

# FORMALISM AND STATE SOVEREIGNTY IN *PRINTZ V. UNITED STATES*: COOPERATION BY CONSENT

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In *Printz v. United States*,<sup>1</sup> the Supreme Court expressly rejected functionalism as a consideration in the state sovereignty context, replacing it with a structural formalism. It is the thesis of this article that academic doubts about the historical analysis and jurisprudential precedents relied upon by the *Printz* majority should not overshadow the relevance of this change in doctrine. As Chief Justice Rehnquist has explained, “[w]hen an opinion issues for the Court, it is not only the result, but also those portions of the opinion necessary to that result by which we are bound.”<sup>2</sup> An inviolable sovereignty rule was necessary to the *Printz* holding.

Until last year, the Court had firmly repudiated its nineteenth-century decision, *Kentucky v. Dennison*,<sup>3</sup> for its absolute prohibition against the commandeering of any state officer by the federal government.<sup>4</sup> Nevertheless, former Acting Solicitor General Walter Dellinger describes his defense of the Brady Act in *Printz v. United States*, in the following two sentences: “I told the Court, ‘If you do this, you’ll have to bring back the discredited holding of *Kentucky v. Dennison*.’ And they

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1. 117 S. Ct. 2365 (1997).

2. *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1129 (1996).

3. 65 U.S. 66 (1860).

4. See *id.* at 107-08. For the Supreme Court’s later repudiation of *Dennison*, see *Puerto Rico v. Branstad*, 483 U.S. 219, 227 (1987) (overruling *Dennison*); *FERC v. Mississippi*, 456 U.S. 742, 761 (1982) (“this rigid and isolated statement from *Kentucky v. Dennison*—which suggests that the States and the Federal Government in all circumstances must be viewed as coequal sovereigns—is not representative of the law today.”); see also *Printz*, 117 S. Ct. at 2400 n. 30 (1997) (Stevens, J., dissenting) (describing *Dennison* as “ill starred”).

said, 'OK.'"<sup>5</sup> Although the *Printz* decision was more complex than this exchange, there is much truth to the description. *New York v. United States*,<sup>6</sup> the recent precedent in which the Supreme Court held a federal statute unconstitutional on Tenth Amendment grounds,<sup>7</sup> involved the commandeering of the state's legislature.<sup>8</sup> *Printz* involved the commandeering of a local sheriff,<sup>9</sup> and the Court saw no distinction between the two cases.<sup>10</sup> Justice Scalia, writing for the Court, held that Congress may not command a state's officers to administer a federal regulatory program.<sup>11</sup>

In *Dennison*,<sup>12</sup> the Supreme Court interpreted the Extradition Clause<sup>13</sup> to create a duty for the state executive to deliver fugitives on proper demand, and at the same time held that the federal courts could not require performance of this duty.<sup>14</sup> Chief Justice Taney declared unequivocally that "the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it."<sup>15</sup> This rule was the high water mark of structural federalism, but it fell into decline within fifteen years of being decided.<sup>16</sup> And over 125 years later, in *Puerto Rico v. Branstad*,<sup>17</sup> the Supreme Court dealt the *Dennison* rule its death blow,

5. Conversation with Professor Dellinger, Spring 1998.

6. 505 U.S. 144 (1992).

7. See *id.* at 177 ("Whether one views the take title provision as lying outside Congress' enumerated powers, or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the Federal structure of our Government established by the Constitution.").

8. See *id.* at 176 ("[t]he act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program") (citations omitted).

9. See *Printz*, 117 S. Ct. at 2369.

10. See *id.* at 2383 ("We adhere to that principle [of dual sovereignty] today, and conclude categorically, as we concluded categorically in *New York*: 'The Federal Government may not compel the States to enact or administer a federal regulatory program.'") (quoting *New York*, 505 U.S. at 188).

11. See *id.* at 2384.

12. 65 U.S. 66 (1860).

13. U.S. CONST. art. IV, §2.

14. See *Dennison*, 65 U.S. at 107-09.

15. *Id.* at 107.

16. See *Board of Liquidation v. McComb*, 92 U.S. (2 Otto) 531, 541 (1876) (stating that "when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance," even if the order is sought in federal court against a state officer).

17. 483 U.S. 219 (1987).

announcing that the rule “rests upon a foundation with which time and the currents of constitutional change have dealt much less favorably [than the *Dennison* Court’s Extradition Clause interpretation]. If [the rule] seemed clear to the Court in 1861, facing the looming shadow of a Civil War . . . basic constitutional principles now point as clearly the other way.”<sup>18</sup> The *Branstad* Court continued, “[t]he fundamental premise of the holding in *Dennison*—that the States and the Federal Government in all circumstances must be viewed as coequal sovereigns—is not representative of the law today.”<sup>19</sup>

*Printz* suggests that *Dennison* may not only have withstood the “currents of constitutional change,” but that, as a practical matter, *Dennison* is quite representative of current law, having the potential to overturn the administration of numerous federal statutes.<sup>20</sup> The *Printz* holding prohibiting the commandeering of state officers announced a bright line rule under the constitutional requirement of “dual sovereignty.”<sup>21</sup> In light of this rule, Justice Scalia compared the status of any statute jeopardized thereby with that of the statutes at issue in *INS v. Chadha*,<sup>22</sup> “in which the legislative veto, though enshrined in perhaps hundreds of federal statutes, most of which were enacted in the 1970s and the earliest of which was enacted in 1932 . . . was nonetheless held unconstitutional.”<sup>23</sup> The *Printz* majority discarded any possibility of balancing tests

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18. *Id.* at 227.

19. *Id.* at 228 (citing *FERC v. Mississippi*, 456 U.S. 742, 761 (1982)).

20. Justice O’Connor concurred with the *Printz* majority with the caveat that the Court was not deciding the constitutionality of “purely ministerial reporting requirements.” *Printz*, 117 S. Ct. at 2385 (O’Connor, J., concurring). However, such reporting requirements still seem to necessitate the commandeering of state executive officers, and the *Printz* opinion declares that no balancing tests are permissible. *See id.* at 2384; *see also id.* at 2383 n.17 (“The Brady Act does not merely require CLEOs [chief law enforcement officers] to report information in their private possession. It requires them to report information that belongs to them in their official capacity . . . . In other words, the suggestion that extension of this statute to private citizens would eliminate the constitutional problem posits the impossible.”). For examples of statutes which *Printz* may jeopardize, see Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1003, n.3 (1995).

