attention to this question, a puzzling circumstance in light of the potentially enormous impact that the choice of procedure will often have on the implementation of substantive legal directives.<sup>150</sup>

Likely to exacerbate the problem, and thus render even more pressing the need to obtain more carefully reasoned guidance from the Supreme Court, is the

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*Doctrine*, 10 U. BRIDGEPORT L. REV. 311, 326 (1990) ("This history indicates that equitable doctrines have never addressed such systemic factors as federalism and comity. At most, courts sitting in equity addressed inter-judicial or inter-governmental tensions only inadvertently through the resolution of individual disputes.").

149. We should emphasize that our conclusion does not necessarily lead to a rejection of *Younger* abstention. It is arguable that the deference dictated by *Younger* could be justified by other considerations, such as concern for state legislative and executive discretion and autonomy. *But see Limits of Judicial Function*, *supra* note 145, at 84-90.

150. *See, e.g.,* *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958); Martin H. Redish & Carter G. Phillips, *Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356 (1977).

Court's recent decision in *Seminole Tribe of Florida v. Florida*.<sup>151</sup> There the Court severely limited Congress' power to abrogate state sovereign immunity. As a result of *Seminole Tribe*, private party suits against state governments brought under federal law abrogating state sovereign immunity (unless enacted pursuant to the Enforcement Clause of the Fourteenth Amendment<sup>152</sup>) cannot be brought in federal courts.<sup>153</sup> Since *Seminole Tribe* closed the doors of the federal courts in most suits brought against state governments, even to enforce federal statutory rights, it seems reasonable to expect a substantial increase in the number of federal question-based actions brought in state court. In such cases, the extent to which state courts are required to employ federal procedures may have a significant impact on the efficiency and effectiveness of the state court enforcement of substantive federal rights.

1. *Choosing Between State and Federal Procedures*.—Cases presenting the question of the extent to which state courts are bound to employ federal procedures in the enforcement of substantive federal rights and claims have, at various times, been described as either “converse *Erie*”<sup>154</sup> or “reverse *Erie*” decisions. Such cases present the mirror-image of the situation involved in the Court's famed decision in *Erie Railroad Co. v. Tompkins*.<sup>155</sup> In *Erie*, the Court held that federal courts applying state law must apply the substantive law of the forum state.<sup>156</sup> In subsequent decisions, the Court considered the extent to which a federal court sitting in diversity must, in addition to enforcing state substantive law, also employ state procedures.<sup>157</sup> In contrast to the *Erie* line of cases, converse-*Erie* decisions deal with state court enforcement of substantive federal law.

Conceptually, two groups of converse-*Erie* situations are conceivable. One group consists of situations in which federal law explicitly demands that state courts adopt particular procedures when hearing a federal right. The other cluster of converse-*Erie* cases addresses federal law that is silent as to which procedures state courts should adopt when hearing a case based on a federal right. In the former situation, assuming that commandeering of state courts falls

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151. 517 U.S. 44 (1996).

152. U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

153. See Andrew I. Gavil, *Interdisciplinary Aspects of Seminole Tribe v. Florida: State Sovereign Immunity in the Context of Antitrust, Bankruptcy, Civil Rights and Environmental Law*, 23 OHIO N.U. L. REV. 1393, 1398 (1997) (“Rather than serving as a source of State insulation from federal authority, therefore, [*Seminole Tribe*] is emerging as a somewhat perverse, inverted “Bill of Rights,” which minimizes the degree to which states can be held answerable to their own citizens.”).

154. See generally Note, *State Enforcement of Federally Created Rights*, 73 HARV. L. REV. 1551 (1961).

155. 304 U.S. 64 (1938).

156. *Id.* at 78.

