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State (Un)Separated Powers and Commandeering

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INTRODUCTION

One of the more controversial aspects of the Patient Protection and Affordable Care Act[1] (PPACA) is the requirement that a health care exchange for the comparison and purchase of approved health insurance plans be established in each state.[2] The PPACA mandates that if a state's government chooses not to establish an approved exchange, the federal government will do so, with or without state cooperation.[3] But in a potentially serious blow to the PPACA's successful implementation, the U.S. Supreme Court will soon decide a challenge contending that participants in federally established exchanges are not entitled to the tax subsidies available to participants in state-established exchanges.[4] One unfamiliar with the anti-commandeering doctrine might be forgiven for wondering: Wouldn't it be easier for the federal government to merely establish standards for the health care exchanges and order the states to establish and maintain them according to the specifications? But alas, the Supreme Court has held that while state officials must obey federal law and not interfere with its administration, Congress may not compel or otherwise "commandeer" state officials to legislate according to federal dictates[5] or to enforce federal law.[6] Notably, the Constitution allows state court judges to be compelled to hear federal claims to the extent they hear similar state claims.[7]

This Essay argues that the Court's line between state judges and other state officials is not as clean as the case law suggests. Specifically, early state constitutions, as well as the British constitutional order prevailing

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1. Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152 (2010) (codified as amended in scattered sections of 20, 21, 25, 26, 29, 42 U.S.C.).
2. 42 U.S.C. § 18031(b) (2012).
3. Abby Goodnough, *Liking It or Not, States Prepare for Health Law*, N.Y. TIMES, Sept. 24, 2012, at A1.
4. *See* King v. Burwell, 759 F.3d 358 (4th Cir.), *cert. granted*, 135 S. Ct. 475 (2014).
5. New York v. United States, 505 U.S. 144, 161–66 (1992).
6. Printz v. United States, 521 U.S. 898, 925–31 (1997).
7. *See id.* at 928–29; Testa v. Katt, 330 U.S. 386, 389–94 (1947).

before the U.S. Constitution was enacted—which did not separate powers as rigidly as the U.S. Constitution—combine to undermine the distinction. Taking this line of analysis seriously is not to deny that commandeering state executive or legislative officials raises federalism concerns. But paying more careful attention to early state conceptions of the separation of powers furthers federalist goals in another way: it engenders respect for the states' freedom to deviate from the model of government the U.S. Constitution establishes for the federal government. More generally, and perhaps more importantly, this Essay follows in the tradition of other scholarship in emphasizing that one should not look only to the U.S. Constitution to understand the American constitutional tradition: the many state constitutions throughout American history are a part of that tradition also.[8]

I. *PRINTZ* AND THE SEPARATION OF POWERS

In *Printz v. United States*,[9] the Supreme Court invalidated provisions of the Brady Handgun Violence Prevention Act that required local law enforcement officers to run background checks on prospective handgun buyers within their respective jurisdictions.[10] Writing for the majority, Justice Scalia grounded the decision in federalism concerns and reasoned that such schemes violated the Constitution based on the Court's precedents, the Constitution's structure, quotations from *The Federalist*, and the dearth of commandeering schemes in early congressional practice.[11] Following an earlier case that had invalidated commandeering of state legislatures,[12] *Printz* held that the structure of the Constitution permitted commandeering of only state judges but not other state officials.[13] The Court's commandeering jurisprudence has attracted considerable scholarly commentary, much of it critical.[14]

Though the bulk of the majority opinion (and the dissent) focused on federalism, one brief section also stated that the commandeering scheme at issue would violate the separation of powers, insofar as only the President is empowered to enforce federal law.[15] The section consisted of a breezy invocation of the Take Care Clause, citations to *The Federalist*, and an

8. *See* SANFORD LEVINSON, FRAMED: AMERICA'S FIFTY-ONE CONSTITUTIONS AND THE CRISIS OF GOVERNANCE 28–30 (2012).

9. 521 U.S. 898 (1997).