21. *Printz*, 117 S. Ct. at 2384 (“such commands are fundamentally incompatible with our constitutional system of dual sovereignty”); *see also* *Gregory v. Ashcroft*, 501 U.S. 452, 457-58 (1991) (stating that the constitutional structure requires joint sovereignty between the federal government and the states).

22. 462 U.S. 919 (1983).

23. *Printz*, 117 S. Ct. at 2376.

or case-by-case analysis.<sup>24</sup> The Court also rejected, *a fortiori*, any distinction between policymaking and ministerial functions by state officials—thus making the ruling an anti-functional one.<sup>25</sup>

The foundation of the *Printz* decision is a belief in the inviolability of state sovereignty. Contrary to one recent commentary, *Printz* need not raise any questions about the continued role of cooperative federalism.<sup>26</sup> Nor, as Professor Vicki Jackson suggests, is the *Printz* variety of federalism potentially unworkable.<sup>27</sup> States would continue to enforce federal regulatory programs whenever they consented to cooperate, which is their constitutional prerogative. Any changes in cooperation between federal and state governments would be based on local politics. Although *Dennison* is never mentioned by the majority, this article will show how the structuralist reasoning in *Printz* is neither dictum nor a departure from the Constitution, and that *Printz* necessarily requires the overturning of all federal statutes violative of the *Dennison* rule. The few exceptions are those statutes that are enacted as a direct implementation of constitutional clauses that expressly require—or expressly authorize Congress to

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24. See *id.* at 2384 (“The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.”).

25. See *id.* at 2381 (suggesting the legal standard proposed by the Federal government—distinguishing policymaking functions from ministerial functions—would create a line as nebulous as the one which divides constitutional from unconstitutional delegations of power, and concluding that “[e]ven assuming, moreover, that the Brady Act leaves no ‘policymaking’ discretion with the states, we fail to see how that improves rather than worsens the intrusion upon state sovereignty”). The Court was even more dismissive of the dissent’s suggestion that the Brady Act escaped the *New York* holding because it was directed to individuals, rather than states. See *id.* at 2382 (“To say that the Federal Government cannot control the state, but can control all of its officers, is to say nothing of significance.”).

26. See Note, *Federalism—Compelling State Officials to Enforce Federal Regulatory Regimes*, 111 HARV. L. REV. 207, 217 (1997) (“Despite its invocation of a ‘categorical’ rule, *Printz* raised more questions than it answered and burdened Congress and the courts with the task of deciding what role, if any, the notion of cooperative federalism can continue to play in the constitutional structure.”).

27. See Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2182 (1998) (“*Printz v. United States* appears to offer a relatively clear line that Congress may not transgress—requiring (rather than inducing) state officials to be the enforcement agents of federal laws. This line, although offering some benefits of clarity, is not well grounded in history and does not necessarily inhere in the pragmatics of a workable federalism.”).

require-affirmative state action.<sup>28</sup> The result is a federal system in which state and federal governments are confined to their proper spheres.<sup>29</sup>

## FACTS

In 1993, Congress amended the Gun Control Act of 1968<sup>30</sup> (hereinafter "GCA") by passage of the Brady Act, which required the Attorney General to establish a national instant background check system for gun purchasers by November 30, 1998.<sup>31</sup> Interim provisions required the firearms dealer to gather certain information about purchasers and provide it to the chief law enforcement officer (hereinafter "CLEO") of the purchaser's residence.<sup>32</sup> Subject to a few exceptions, the firearms dealer was then required to wait five business days before selling the handgun, unless the CLEO notified the dealer that the CLEO had no reason to believe the transfer would be illegal.<sup>33</sup>

A dealer was permitted to sell a gun immediately if the purchaser had a state handgun permit issued after a background check,<sup>34</sup> or if state law provided for a background check.<sup>35</sup> However, if a state did not provide for either of these alternatives, whenever a CLEO was notified of a proposed transfer, the CLEO would have to "make a reasonable effort" to determine within five business days whether the transfer would violate federal, state, or local law.<sup>36</sup> This "reasonable effort" would include "research in whatever state and local

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28. An example of such a clause would be the Extradition Clause, U.S. CONST. art. IV, § 2. See *Printz*, 117 S. Ct. at 2371-72, 2372 n.3. According to the Extradition Clause:

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

For other examples, see *Caminker*, *supra* note 20, at 1031.

29. The benefits of a dual sovereignty system are a matter of contention. See, e.g., *Jackson*, *supra* note 27, at 2196; Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1564-66 (1994).

30. 18 U.S.C. § 921-28 (1994).

31. Pub.L. No. 103-159, as amended by Pub.L. 103-322, 103 Stat. 2074, note following 18 U.S.C. § 922 (1994).

32. See 18 U.S.C. § 922(s)(1)(A)(i)(I)–(IV) (1994).

33. See *id.* § 922(s)(1)(A)(ii).

34. See *id.* § 922(s)(1)(C).

35. See *id.* § 922(s)(1)(D).

36. *Id.* § 922(s)(2).

recordkeeping systems are available and in a national system designated by the Attorney General."<sup>37</sup> Although the Brady Act did not require the CLEO to take any action if the transfer was unlawful, if the CLEO did notify the firearms dealer, he was required to provide the purchaser with a written statement of the reasons for the purchaser's ineligibility if requested to do so.<sup>38</sup> Furthermore, the CLEO was required to destroy all records in his possession relating to the transfer if no basis for rejecting the sale was discovered.<sup>39</sup> The GCA also stated that any person who "knowingly violates [the section of the GCA amended by the Brady Act] shall be fined under this title, imprisoned for no more than a year, or both."<sup>40</sup>

Two CLEO's—Jay Printz of Ravalli County, Montana, and Richard Mack of Graham County, Arizona—separately challenged the interim provisions as unconstitutional.<sup>41</sup> In each case, the district courts held the interim provisions unconstitutional, but severed them from the rest of the statute.<sup>42</sup> The Ninth Circuit consolidated the cases and reversed both decisions, upholding all of the interim provisions.<sup>43</sup> The Supreme Court granted certiorari and reversed the Ninth Circuit.<sup>44</sup>

### ANALYSIS

Justice Scalia began the majority opinion in *Printz* with the following comment: "Because there is no constitutional text speaking to this precise question, the answer to the CLEO's challenge must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court."<sup>45</sup> This language is unusual, not because such an absence of text is uncommon in constitutional jurisprudence, but because the Court's final conclusion is so

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37. *Id.*

38. *See id.* § 922(s)(6)(C).