157. See, e.g., *Brown v. Western Ry.*, 338 U.S. 294 (1949); *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359 (1952).

within congressional power (whether via the Necessary and Proper Clause or the State Judges Clause), the implication is all but inescapable that state courts would have to employ federal procedures when expressly mandated by federal statute. To do otherwise would allow state procedural rules to trump conflicting federal statutes, and the lesson of *Testa* is that under the Supremacy Clause state courts cannot ignore validly enacted federal law.<sup>158</sup>

The more difficult question is, assuming the existence of the commandeering power, to what extent (if at all) should state courts be required to abandon their own procedural rules in favor of conflicting federal procedures when adjudicating federal claims where Congress remains silent on the issue. A careful review of the Court's converse-*Erie* cases reveals no clear answer to this question.<sup>159</sup>

In determining whether state courts must employ federal procedures in adjudicating federal claims, the Supreme Court has available several conceivable options. First, the Court could hold that in the absence of an express congressional directive to the contrary, a state court is always free to employ its own procedural rules when adjudicating any issue of federal law. Second, the Court could adopt a balancing test. Under such an approach, a state forum would be required to employ a particular federal procedure when and only when it is found that the extent of disruption caused to the state judicial system by the need to alter selectively its own procedural structure is outbalanced by the degree of interference with attainment of the substantive goal embodied in the governing federal law that would result from the state court's failure to employ the federal procedure in question. A pro-federal variation on this broad, ad hoc balancing analysis would ask whether the federal procedure in question was somehow "bound up" with the substantive federal law being enforced, in other words, the extent to which use of the federal procedure was essential to achieve the substantive federal goal.<sup>160</sup> If the federal procedure is, in fact, tied to achievement of the substantive federal goal in this manner, the state court would be required to employ the procedure, regardless of the resulting burdens on the state judicial system. Finally, the Court could adopt a variation of this pro-federal model. Under this standard, state courts must always employ federal procedures in enforcement of a substantive federal cause of action, at least absent the resulting need for a significant restructuring of the state judicial system in order to accommodate the federal procedures.

At various times, the Supreme Court appears to have chosen among these different models in order to resolve the converse-*Erie* question, albeit without expressly recognizing those differences. In its initial converse-*Erie* decision,

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

159. *See, e.g.*, *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359 (1952); *Brown v. Western Ry. of Ala.*, 338 U.S. 294 (1949); *Minneapolis & St. Louis R.R. v. Bombolis*, 241 U.S. 211 (1916); *Central Ry. Co. v. White*, 238 U.S. 507 (1915).

160. The "bound up" language is drawn from the Supreme Court's direct *Erie* case, *Byrd v. Blue Ridge Rural Electrical Coop.*, 356 U.S. 525 (1958). *See Redish & Phillips, supra* note 150, at 365.

*Central Vermont Railway Co. v. White*,<sup>161</sup> the Court forbade state courts in a Federal Employers' Liability Act ("FELA")<sup>162</sup> action from applying a state rule that required plaintiffs to prove the absence of contributory negligence. The Court found that Congress had intended the FELA to require the defendant to prove contributory negligence and that the state rule at issue constituted a conflicting substantive rule, not a "mere matter of state procedure."<sup>163</sup> However, the Court indicated that had the state rule at issue been a mere matter of procedure, "the state court can, in those and similar instances, follow their own practice in the trial of suits arising under the Federal law."<sup>164</sup> *White* thus appears to establish, albeit solely in the form of dictum, an irrebuttable presumption in favor of allowing state courts to employ their own procedural rules in the adjudication of federal claims when Congress is silent as to which procedures are to be used.