10. *Id.* at 933–34.

11. *Id.* at 905–29.

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

13. *Printz*, 521 U.S. at 928–29.

14. *See, e.g.*, Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1295–1302 (2009); Evan H. Caminker, Printz, *State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 201–02; Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 YALE L.J. 1104, 1106–09 (2013); 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, 824–30, 855–56 (1998); Gil Seinfeld, *The Jurisprudence of Union*, 89 NOTRE DAME L. REV. 1085, 1133–37 (2014).

15. *Printz*, 521 U.S. at 922–23.

article about the unitary executive theory.[16] This very short segment of the *Printz* opinion has been subjected to only occasional scholarly attention.[17] But prior scholarship *has* pointed out some problems with the kind of separation of powers reasoning deployed by the *Printz* Court: the explanation may not adequately account for voluntary state enforcement of federal law, such as enforcement pursuant to conditional spending regimes, that have consistently been sustained in the face of constitutional challenge, and it also fails to persuade that invalidating the offending legislation is the best remedy.[18]

But the separation of powers analysis in *Printz* also inspires a different approach to the commandeering issue, one that focuses on the separation of powers (or lack thereof) at the state level.

II. UNSEPARATED POWERS IN EARLY STATE CONSTITUTIONS

Early state constitutional arrangements and the eighteenth-century British constitutional order suggest not only that the line between state judges and other state officials was not always clear, but also that those who wrote and ratified the U.S. Constitution contemplated just such a state of affairs.

The Constitution contains no explicit requirement that states separate their powers. To be sure, the federal government must guarantee to each state "a Republican Form of Government"[19] and states may not deprive persons of "life, liberty, or property, without due process of law."[20] Though these clauses' meanings are underdetermined by the constitutional text—indeed, the contours of the due process requirement are constantly litigated—one can imagine that wholly unseparated powers might violate them. If, for example, the same state institution made, enforced, and interpreted law, and meted out criminal punishment absent independent review, that arrangement would likely raise serious due process concerns. But by and large, the Constitution gives states considerable leeway in organizing their own governments.[21]

There is no reason to assume that the federal model of separated powers was understood at the time of ratification to be the one that states would or should adopt. Until 2009, the U.K. House of Lords functioned as a court of

16. *Id.*

17. Among the articles that have examined whether the federal separation of powers forbids commandeering are Jay S. Bybee, Printz*, the Unitary Executive, and the Fire in the Trash Can: Has Justice Scalia Picked the Court's Pocket?*, 77 NOTRE DAME L. REV. 269 (2001), and Evan H. Caminker, *The Unitary Executive and State Administration of Federal Law*, 45 U. KAN. L. REV. 1075 (1997).

18. Caminker, *supra* note 17, at 1077–78.

19. U.S. CONST. art. IV. But that clause has been held nonjusticiable under the political question doctrine. *See* Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849).

20. U.S. CONST. amend. XIV, § 1. But judicial review of a state's separation of powers for compliance with due process also may be unavailable. *See* Dreyer v. Illinois, 187 U.S. 71, 84 (1902).

21. A fact that *Printz* itself recognized. *See Printz*, 521 U.S. at 908 n.2.

last resort in addition to the upper chamber of Parliament.[22] Specifically, the role of the king's governing council in the Middle Ages, which eventually evolved into Parliament, included a judicial function for centuries.[23] And though the jurisdiction of the House of Lords would expand and contract over time,[24] this was the system that prevailed at the time the U.S. Constitution was ratified and with which the ratifying generation would have been familiar.