39. *See id.* § 922 (s)(6)(B)(i).

40. *Id.* § 924(a)(5).

41. *See Mack v. United States*, 856 F. Supp. 1372, 1375 (D. Ariz. 1994); *Printz v. United States*, 854 F. Supp. 1503, 1510-11 (D. Mont. 1994).

42. *See Mack*, 856 F. Supp. at 1375; *Printz*, 854 F. Supp. at 1519-20.

43. *See Printz v. United States*, 66 F.3d 1025 (1995).

44. *See Printz*, 117 S. Ct. at 2365.

45. *Id.* at 2370.

uncompromisingly formalist.<sup>46</sup> In order to determine which arguments actually drive the majority opinion, it is helpful to start with the Court's conclusion and work backwards to find premises that require a bright line test. The *Printz* Court sets forth the following rule:

The Federal Government may neither issue directives requiring States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.<sup>47</sup>

Justice Scalia looked to three sources for this decision.<sup>48</sup> Of these three lines of analysis, two of them—historical understanding and practice, and constitutional jurisprudence—are at best *supportive* of a bright line rule. As will be shown below, neither argument standing alone is strong enough to justify the majority holding. However, the *Printz* decision is *absolutely required* by Justice Scalia's structural analysis, and thus it is the structural analysis that decides the case.

#### A. Historical Understanding and Practice

A comparison of the majority and dissenting opinions shows much ambiguity in the historical understanding, an understanding which the Court admits was not dispositive.<sup>49</sup>

Justice Scalia relied on early congressional enactments and the statements of the Framers for evidence that Congress may not commandeer state officers.<sup>50</sup> The majority's belief in the importance of state sovereignty colors this analysis, however, because the *Printz* Court placed the burden on the government to show at least some evidence that the Founders did not believe state consent to be necessary when state officers administered federal programs under early enactments.<sup>51</sup>

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46. See *id.* at 2383 (citing *New York* in defense of apparently formalistic results where the "form of our government" is at stake) (quoting *New York*, 505 U.S. at 187). See *infra*.

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

48. See *id.* at 2370.

49. See *id.* at 2376 ("The constitutional practice we have examined above tends to negate the existence of the congressional power asserted here, but is not conclusive.").

50. See *id.* at 2369-76.

51. See *id.* at 2372 ("But none of these statements necessarily implies-what is the

In response to the government's argument that the commandeering of state officers was required by the earliest Congresses,<sup>52</sup> which implies that the Constitution permitted such practices, Justice Scalia noted that such enactments "'provide contemporaneous and weighty evidence' of the Constitution's meaning,"<sup>53</sup> but added that "[c]onversely if, as petitioners contend, earlier Congresses avoided use of this highly attractive power, we would have reason to believe that the power was thought not to exist."<sup>54</sup> This response was vehemently objected to by Justice Stevens, however, on the theory that such a principle would have undermined many of the New Deal statutes.<sup>55</sup> In addition, pre-ratification history is much more compelling than post-ratification history.

Even if the Court's early enactments test was uncontested, however, the relevant enactments may be seen either as a consistent avoidance of Congress's coercion of the participation of state officials or, alternatively, as a frequent use of the practice, depending upon how the terms are defined.

The majority defined the use of state officials as not including the commandeering of state judiciaries in enforcing federal law.<sup>56</sup> Thus, the use of state judges for enforcement of federal law, a prevalent early practice, is discarded as irrelevant to the question of state sovereignty because the Madisonian Compromise,<sup>57</sup> the Supremacy Clause,<sup>58</sup> and the

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critical point here—that Congress could impose these responsibilities without the consent of the states.”).

52. See Brief for United States, 28 (claiming that “the earliest Congresses enacted statutes that required the participation of state officials in the implementation of federal laws.”); *Printz*, 117 S. Ct. at 2370 (citing naturalization statutes which required state court participation, e.g. Act of Mar. 26, 1790, ch. 3, §1, 1 Stat. 103; Act of July 20, 1790, ch. 29, §3, 1 Stat. 132 (statute which required state courts to “resolv[e] controversies between a captain and the crew of his ship concerning the seaworthiness of the vessel”); Act of Feb. 12, 1793, ch. 7, §3, 1 Stat. 302-05 (to hear “claims of slave owners who had apprehended Fugitive slaves”); Act of Apr. 7, 1798, ch. 26, §3, 1 Stat. 548 (to take “proof of the claims of Canadian refugees who had assisted the United States during the Revolutionary War”); and Act of July 6, 1798, ch. 66, §2, 1 Stat. 577-78 (to require “deportation of alien enemies . . . in times of war”).

53. *Printz*, 117 S. Ct. at 2370 (quoting *Bowsher v. Synar*, 478 U.S. 714, 723-24 (1986) (quoting *Marsh v. Chambers*, 463 U.S. 783, 790 (1983))).

54. *Id.*

55. See *id.* at 2391 (Stevens, J., dissenting).

56. See *id.* at 2371.

57. U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”). See *Printz*, 117 S. Ct. at 2371 (“These early laws establish, at most, that the Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions, insofar as those prescriptions

Full Faith and Credit Clause<sup>59</sup> show that courts were necessarily viewed as distinct from the executive and legislative branches for sovereignty purposes.<sup>60</sup> Taking this logic a step further, Justice Scalia argued that the numerosness of statutes requiring enforcement by the judiciary, contemporaneous with an utter absence of commandeered executive officers, suggests that early Congresses believed that they did not have the power to commandeer non-judicial state officers.<sup>61</sup> Under similar reasoning, the majority discarded the Extradition Act of 1793 as evidence of early commandeering because it directly implemented the Extradition Clause.<sup>62</sup>

However, in dissent, Justice Stevens provided common sense reasons why a lack of such early statutes did not indicate a lack of power to enact them—for instance, it was more convenient and politic to have the States' consent.<sup>63</sup> Moreover, Justice Stevens noted that the use of state courts was not merely a judicial function falling under the Supremacy Clause, but also included a number of executive functions regularly performed by state judges.<sup>64</sup> To the extent courts were considered

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related to matters appropriate for the judicial power," and suggesting this conclusion is implied by the Madisonian Compromise because it "established only a Supreme Court, and made the creation of lower federal courts optional with the Congress—even though it was obvious that the Supreme Court alone could not hear all federal cases throughout the United States") (citing C. WARREN, *THE MAKING OF THE CONSTITUTION* 325-27 (1928)).