In contrast to *White*, the Court, in its subsequent decision in *Dice v. Akron, Canton & Youngstown Railroad Co.*<sup>165</sup> seemingly adopted, albeit in a most cryptic fashion, some form of systemic balancing approach to the converse-*Erie* question. In *Dice*, a plaintiff filed an action in state court against his employer under FELA. The defendant argued that the plaintiff had signed an agreement releasing the defendant from liability. The plaintiff responded that his release had been obtained as the result of fraud. The Supreme Court initially held that the validity of the release agreement was an issue of federal law. Applying state law to determine the validity of a release agreement, the Court reasoned, would "defeat[]" federal rights, undermine uniformity necessary to effectuate the purposes of FELA, and be "incongruous" with the general policy of FELA.<sup>166</sup>

In addition to the choice-of-law issue concerning the substantive question of the release's validity, the Supreme Court had to decide whether the state court was required to employ the federal practice of using a jury to decide the fraud issues. The Ohio state court applied state law that assigned the factual issues concerning the fraudulent nature of the release to the judge, rather than to the jury. The defendants argued that in light of the decision in *Minneapolis & St.*

161. 238 U.S. 507 (1915).

162. 45 U.S.C. §§ 51-60 (1994).

163. *Central Vermont Ry. Co.*, 238 U.S. at 512.

164. *Id.*

There can, of course, be no doubt of the general principle that matters respecting the remedy—such as the form of the action, sufficiency of the pleadings, rules of evidence, and the statute of limitations—depend upon the law of the place where the suit is brought . . . . As long as the question involves a mere matter of procedure as to the time when and the order in which evidence should be submitted the state court can, in those and similar instances, follow their own practice in the trial of suits arising under the Federal law.

*Id.* (citations omitted).

165. 342 U.S. 359 (1952).

166. *Id.* at 361-62.



*Louis Railroad v. Bombolis*,<sup>167</sup> where the Court had refused to impose on state courts in FELA actions the Seventh Amendment's unanimous verdict obligations,<sup>168</sup> states may eliminate the use of the jury for the phase of the case that determines if the release had been fraudulently obtained.<sup>169</sup> The Court rejected this argument because the right to a jury trial is "too substantial" a part of the FELA's rights, and "part and parcel" of the FELA remedy, as to be classified as a purely procedural rule.<sup>170</sup> Though the Court did not elaborate, presumably the federal interest in having resolution by a jury flowed from the widespread assumption that juries are, as a general matter, likely to favor individual plaintiffs over large corporate defendants in negligence actions, combined with the statute's obviously pro-plaintiff tenor.<sup>171</sup>

167. 241 U.S. 211 (1916).

168. U.S. CONST. amend. VII.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

*Id.* The Seventh Amendment orders a trial by jury "according to the rules of the common law." Those rules include a unanimous verdict requirement. *See American Pub. Co. v. Fisher*, 166 U.S. 464, 467-68 (1897).

169. The Minnesota statute in *Bombolis* allowed a civil verdict by five-sixths of the jury if, after twelve hours, the jury could not reach an unanimous verdict. *Bombolis*, 241 U.S. at 216. For companion cases involving similar statutes, see *St. Louis & San Francisco Railroad v. Brown*, 241 U.S. 223 (1916) (three-fourths verdicts); *Louisville & Nashville Railroad v. Stewart*, 241 U.S. 261 (1916) (three-fourths verdict); *Chesapeake & Ohio Railway v. Carnahan*, 241 U.S. 241 (1916) (jury of seven).

170. *Dice*, 342 U.S. at 363. Justice Frankfurter concurred separately, arguing that the majority had improperly found the state procedure bound up and preempted by the federal law. *Id.* at 364 (Frankfurter, J., concurring). According to Justice Frankfurter, *Bombolis* meant that a state court decision to have no jury in all negligence actions is not inconsistent with FELA because "certainly [FELA] does not require" state courts to have juries for negligence actions brought under the statute. *Id.* at 367. Moreover, if a state kept the traditional division of courts between common law and equity, "there is nothing in" FELA that requires states to abandon this distribution of authority. *Id.* State courts were "not trying to evade their duty under [FELA]." *Id.* at 368. In short, Justice Frankfurter felt that the Court was making an error in statutory construction. He wrote:

The fact that Congress authorized actions under the [FELA] to be brought in State as well as in Federal courts seems a strange basis for *the inference that Congress overrode State procedural arrangements* controlling all other negligence suits in a State, by imposing upon State courts to which plaintiffs choose to go the rules prevailing in the Federal courts regarding juries.

