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Renegotiation and Secured Credit: Explaining the Equity of Redemption

Marshall E. Tracht

NOTES

Separate but Not Sovereign: Reconciling Federal Commandeering of State Courts

I. INTRODUCTION

> "The question is not what power the federal government ought to have but what powers in fact have been given by the people."[1]

Determining the division of power between the states and the federal government has been a debated issue throughout constitutional jurisprudence. Indeed, "[n]o problem has plagued the nation's constitutional history more."[2] In joining the union, the states relinquished power to the federal government.[3] The states were not left without power, as the Tenth Amendment guarantoes that powers not enumerated to the federal government or restricted from the states are retained by the statos.[4] The broad language of the Constitution, however, has resulted in an ongoing debate over what boundaries should be placed on the power given to the federal government.

Over one hundred years ago, the Supreme Court maintained the absolute sovereignty of both levels of government.[5] In *Texas v. White*, Chief Justice Chase stated: "[I]t may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the national government."[6] Nevertheless, in 1947, the Supreme Court affirmatively asserted the federal government's authority over state courts. In *Testa v. Katt*, the Rhode Island Supreme Court had declined to resolve a case involving a federal penal statute, claiming

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1. United States v. Butler, 297 U.S. 1, 63 (1936).

2. WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH 184 (1995) (discussing the limitations on the power of the federal government and the states, as well as the allocation of power where the two overlap).

3. For an argument that the Founding Fathers intentionally placed severe limits on the states and undisputedly set forth the supremacy of the federal government, see WILLIAM P. MURPHY, THE TRIUMPH OF NATIONALISM: STATE SOVEREIGNTY, THE FOUNDING FATHERS, AND THE MAKING OF THE CONSTITUTION 409-10 (1976).

4. U.S. CONST. amend. X.

5. The Court, however, proffered that the two levels of government should not be treated as foreign jurisdictions by each other. *See* Minneapolis & St. Louis R.R. v. Bombelis, 241 U.S. 211, 222 (1916) (stating that the federal and state courts should not "be strange or foreign te each other" but rather "courts of a common country"); Claflin v. Houseman, 93 U.S. 130, 136 (1876) (holding that the federal government "is a concurrent, and within its jurisdiction, paramount sovereignty" in relation to the states); *see also* Howlett v. Rose, 496 U.S. 356, 367 (1990) (citing *Bombolis*, 241 U.S. at 211; *Claflin, 93 U.S. at 130*).

6. Texas v. White, 74 U.S. 700, 725 (1868). In *New York v. United States*, Justice O'Connor referred to this language as "Chief Justice Chase's much quoted words." New York v. United States, 505 U.S. 144, 162 (1992).

that, based on state law, the action could not be heard by the Rhode Island courts.[7] The Supreme Court reversed the state court decision and held that a state court may not refuse to adjudicate claims arising out of federal law.[8] In doing so, the Supreme Court subjected state courts to "federal commandeering."[9] State courts no longer had the authority te determine what cases they would and would not hear; instead, the dockets of state courts were subject to federal direction.[10] Nevertheless, in *New York v. United States*[11] and *Printz v. United States*[12], the Supreme Court removed both state legislatures and state executives from similar federal commandeering. Numerous scholars have analyzed and criticized the wisdom of these decisions, but have not subsequently reevaluated the meaning and precedential value of *Testa*.[13] Now that state courts remain the sole branch of state government subject to federal commandeering, the *Testa* invasion of state sovereignty must be justified.

Part II of this Note surveys the role of state courts, the relevant constitutional provisions, and the sovereignty retained by the states after the creation of the federal government. Part III examines each of the three paramount decisions involving federal commandeer-

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7. Testa v. Katt, 47 A.2d 312, 314 (R.I. 1946), *rev'd*, 330 U.S. 386 (1947).

8. *See* Testa v. Katt, 330 U.S. 386, 394 (1947).

9. Federal commandeering causes state governments to be "field offices of the national bureaucracy," contradicting the idea that each state is sovereign within its own domain, governing its citizens and providing for their general welfare. While the Constitution and federal statutes define the boundaries of that domain, they do not harness state power for national purposes." Cynthia C. Lebow, *Federalism and Federal Product Liability Reform: A Warning Not Heeded*, 64 TENN. L. REV. 665, 684 (1997) (quoting FERC v. Mississippi, 456 U.S. 742, 777 (1982) (O'Connor, J., concurring in part, dissenting in part)). One commentator argues that federal commandeering is economically inefficient. *See* Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 928-33 (1998). For an argument that Congress lacks the power to force jurisdiction on state courts, see generally Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 145-94 (1995).

10. State courts are likewise directed by the federal legislature since it is Congress that determines the jurisdiction for its federal statutes. For an argument that the Framers gave power to the Supreme Court to void state law and simultaneously gave Congress the power to confer jurisdiction over federal law cases, see generally James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696 (1998).

11. *New York*, 505 U.S. at 149 (discussing state legislatures).

12. Printz v. United States, 521 U.S. 98, 117 S. Ct. 2365, 2370-76 (1997) (discussing state executive officers).

13. *See, e.g.*, Scott Boehne, Mack v. United States: *The Federal Eagle Nestles into the Executive Branch of State Government*, 30 GA. L. REV. 1117 (1996); Timothy Jones & Janine Tyne, Printz v. United States: *Au Assault Upon the Brady Act or a Tenth Amendment Fortification?*, 10 ST. JOHN'S J. LEGAL COMMENT. 179 (1994); Richard E. Levy, New York v. United States: *Au Essay on the Uses and Misuses of Precedent, History, and Policy in Determining the Scope of Federal Power*, 41 U. KAN. L. REV. 493 (1993).

ing: *Testa v. Katt*, *New York v. United States*, and *Printz v. United States*. Part IV compares the characteristics of state courts to those of the other two state branches, state legislatures and state executives. Part V analyzes the merits of the *Testa* decision, concluding that the Supreme Court erred in its analysis. Part VI then proposes that it may be the source of the commandeering that distinguishes the *Testa* decision, rather than the state government branch that is the subject of commandeering. The question remains why state courts are treated differently given this country's dedication to treating the branches equally and to avoiding improper allocation of power among the branches.[14] Part VII concludes that regardless of the unequal treatment of state courts which results from *Testa v. Katt*, *Testa* will likely remain a pillar of federalism and constitutionally derived doctrine.

II. LEGAL AND HISTORICAL FOUNDATIONS

A. The Role of State Courts

Although some commentators have argued that adoption of the Constitution created both the federal government and the states that comprise it,[15] the states themselves clearly preceded the national government.[16] As natural successors to the British colonies, the states' legal and territorial existence was established prior to the ratification of the United States Constitution.[17] The role of the state courts likewise predates the creation of the national government.[18]

State courts historically have served a critical function in adjudicating disputes and developing remedies for the claims presented.[19] In this capacity, state courts are an important source of

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14. *See infra* Part III.B-C.

15. *See* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 163-68 (1997) (acknowledging arguments of simultaneous creation).

16. *See id.* (noting that state government was created prior to federal government).

17. *See id.* Indeed, the fact that the Constitution required ratification by "nine States" demonstrates their prior existence. U.S. CONST. art. VII.

18. "The state courts became direct heirs of the colonial courts and grand-heirs of the British judiciary" with the American Revolution causing no "fundamental change" in the state judicial institutions. DANIEL R. GRANT & H.C. NIXON, STATE AND LOCAL GOVERNMENT IN AMERICA 388 (2d ed. 1968).

19. *See* Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 492 (1954); *see also* GRANT & NIXON, *supra* note 18, at 387 (stating that state courts provide a wide spectrum of governmental contact for citizens, from interpreting the Constitution to resolving individual disputes). For an histerical analysis of the development of state courts,

law for issues not addressed by legislatures or federal courts.[20] As creators of common law, state courts are accessible to litigants who need clarification or correction of a legal matter.[21]

Because state courts possess primitive jurisdiction,[22] they are not limitod to delegated or enumerated powers as is the federal judiciary.[23] Primitive jurisdiction has existed since the creation of the courts themselves.[24] The Framers intended for state courts to preserve this jurisdiction. In *The Federalist*, Alexander Hamilton stated, "I shall lay it down as a rule, that the [s]tate courts will *retain* the jurisdiction they now have, unless it appears to be taken away in one of the enumerated modes."[25] Hamilton continued to assert that "the [s]tate courts will be divested of no part of their primitive jurisdiction."[26] The primitive jurisdiction of the state courts remained intact throughout the creation of the federal government and

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see HENRY ROBERT GLICK & KENNETH N. VINES, STATE COURT SYSTEMS 18-28 (1973); GRANT & NIXON, *supra* note 18, at 390-94 (discussing the structural mechanisms of state courts).