58. U.S. CONST. art. VI, cl.2 ("the Laws of the United States . . . shall be the supreme Law of the Land; and the judges in every State shall be bound thereby.").

59. U.S. CONST. art. IV, § 1 (requiring state judges to enforce obligations arising in other states).

60. *See Printz*, 117 S. Ct. at 2371.

61. *See id.* ("Indeed, it can be argued that the numerosness of these statutes, contrasted with the utter lack of statutes imposing obligations on the States' executive (notwithstanding the attractiveness of that course to Congress), suggests an assumed absence of such power.").

62. *See id.* at 2371-72; *see also supra* note 28 (mentioning the Extradition Clause as an instance in which the Constitution allows the federal government to require specific action on the part of the states).

63. *See id.* at 2393 (Stevens, J., dissenting) ("Thus, for example, the decision by Congress to give President Wilson the authority to utilize the services of state officers in implementing the World War I draft surely indicates that the national legislature saw no constitutional impediment to the enlistment of state assistance during a federal emergency. The fact that the president was able to implement the program by respectfully 'request[ing]' state action, rather than bluntly commanding it, is evidence that he was an effective statesman, but surely does not indicate that he doubted either his or Congress' power to use mandatory language if necessary.") (citations omitted).

64. *See Printz*, 117 S. Ct. at 2391-92 (Stevens, J., dissenting) (giving examples of state court responsibilities to consider applications for citizenship, register aliens seeking naturalization, and certify the seaworthiness of vessels).

distinctive from other branches of state government, the use of courts in non-judicial, executive capacities suggests that early Congresses may have thought the state executive branch was subject to federal regulation.<sup>65</sup>

Even if the majority's historical argument is not a clear winner as to the interpretation of early congressional enactments, it successfully casts doubt upon Justice Stevens's view that early enactments prove the Constitution did allow for required participation of state officials.

In addition, there was also contention over Alexander Hamilton's viewpoint, expressed in *The Federalist* No. 27, to which Justice Souter, dissenting, devoted nearly all of his discussion.<sup>66</sup> After explaining that the federal government could "employ the ordinary magistracy of each [State] in the execution of its laws,"<sup>67</sup> Hamilton continued as follows:

[t]hus the Legislatures, Courts, and Magistrates of the respective members will be incorporated into the operations of the national government, *as far as its just and constitutional authority extends*; and it will be rendered auxiliary to the enforcement of its laws.<sup>68</sup>

For Justice Souter, this language clearly permitted the commandeering of a state executive because "the state governmental machinery 'will be incorporated' into the Nation's operation, and because the 'auxiliary' status of the state officials will occur because they are 'bound by the sanctity of an oath.'"<sup>69</sup>

Justice Scalia detected two flaws in this interpretation. First, because of the oath to observe the laws of the United States, Justice Souter's view would affirmatively require state officers to take a role in implementing federal law absent any congressional directive.<sup>70</sup> Second, it would require the state

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65. See *id.* at 2391 (Stevens, J., dissenting) ("[T]he fact that Congress did elect to rely on state judges and the clerks of state courts to perform a variety of executive functions is surely evidence of a contemporary understanding that their status as state officials did not immunize them from federal service.") (citations omitted).

66. See *id.* at 2401-04 (Souter, J., dissenting).

67. THE FEDERALIST No. 27, 176 (Alexander Hamilton) (C. Rossiter, ed., 1961).

68. *Id.* at 177 (emphasis in original).

69. *Printz*, 117 S.Ct at 2402 (Souter, J., dissenting) (citing Hamilton, *supra* note 67, at 175).

70. See *id.* at 2373.

legislature to follow federal directives.<sup>71</sup> Justice Scalia readily dismissed the first result as unthinkable.<sup>72</sup> For the second, he looked to the recent *New York* decision prohibiting the commandeering of state legislatures as a refutation of the dissent's interpretation of *The Federalist* No. 27.<sup>73</sup> As Justice Stevens noted, however, *New York* did not discuss *The Federalist* No. 27 and therefore should not be persuasive as to the bearing of *The Federalist* No. 27 on state courts.<sup>74</sup> If state courts were expected to assume executive responsibilities, as Justice Stevens argues, the *New York* opinion would not necessarily refute Hamilton's view of the use of state executive officials, but only legislative officials.<sup>75</sup>

Justice Scalia proposed a different interpretation of *The Federalist* No. 27, claiming that it refers to the duty of state officers not to obstruct federal law in the enforcement of state law.<sup>76</sup> This theory fits squarely within both the *New York* decision and *The Federalist* No. 36, which called for paying states whenever their officials are employed by the federal government.<sup>77</sup> The potential weakness in this interpretation, as pointed out by Justice Souter, is that it ignores the incorporation language contained in *The Federalist* No. 27.<sup>78</sup>

71. *See id.*

72. *Compare id.* ("But no one has ever thought, and no one asserts in the present litigation, that that is the law.") with *infra* note 137.

73. *See id.* at 2373 ("The second problem with Justice Souter's reading is that it makes state legislatures subject to federal direction . . . . We have held, however, that state legislatures are not subject to federal direction.") (citing *New York v. United States*, 505 U.S. 144 (1992)).

74. *See id.* at 2391 (Stevens, J., dissenting) ("But since the New York opinion did not mention *Federalist* 27, it does not affect either the relevance or the weight of the historical evidence provided by No. 27 insofar as it relates to state courts and magistrates.").

75. *New York* might, however, render Justice Souter's interpretation less persuasive, because the same logic applied to state legislatures as executives in *The Federalist* No. 27. Indeed, it appears that *The Federalist* No. 27 necessarily implicates state legislatures under Justice Souter's reading. *See Printz*, 117 S.Ct at 2373 n.5. If true, and if *The Federalist* No. 27 is as decisive as Justice Souter believes it to be, then *New York* might have to be overturned—a position which Justice Souter did not take. *See id.* at 2401 (Souter, J., dissenting).