*Id.* (emphasis added).

171. For example, FELA granted to plaintiffs the irrebuttable option to choose the forum by denying to defendants the choice of removal where plaintiff chose to sue in the state forum. 28 U.S.C. § 1445(a) (Supp. II 1996).

The *Dice* Court, however, prefaced its rejection of the state court's elimination of a jury trial for the fraud phase of the case by cryptically stating that "[t]he *Bombolis* case might be more in point had [the state] abolished trial by jury in all negligence cases including those arising under [FELA]."<sup>172</sup> The Court seems to have been suggesting that had the state totally abandoned the use of jury trials in negligence cases, it might have been allowed to employ the judge in resolving the fraud issue, despite the strong federal interest in employing jury trials in the adjudication of FELA actions.

Because the Court in *Dice* appeared to speak almost in its own shorthand, however, it is difficult to glean from the decision a clear guide for the resolution of future cases. Professor Michael Collins has argued that *Dice* "indicated the Court's reluctance to impose entirely new structures on the states for the disposition of federal claims for relief. . . . It also suggests that . . . federal power to displace state procedure may not be limitless."<sup>173</sup> Professor Collins concluded that, under *Dice*, the Court's rule of thumb in converse-*Erie* cases is to find state procedural rules trumped only upon "a clear congressional statement to that effect."<sup>174</sup> Justice O'Connor has in recent years adopted this view, writing in dissent that "absent specific direction from Congress . . . state courts have always been permitted to apply their own reasonable procedures when enforcing federal rights."<sup>175</sup>

While the Court could conceivably choose such a deferential standard, it is all but impossible to construe the *Dice* opinion to have in fact adopted such a view. At no point in the text of the FELA did Congress expressly direct the state courts to employ the federal practice of directing juries to decide factual issues of fraud in obtaining releases. Under Professor Collins' standard, then, presumably the Court in *Dice* should have allowed the state court to follow its own practice of having the judge decide such issues. This conclusion, of course, is directly contrary to the result actually reached in *Dice*. Instead, the *Dice* Court's conclusion appears to have anticipated the type of systemic balancing test subsequently adopted by the Court for *Erie* cases in *Byrd v. Blue Ridge Rural Electrical Coop.*,<sup>176</sup> under which the forum's interest in employing its own procedures is balanced against the interest of the source of the substantive law in assuring that uniform policy goals are attained.<sup>177</sup>

The most significant problem with such a balancing analysis, however, is its inherent unpredictability. It is simply impossible to avoid the subjectivity and vagueness inherent in the weighing of competing concerns that are wholly

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

173. Collins, *supra* note 20, at 183; see also Caminker, *supra* note 70, at 1030 ("Congress's power to conscript other branches does not entail the power to require fundamental restructuring of the state's administrative machinery.").

174. Collins, *supra* note 20, at 184 n.405.

175. *Southland Corp. v. Keating*, 465 U.S. 1, 31 (1984) (O'Connor, J., dissenting).

176. 356 U.S. 525 (1958).

177. See Redish & Phillips, *supra* note 150, at 362-66.

unquantifiable.<sup>178</sup> Problems caused by the unpredictability inherent in this ad hoc balancing analysis substantially increase when one realizes the extremely limited opportunity for federal intervention in the converse-*Erie* decision-making process. This is due to the fact that, for the most part, the decision whether a state court is obligated to employ particular federal procedures in the enforcement of a federal claim will be made exclusively by the state courts themselves. Because the lower federal courts have no opportunity to review the decisions of state courts in civil actions,<sup>179</sup> the only opportunity for federal review of the state courts' decisions will come through review in the Supreme Court which provides, at best, a highly speculative means of assuring state court compliance with supreme federal interests.