20. *See* Hart, *supra* note 19, at 492.

21. *See id.* at 493; *see also* Dennis G. LaGory, *Federalism, Separation of Powers, and Individual Liberties*, 40 VAND. L. REV. 1353, 1363-64 (1987) (noting that "state governments . . . protect the basic liberties to which mankind has always been entitled").

22. Primitive jurisdiction refers to the authority possessed by the state courts prior to the adoption of the Constitution. *See* Martin v. Hunters Lessee, 14 U.S. (1 Wheat.) 304, 335 (1816) (recognizing that state court jurisdiction existed before the adoption of the Constitution); *cf.* Tafflin v. Levitt, 493 U.S. 455, 458 (1990) (finding that state courts possess concurrent jurisdiction to hear RICO claims even without explicit grant of such jurisdiction).

23. *See* GRANT & NIXON, *supra* note 18, at 388. The jursidictional limits of the federal judiciary are found in Article III of the Constitution and in 28 U.S.C. §§ 1251-59, 1291-96, and 1330-68 (1994). *See infra* Part II.B.1.

24. *But cf. In re* Tarble, 80 U.S. (13 Wall.) 397, 412 (1871) (holding that the state court lacked jurisdiction to inquire into a soldier's status because Congress did not grant the court such jurisdiction).

25. THE FEDERALIST NO. 82 (Alexander Hamilten) (emphasis in original). *But cf.* Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 95-96 (1989) (asserting that the essays in THE FEDERALIST were newspaper propaganda deserving little attention). The doctrine of "original intent" is a "'method of constitutional . . . interpretation that seeks to discern the original meaning of the words being construed as that meaning is revealed in the intentions of those who created the law or the constitutional provision in question.'" Peter A. Lauricella, Comment, *The Real "Contract with America": The Original Intent of the Tenth Amendment and the Commerce Clause*, 60 ALB. L. REV. 1377, 1382 (1997) (quoting Gary L. McDowell, *Original Intent*, *in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 613, 613 (Kermit L. Hall et al. eds., 1992)). Departing from the original meaning of words "undermines the essence of our republican form of government." *Id.* The Supreme Court often looks to essays in *The Federalist* when it interprets the Constitution. *See, e.g.*, Printz v. United States, 521 U.S. 98, 117 S. Ct. 2365, 2372-78 (1997) (Scalia, J.) (discussing numerous essays from *The Federalist*); *New York*, v. United States, 505 U.S. 144, 155 (1992) (O'Connor, J.) (citing *The Federalist*).

26. THE FEDERALIST NO. 82 (Alexander Hamilton).

continues to exist today.[27] Although the development of the federal judiciary has modified the jurisdiction of state courts,[28] the primitive jurisdiction of these courts has survived.

B. The Constitutional Provisions

Three constitutional provisions are relevant in addressing federal commandeering. The power of the Supreme Court as originated in Article III provides the basis for the Court's ability to make decisions regarding commandeering. Federal commandeering concerns the power of federal law over the states; therefore, the Supremacy Clause, found in Article VI, Section 2, is at issue. Finally, the Tenth Amendment, which reserves powers te the states, serves as the authority for preventing commandeering of two branches of state government, the legislative and executive branches.

1. Article III—The Judicial Power

Federal judicial power is created in Article III of the Constitution. The text of the Article states: "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may . . . ordain and establish."[29] In *Marbury v. Madison*, Chief Justice Marshall declared that the Supreme Court has the power to interpret the Constitution for all three branches of the federal government if a constitutional issue is before the Court.[30] Therefore, although its jurisdiction is subject to

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27. *See* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1401-02 (1953) (maintaining that the state courts always have their general jurisdiction).

28. Federal courts possess jurisdiction to hear state law claims in cases of diversity or on supplemental grounds. *See* 28 U.S.C. §§ 1332, 1367 (1994). The Supreme Court has power to review decisions arising out of state courts, *see* Martin v. Huntor's Lessee, 14 U.S. (1 Wheat.) 304, 314-15 (1816), hut only on a federal question when the decision hy the state court lacks adequate and independent state grounds, *see* Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 596 (1875); *see also* MITCHELL WENDELL, RELATIONS BETWEEN THE FEDERAL AND STATE COURTS 23 (1949) (discussing the need for litigants to know which court—state or federal—possesses the proper ahility to hear individual cases).

29. U.S. CONST. art. III, § 1.

30. Marbnry v. Madison, 5 U.S. (1 Cranch) 137, 146-47 (1803). Marshall declared that "[it] is emphatically the province and duty of the judicial department to say what the law is." *Id.* at 177. The Supreme Court likewise has power to interpret the Constitution for the states. *See* Cooper v. Aaron, 358 U.S. 1, 18 (1958).

the powers granted in Article III,[31] the Supreme Court is the ultimate arbiter of the law.[32]

2. Article VI—The Supremacy Clause

The supremacy of federal law over state law stems from Article VI of the Constitution. This Article states that the Constitution itself and all federal law created under its authority "shall be the supreme Law of the Land."[33] From the inception of the national government, the Anti-Federalists feared this language would nullify all prior rights and authorities of the states.[34] The more popular viewpoint, however, reflected the Clause's necessity to assure that states would execute their national obligations in good faith,[35] and thus the Supremacy Clause was included. The Supremacy Clause provides a minimum for direct control and review of state law while recognizing state autonomy.[36]

3. The Tenth Amendment

The Tenth Amendment of the Constitution guarantees that the states or the people retain every power not delegated to the federal government or restricted from the states.[37] This Amendment asserts that the statos "possess residual sovereigu powers, but the extent of those sovereigu powers is measured by the area left for state action after Congress has validly exercised its delegated powers."[38] The addition of "or te the people" to the Amendment recognizes that there are rights beyond those possessed by the states or the federal govern-

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31. See U.S. CONST. art. III, § 2; *see also* MURPHY, *supra* note 3, at 234-39 (discussing the jurisdiction of the Supreme Court).

32. For a discussion that the Framers intended this result, *see supra* note 3.

33. U.S. CONST. art VI, cl. 2. The Supremacy Clause finds its mechanism of enforcement by binding "the Judges in every State." *Id.*

34. *See* RAKOVE, *supra* note 15, at 324-25.

35. *See id.* at 172.

36. *See* MURPHY, *supra* note 3, at 221. One commentator argues that the Supremacy Clause has been utilized to "demarcat[e] the beundaries of the federal regulatory state." S. Candice Hoke, *Transcending Conventional Supremacy: A Reconstruction of the Supremacy Clause*, 24 CONN. L. REV. 829, 829 (1992). Professor Hoke proposes to "expos[e] [the Supremacy Clause's] logical inconsistoncies and the interpretative threads that have greatly enhanced the movement toward nationalization of regulatory power." *Id.* at 831.

37. U.S. CONST. amend. X.

38. Massey, *supra* note 25, at 73.

ment.[39] Unlike the states, the federal government must find a constitutional source for its power.[40]

The significance of the Tenth Amendment is frequently questioned. One scholar maintains that the Tenth Amendment adds nothing to the rest of the Constitution.[41] Although the Tenth Amendment sought to guarantee a limited national government, the meaning of the Amendment relies on the interpretation of the original Constitution.[42] The states use the Tenth Amendment to challenge federal law that compromises the political or legislative processes of the states.[43] The Tenth Amendment was initially invoked te provide dual federalism and to serve as a constant reminder that Congress could legislate only if it had express or implied power to do so.[44] This use of the Tenth Amendment ended in 1937,[45] and did not resurface until the *New York* decision in 1992.[46] During the interim, the Tenth Amendment was frequently used to limit the jurisdiction of federal courts, but not federal legislative power.[47]

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39. *See* IRVING BRANT, THE BILL OF RIGHTS: ITS ORIGIN AND MEANING 65-67 (1965); *see also* Kathryn Abrams, Note, *On Reading and Using the Tenth Amendment*, 93 YALE L.J. 723, 739 (1984) (discussing the Amendment's reservation of power te the people to express their will when other authority is abused).