76. *See id.* at 2374 (suggesting *The Federalist* No. 27 be "taken to refer to nothing more (or less) than the duty owed to the National Government, on the part of *all* state officials, to enact, enforce, and interpret state law in such fashion as not to obstruct the operation of federal law, and the attendant reality that all state actions constituting such obstruction, even legislative acts, are ipso facto invalid.").

77. *See id.* (citing *THE FEDERALIST* No. 36, at 222 (Alexander Hamilton) (C. Rossiter, ed., 1961)).

78. *See id.* at 2402 n.1 (Souter, J., dissenting).

The historical background is thus far from transparent.<sup>79</sup> Moreover, the correctness of Justice O'Connor's historical analysis in *New York*—an important precedent for the majority—has been questioned as a basis for the principle that state legislatures may not be commandeered by Congress.<sup>80</sup> It has also been argued that although Justice O'Connor was accurate in her view that the Framers frowned upon the commandeering of state legislatures, Justice Stevens' dissent in *New York* was correct in saying that the Framers did intend the commandeering of state executive officers.<sup>81</sup>

It should suffice to note that the *Printz* majority itself declared that its historical analysis was “not conclusive” enough for the Court to “negate the existence of the congressional power asserted here.”<sup>82</sup> The apparent purpose of the historical section of the Court's opinion, therefore, is to discredit the dissenting views of the early congressional history.

### B. Structural Analysis

The bright-line structural analysis relied upon by Justice Scalia represents a potential watershed in the jurisprudence of federalism. It is the only argument used by the majority which all three dissenting Justices leave untouched, except for Justice Stevens' broad, unsubstantiated claim that there is not “a clause, sentence, or paragraph in the entire text of the Constitution” to support the majority holding.<sup>83</sup> There is no direct counter-argument offered to suggest how the majority misapprehended the nature of state sovereignty as required by the “essential postulates” of the Constitution's structure.<sup>84</sup>

79. See *id.* at 2402 (Souter, J., dissenting) (Justice Souter, whose dissent is based on a historical analysis, declared that his decision was “closer than I anticipated.”).

80. See, e.g., H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 681-89 (1993); Martin H. Redish, *Doing it with Mirrors: New York v. United States and Constitutional Limitations on Federal Power to Require State Legislation*, 21 HASTINGS CONST. L.Q. 593, 595-603 (1994).

81. See Saikrishna B. Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 1990-2032 (1993).

82. *Printz*, 117 S.Ct at 2376 (“The constitutional practice we have examined above tends to negate the existence of the congressional power asserted here, but it is not conclusive.”).

83. *Id.* at 2389 (Stevens, J., dissenting).

84. *Id.* at 2376 (“We turn next to consideration of the structure of the Constitution, to see if we can discern among its ‘essential postulates’ a principle that controls the present cases.”) (citing *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1934)).

Instead, the dissenting justices are concerned about the functional effects of recognizing state sovereignty as a protection against federal commandeering,<sup>85</sup> the power of the Necessary and Proper Clause to overcome state sovereignty,<sup>86</sup> and the historical intent of the Founders.<sup>87</sup> In the end, Justice Scalia's structural consideration of the Constitution's text is never questioned in textual terms.

The first premise of Justice Scalia's argument is that "the Constitution established a system of 'dual sovereignty.'"<sup>88</sup> As Justice Scalia noted, this is "incontestible."<sup>89</sup> In support, James Madison is quoted for the established proposition that "[a]lthough the States surrendered many of their powers to the Federal Government, they retained a 'residuary and inviolable sovereignty.'"<sup>90</sup> Justice Scalia then proceeded to show how the Constitution's text reflects the existence of this state sovereignty, and in support cited the following examples of clauses from the Constitution: the prohibition on involuntary reduction of a state's territory;<sup>91</sup> the Judicial Power Clause<sup>92</sup> and the Privileges and Immunities Clause,<sup>93</sup> both of which refer to citizens of states; the amendment provision requiring state

85. See *Printz*, 117 S. Ct. at 2394 (Stevens, J., dissenting) (suggesting that the structural arguments are insufficient to rebut a presumption based upon Justice Stevens' historical understanding); see *id.* at 2395 (discussing the needs of Our Federalism and its protection for state sovereignty).

86. See *id.* at 2387 (Stevens, J., dissenting) (applying the Necessary and Proper Clause as a source of support for "temporary enlistment of local police officers").

87. See *id.* at 2389-94 (historical analysis suggesting the Framers did intend the commandeering of state officers).

88. *Printz*, 117 S. Ct. at 2376 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991); see also *Tafflin v. Lefitt*, 493 U.S. 455, 458 (1990)).

89. See *Printz*, 117 S. Ct. at 2376.

90. *Id.* (quoting THE FEDERALIST No. 39, at 245 (James Madison) (C. Rossiter, ed., 1961)).

91. U.S. CONST. art. IV, § 3 ("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.").

92. U.S. CONST. art. III, § 2 ("The judicial Power shall extend . . . to Controversies between two or more States—between a State and citizens of another State;—between citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens, or subjects."). The final phrase, however, was changed by the Eleventh Amendment.

93. U.S. CONST. art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

ratification,<sup>94</sup> and the Guarantee Clause,<sup>95</sup> which the Court had previously held “presupposes the continued existence of the states and . . . those means and instrumentalities which are the creation of their sovereign and vested rights.”<sup>96</sup>

It is in this fashion that a Constitution that contains “no . . . text speaking to this precise question”<sup>97</sup> can nonetheless provide substantial text that presupposes inviolable state sovereignty.<sup>98</sup> This argument is the crux of the structural analysis. By implication, because states are sovereign over their own executive officers, any federal commandeering would violate state sovereignty. The state governments are thus formally treated as separate spheres.<sup>99</sup> In spirit, the reasoning is reminiscent of Chief Justice Taney’s opinion in *Dennison*, which suggested that any compulsion of state officers to enforce federal law would have to destroy state sovereignty.<sup>100</sup>

The *Printz* Court also considered the Tenth Amendment an explicit recognition that Congress does not have all governmental powers, “but only discrete, enumerated ones” under Article I, § 8—a limitation which Justice Scalia argued is implied by the original text alone.<sup>101</sup> The Court’s logic is thus truly based on the Constitution’s structure, as opposed to the idea that any one textual clause precludes federal encroachment. The *Printz* opinion limited its use of the Tenth Amendment to evidence that an inviolable residual state

94. U.S. CONST. art. V (“The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof . . .”).

95. U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”).

96. *Printz*, 117 S. Ct. at 2376 (quoting *Helvering v. Gerhardt*, 304 U.S. 405 at 414-15 (1938)).