Of course, if one were to proceed under an assumption of state and federal court "parity," there logically should be no problem with placing such heavy reliance on the state courts to act as the virtual guarantors of the protection of federal interests. However, as we have shown, the fact that state courts are deemed technically competent to adjudicate federal law reflects not an assumption of parity, but rather merely a recognition of the practical necessity of the need both to spread the federal adjudicatory burden and to preserve federal supremacy. Because the existence of the commandeering power reflects the principle of federal dominance within the structure of judicial federalism, state courts should not be given wide-ranging and effectively unreviewable discretion to ignore federal procedures that might prove to be important to attaining and preserving federal substantive goals.

This reasoning logically leads to a preference for a standard which would contain considerably less discretionary flexibility than an ad hoc balancing analysis would permit when a state court makes such a determination. Rather, these considerations call for a standard that will assure the attainment of federal supremacy in the enforcement and protection of federal claims. Such a standard would dictate a strong presumption in favor of the use of federal procedures when a state court is called upon to adjudicate a federal cause of action.<sup>180</sup>

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178. See CHARLES ALAN WRIGHT, *THE LAW OF FEDERAL COURTS* 403 (5th ed. 1994) ("The [Byrd] opinion exhibits a confusion that exceeds even that normally surrounding a balancing test, as lower courts understandably experienced considerable difficulty in applying it."). See also John Hart Ely, *The Irrepressible Myth of Erie*, 87 *HARV. L. REV.* 693, 709 (1974).

179. See TENSIONS IN THE ALLOCATION OF JUDICIAL POWER, *supra* note 117, at 309. ("With only a minimum of exceptions . . . any federal policing of the state courts must come on direct review by the Supreme Court; the lower federal courts do not sit in collateral judgment over the rulings of state courts.").

180. While this conclusion should prevail when the state court is called upon to adjudicate a federal cause of action, it is arguable that the burden imposed on the state court to employ federal procedures should not be as unrelenting when the federal issue arises in the course of the adjudication of a state cause of action. In such cases, the state possesses a competing and countervailing interest in achieving enforcement of its own substantive policies through use of its own procedures. To be sure, in light of the principle of federal dominance, where Congress expressly directs state courts to adhere to federal procedures where issues of federal law arise or

At no point has the Supreme Court ever adopted so sweepingly protective a converse-*Erie* standard as the one we advocate.<sup>181</sup> On occasion, however, the Court has focused intently on the importance of certain procedural rules to the effective enforcement of federal substantive law. One example is in *Brown v. Western Railway of Alabama*.<sup>182</sup> The plaintiff in *Brown* filed a FELA action in state court. The state court dismissed the complaint under a state pleading requirement that construed allegations “most strongly against the pleader.”<sup>183</sup> The Supreme Court reversed, stating:

Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws. “Whatever springs the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.” Should this Court fail to protect federally created rights from dismissal because of over-exacting local requirements for meticulous pleadings, desirable uniformity in adjudication of federally created rights could not be achieved.<sup>184</sup>

*Brown* demonstrates that at least on occasion the Supreme Court is willing to effectuate the federal power to commandeering state courts by finding certain

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where use of state procedures could seriously disrupt proper enforcement of substantive federal law, federal procedures should necessarily prevail. However, absent one or both of these circumstances, it would seem reasonable to allow a state court to employ its own procedures in the adjudication of its own causes of action.

181. Indeed, in its most recent statement on the converse-*Erie* issue, the Court appears actually to have retracted somewhat from a pro-federal balancing analysis. See *Johnson v. Fankell*, 117 S. Ct. 1800 (1997). The Court in *Johnson* held that the State did not have to follow the federal practice of allowing interlocutory appeals of orders denying qualified officer immunity in 42 U.S.C. § 1983 (Supp. II 1996) civil rights actions (an exception recognized by federal courts to the rule that only final judgments may be appealed). The Court distinguished *Dice*, because there the Court:

[had] made clear that Congress had provided in FELA that the jury trial procedure was to be part of claims brought under the Act. In [*Johnson*], by contrast, Congress has mentioned nothing about interlocutory appeals in § 1983; rather, the right to an immediate appeal in the federal court system is found in § 1291, which obviously has no application to state courts.