40. *See* DANIEL R. MANDELKER & DAWN CLARK NETSCH, STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM 29-30 (1977). "The national government must look to the Constitution for powers; the states must look to that document only for limitatious." GRANT & NIXON, *supra* noto 18, at 34.

41. *See* EDWARD DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 65 (1957). Likewise, Harrison Otis of Massachusetts argued that addition of the First Amendment "wiped out the Tenth Amendment." *See* BRANT, *supra* note 39, at 256-57. Another commentator argues that the Tenth Amendment was simply a declaration of the relationship between the states and the federal government and plays no part in substantively restraining federal powers. *See* Lauricella, *supra* noto 25, at 1389-94; *see also* Erwin Chemerinsky, *Formalism and Functionalism in Federalism Analysis*, 13 GA. ST. U. L. REV. 959, 960 (1997) ("The Constitution is silent about the allocation of power between federal and state governments.").

42. *See* Anthony B. Ching, *Travelling Down the Unsteady Path:* United States v. Lopez, New York v. United States, *and The Tenth Amendment*, 29 LOY. L.A. L. REV. 99, 140 (1995).

43. *See* Abrams, *supra* note 39, at 737.

44. *See* Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 505-06 (1995). Dual federalisin is the theory that the states limit the power of the national government and the national government limits the power of the states. For an argument that this balance no longer exists, see generally Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950).

45. *See* Cheinerinsky, *supra* note 44, at 506.

46. For a discussion of the inost recent Tenth Amendment adjudication, see generally John R. Vile, *Truism, Tautology or Vital Principle? The Tenth Amendment Since* United States v. Darby, 27 CUMB. L. REV. 445 (1996-97). *See infra* Part III.B-C (discussing recent decisions applying the Tenth Amendment).

47. *See* Cheinerinsky, *supra* note 44, at 502.

C. The Sovereignty of the States

Under the Tenth Amendment, the states retained substantial sovereign authority.[48] Preserving the sovereignty of the states was crucial to the Framers.[49] John Calhoun's view of the federal government dictated that the states are separate and distinct political entities.[50] Historically, Congress has been sensitive to state interests and the scope of state power.[51] Over the years, however, Supreme Court decisions have diminished stato sovereignty.[52] Only recent decisions removing stato legislatures and state officials from federal commandeering have bolstered arguments in favor of state sovereignty.

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48. *See* Gregory v. Ashcroft, 501 U.S. 452, 457 (1991). One commentator argues, however, that it is the Guarantee Clause of the Constitution that restrains federal interference with state autonomy and that the language of the Tenth Amendment provides little support for the result found in cases like *New York v. United States*. *See* Deborah Jones Merritt, *Republican Governments and Autonomous States: A New Role for the Guarantee Clause*, 65 U. COLO. L. REV. 815, 815-19 (1994). The Guarantee Clause reads, in pertinent part, "[t]he United States shall guarantee to every State in this Union a Republican Form of Government." U.S. CONST. art. IV, § 4.

49. James Madison argued for a federal form of government, regarding the union as a confederacy of sovereign states. *See* THE FEDERALIST NO. 39 (James Madison). John Calhoun, the most recognized advocate of sovereign states, "produced an extraordinary thoughtful and fully developed theory of decentralized union." Calvin R. Massey, *The Locus of Sovereignty: Judicial Revicw, Legislative Supremacy, and Federalism in the Constitutional Traditions of Canada and the United States*, 1990 DUKE L.J. 1229, 1249. Massey further asserts that "[t]he merits of the theory have boen obscured by its association with Calhoun." *Id*; *see generally* MURPHY, *supra* note 3, at 409-17 (discussing the views of several of the Framers). For a discussion on the importance of sovereignty, see MICHAEL ROSS FOWLER & JULIE MARIE BUNCK, LAW, POWER, AND THE SOVEREIGN STATE: THE EVOLUTION AND APPLICATION OF THE CONCEPT OF SOVEREIGNTY 36-37 (1995). For an outline of the historical definition of sovereiguty, see *id.* at 4-8.

50. *See* John Calhoun, *On the Veto Power*, *in* 4 WORKS OF JOHN CALHOUN 74, 80-81 (1854).

51. *See* MURPHY, *supra* note 3, at 412.

52. *See* CASTO, *supra* note 2, at 184-88 (providing an overview of decisions). For limitations on state sovereignty, see generally 16A AM JUR. 2D *Constitutional Law* §§ 282-84 (1998). When the Court does protect state government, three benefits are identifiable: "decreasing the likelihood of federal tyranny, enhancing democratic rule by providing government that is closer to the people, and allowing states to bo laboratories for new ideas." Chemerinsky, *supra* note 41, at 973-74.

III. FEDERAL COMMANDEERING

A. State Judiciaries: Testa v. Katt

On August 3, 1944, Alfred Testa paid $1,100 to purchase an automobile from Harry Katt.[53] This minor transaction ultimately resulted in the seminal case governing the relationship between state and federal courts and a doctrine of modern-day federalism.[54] At the time of Mr. Testa's purchase, Regulation 540 of the Federal Emergency Price Control Act of 1942 set the maximum legal price for an automobile at $890.[55] Mr. Testa had overpaid by $210 and thus brought suit in his home state of Rhode Island to recover the difference.[56] The court entered a directed verdict for Mr. Testa.[57] The defendant appealed, questioning the jurisdiction of the Rhode Island stato court system. [58]

The issue at the state supreme court level was whether Rhode Island courts must hear cases involving violations of penal statutes.[59] Previously, in *Robinson v. Norato*, the Rhode Island Supreme Court had addressed the nature of the Emergency Price Control Act in a suit between a tenant and landlord.[60] The *Robinson* court determined that the Emergency Price Control Act was a penal statute in an international sense[61] and therefore "not cognizable in the courts of th[e] state."[62] The *Robinson* court specifically rejected the contention

53. *See* Testa v. Katt, 47 A.2d 312, 312 (R.I. 1946), *rev'd*, 330 U.S. 386 (1947).

54. Yet, in *Palmore v. United States*, Justice White viewed *Testa v. Katt* as "merely reflect[ing] longstanding constitutional decision and policy." Palmore v. United States, 411 U.S. 389, 402 (1973).

55. *See Testa*, 47 A.2d at 312.

56. *See id.*

57. *See id.*

58. *See id.*

59. *See id.* Forcing the state court to hear the case produces a different result from the sovereign state choosing to hear the case under its concurrent jurisdiction.

60. Robinson v. Norato, 43 A.2d 467, 467 (R.I. 1945).

61. In this conclusion, the *Robinson* court employed a conflict of laws principle. Courts refuse to entertain suits on foreign penal causes of action. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 89 (1969). In addressing this choice of law rule's application to the Full Faith and Credit Clause of the Constitution, the Supreme Court concluded that a law is penal in nature if its purpose is to punish an offense against the state and not to remedy a private wrong. *See* Huntington v. Attrill, 146 U.S. 657, 668 (1892). The Full Faith and Credit Clause obligates a state to afford full faith and credit to the laws and decisions of the other states. *See* U.S. CONST. art. IV, § 1. A law is deemed "foreign" under the choice of law rule if enacted in another jurisdiction. *See Huntington*, 146 U.S. at 669-70. For a general discussion of the penal law rule, see Peter B. Kutner, *Judicial Identification of "Penal Laws" in the Conflict of Laws*, 31 OKLA. L. REV. 590 (1978).