In colonial America, moreover, many colonies had governmental institutions that blurred the lines among legislative, executive, and judicial officers.[25] Both Massachusetts and Virginia permitted their governors and legislative officials to decide judicial cases and make rules.[26] Nowhere were executive officers, legislators, and judges cleanly distinguished from one another.[27]

State practices soon after the Constitution was ratified may be similarly useful to interpreting constitutional meaning. The history of state constitutional conventions shows a considerable willingness to reject aspects of the federal model of separated powers.[28] Under the New York constitutions of 1777 and 1821, the state's highest court "consisted of the president of the senate, the senators, the chancellor, and the justices of the supreme court."[29] Similarly, the New Jersey constitution of 1776 provided that the governor sit on the appellate court of last resort.[30] Even when the U.S. Supreme Court encountered such blended institutions, it passed on them without comment. Consider *Calder v. Bull*,[31] an old chestnut of 1L Constitutional Law courses used to demonstrate the divide between natural law theories and legal positivism; there, the Connecticut state legislature sat essentially as a court, passing a law to overturn a ruling of a probate court and ordering a new hearing in the dispute.[32] And in 1902, admittedly much later in American history, the Court was explicit in its recognition of state authority to separate powers as the state saw fit:

> Whether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State. And its determination one way or the other cannot be an element in the inquiry, whether the due process of law prescribed by the Fourteenth Amendment has been

22. *See generally* GLENN DYMOND, HOUSE OF LORDS, LIBRARY NOTE: THE APPELLATE JURISDICTION OF THE HOUSE OF LORDS (2009), *available at* http://www.parliament.uk/documents/lords-library/lln2009-010appellate.pdf.
23. *Id.* at 2.
24. *See id.* at 2–6.
25. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 7–17 (3d ed. 2005).
26. *Id.* at 10–11.
27. *See id.* at 14.
28. JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 3, 97 (2006).
29. FRIEDMAN, *supra* note 25, at 91.
30. *Id.*
31. 3 U.S. (3 Dall.) 386 (1798).
32. *Id.* at 386–87.

> respected by the State or its representatives when dealing with matters involving life or liberty.[33]

Thus, not only can we be confident that unseparated powers are permissible under the Constitution, but the evidence provided by the colonial and early Republic experience suggests that such arrangements were understood to be entirely unremarkable at the time of federal constitutional ratification. This conclusion seriously undercuts the soundness of *Printz*'s distinction between state judges and other state officials.

III. IF STATE JUDGES MAY BE COMMANDEERED, OTHER OFFICIALS OUGHT TO BE SIMILARLY SUSCEPTIBLE TO CONGRESSIONAL COMMANDEERING

The historical evidence regarding the separation of powers at the state level suggests that if state judges can be compelled to hear federal claims, other state officials can be similarly commandeered. The Supremacy Clause does not distinguish between the different types of officials, and a functional distinction likely would have been unworkable at the time of the Founding and remains so today. Bearing these considerations in mind may help foster respect for federalism, albeit in a different way than the *Printz* Court thought was important.

The fuzzy lines separating state judges from other officers undermine the *Printz* distinction as a general matter. But the distinction is even weaker when one considers and rejects some of *Printz*'s justifications for the distinction. First, the decision noted that judicial commandeering was justified not by the Supremacy Clause generally but by the Judges Clause,[34] which binds state judges to respect federal law in conflict with state law.[35] But as the dissent and a number of scholars demonstrate, that is not a viable reading of the Judges Clause.[36] The clause instead should be read as a conflict-of-law rule for those cases when state judges hear claims in which state and federal laws contradict each other, rather than an affirmative grant of authority to the federal government to demand that state courts hear federal causes of action.[37] This reading makes sense of the clause's language pertaining to "contrary" state law.

Moreover, suggesting, as *Printz* appears to, that one can functionally distinguish judicial officers from other types of state officers may not be a

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33. Dreyer v. Illinois, 187 U.S. 71, 84 (1902).

34. U.S. CONST. art. VI, cl. 2 ("[T]he Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

35. *See* Printz v. United States, 521 U.S. 898, 907 (1997).

36. *See, e.g.*, *id.* at 968 (Stevens, J., dissenting); Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1036–38 (1995).