*Id.* at 1806 n.12. However, neither the text nor history of 28 U.S.C. § 1291 (1994), embodying the final judgment rule, in any way provides the basis for an exception for appeal of claims of qualified immunity. Rather, it was the substantive policy against subjecting federal offices to unjustified suit that had originally led the Court to recognize this exception to the final judgment rule. See generally *Mitchell v. Forsyth*, 472 U.S. 526 (1985). Thus, the Court’s decision in *Johnson* enabled a state court to avoid use of a procedure established solely to facilitate protection of a substantive federal right.

182. 338 U.S. 294 (1949).

183. *Id.* at 295.

184. *Id.* at 298-99 (quoting *Davis v. Wechsler*, 263 U.S. 22, 24 (1923)).

state procedural rules preempted in the context of state court adjudications of a federal cause of action. The FELA, which was the statute at issue in *Brown*, was silent concerning the need to use federal procedures. Despite this congressional silence, the Court refused to provide state courts with a blank check to employ their own procedural rules in federal causes of action. Instead, the Court considered the policy repercussions that would arise from adherence to state procedural rules and found that if the state procedures “defeated” the assertion of federal rights, applicable federal procedures had to be utilized. *Brown* effectively constitutes a preemption case, where the Court read the FELA to preempt all state procedural rules that defeated the purpose of the statute.<sup>185</sup>

The Supreme Court employed a similar analysis in its subsequent decision in *Felder v. Casey*.<sup>186</sup> At issue in *Felder* was the application of 42 U.S.C. § 1983,<sup>187</sup> the basic federal civil rights cause of action, to a Wisconsin notice-of-claim statute that required a plaintiff wishing to sue a governmental defendant to notify that defendant about certain matters concerning the suit and, once notice had been provided, not to file suit for 120 days.<sup>188</sup> Under Wisconsin law, failure to comply with the notice-of-claim statute constituted grounds for dismissal. The Court reaffirmed the “general and unassailable proposition . . . that States may establish the rules of procedure governing litigation in their own courts,” but also emphasized that a local practice cannot be employed to defeat a federal right.<sup>189</sup> The Court held that the Wisconsin statute was preempted for two reasons.<sup>190</sup> First, the statute conflicted with the purpose and effects of the remedial objectives of § 1983.<sup>191</sup> Second, the Wisconsin statute is outcome-determinative, that is, it ensures different outcomes in § 1983 litigation based solely upon the court in which the claim is asserted.<sup>192</sup>

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185. Construing *Brown* as a preemption case comports with the Court’s preemption jurisprudence, which finds state law preempted if it undermines achievement of the goals of a federal statute. See *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (stating that a state law is preempted if it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”).

186. 487 U.S. 131 (1988).

187. 42 U.S.C. § 1983 (Supp. II 1996).

188. *Felder*, 487 U.S. at 134.

189. *Id.* at 138.

190. *Id.*

191. *Id.*

192. *Id.* Building on this last point, Justice Brennan’s cogently explored the downside of dual federalism, the downside that *Printz v. United States*, 117 S. Ct. 2365 (1997), ignored. Brennan stated,

[T]he very notions of federalism upon which respondents rely dictate that the State outcome-determinative law must give way when a party asserts a federal right in state court . . . . [T]he Supremacy Clause imposes on state courts a constitutional duty ‘to proceed in such [a] manner that all the substantial rights of the parties under controlling federal law [are] protected.’

*Felder*, 487 U.S. at 151 (quoting *Garrett v. Moore-McCormack*, 317 U.S. 239, 245 (1942)).