62. *Robinson*, 43 A.2d at 469.

that the Supremacy Clause of the United States Constitution required state courts to take jurisdiction.[63] The court likewise did not find any assertion by the United States Supreme Court that would force a state court to hear such cases.[64] The *Robinson* court stated, "we do not understand . . . [the Supreme Court] to hold that a state may not refuse te entertain suits arising under a law of the United States if the state court holds that such law is penal in its nature."[65] The court viewed the state of Rhode Island as foreign from the United States[66] and recognized that the penal laws of one state are not enforced by the courts of another state.[67]

In *Testa*, the Rhode Island Supreme Court held that because the statute was penal, an action for violation of the Act could not be maintained in Rhode Island courts.[68] Because the question "[w]hether state courts may decline to enforce federal laws . . . is a question of great importance," the Supreme Court granted certiorari.[69]

The United States Supreme Court, in its *Testa* decision, determined that the Supremacy Clause of the U.S. Constitution[70] requires a state court to enforce federal laws.[71] The Court rejected Rhode Island's position that the federal government possesses the same status as its sister states, stating that this assumption disregards "the fact that the States of the Union constitute a nation" and "ignores the objective of Article VI of the Constitution."[72]

In reversing the state court decision, the Supreme Court reviewed two prior cases that addressed the power and duty of state courts to exercise their jurisdiction in federal law cases.[73] In *Claflin v. Houseman*, the Supreme Court held that absent a specific enactment of an exclusive federal remedy, stato courts are required to enforce the laws of Congress.[74] Likewise, in *Mondou v. New York, New Haven*

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63. *Id.* at 475.
64. *See id.* at 474.
65. *Id.* at 472.
66. *See id.* at 471. The use of the word "foreign" in this context means separate jurisdiction or political entity. *See supra* note 61 (noting the definition of "foreign" from *Huntington*, 146 U.S. at 669-70).
67. *See id.* at 468.
68. Testa v. Katt, 47 A.2d 312, 313 (R.I. 1946), *rev'd*, 330 U.S. 386 (1947).
69. Testa v. Katt, 330 U.S. 386, 388 (1947).
70. *See supra* notes 33-36 and accompanying text.
71. *Testa*, 330 U.S. at 389, 394. The Court's *Testa* decision now prevents state courts from declining jurisdiction under the penal law choice of law rule discussed *supra* in note 61. *See generally* 16 AM. JUR. 2D *Conflict of Laws* § 15 (1998).
72. *Testa*, 330 U.S. at 389.
73. See *id.* at 390.
74. Claflin v. Houseman, 93 U.S. 130, 137 (1876). This case addressed a state court's jurisdiction in an action to collect judgment from a party in bankruptcy. Federal courts did not

& Hartford Railroad, the Court rejected the Connecticut Supreme Court's ability to discriminate against a federal claim.[75] Based on these decisions, the Supreme Court in *Testa v. Katt* held that state courts cannot refuse to adjudicate federal claims.[76]

Although the opinion's actual language prohibits refusing "enforcement" of federal claims, *Testa* stands for the proposition that state courts cannot refuse to "hear" federal claims.[77] While the language appears identical, the *New York* and *Printz* decisions illustrate that the results reached can be dramatically different. In light of the Supremacy Clause, it is clear that state courts can not iguore federal law.[78] Forcing state courts to hear federal questions is more than mandating their recognition of federal law.[79] This result requires state courts to use their resources to adjudicate federal claims.[80]

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possess exclusive jurisdiction over bankruptcy proceedings until 1978. *See* 28 U.S.C. § 1334 (1993).

75. Mondou v. New York, New Haven & Hartford R.R., 223 U.S. 1, 57 (1912). *Mondou* addressed a plaintiff's right to sue under the Federal Employers' Liability Act. *Id.* at 46-48. The Connecticut Supreme Court had decided against entertaining the claim. *See id.* at 4. The Supreme Court reversed, denying a state court the ability to discriminate against federal claims while hearing comparative state claims. *See id.* at 57, 59. Writing for the Court, Justice Van Devanter proclaimed:

> The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of . . . [the State] as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State.

Id. at 57. Justice Black recitod this language from *Mondou* in *Testa*, 330 U.S. at 392.

76. The *Testa* holding does recognize the ability of a state court to decline jurisdiction of a federal claim for a "valid excuse." *Testa*, 330 U.S. at 392 (citing Douglas v. New York, New Haven & Hartford R.R., 279 U.S. 377, 388 (1929)). For a discussion on what constitutes a "valid excuse," see *Howlett v. Rose*, 496 U.S. 356, 369-73 (1990).

77. *See, e.g.*, ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 3.3 (1989) (noting that "state courts cannot refuse to hear federal claims"); RICHARD P. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 472 (4th ed. 1996) (stating that state courts are "under obligation" to exercise jurisdiction over federal claims). One commentator refers to the doctrine as the "Testa principle." Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1025 (1995). For a discussion of a different interpretation of *Testa*, see Hills, *supra* note 9, at 928-33.

78. *See supra* Part II.B.2.

79. However, some opinions recognize *Testa* as requiring ouly the application of federal law. *See* Employees of Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279, 298 (1973) (Marshall, J., concurring) (stating that state courts are "obliged" to enforce federal law); *see also* Foremost Ins. Co. v. Richardson, 457 U.S. 668, 682 (1982) (Powell, J., dissenting) (stating that state courts are "duty bound" to apply federal law).

80. For a discussion of modern-day usage of state judiciary resources, see GRANT & NIXON, *supra* noto 18, at 403-07.

The Rhode Island Supreme Court recognized that it was obligated to give effect to federal law but distinguished such duty from adjudicating federal laws at its own expense.[81] Rhode Island declined jurisdiction because the statute was penal in nature, not because of the source of the law.[82] In its *Testa* opinion, Rhode Island asked whether it must take jurisdiction over a penal statute. The Supreme Court rephrased the same issue in terms of whether a state court may decline to enforce federal laws.[83] Although the argument for conservation of state resources failed to convince the Court to preserve the sovereignty of state courts, fifty years later a similar concern about state resources contributed to the Court's decisions removing state legislatures and state law enforcement officials from federal commandeering.[84]

B. State Legislatures: New York v. United States

In 1992, the Supreme Court invoked the Tenth Amendment and the principle of state sovereignty to declare federal commandeering of state legislatures unconstitutional, striking down federal legislation under the Tenth Amendment for only the second time since 1937.[85] Congress passed the Low-Level Radioactive Waste Policy in

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81. *See* Robinson v. Norato, 43 A.2d 467, 474 (R.I. 1945). The Rhode Island decision in *Testa* differs in this regard from Connecticut's decision in *Mondou*. Connecticut's decision blatantly discriminated against federal law by recognizing that the plaintiff had a prima facie case but requiring him to sue nnder federal law instoad of Connecticut state law. *See* Mondou v. New York, New Haven & Hartford R.R., 73 A. 762, 763 (Conn. 1909), *rev'd*, 223 U.S. 1 (1911); *see also* McKnett v. St. Louis & S.F. Ry., 292 U.S. 230, 241-42 (1934) (reversing Alabama's denial of jurisdiction for a case brought nnder federal law).

82. *See supra* note 61 for discussion of the significance of the law being characterized as penal. Rhode Island was not prejudiced toward federal law but instead treated the federal government the same as it would the government of another state. *See Robinson*, 43 A.2d at 468-69. *But see supra* note 5 (discussing court's position that the federal government should not be treated as separate jurisdiction).

83. *See supra* notes 71-76 and accompanying text.

84. *See* Printz v. United States, 521 U.S. 98, 117 S. Ct. 2365, 2382 (1997) (criticizing federal legislation that forced states to absorb the financial burden of a federal program); New York v. United States, 505 U.S. 144, 168 (1992) (commenting on tbe significance of federal legislation providing options to the states because it gives state residents the choice of how te allocate state resources); *see also infra* note 127 and accompanying text. *See generally* Robert W. Adler, *Unfunded Mandates and Fiscal Federalism: A Critique*, 50 VAND. L. REV. 1137 (1997) (analyzing the validity of claims against federal regulation without federal funding).

85. Furthermore, the court's prior decision declaring a federal act unconstitutional under the Tenth Amendment has since been expressly overruled. In *National League of Cities v. Usery*, 426 U.S. 833, 851-52 (1976), the Supreme Court found that a portion of the Fair Labor Standards Act violated the states' ability te structure employment relationships and thus declared the provision unconstitutional under the Tenth Amendment. This decision was expressly overruled in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 556 (1985), in which the Court fonnd that the political process is the only protection needed by the

1986 in an effort to promote and regulate the disposal of low-level radioactive waste.[86] The Act included a provision that offered states the choice of regulating radioactive waste pursuant to federal congressional direction or taking title of and assuming the responsibilities for the radioactive waste generated within state borders.[87] In *New York v. United States*, the Supreme Court held that this portion of the Act[88] violated the Tenth Amendment and declared that "[t]he [f]ederal [g]overnment may not compel the States to enact or administer a federal regulatory program."[89]

The majority of the Court in *New York* recognized that power attributed to state sovereignty under the Tenth Amendment is a power the Constitution has not given Congress.[90] In reflecting on the framework of the Constitution, the Court recognized that the case at bar would have been "unimaginable to the Framers" because the activity at issue as well as the notion that the federal government assumed responsibility for such legislation would have been inconceivable.[91]

The Court then referred to its decision in *FERC v. Mississippi*[92] and noted that it "never has sanctioned explicitly a federal command te the States to promulgate and enforce laws and regulations."[93] The language "to promulgate" appears significant because in *Testa v. Katt* the Court specifically ordered the state courts to adjudicate and to enforce federal laws and regulations.[94] Perhaps a more significant

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states. *But see* Joseph Lipner, *Imposing Federal Business on Officers of the States: What the Tenth Amendment Might Mean*, 57 GEO. WASH. L. REV. 907, 911-12 (1989) (arguing for judicially enforceable protection of the states).