97. *Id.* at 2370.

98. This is not, however, an “*expresio unius*” theory. See *infra* note 166.

99. Compare *Printz*, 117 S. Ct. at 2378 (“This separation of the two spheres is one of the Constitution’s structural protections of liberty.”), with *infra* notes 104, 108 (giving a functionalist explanation of this separation).

100. See *Dennison*, 65 U.S. at 107 (“Indeed, such a power would place every state under the control and dominion of the General Government, even in the administration of its internal concerns and reserved rights.”).

101. See *Printz*, 117 S. Ct. at 2376.

sovereignty exists.<sup>102</sup> Justice Thomas' concurrence reads the Court's opinion to hold the Brady Act in violation of the Tenth Amendment,<sup>103</sup> but Justice Scalia's argument may be read even more broadly—residual state sovereignty would have been violated by the Brady Act even before the Bill of Rights was ratified.<sup>104</sup>

Further, the *Printz* concept of dual sovereignty under the structure of the Constitution was based on the understanding of Madison and Hamilton, as understood in *New York*.<sup>105</sup> As noted by the Court, James Madison declared that for the central government to make "laws, with coercive sanctions, for the States as political bodies," had been "exploded on all hands," and that as a result, it was decided that the states and central government would exercise concurrent authority over the people.<sup>106</sup> Alexander Hamilton similarly announced that the people were "the only proper objects of government."<sup>107</sup> For the majority, these remarks indicated a founding view of the constitutional text similar to their own, not a founding vision of government policy. The historical evidence was not used by the Court to suggest how the Framers desired federalism to function, but rather the Framers' understanding of the textual choice they made when the Constitution was ratified to "regulate individuals, not states."<sup>108</sup>

102. *See id.* at 2376-77 ("Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, art. I § 8, which implication was rendered express by the Tenth Amendment's assertion that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively.").

103. *See id.* at 2385 (Thomas, J., concurring) ("The Court properly holds today that the Brady Act violates the Tenth Amendment . . .").

104. *See id.* at 2379 n.13 (In response to the dissenting argument under the Necessary and Proper Clause, Justice Scalia explained: "This argument . . . falsely presumes that the Tenth Amendment is the exclusive textual source of protection for principles of federalism. Our system of dual sovereignty is reflected in numerous constitutional provisions . . . and not only those, like the Tenth Amendment, that speak to the point exactly.")

105. *See id.* at 2377. ("We have set forth the historical record in more detail elsewhere.") (citing *New York*, 505 U.S. at 161-66).

106. *See Printz*, 117 S. Ct. at 2377 (quoting 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, 9 (M. Farrand ed. 1911)).

107. *See Printz*, 117 S. Ct. at 2377 (quoting THE FEDERALIST No. 15, at 109 (Alexander Hamilton)(C. Rossiter, ed. 1961)).

108. *See Printz*, 117 S. Ct. at 2377 ("The Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not states.") (quoting *New York*, 505 U.S. at 166). For a different perspective, see Jackson, *supra* note 27, at 2195-96 (arguing that Justice Scalia fails to differentiate between the action of the whole on the

The *Printz* Court also applied functionalist reasoning, but as a defense of formalism. Justice Scalia recognized federalism as a separation of powers issue between sovereign states and a sovereign national government,<sup>109</sup> but he also considered the effects of the separation of separate spheres of state and federal governments. Justice Scalia discussed the advantages of a system in which the two sovereignties protect liberty, with both levels of government accountable to their respective citizens.<sup>110</sup> He concluded, “[t]he power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the 50 states.”<sup>111</sup> Yet these were not simply Justice Scalia’s policy judgments—the separation of powers discussion is amply supported by the intent of the Founders and the Court’s prior jurisprudence.<sup>112</sup>

In addition, the Court made the more novel functionalist argument that federal control of state officers would encroach upon the balance between Congress and the Executive Branch.<sup>113</sup> The Framers were clear that there was to be unity in the Executive Branch.<sup>114</sup> As the majority explained, “[t]hat 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

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part and the part on the whole, because Congress represents the states through its citizens).

109. See *Printz*, 117 S. Ct. at 2378.

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

111. *Id.* at 2378.

112. See *Gregory*, 501 U.S. at 458 (“Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”); THE FEDERALIST No. 51, at 323 (James Madison)(C. Rossiter, ed., 1961) (“[T]he power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.”); see also THE FEDERALIST No. 28, at 180-81 (Alexander Hamilton)(C. Rossiter, ed., 1961)(discussing how the general and state governments can be used by the people as checks against each other).

113. See *Printz*, 117 S. Ct. at 2378.

114. See THE FEDERALIST No. 70 (A. Hamilton); Statement of James Wilson in 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 495 (M. Jensen ed.1976). See also Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 568-99 (1994)(arguing that the Constitution’s structure, when properly read, vests a unitary executive power solely and exclusively in the hands of the President).

requiring state officers to execute its laws."<sup>115</sup> Insofar as state officers could be commandeered to execute the laws, the constitutional guarantee of the President's power to faithfully execute the laws would be effectively decreased.<sup>116</sup>

Justice Stevens, in contrast, framed the question of state sovereignty in terms of the structure of the *federal* government—because the federal government was structured to represent states, concerns about federalism should be limited.<sup>117</sup> This argument presupposed that the issue in *Printz* was how much of a burden a statute may impose on state sovereignty, which was indeed the issue in *Garcia v. San Antonio Metropolitan Transit Authority*.<sup>118</sup> However, the issue in *Printz* was not the importance of protecting the role of state sovereignty, but the existence of the sovereignty itself. As Justice Scalia explained, the object of the federal law was to infringe on state sovereignty.<sup>119</sup> This implicates the structure of the Constitution; at stake is not a burden on state sovereignty, but the authority to impose the particular type of burden.

The dissenting Justices' apparent answer to the majority's textual analysis of governmental structure was an application of the Necessary and Proper Clause as a source of commandeering power.<sup>120</sup> But this dissenting view did not address the majority's structural analysis. Justice Scalia did not rely upon the functional arguments in support of inviolable

115. *Printz*, 117 S. Ct. at 2378.