The decisions in both *Brown* and *Felder* reflect a high degree of care and effort to prevent state court use of procedural rules that would hinder effectuation of the substantive policies embodied in federal law. However, the inherently limited availability of Supreme Court policing of the state courts' procedural choices in converse-*Erie* contexts renders dubious the success of the *Brown* and *Felder* case-by-case mode of analysis in the continued assurance of federal supremacy. The Supreme Court is, as a practical matter, simply unable to review a sufficient number of state court decisions to make any case-by-case analysis fully protective of federal interests. Instead, the Supreme Court, by directing the state courts to employ federal procedures when adjudicating a federal claim unless to do so would require a significant attenuation in the structure of the state judicial system would simultaneously reduce the state courts' case-by-case discretion and facilitate Supreme Court policing of state court decisions on the issue.

2. *Applying Converse-Erie Principles to the Tobacco Settlement.*—The issues raised by the converse-*Erie* doctrine could conceivably play an important role in deciding the constitutionality of tobacco settlement legislation, if and when such legislation were ever adopted. The tobacco industry, in exchange for acceptance of strict advertising limits and the payment of substantial sums of money, agreed to settle the states Attorneys General actions against the industry for Medicaid reimbursement, as long as Congress provided three forms of legal protection to the industry: (1) immunity from punitive damages in civil lawsuits regarding past industry misconduct; (2) prohibition of certain types of multi-party actions; and (3) caps on annual pay-outs for lost suits.<sup>193</sup> While more recent political developments make congressional approval of the settlement unlikely and appear to have rendered the constitutional issues surrounding such legislation largely academic, the questions surrounding Congress' constitutional power to prohibit multi-party actions against the tobacco industry remain worthy of intellectual analysis.

One problem facing Congress in enacting these legal protections is that both the source of the substantive law and the judicial forums are likely to be state, rather than federal law. Thus, were Congress to enact a law prohibiting multi-party product liability actions in state court against tobacco manufacturers, Congress would in effect direct state courts to employ specific procedures in

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193. See Jeffrey Taylor, *Bipartisan Bill Over Tobacco is in the Works*, WALL ST. J., Feb. 27, 1998, at A3. Companies will remain subject to criminal charges. Senators Tom Harkin (D-Iowa), Bob Graham (D-Fla.), and John Chafee (R-R.I.) have proposed a bill that grants tobacco companies only an \$8 billion cap on the amount of damages annually paid—but provides no immunity from class-action suits. Representative Vic Fazio (D-Cal.) and Senator Kent Conrad (D-N.D.) each went one step further, proposing bills that provide no future legal relief to the tobacco industry. See Jeffrey Taylor, *White House Backs Tobacco Bill With No Legal Relief for Industry*, WALL ST. J., March 12, 1998, at A4. On April 1, 1998, the Senate Commerce Committee approved a tobacco bill that gave the tobacco industry only one form of litigation relief: a \$6.5 billion cap on annual pay outs. See Joseph Nocera, *Don't Snuff Out Big Tobacco: Why Revenge is Bad Public Policy*, FORTUNE, Apr. 27, 1998, at 35.

enforcing their own substantive tort law in their own courts. Whether one views the issue from the perspective of congressional power under Article I or from that of the Tenth Amendment protection of states' rights, it is by no means clear that Congress possesses the constitutional authority to impose such restrictions.