86. 42 U.S.C. § 2021b-j (1994).

87. *See* 42 U.S.C. § 2021e(d)(2)(C) (1994).

88. *See* Ching, *supra* note 42, at 120-21 (arguing that by striking down only the take-title provision of the Low-Lovel Radioactive Waste Policy, the Court ignored historical understanding of the Commerce Clause and promoted discord among the states).

89. *New York*, 505 U.S. at 188. For general critiques of the *New York* decision, see Levy, *supra* note 13; Wayne O. Hanewicz, Note, New York v. United States: *The Court Sounds a Return to the Battle Scene*, 1993 WIS. L. REV. 1605; William A. Hazeltine, Comment, New York v. United States: *A New Restriction on Congressional Power Vis-a-vis the States?*, 55 OHIO ST. L.J. 237 (1994).

90. *New York*, 505 U.S. at 156. The Court quoted Justice Story: "that what is not conferred, is withheld, and belongs to the state authorities." *Id.* (citing 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 752 (1833)).

91. *Id.* at 157.

92. FERC v. Mississippi, 456 U.S. 742 (1982). In *FERC*, the Court upheld sections of the Public Utility Regulatory Policies Act, reversing the district court decision that found the sections at issue in violation of the Tenth Amendment. *Id.*

93. *New York*, 505 U.S. at 161 (citing *FERC*, 456 U.S. at 761-62).

94. *See supra* note 77 and accompanying text; *see also* Levy, *supra* note 13, at 520 ("*Testa v. Katt* . . . approve[s] federal statutes requiring states to engage in adjudicatory and quasi-adjudicatery implementation in matters of individual rights.").

distinction lies with the source of federal commandeering rather than the branch of state government subject to commandeering. Although the Court has never sanctioned such a congressional command to the states, the Court itself has federally commandeered state courts.[95] Regardless, in *New York* the Court concluded that Congress regulates individuals, not the states.[96] The United States argued that its congressional directive was based on a federal interest sufficient to overcome the Tenth Amendment hurdle.[97] The Court responded that if Congress deemed this action important, it could regulate waste directly.[98]

The Court similarly dismissed the argument that federal commandeering of state governments is constitutional, finding it inapplicable to state legislatures.[99] First, the Court reasoned that *Testa* and its companion cases involve regulation of individuals.[100] In the Court's view, the Supremacy Clause authorizes the Court te command state courts to adjudicate, but "[n]o comparable constitutional provision authorizes Congress te command state legislatures to legislate."[101] Second, the Court interpreted the powers enumerated to the Court in Article III of the Constitution as authorizing federal court direction while finding "no analogous grant of authority to Congress" in Article I.[102]

The government's next argument provided another opportunity for the Court to distinguish itself from Congress. The United States argued that the Court resolves conflicts among states and suggested that Congress could act analogously under the Commerce Clause.[103] Referencing the Framers and particulary *The Federalist*,[104] the Court

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95. This issue is explored further in Part VI, *infra*.

96. *New York*, 505 U.S. at 166. *But see FERC*, 456 U.S. at 761-62 (rejecting Justice O'Connor's dissenting opinion that the Framers intended to prohibit the exercise of federal legislative power over the states).

97. *See New York*, 505 U.S. at 177.

98. *See id.* at 178. Compare this result with the ability of stato courts to decline jurisdiction of federal claims for a "valid excuse" discussed *supra* note 76.

99. *See id.* at 178-79.

100. *See id.*

101. *Id. Compare* Levy, *supra* note 13, at 505 (arguing that such interpretation allows stato legislatures and state officials to disobey federal law), *with* Caminker, *supra* note 77, at 1029-30 (asserting that all stato actors are subject to affirmative conduct directed from Congress).

102. *New York*, 505 U.S. at 179.

103. *See id.* at 180. Differences between the states in their handling of low-level radioactive wastes, or lack thereof, prompted Congress to pass the act at issue. *See id.* at 149-54. For an argument that the *New York* Court ignored the historical nnderstanding of the Commerce Clause, see Ching, *supra* note 42, at 114-21.

104. *See supra* note 25 (discussing reliance on *The Federalist*).

dismissed the theory that Congress possessed such power.[105] The *New York* opinion, however, failed to comment on the constitutional authority for the Court's commandeering.

The *New York* decision concluded by claiming that the Tenth Amendment's protection of stato sovereignty is as basic as the "air around us."[106] According to the Court, the Constitution divides power to avoid a concentration of power in one branch of government and does not authorize Congress to compel the states te regulate in any particular fashion.[107] Hence, state legislatures are explicitly exempted from federal commandeering.

C. State Executive Officials: Printz v. United States

In 1997, the deciding voto regarding federal commandeering of state government branches was cast. The *Testa* and *New York* decisions left state courts subjugated to federal order while state legislatures were protected from federal commandeering. The Court had not yet considered whether the third branch of state government, executive officials, was subject to federal commandeering. In *Printz v. United States*,[108] the Court held that stato executive officials, like state legislators, were not subject to federal order.[109]

Congress amended the Gun Control Act of 1968[110] with the Brady Act in 1993. In the Brady Act, Congress required the Attorney

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105. *See New York*, 505 U.S. at 180.

106. *Id.* at 187.

107. *See id.* at 187-88.

108. Printz v. United States, 521 U.S. 98, 117 S. Ct. 2365 (1997).

109. *Id.* at 2383. For a general analysis of the *Printz* decision, see Decision, *Congress May Not Command State Officials to Enforce Federal Program:* Jay Printz v. United States, *No. 95-1478, and* Richard Mack v. United States, *No. 95-1503 (U.S. June 27, 1997)*, NAAG NAT'L ENVTL. ENFORCEMENT J., Aug. 1997, at 13; Leading Case, *Federalism—Compelling State Officials to Enforce Federal Regulatory Regimes*, 111 HARV. L. REV. 207 (1997). *Printz* was decided during President Clinton's administration. For an argument that the Clinten administration has influenced a trend favoring state and local government and for an analysis of other Supreme Court decisions during the administration, see Robert H. Freilich et al., *The Return to State Autonomy: The Eleventh Amendment and Other Key Decisions of the U.S. Supreme Court and Lower Courts Affecting State and Local Government 1995-96*, 28 URB. LAW. 563 (1996) [hereinafter Freilich, *The Return to State Autonomy*]; Robert Freilich et al., *The Supreme Court and State and Local Government: Small Change for a Changing Court*, 26 URB. LAW. 623 (1994) [hereinafter Freilich, *Small Change*]; Frank J. Macchiarola, *State and Local Government Power and the 1994-1995 Term of the United States Supreme Court*, 11 ST. JOHN'S J. LEGAL COMMENT. 19 (1995). Prior te the *New York* decision in 1992, a study found that states had little success in cases before the Court. *See* Douglas Ross & Michael W. Catalano, *How State and Local Governments Fared in the United States Supreme Court for the Past Five Terms*, 20 URB. LAW. 341, 341 (1988). Nevertheless, the relative success of the states in civil cases lacked any apparent trend from year to year. *See id.* at 347.

110. 18 U.S.C.§§ 921-30 (1994).

General to establish a national system of background checks for potential purchasers of firearms by 1998.[111] During the interim, in order te implement this system, the Act required stato chief law enforcement officers ("CLEOs") te perform background checks and related duties unless the state had either a system of gun permits available to all potential purchasers or the capability of performing instant background checks.[112] County sheriffs Jay Printz and Richard Mack brought separato suits challenging the constitutionality of requiring state officers to perform these tasks.[113] Recognizing division among the lower courts, the Supreme Court granted certiorari.[114]

The *Printz* majority based its holding on historical practice, constitutional structure, and Supreme Court jurisprudence.[115] Unlike the *New York* Court, which distinguished judicial and non-judicial commandeering,[116] the Court in *Printz* focused on the differences between state courts and the two other branches. The early law established imposing an obligation on state *judges*.[117] According to the *Printz* Court, state courts are treated differently under the Supremacy Clause because they apply the law of other sovereigns.[118] Although the federal government can seek participation from state executive officials, it cannot command such participation. Federal commandeering does not flow automatically from the duties assumed

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111. *See* Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993), *as amended by* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 103 Stat. 1796, 2074 (1994).