116. *See id.*

117. *See id.* at 2394 (Stevens, J., dissenting) ("Given the fact that the Members of Congress are elected by the people of the several States, with each State receiving an equal number of Senators in order to ensure that even the smallest States have a powerful voice in the legislature, it is quite unrealistic to assume that they will ignore the sovereignty concerns of their constituents.").

118. 469 U.S. 528 (1985). In fact, this distinction has already arisen in the Fourth Circuit when it was faced with a claim that *Printz* should be applied to a generally applicable law. *See West v. Anne Arundel County, Md.*, 137 F.3d 752, 759-60 (4th Cir. 1998) (declining to overrule *Garcia*, and noting the exception in *Printz* for generally applicable laws that affect state sovereignty).

119. *See Printz*, 117 S. Ct. at 2383 ("But where, as here, it is the whole object of the law to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty, such a 'balancing analysis' is inappropriate."). Justice Scalia further declared, "[I]t is the very *principle* of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect." *Id.*

120. *See id.* at 2387 (Stevens, J., dissenting) ("[T]he additional grant of authority in that section '[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers' is surely adequate to support the temporary enlistment of local police officers . . .").

residual state sovereignty. Instead, he looked to the mandate against commandeering that the Court had already determined from the structure of the Constitution.<sup>121</sup>

The majority explained that the Necessary and Proper Clause addressed what might follow from the sovereignty declared by the Constitution, but it did not address the sovereignty itself.<sup>122</sup> Ironically, Justice Scalia used the Necessary and Proper Clause itself for support. His argument is striking and bears repetition:

What destroys the dissent's Necessary and Proper Clause argument, however, is not the Tenth Amendment but the Necessary and Proper Clause itself. When a "La[w] . . . for carrying into Execution" the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions we mentioned earlier . . . it is not a "La[w] . . . proper for carrying into Execution the Commerce Clause," and is thus, in the words of the Federalist, "merely [an] ac[t] of usurpation" which "deserves to be treated as such."<sup>123</sup>

This language differs from the *New York* decision, which the *Printz* Court quoted to support the above proposition, in that it expressly uses the Necessary and Proper clause itself as a limitation on Congress's power. This principle of a limiting Necessary and Proper Clause is developed in an article by Professor Gary Lawson and Patricia Granger cited by the Court. Lawson and Granger argued that the term "proper" was used during the time of the Framers to indicate a law "that is within the peculiar jurisdiction or responsibility of the relevant governmental actor."<sup>124</sup> The test in the federalism context is whether or not a law is improperly regulating unenumerated areas, even if it will make exercise of an enumerated power more efficient.<sup>125</sup> Significantly, Lawson and Granger state that although "freestanding conceptions of state sovereignty" may have been inappropriate measures under the Commerce

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121. This reliance on structure in response to the dissent suggests that the majority's functional arguments may have been unnecessary to the decision.

122. See *Printz*, 117 S. Ct. at 2379 (The Court looked to a similar analysis which it had applied in *New York*—"The Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.") (quoting *New York*, 505 U.S. at 166).

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

124. Gary Lawson and Patricia Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 291 (1993).

125. See *id.* at 331.

Clause,<sup>126</sup> the Court might have a *duty* to apply them under the Necessary and Proper Clause.<sup>127</sup>

Thus, the Court held that the Necessary and Proper Clause does not address the existence of an inviolable state sovereignty.<sup>128</sup> Instead, the Necessary and Proper Clause dictates that if such a sovereignty exists, Congress may never pass a law reducing that sovereignty.<sup>129</sup>

Although this is a groundbreaking holding under the Necessary and Proper Clause, it is not “directly contradicted” by *McCulloch v. Maryland*,<sup>130</sup> as claimed by Justice Stevens.<sup>131</sup> The majority did not directly address Justice Stevens’ argument, but the dissent overstated the requirements of *McCulloch*. In footnote two, Justice Stevens described Chief Justice Marshall as “explaining that ‘the only possible effect’ of the use of the term ‘proper’ was ‘to present to the mind the idea of some choice of means of legislation not straitened and compressed within . . . narrow limits.’”<sup>132</sup> In fact, Chief Justice Marshall never fully defined the term “proper” in his opinion,<sup>133</sup> and the paragraph from which Justice Stevens quoted suggests room for a jurisdictional, limiting understanding of the word. The actual language in *McCulloch* is as follows:

In ascertaining the sense in which the word “necessary” is used in this clause of the constitution, we may derive some aid from that with which it is associated. Congress shall

126. See *Garcia*, 469 U.S. at 550.

127. See Lawson and Granger, *supra* note 124, at 332-33.

128. See *Printz*, 117 S. Ct. at 2379 (denying the dissent’s reasoning that the Commerce Clause aided by the Necessary and Proper Clause “establishes the Brady Act’s constitutional validity, because the Tenth Amendment imposes no limitations on the exercise of delegated powers but merely prohibits the exercise of powers ‘not delegated to the United States.’”) (citation omitted in original).

129. See *id.* (“When a ‘La[w] . . . for carrying into Execution’ the Commerce Clause violates the principle of state sovereignty . . . it is not a ‘La[w] . . . proper for carrying into Execution the Commerce Clause,’ and is thus, in the words of The Federalist, ‘merely [an] ac[t] of usurpation’ which ‘deserve[s] to be treated as such.’”) (quoting THE FEDERALIST NO. 33, at 204 (Alexander Hamilton) (C. Rossiter ed., 1961)).

130. 17 U.S. 316 (1819).

131. *Printz*, 117 S. Ct. at 2388 n.2 (Stevens, J., dissenting) (“Moreover, this reading of the term ‘proper’ gives it a meaning directly contradicted by Chief Justice Marshall in *McCulloch v. Maryland*.”) (citations omitted).