37. *See* Caminker, *supra* note 36, at 1036–37; Martin H. Redish & Steven G. Sklaver, *Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism*, 32 IND. L. REV. 71, 80–81 (1998) (arguing that the Judges Clause represents means of implementing power to commandeer state courts, rather than the source of that power).

sound rule, as tensions within the *Printz* opinion itself demonstrate. Simply put, when titles and functions are blended as much as they were in some early state constitutions, and as much as they might be in a hypothetical future state system, it is hard to distinguish between a court and an executive body. *Printz* noted that the federal government defending the Brady law could find no refuge in a prior case upholding a requirement that a state administrative agency apply federal law while acting in a judicial capacity.[38] But earlier in the opinion, the Court discussed early acts of Congress requiring state courts, for example, to transmit citizenship applications to the Secretary of State and order the deportation of alien enemies in wartime.[39] Those tasks seem fundamentally executive in nature, but the Court minimized their significance because the statutes only compelled judges to act, as opposed to other types of officials. That reasoning implies that functional distinctions are not enough; one must look to what type of state official is acting. But in our constitutional order, where states are afforded considerable freedom to structure their own governments, it may not always be possible to determine when a state official qualifies as a judge. Moreover, the extent of states' discretion to assign nonjudicial functions to judges and judicial functions to other officers may go well beyond the minor examples discussed in *Printz*—examples which may not show a real difference between state systems and the federal separation of powers.[40] The minor executive tasks distinguished away in *Printz* are different in kind from the circumstances in *Calder* and under early state constitutional provisions naming legislators and executive officials as members of state courts. There is nothing in the Constitution to prevent states from adopting similar structures in the future, and a rule that Congress may commandeer judges but not others is unlikely to be workable if any do.

Ultimately, the source of authority for judicial commandeering makes no difference to this analysis. For example, whether the power to compel state courts to hear federal claims is derived from Congress's Article I powers[41] or from some structural constitutional principle of union,[42] the distinction between judges and other officials as a matter of state constitutional structure is untenable and creates serious doubt about the viability of the *Printz* distinction.

It is worth noting briefly that undercutting the distinction between judicial officers and other state officials also could suggest an alternative conclusion: that the commandeering of any state officials, including

38. *Printz*, 521 U.S. at 929 (majority opinion) (distinguishing FERC v. Mississippi, 456 U.S. 742 (1982), on the grounds that it upheld a federal statute that only established preconditions for continued state regulation).

39. *Id.* at 905–06.

40. For instance, by statute, the Chief Justice of the United States serves on the Board of Regents of the Smithsonian Institution, a job that also seems executive rather than judicial in nature. *See* 20 U.S.C. § 42 (2012). But I have seen no suggestion that assigning this task to a judicial officer offends the federal separation of powers.

41. *See* Redish & Sklaver, *supra* note 37, at 88–90.

42. *See* Seinfeld, *supra* note 14, at 1133–37.

judges, is contrary to the Constitution's federalist structure. But that conclusion seems untenable in light of the long history of state judges being expected to hear federal claims on an equal footing with state claims. To overrule *Testa v. Katt*[43] would upset the applecart in a way that rethinking the commandeering decisions would not. First, *New York*, *Printz*, and the older commandeering cases on which they relied are more recent. Second, as *Printz* points out as one basis for its holding, it is difficult to find many, if any, other examples of Congress attempting the sort of commandeering schemes invalidated in those cases. Thus, the damage to settled expectations resulting from a reassessment of the commandeering cases would be much less than from freeing state courts to reject federal claims for any reason they choose.

CONCLUSION

This Essay provides one more reason to be skeptical of the Supreme Court's reasoning in the commandeering cases. *Printz*'s separation of powers discussion is unsatisfying to say the least. But the case's holding is rooted in federalism. Others have critiqued the historical foundations of—and the policy objections to—that rationale. That is well beyond the scope of this Essay. Rather, I hope that my argument suggests the possibility that recognizing a controversial federal commandeering power would not necessarily be an affront to federalism. Instead of superimposing assumptions about the federal separation of powers onto the states, respecting the alternative structural constitutional arrangements that states may choose might actually enhance federalist goals.

43. 330 U.S. 386 (1947).