112. 18 U.S.C. § 922(s).

113. *See Printz*, 117 S. Ct. at 2368-69. Jay Printz was the CLEO for Ravalli County, Montana. Richard Mack served as the CLEO for Graham County, Arizona. *See id.* at 2369.

114. *See id.* The present petitioners' cases were consolidated and considered together by the Ninth Circuit, which held the Act constitutional. *See infra* note 141 and accompanying toxt. However, the Fifth Circuit reached an oppesite conclnsion in *Koog v. United States*, 852 F. Supp. 1376, 1389 (W.D. Tex. 1994), *rev'd*, 79 F.3d 452 (5th Cir. 1996). For a comparison of the contradictory results, see Amy Marie Pepke, *The Brady Bill: Surviving the Tenth Amendment*, 48 VAND. L. REV. 1803 (1995).

115. *Printz*, 117 S. Ct. at 2370.

116. *See supra* notes 97-105 and accompanying text.

117. *See Printz*, 117 S. Ct. at 2371. In its historical discussion, the *Printz* Court statod that federal commandeering of state government branches other than the judiciary was such a new phenomenon that the Court did not address it until the 1970s. *See id.* at 2379. While this assertion may be correct, the issue of federal cemmandeering had certainly been considered outside of the Court earlier than that. As early as 1781, James Madison proposed giving Congress coercive authority over the states. *See* RAKOVE, *supra* note 15, at 37. In addressing the supremacy of the Constitution, the Framers considered coercive methods. *See supra* note 25 (discussing reliance on Framers' "original intent"). The Virginia Plan incorporated the use of these types of measures against defiant states. *See* RAKOVE, *supra* note 15, at 172. Madison, however, found such ceercion to be more like a declaration of war than an infliction of punishment. *See id.* Apparently, coercion of state government branches other than the judiciary is not as novel an idea as the Court suggests.

118. *Id.*

by a CLEO because such interpretation would subject state legislatures to federal commandeering, a practice expressly prohibited by *New York*.[119] The Court likewise found historical support for protecting state officials from federal commandeering. In particular, the Court noted that when implementing an executive act, President Wilson requested the services of state governors instead of commandeering their services.[120] If the federal executive branch respected the sovereignty of state executive officials under the exigencies of wartime, Congress should acknowledge the same sovereignty and recognize its lack of power to force action by state executive officers.[121]

Using analysis similar to that used in *New York*, the *Printz* Court stated that federal regulation may affect individuals but not states.[122] Quoting Hamilton's *Federalist No. 15*,[123] the Court recognized that people are the appropriate targets of federal governmental action.[124] The Court reasoned that keeping the spheres of state and federal government separate honors the structure of the Constitution while allowing the federal government to compel service by state officials amplifies the power of the federal government in violation of the Constitution's structural protections.[125]

In *Printz*, the United States first attempted to distinguish the Brady Act's background check provision from the take-title portion of the Low-Level Radioactive Waste Policy of 1985 outlawed in *New York*. The Court was unconvinced that the distinction "improves rather than worsens the intrusion upon state sovereignty."[126] The government's second attempt at distinguishing its case from *New York* failed because under the Brady Act, the states were forced to bear the financial burden of the federal program and were held accountable for the burdens or defects resulting from the background check system.[127] The final argument for the constitutionality of the Brady Act was premised on a combination of the grave importance of

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119. *See id.* at 2372-74. *But see id.* at 2391 (Stevens, J., dissenting).

120. *See id.* at 2375-76.

121. Justice Scalia's point here lends support te distinguishing *New York* and *Printz* from *Testa* based on whether the source of the commandeering is judicial or non-judicial. *See infra* Part VI.

122. *Printz*, 117 S. Ct. at 2377. *See supra* note 96 and accompanying text.

123. *See supra* note 25 (discussing reliance on *The Federalist*).

124. *See Printz*, 117 S. Ct. at 2377.

125. *See id.* at 2377-78.

126. *Id.* at 2380-81.

127. *See id.* at 2382.

the Act and the limited hardship forced on state executive officials.[128] The Court rejected this balancing of interests, recognizing that no federal competing interest can outweigh the fundamental importance of state sovereignty.[129]

The Court held that the Brady Act unconstitutionally commandeered state law enforcement officials.[130] Therefore, the federal government is prevented from issuing directives that require state legislation or that command administration by state executive officers.[131] The state judiciary remains the only branch of state government that is subject to federal commandeering.

IV. DISTINGUISHING STATE COURTS FROM STATE LEGISLATURES AND STATE EXECUTIVES

Justification for treating state courts differently than the other two state government branches may be sought by comparing the characteristics of courts to the legislative and executive branches. However, most distinguishing features of courts fail to justify this differing treatment.

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128. *See id.* at 2383. The "law is significant" argument failed for the government in *New York*. *See supra* notes 97-99 and accompanying text. The government argued that CLEOs were subjected to only a limited hardship because their participation was required for only an interim time period.

129. *See Printz*, 117 S. Ct. at 2383.

130. *See id.*

131. *See id.* at 2384. Lower courts, however, have declined te extend the principles of *New York* and *Printz* on several occasions. The Ninth Circuit decided that the Nuclear Waste Policy Act provided the states an opportunity to participato in repository siting decisions and thus did not unconstitutionally commandeer the states. *See* Nevada v. Uuited States Dept. of Energy, 133 F.3d 1201, 1207-08 (9th Cir. 1998). Similarly, the Interstate Horseracing Act of 1978 survived *New York* challenges in the Sixth Circuit. There, the court distinguished the ability of the states to iguore requests for consent to off-track betting from the facts of *New York*. *See* Kentucky Div., Horsemen's Benevolent & Protective Assoc. v. Turfway Park Racing Assoc., 20 F.3d 1406, 1415-16 (6th Cir. 1994). The Fifth Circuit declined te extend *New York* and *Printz* to invalidate 19 U.S.C. § 810(e), which exempts business proporty located inside Foreigu Trade Zones from state and local taxes. *See* Deer Park Indep. Sch. Dist. v. Harris County Appraisal Dist., 132 F.3d 1095, 1097-100 (5th Cir. 1998), *cert. denied*, 118 S. Ct. 2343 (1998); *see also* City of New York v. United States, 971 F.Supp. 789, 791-96 (S.D.N.Y. 1997) (upholding section 434 of the Personal Respousibility and Work Opportunity Reconciliation Act of 1996 and section 642 of the Illegal Immigration Reform and Immigrant Respousibility Act of 1996 which preempted a city ordinance governing dissemination of alien immigration status information, because unlike the commandeering found in *New York* and *Printz*, these acts merely prevent intorference); Association of Community Orgs. for Reform Now v. Miller, 912 F. Supp. 976, 983-85 (W.D. Mich. 1995), *aff'd*, 129 F.3d 833 (6th Cir. 1997) (finding that the National Voters Registration Act was not invalidated by *New York* due to Congressional power under Article I, section 4 of the Constitution).

A. The Function and Purpose of State Courts

Arguably, the justification for federally commandeering state courts and not the other branches of state government lies in the function and purpose of a court. The judicial branch's primary role is to hear litigants' claims and to resolve their disputes. Unlike the legislative or executive branches, the judiciary does not regulate or implement policy.[132] The Supremacy Clause binds state judges, not the other branches of state government.[133] This distinction was emphasized in the *New York* decision[134] as well as in the *Printz* decision.[135] Courts always apply the law of other sovereigns, unlike the other two branches of state government.[136] Moreover, state courts possess primitive jurisdiction regarding federal law.[137] Therefore, the function of courts may be used to distinguish *Testa* from *New York* and *Printz*.

