IN THE BEGINNING ARE THE STATES

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My thesis is borrowed from Henry Hart. Hart observed that the Constitution, the federal government, and federal law are a superstructure built on top of something else–the states.[1] I intend to make this mundane observation seem strange in order that one might understand it more deeply. To that end, I will discuss four areas in which the Constitution is silent.

The first area concerns the origin of the states. Congress has power to admit new states into the Union, but there is no suggestion in the Constitution that Congress can create one.[2] The second area is related to *Marbury v. Madison*[3] and *Marbury*'s metaphorical relation, its evil twin sibling, *Luther v. Borden*.[4]

Marbury is the classic example of the way in which the practice we call judicial review derives from the nature of courts as courts. There was a plaintiff named Marbury. He wanted his piece of paper. He said he had a legal entitlement to it. The Court, in order to know what law to apply to Marbury's case, needed to identify the applicable law. In order to do that, it turns out, the Court had to do judicial review. The Court had to determine the validity of a statute by asking whether it was consistent with the Constitution.[5]

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1. *See* Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 495 (1954).

2. New States may be admitted by the Congress into this Union; but no new State shall be

> formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

U.S. CONST. art. IV, §3, cl. 1.

3. 5 U.S. (1 Cranch) 137 (1803) (holding that Congress could not expand the original jurisidiction of the Supreme Court beyond the jurisdiction specifically authorized by the Constitution).

4. 48 U.S. (7 How.) 1 (1849) (political branches' decision as to identity of lawful state government is binding on the Judiciary).

5. *See Marbury*, 5 U.S. at 177-78.

Luther is *Marbury*'s twin because it came to the Court as an ordinary action in trespass, just as *Marbury* was about private rights. Members of the militia broke into a private house, and the householder brought a lawsuit. It turned out that in order to decide the lawsuit, the Court first had to decide which was the legitimate government of the State of Rhode Island, the charter government or the rebel government led by Thomas Dorr.[6] This is an extremely difficult question to answer. To begin with it is hard to determine whether this is a matter of federal or state law.

If *Luther* presents a question of Rhode Island law, it is one that defies the *Erie* Doctrine.[7] The Court could not ask the Rhode Island courts for guidance, because it could not rely upon the Rhode Island courts without knowing what the legitimate government of Rhode Island was–and that was the very question the Court was trying to answer. If, on the other hand, *Luther* presents a question of federal law, there are no resources in federal law that indicate how it should be answered. There is certainly nothing about this question in the Constitution. That document does not address the source of state sovereignty, even though that sovereignty is the substratum on which the national government rests.

Luther is *Marbury*'s evil twin because the Court avoided this issue, even though the case was a straightforward action in trespass. The Court decided that the question was one left to the "political" branches of the national government.[8] The Court was terrified of having to look into the abyss of the nature of state sovereignty in the American system.

The third area concerns *Printz v. United States*.[9] It has been much

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6. In *Luther*, the defendants sought to justify their trespass on the basis of official privilege. The plaintiff responded that this privilege was not available because the organization for which the defendant worked was not the legitimate government of Rhode Island because the people of Rhode Island, in an exercise of popular sovereignty, had changed their government. *See Luther*, 48 U.S. at 1-2.

7. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State.").

8. [T]he Constitution of the United States, as far as it has provided for an emergency of

> this kind, and authorized the general government to interfere in the domestic concerns of a State, has treated the subject as political in its nature, and placed the power in the hands of that department.

Luther, 48 U.S. at 42.

9. 117 S. Ct. 2365 (striking down provisions of the Brady Handgun Violence Prevention Act that required state law enforcement officers to help administer a

observed that *Printz* does not make the sort of straightforward textual argument that one might hope it would offer.[10] I want to talk about one piece of textual support for *Printz*. This textual point illustrates that the constitutional role of the states, while fundamental, is largely implicit.

The textual support for *Printz* is found in the Militia Clauses of Article I, Section 8,[11] provisions the Court did not address in *Printz*.[12] These clauses authorize Congress to provide for the calling out of the state militias "to execute the Laws of the Union, suppress Insurrections and repel Invasions"[13] and also to organize, equip, and discipline "such Part of them as may be employed in the Service of the United States."[14] This specific grant of power suggests, by *expresio unius est exclusio alterius*, that Congress has no other power to commandeer or otherwise

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federal, handgun-control policy by conducting background checks on handgun purchasers).