In order to avoid this problem of constitutional federalism, some of the proposed congressional tobacco legislation sought to employ a carrot approach, rather than a stick approach. For example, Senator McCain's bill, presumably relying on the waiver structure approved by the Supreme Court in *South Dakota v. Dole*,<sup>194</sup> provided that only those states which enact laws restricting multi-party adjudication of tobacco suits qualify for the newly created fund of tobacco money, to be made available as a result of projected payments from the industry.<sup>195</sup> However, this provision, standing alone, would undoubtedly fail to satisfy the tobacco industry, since there would always exist the possibility that a state would choose not to participate in the fund so that it can continue to permit multi-party actions against tobacco manufacturers. Indeed, the linchpin of all of the hotly debated tobacco settlements currently before Congress is the limitation of the industry's exposure to unpredictable levels of liability.<sup>196</sup> Thus, the bill further provided that any state which does not enact such a prohibition on multi-party products liability actions will have its substantive tobacco product liability law preempted. While there seems to be no doubt that Congress has the power under the Commerce Clause to preempt substantive state tobacco law, forcing states to choose between federal preemption or abandonment of multi-party actions arguably contradicts the Supreme Court's decision in *New York v. United States*,<sup>197</sup> which held that Congress may not constitutionally coerce enactment of state legislation.<sup>198</sup>

An alternative, arguably more acceptable approach might be for Congress to enact a federal statute which preempts all previously existing state tort law. For example, Congress could simultaneously incorporate each state's preexisting tobacco product liability law by reference<sup>199</sup> and order that, in enforcing what would at that point possess the status of substantive federal tort law, state courts

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194. 483 U.S. 203 (1987) (rejecting a challenge to a federal statute that conditioned receipt of federal highway funds for states that permitted persons under the age of twenty-one to buy liquor, on the grounds that Congress has power to condition receipt of state benefits on a state's agreement to waive constitutional protection).

195. S. 1415, 105th Cong., 2d Sess. § 611 (1998) ("To be eligible to receive payments . . . a State . . . shall enter into consent decrees under this section . . . [which] shall contain . . . provisions relating to . . . the dismissal of pending litigation as required under Title VII.").

196. See William Neikirk, *Stalled Deal over Tobacco has Congress in a Quandary*, CHI. TRIB., March 12, 1998, at 15 ("Democrats also have accused Republican leaders of dragging their feet on the [tobacco] legislation. . . . The chief issue: Should the tobacco companies be granted protection from lawsuits, even limited annual 'caps,' in litigation?").

197. 505 U.S. 144, 166 (1992).

198. *Id.* at 175-76.

199. Cf. *Shoshone Mining Co. v. Rutter*, 177 U.S. 505 (1900) (providing an example of congressional legislation which incorporates substantive state law principles by reference).

could not hear multi-party actions.

So revised, the issue becomes one of implicating the converse-*Erie* doctrine. Since this alternative form of tobacco legislation expressly commandeers state courts, those courts would be bound by this valid federal law. If Congress were to conscript state courts in this manner, then surely Congress would possess the constitutional authority to direct that in adjudicating what would now be substantive federal claims, the state courts are not permitted to hear multi-party actions. The principle of federal dominance out of which the federal commandeering power flows would necessarily extend to include the power to direct the choice of procedures to be employed in the adjudication of substantive federal law.

### CONCLUSION

The Court in *Printz v. United States*<sup>200</sup> was correct in concluding that the Constitution authorizes federal power to commandeer state courts. While the *Printz* Court constitutionally grounded this power in the State Judges Clause, we believe that the power is more appropriately derived from the Necessary and Proper Clause, when read in conjunction with Congress' enumerated powers. Regardless of where the commandeering power is properly grounded, however, its very existence establishes that the original rationale for the state court power to adjudicate federal rights was to spread federal burdens onto state courts and to prevent the destruction of federal law. This commandeering authority establishes that state courts are empowered to decide federal rights as a matter of necessity, and not because of federal deference to the abilities of state judges.

While the Court has properly recognized the existence of the commandeering power, it has largely ignored the implications for the theory of judicial federalism that necessarily flow from recognition of this authority. Once the Court recognizes that the existence of the commandeering power originates in federal dominance over state judiciaries, the many Supreme Court jurisdictional doctrines premised on notions of deference to the state courts based on the notion of state-federal court parity should be totally rejected.

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200. 117 S. Ct. 2365 (1997).