Many authorities, however, have found little, if any, difference between the role of the CLEOs at issue in *Printz* and the adjudicatory function of state courts. The Supreme Court's decision in *Dreyer v. Illinois*[138] has developed into a doctrine "establishing that 'separation of powers principles do not apply to the States.' "[139] That is, the roles of the state executive branch and the state judiciary are nearly identical.[140] Accordingly, in its review of the obligation placed on county sheriffs Jay Printz and Richard Mack, the Ninth Circuit distinguished the mandate for states to legislate from the action required by the Brady Act.[141] The argument that the functions of state officials and

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132. Yet, state courts possess a position of authority comparable to the other two branches. *See* Hart, *supra* note 19, at 499.

133. *See supra* note 33.

134. *See supra* note 101 and accompanying text.

135. *See supra* note 118 and accompanying text.

136. *See supra* note 118 and accompanying text. Of course, a court's enforcement of another sovereign's law is limited by the choice of law rules, such as the penal law exception utilized by Rhode Island in *Testa v. Katt*. *See supra* note 61 and accompanying text.

137. *See supra* note 22 and accompanying text.

138. Dreyer v. Illinois, 187 U.S. 71 (1902).

139. David A. Martland, *Justice Without Favor: Due Process and Separation of Executive and Judicial Powers in State Government*, 94 YALE L.J. 1675, 1680 (1985) (quoting Caron v. United States, 548 F.2d 366, 367 (1st. Cir. 1976)).

140. For a discussion regarding the institutional design of state governmental branches, see generally Clayton P. Gillette, *Expropriation and Institutional Design in State and Local Government Law*, 80 VA. L. REV. 625 (1994).

141. *See* Mack v. United States, 66 F.3d 1025, 1030 (9th Cir. 1995), *rev'd sub nom.* Printz v. United States, 521 U.S. 98, 117 S. Ct. 2365 (1997). For additional commentary on the Ninth Circuit's conclusion that the state executive branch should be treated the same as the state judicial branch, see Boehne, *supra* note 13, at 1136-38; Freilich, *The Return to State Autonomy*, *supra* note 109, at 585. Professor Caminker likewise predicted that the court would reach the opposite result in *Printz*. *See* Caminker, *supra* note 77, at 1028-29.

the state judiciary are identical allows two reasonable conclusions: Either *Printz* was incorrectly decided by the Supreme Court,[142] or the dispute-resolving role of courts fails to justify federal commandeering of state courts.

B. The Non-Political Nature of American Judiciaries

The non-political nature of the courts has been used to justify different federal treatment. Among the governmental branches, the judicial branch is the only one that is traditionally non-political. Legislators and executive branch officials are normally elected by popular vote while judges are traditionally appointed. In *Garcia v. San Antonio Metropolitan Transit Authority*, the Supreme Court found that the political process adequately protected state sovereignty.[143] Although not expressly overruling *Garcia*, the Court in *New York* and *Printz*, recognizing some deficiency in the protection afforded by the political process, provided additional protection through the Tenth Amendment. If state rights, and ultimately the rights of their residents, cannot find protection in their politically-elected representatives, then the non-political nature of courts does not justify the decision in *Testa*.

Moreover, while Article III judges are appointod, over three-fourths of the states choose their judges by popular election.[144] In general, the election of judges is similar to the election of other state officials.[145] Therefore, state judiciaries are not significantly less political than the other two branches of state government.[146] The non-political distinction fails as a justification for federally commandeering state courts.

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142. Clearly, the Supreme Court determined that the state executive branch more closely resembled the state legislative branch. In *Printz*, the Court found little distinction between making law and merely enforcing it because policymaking almost always accompanies enforcement of the law. *See Printz*, 117 S. Ct. at 2380-81. This Note, however, does not purport to address the correctness of the *Printz* decision. For a general critique of the *Printz* decision and its effects on federalism, see Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180 (1998).

143. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); *see also supra* note 85.

144. *See* GRANT & NIXON, *supra* note 18, at 394; *see also* GLICK & VINES, *supra* note 19, at 40 (noting that only seven states select their judges purely by appointment).

145. *See* GLICK & VINES, *supra* note 19, at 36.

146. *See* GRANT & NIXON, *supra* note 18, at 396-98 (analyzing judges' role in politics). For a discussion of the five different systems utilized to select state judges and an analysis of the politics involved in each system, see GLICK & VINES, *supra* note 19, at 39-47.

C. The Permissive Creation of Federal Courts

Article III of the Constitution provides for the creation of lower federal courts as "Congress may from time to time ordain and establish."[147] Consequently, the existence of federal courts other than the Supreme Court results from Congress' discretionary power. If the lower federal courts were not created,[148] the implication would be that the state courts are subject to the direction of the Supreme Court. The adjudication of federal claims would be left to the states "by the simple expedient of not creating federal court juridiction to hear such claims."[149] Therefore, many argue that the discretionary creation of inferior federal courts provides support for the *Testa* result and for distinguishing state courts from state legislatures or state officials in the context of the commandeering debate.

Although in theory this argument is plausible, at the time of the *Testa* decision, lower federal courts already existod.[150] The federal commandeering of state judiciaries needs greator justification than a hypothetical argument. Thus, the permissive creation of the courts does not justify the federal comandeering of state courts.

V. REANALYZING THE *TESTA* DECISION

The *New York* and *Printz* Courts distinguished state legislatures and state executives from state courts to justify different treatment of the three branches,[151] but because state courts are not characteristically dissimilar from the other two branches, the distinctions discussed above fail to justify the commandeering of state courts permitted by *Testa*. Therefore, the question remains as to what permits the differing outcome of *Testa* when compared to *New York* and *Printz*. Because of this unresolved tension, a reanalysis of the Supreme Court's decision in *Testa* is required.

Testa v. Katt is a choice of law case. In declining to adjudicate Mr. Testa's claim, the Rhode Island Supreme Court was utilizing the

147. U.S. CONST. art. III, § 1.

148. For a discussion of the creation and jurisdiction of the lower federal courts, see generally John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203 (1997).

149. 32 AM. JUR. 2D *Federal Courts* § 3 (1995).

150. The lower federal courts even possessed jurisdiction to hear stato law claims in diversity cases. *See supra* note 28.

151. *See supra* notes 101 and 117 and accompanying text. *But see* Caminker, *supra* note 77, at 1029 (stating that nothing in *Testa* suggests that courts are different from the other branches).

rule which prevents its state courts from hearing a case involving the penal laws of another jurisdiction.[152] In *Testa*, however, the Supreme Court completely ignored or perhaps misunderstood the Rhode Island decision. The Court stated that "[e]xcept for the penalty feature," the Rhode Island court's decision was "strikingly similar" te the precedent in *Mondou*.[153] Yet, the "penalty feature" was the basis for Rhode Island's decision.[154] The Supreme Court also held that a state could not decline jurisdiction because of the state's "established policy" against such enforcement.[155] However, in doing so, the Court confused two different choice of law rules. Courts may refuse to entertain a foreign cause of action if its enforcement is contrary te the strong public policy of the forum court.[156] The state court decision in *Testa* was not based on this rule, but instead, on the penal law choice of law rule. The Court, relying on the Supremacy Clause, asserted its own authority over state courts. Unfortunately, its decision misconstrued the state's argument and therefore produced a result that lacks a proper basis.[157]

VI. RECONCILING *TESTA*: FEDERAL COMMANDEERING AS A JUDICIAL POWER?

As shown above, the *Testa* decision lacks a proper foundation, leaving open the question of why federal commandeering of state courts is permitted. Although the reasoning in *Testa* is incorrect, the doctrine created by the decision has been acceptod throughout more than fifty years of jurisprudence, including the recent *New York* and *Printz* decisions. Given the passage of time and the evolution of the law between *Testa* and the *New York* and *Printz* decisions, we must

152. *See supra* note 68.
153. Testa v. Katt, 330 U.S. 386, 392 (1946).
154. *See supra* note 65 and accompanying text.
155. *Testa*, 330 U.S. at 392-93.
156. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 90 (1969).
157. A better argument for the Court's decision in *Testa* would have focused on the jurisdictional characterizations of the choice of law rules. Although the states may be sovereign entities, the Court has refused to accept them as separate jurisdictions. *See supra* note 5. If the jurisdictions were the same, then the Rhode Island court misapplied the choice of law rule. *See supra* note 61. The *Testa* court alluded te this result but failed te develop it or for that matter illustrate any understanding of it beyond its Supremacy Clause analysis. *Testa*, 330 U.S. at 389; *see also* WENDELL, *supra* note 28, at 20 ("Yet our various court systems cannot be independent of one another as they would be if each of them belonged to a separate foreign country.")

consider whether there is any principled justification for continued adherence to the doctrine of federal commandeering of state courts.