10. *See* Evan H. Caminker, Printz, *State Sovereignty, and the Limits of Formalism*, 1997 Sup. Ct. Rev. 199, 200 (1997) ("[A]ll but the most unreflective formalists should find its reasoning process troubling. More than any other decision in the recent antinationalist movement, *Printz* suggests that something is amiss in the way the Court justifies its vision of federal-state relations."); 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 (1998) (describing Justice Scalia's textual argument as "gravely inadequate").

11. U.S. CONST. art. I, § 8, cls. 15, 16.

12. In *Printz*, the Court did not address the Militia Clauses of Article I, Section 8, but instead limited its discussion to the Extradition Clause, the Full Faith and Credit Clause, and the Supremacy Clause. *See Printz*, 117 S. Ct. at 2371-72. Professor Caminker was among those commentators who soon observed that the Court had missed the opportunity to buttress its textual argument by failing to address the Militia Clauses as well, although he suggests this attempt would have been unpersuasive. *See* Caminker, *supra* note 10, at 212-13 & nn.41-42 (1997). Professor Bybee has suggested that the specific mechanism for federal intervention described in the Domestic Violence Clause, U.S. CONST. art IV, § 4, cl. 3, should be read to strengthen the textual argument supplied by the Militia Clauses:

> The Domestic Violence Clause was also viewed as a disability on the federal government and a reservation of state authority, a kind of Tenth Amendment for crime. Through the Militia Clause, the Framers authorized to Congress the use of the militia to execute the laws of the United States, repel invasions, and suppress insurrections. The Domestic Violence Clause, on the other hand, was seen as a bill of rights for the states, ensuring that the United States would not abuse its authority over the militia to displace state power over domestic disturbances. The Domestic Violence Clause dispelled any thought that the United States had a general authority to address crime.

Jay S. Bybee, *Insuring Domestic Tranquility:* Lopez, *Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause*, 66 GEO. WASH. L. REV. 1, 79 (1997).

13. U.S. CONST. art I, § 8, cl. 15.

14. U.S. CONST. art I, § 8, cl. 16. In the execution of this second power the Constitution "reserv[es] to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." *Id.*

compel the service of state executive officials in the enforcement of federal regulatory regimes.[15] Moreover, when the state militias are called out they come under the command of the federal executive, which is to say the president. The statute in *Printz* did not follow this model, as Justice Scalia noted while making a different argument.[16] In light of the Militia Clauses, the act at issue in *Printz* is even more suspect. Perhaps Congress should have provided for state participation in enforcing the Brady Act by calling out the state militias. In any event, the fact that Congress has that specific power suggests that it is all the power Congress has.

The important observation to be made is how strange it is that a principle so fundamental to the relations between the state and national governments is not expressed directly, but instead must be inferred from what the Constitution does not say. The explanation for this is that the status of the states is not made explicit because the states, and much about their role, is taken for granted.

The fourth area is about what I will call the real Constitution: those provisions of the Constitution that set out the structure of government and bind government without the need to be interpreted by the federal courts or enforced by any authority, because they are both clear and fundamental to the operation of the national government. This Symposium's earlier discussion of formalism, functionalism, and the separation of powers reminds us of the importance of these truly basic structural rules, including the rules that allocate the authority to construe other rules.[17]

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15. *But see* Caminker, *supra* note 10, at 213 & n.42 (arguing that the Court in Printz made "an unjustified assumption that these particular grants of commandeering authority imply a more general anti-commandeering default rule"); *id.* n.42 ("The *canon expressio unius est exclusio alterius* does not necessarily apply here, as there is a plausible explanation of why the Constitution would sensibly include these specific commandeering provisions even if the Necessary and Proper Clause generally authorizes commandeering pursuant to Congress's Article I, Section 8 powers."); *see also* Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180, 2185 n.13, 2197 n.79 (1998) (arguing that "[a]lternative explanations of the Militia Clauses do not support the *expressio unius* inference").

16. *See* Printz v. United States, 117 S. Ct. 2365, 2377-78 (1997) (stating that commandeering state executive officials undercuts the unitary nature of the federal executive branch and concluding that this "unity would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws").

17. *See, e.g.*, Frank H. Easterbrook, *Formalism, Functionalism, Ignorance, Judges*, 22 HARV. J.L. & PUB. POL'Y 13 (1998); William N. Eskridge, Jr., *Relationships Between*

To understand the importance of the truly basic structural rules, consider the standard contrast between formalism and functionalism. When it comes to separation of powers issues, Justice White was the arch-functionalist. He considered the relations between the coordinate branches of government to be loosely governed by standards rather than strict rules.[18] Yet in taking this position, Justice White relied on the extremely formalistic norm that the Supreme Court is itself the final arbiter in matters of constitutional interpretation. That rule is ruthlessly formalistic in that it is both very clear and entirely rigid. The rule is also highly majoritarian: five beats four even if the four are right. No one believes that the Court is going to be right all of the time, but a central feature of a formal rule is that its clarity is the reason it is followed and this is true even when its purpose–in this case, correctly interpreting the law–is not always being advanced.

The real Constitution includes only those provisions that do not depend on the Supreme Court for interpretation or enforcement.[19] I also will define it to include only those norms that are followed because they are written down in the old document, not those that are followed because people today think they are a good idea. Departures from such norms, I hypothesize, would not be allowed by the people even if Congress, the President, and the Supreme Court collaborated to accomplish them. Such departures would be allowed only through the process of constitutional amendment.

What is the real Constitution? Basically, it consists of numbers. Two,[20] four,[21] and six[22] are the main numbers, and then there is a

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Formalism and Functionalism in Separation of Powers Cases, 22 HARV. J.L. & PUB. POL'Y 21 (1998).

18. *See, e.g.*, INS v. Chadha, 462 U.S. 919, 972-74 (1983) (White, J., dissenting) (describing the legislative veto as "an important if not indispensable political invention that allows the President and Congress to resolve major constitutional and policy differences" and stating that it is "irresponsible" for the Court "to strike an entire class of statutes based on consideration of a somewhat atypical and more readily indictable exemplar" of federal legislation).

19. *See* Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 404 (1985) ("The focus of constitutional litigation on certain substantive areas is importantly . . . a product of linguistic design, in which relatively precise language forestalls litigation with respect even to matters of great moment . . . .").

20. *See* U.S. CONST. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . .").

21. See U.S. CONST. art. II, § 1, cl. 1 ("[The President] shall hold his Office during the Term of four Years . . . .").

22. *See* U.S. CONST. amend. XVII, cl. 1 ("The Senate of the United States shall be

non-number, life tenure.[23] That is the fundamental structure, the iron frame that supports the rest. Suppose there were a statute, passed by both houses of Congress, signed by the President, and approved by the Supreme Court in litigation, providing that the term of Representatives shall be four years. That law simply would not work. I think people would not follow it even if it were able to get that far. It is not that people are particularly committed to two-year terms, but rather that they are committed to the basic structural rules set out in the Constitution. If the Constitution were amended to provide for a four-year term, there probably would not be a civil war over the issue.

Where are the states to be found in the real Constitution? They are barely mentioned. High-level structural rules that actually make a difference in the constitutional scheme are almost exclusively about the national government. The states appear in the Article V amending process itself, but they appear very little in the fundamental structure. Once again, that is because they are presupposed; they are *before* the Constitution. The truly interesting question is whether this aspect of the constitutional structure means anything today.

Is the Framers' conception of the states as independent political entities with an independent political connection to the people, and independent loyalties from the people, still relevant in the modern constitutional order?[24] I believe it is. It is not true in the way it was in 1789, but it is still true in at least one very important way–the way described by Madison in *The Federalist* No. 46.

Perhaps the most important function of the states is the one we can only hope they will never have to perform. It is a function that only the states could perform if we were actually to confront the problem that most troubled both the Federalists and the Anti-Federalists alike. That problem was a national government that had come un-moored from the people and developed a real will of its own, thus turning into the kind of tyranny that the Glorious Revolution of 1688 and our own Revolution were designed to

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composed of two Senators from each state, elected by the people thereof, for six years . . . .") (amending U.S. CONST. art. I, § 3, cl. 1, providing for the election of senators by state legislatures).

23. *See* U.S. CONST. art. III, § 1, cl. 2 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . . .").

24. For a discussion of the Founders' conception of the independent political bond between the people and the states, see Larry Kramer, *But When Exactly Was Judicially Enforced Federalism "Born" in the First Place?*, 22 HARV. J.L. & PUB. POL'Y 123 (1998).

overthrow. In *The Federalist* No. 46, Madison explained that the continued existence of the states as live political entities is America's best insurance policy against the transformation of our national government into a tyranny.[25]

Suppose there were an attempted military coup in this country. What would the Army do? One thing that would make it easier for scrupulous soldiers not to follow those organizing the coup is the possibility of aligning themselves with the state national guards and the state governors. The states, as Publius wrote, would become centers of resistance.[26] Such resistance would be much easier to organize with political entities and leaders the people already knew and trusted, and with complete governmental structures that could largely replace the national government.

The States are an insurance policy. We are very lucky they are there. Let us hope we never need them.

25. *See* THE FEDERALIST NO. 46, at 319-23 (James Madison) (Jacob E. Cooke ed., 1961).
26. *See id.* at 321.