One way to try to reconcile *Testa* with the later cases invalidating federal commandeering is to consider what branch of stato government is being commandeered. Thus one commentator, writing after *New York* but before *Printz*, suggested that the distinguishing factor is whether the branch is involved in lawmaking as opposed to law enforcement, and predicted on this basis that stato executive officials would fall under the same analysis as state courts and be commandeered by the federal government.[158] Instead, the *Printz* court held that state executive officials, like state legislatures, are immune from federal commandeering.

If *Testa*'s outcome cannot be reconciled based upon the state government branch being commandeered, perhaps its divergent outcome is explained by which federal branch is doing the commandeering. In *New York* and *Printz*, the Court held that Congress unconstitutionally commandeered stato legislatures and state executive officials.[159] In *Testa*, however, the Supreme Court commandeered the state court systems.[160] Although one commentator has argued that "the justifications for the absence of federalism as a limit on federal powers apply as much to the federal judiciary as to Congress,"[161] it may matter whether it is the federal courts—rather than Congress or the executive branch—that is doing the commandeering.[162]

Arguably, the Supreme Court has the power, unique amongst the branches of the federal government, to commandeer the states.[163] Indeed, the Court recognizes its own superior power te commandeer.[164] In *New York*, the Court found its power to

158. *See* Caminker, *supra* note 77, at 1028-29, 1053.

159. *See supra* notes 88-91, 130 and accompanying text.

160. *See supra* note 76 and accompanying text.

161. Chemerinsky, *supra* note 44, at 505. This limit is based on comity, i.e., respect for state governments. *See id.* at 509.

162. *See* Scott E. Gant, *Judicial Supremacy and Nonjudicial Interpretation of the Constitution*, 24 HASTINGS CONST. L.Q. 359, 367-73 (1997) (discussing roots and criticisms of judicial supremacy).

163. The Supreme Court in *New York* found such power in the Supremacy Clause and in Article III. New York v. United States, 505 U.S. 144, 178-79 (1992); *see also supra* notes 99-102 and accompanying text. One commentator suggests that it was Chief Justice John Marshall's expansive interpretation of the Supremacy Clause in *McCullough v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) that gave the Court such power. *See* Hoke, *supra* note 36, at 835-36.

164. The First Circuit found the power of a federal court te grant injunctive relief against a state official differed from the federal commandeering struck down in *New York* and *Printz*. *See* Strahan v. Coxe, 127 F.3d 155, 169-71 (1st Cir. 1997). Obviously, the First Circuit viewed the role of federal courts as distinct from the role of Congress.

commandeer rooted in Article III, while finding "[n]o comparable constitutional provision" giving Congress the same power.[165] When the *Printz* Court considered amplifying Congress's power, it found that this increase in power violated the Constitution's structural protections.[166] The *Printz* opinion also implies that the executive branch lacks constitutional authority to commandeer.[167] In effect, the Court's interpretation of the Constitution increases its portion of federal power over the states.

The origin of the commandeering also creates a plausible distinction under a different approach. Specifically, the Court's interpretation of the Tenth Amendment creates a distinction based on origin. The Tenth Amendment has been consistently viewed as leaving the states power not otherwise enumerated to Congress. If congressional power is the only power potentially prohibited by this amendment, then commandeering by the Court is distinguished from the commandeering by congress that was invalidated in *New York* and *Printz*.[168]

The strictest scrutiny under the Tenth Amendment is directed at legislative action.[169] At one point the Court implied that, where Congress has power, it can act as if the statos do not exist.[170] In *Garcia*, the Court addressed the Tenth Amendment and its ability to invalidate federal legislation.[171] Arguably, state courts are subject to federal commandeering by the Supreme Court because the interpretation of the Tenth Amendment restricts Congress's power, not the power of the Court.[172] Thus, the Tenth Amendment may provide a

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165. New York v. United States, 505 U.S. 144, 179 (1992).

166. *See supra* note 125 and accompanying text.

167. *See supra* note 121 and accompanying text.

168. Indeed, the Tenth Amendment was never even mentioned in *Testa;* instead, the Court's decision rests on its interpretation of the Supremacy Clause. Testa v. Katt, 330 U.S. 386, 389-94 (1947); *see also supra* Part III.A. Compare the *Testa* Court's conclusions regarding the Supremacy Clause with the assertions made by Professor Hoke, *supra* note 36, at 842 (stating that the Court's indulgence of the Supremacy Clause does "not have unequivocal doctrinal support as formulated"). This Note, however, does not purport te determine, or even te address, whether the Court has the authority to make such a determination.

169. *See* Abrams, *supra* note 39, at 738. One commentater criticizes the inconsistency with which the Court utilizes the Tenth Amendment: "Almost simultaneous with the Court's rejection of the Tenth Amendment as a limit on Congress, the Court relied on it to explain that the federal common law had 'invaded rights which . . . are reserved by the Constitution to the several states.'" Erwin Chemerinsky, *Federalism Not as Limits, but as Empowerment*, 45 U. KAN. L. REV. 1219, 1223 (1996) (quoting Erie R.R. v. Tompkins, 204 U.S. 64, 80 (1938)).

170. *See* Gibbons v. Ogden, 22 U.S. (1 Wheat.) 1, 196-97 (1824).

171. Garcia v. San Antenio Metro. Transit Auth., 469 U.S. 528, 556 (1985).

172. However, the Tenth Amendment has been used to restrict jurisdiction of federal courts. *See supra* text accompanying note 47. Professor Chemerinsky has noted: "Indeed, in numerous decisions over the past thirty years, the Court has used federalism to limit federal judicial power. . . . Similarly, the Court has invoked concerns about state sovereignty and

distinction between state court commandeering and the commandeering found unconstitutional in *New York* and *Printz*.

This conclusion, however, is contrary to an earlier policy asserted by the Court. "Courts are reluctant to adjudge any statute" as being contrary to the fundamental law of the Constitution because "[e]very presumption is to be indulged in favor of faithful compliance by Congress."[173] Against this assertion, the Supreme Court invalidated two "commandeering" acts of Congress while permitting its own commandeering of state courts.[174] Perhaps this distinction can be explained by the origin of state court commandeering and by the Tenth Amendment's implicit limitation on Congress's power. Nonetheless, state court commandeering must be revisited.

VII. CONCLUSION

Testa v. Katt placed state courts under federal direction, where they have remained for fifty-two years. Within the past seven years, the Court has found that congressional commandeering of state legislatures and stato law enforcement officials violates the Tenth Amendment. State courts, however, are not distinguishable from the other state governmental branches. In reconciling federal commandeering[175] of state courts, one essential conclusion results: It is the source of the commandeering at the federal level that permits the differing conclusions. The Supreme Court is willing te commandeer state courts but unwilling to permit congressional commandeering of state legislatures or state executives. Still, *Testa* has been accepted as a doctrine of federalism.[176] Given the nature of courts and the view of the Supreme Court, it is unlikely that a state court's cry of

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autonomy as justifications for restricting the scope of federal habeas corpus review." Chemerinsky, *supra* note 169, at 1224.

173. United States v. Butler, 297 U.S. 1, 67 (1936).

174. "As the Court did with separation of powers in the 1980s, the federalism decisions of the 1990s have reasoned deductively from assumed major premises and have largely ignored functional considerations in allocating power between federal and state governments." Chemerinsky, *supra* note 41, at 960.

175. For an argument that the friction between the federal and state governments is "conducive . . . to good government," see Candace H. Beckett, Essay, *Separation of Powers and Federalism: Their Impact on Individual Liberty and the Functioning of Our Government*, 29 WM. & MARY L. REV. 635, 641-42 (1988).

176. For a discussion of modern day federalism, see generally Richard E. Levy & Stephen R. McAllister, *Defining the Roles of the National and State Governments in the American Federal System: A Symposium*, 45 U. KAN. L. REV. 971 (1997).

sovereignty will ever produce the same treatment that has been given to its sister state branches.[177]

*Tonya M. Gray**

177. However, one commentator predicts that, in light of the *New York* opinion, "attempts to impose federal suhstantive and procedural requirements upon state courts will also be closely scrutinized." Lebow, *supra* note 9, at 683.

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