132. *Id.*

133. See Lawson and Granger, *supra* note 124, at 271 (“Chief Justice Marshall’s discussion, however, focused almost exclusively on the word ‘necessary,’ whereas the clause requires executory laws to be both necessary *and proper*.”).

have power "to make all laws which shall be necessary and proper to carry into execution" the powers of the government. If the word "necessary" was used in that strict and rigorous sense for which the counsel for the State of Maryland contend, it would be an extraordinary departure from the usual course of the human mind, as exhibited in composition, to add a word, the only possible effect of which is to qualify that strict and rigorous meaning; to present to the mind the idea of some choice of means of legislation not straitened and compressed within the narrow limits for which gentlemen contend.<sup>134</sup>

Chief Justice Marshall's language explained that the word "necessary" did not mean absolutely necessary, in the sense that one thing could not exist without the other, because the use of the word "proper" brings to mind a meaning of the word "necessary" which is broad enough that it could be narrowed in terms of what is "proper." If the word "necessary" limited Congress to only passing laws which were "indispensable" to the existence of a constitutionally enumerated power, as Maryland had suggested, for the clause to then also require the law to be "proper" would be a very unusual choice of words. All laws indispensable to the existence of a delegated power would, obviously, always be proper.

It is these narrow limits, the ones for which the Maryland "gentlemen contend,"—words omitted by Justice Stevens' quotation<sup>135</sup>—which the term "necessary" cannot signify. None of the language in *McCulloch* prevents the word "necessary" from being limited by the word "proper" in the sense used by Justice Scalia.<sup>136</sup>

134. *McCulloch*, 17 U.S. at 418-19.

135. See *Printz*, 117 S. Ct. at 2388 n.2 (Stevens, J., dissenting) (describing *McCulloch* as "explaining that 'the only possible effect' of the use of the term 'proper' was 'to present to the mind the idea of some choice of means of legislation not straitened and compressed within . . . narrow limits.'" (ellipsis in original).

136. See Lawson and Granger, *supra* note 124, at 289 (explaining that statutory construction suggests the word "proper" adds meaning to the Necessary and Proper Clause, not simply emphasis to the word "necessary"). Moreover, Justice Field, an early supporter of the sovereignty principle announced by *Dennison*, goes so far as to use *McCulloch* in support of the *Dennison* rule. Dissenting in *Ex Parte Clarke*, 100 U.S. 399, 404 (1879), Justice Field looked to the following language from Chief Justice Marshall: "No trace is to be found in the Constitution of an intention to create a dependence of the Federal government on the governments of the States for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely." See *id.* at 413 (quoting *McCulloch*, 17 U.S. at 424). Justice Field argued that the purpose of granting Congress the "necessary" power to execute its

Justice Stevens also responded to the majority's Necessary and Proper Clause argument by reference to the Supremacy Clause, which requires that "all executive and judicial officers, both of the United States and of the several states, shall be bound by Oath or Affirmation, to support this Constitution."<sup>137</sup> He argued that this language requires state officers to follow federal law even when federal law commandeers state officers.<sup>138</sup> However, as Justice Scalia correctly noted, this argument begs the question—because the laws under the Supremacy Clause must be constitutional themselves, the Supremacy Clause only permits commandeering of state officers if such laws are already determined to be constitutional.<sup>139</sup>

If it is granted that the previously-mentioned clauses of the Constitution<sup>140</sup> which presuppose state sovereignty prohibit the commandeering of state officers, Justice Scalia's logic is inexorable. Justice Stevens' Necessary and Proper Clause argument is the only response made by the dissenting justices which contends with Justice Scalia's view, and it assumes its conclusion without even addressing the structural claim or casting doubt on the premise that the above-mentioned clauses presuppose a separate, inviolable sovereignty.

### C. Prior Jurisprudence: An Analytical Precedent

The primary role of prior jurisprudence in *Printz* is to show that once the constitutional structure has been determined, there can be no allowance for any deviation from the requirements of that structure. The Court's precedent may not have recently addressed the precise issue in *Printz*, but it clearly

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powers was to prevent the need to rely on the states, and therefore Congress must follow any conditions states may place upon use of their agents if they are to be used. See *id.* But see Jackson, *supra* note 27, at 2195 (suggesting that the dual sovereignty announced by Justice Scalia "is fundamentally at variance with principles of constitutionalism that date at least to *McCulloch v. Maryland* . . .").

137. U.S. CONST. art. VI, cl. 2; see *Printz*, 117 S. Ct. at 2388 (Stevens, J., dissenting) ("There can be no conflict between the duties to the state and those owed to the Federal Government because Article VI unambiguously provides that federal law 'shall be the supreme Law of the Land,' binding in every State.").

138. See *Printz*, 117 S. Ct. at 2388 (Stevens, J., dissenting) ("Thus, not only the Constitution, but every law enacted by Congress as well, establishes policy for the States just as firmly as do laws enacted by state legislatures.").

139. See *Printz*, 117 S. Ct. at 2379 ("[T]he Supremacy Clause merely brings us back to the question discussed earlier, whether laws conscripting state officers violate state sovereignty and are thus not in accord with the Constitution.").

140. See *supra* at 256.

addressed the issue of the role structure must play in the Court's decisionmaking process. It is adherence to this precedent which makes *Printz* a truly structuralist decision.

Of the three lines of inquiry in *Printz*, Justice Scalia claimed to have looked "most conclusively" to prior jurisprudence to reach the Court's holding,<sup>141</sup> and, without question, the *New York* case was the linchpin of this line of reasoning.<sup>142</sup> As the Court noted, *New York* declared the following hard rule: "Congress cannot compel the States to enact or enforce a federal regulatory program."<sup>143</sup>

In *New York*, the Court was faced with "perhaps our oldest question of constitutional law," the division of authority between the federal government and the states.<sup>144</sup> Among other statutory provisions<sup>145</sup>, the Court had to rule on the constitutionality of a clause in the Low-Level Radioactive Waste Policy Amendments Act of 1985<sup>146</sup>, which gave states a choice between taking title to radioactive waste generated within their borders or becoming liable for damages resulting from their nuclear generators.<sup>147</sup> Justice O'Connor, writing for the Court, observed that in this context, inquiries into Congress's power and inquiries into the state sovereignty reserved by the Tenth Amendment are "mirror images of each other."<sup>148</sup> However, because the Tenth Amendment is a

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

142. *See id.* at 2380 ("When we were at last confronted squarely with a federal statute that unambiguously required the States to enact or administer a federal regulatory program, our decision should have come as no surprise) (citing *New York*, 505 U.S. 144); *see also id.* at 2397 (Stevens, J., dissenting) ("Finally, the Court advises us that the 'prior jurisprudence of this Court' is the most conclusive support for its position. That 'prior jurisprudence' is *New York v. United States.*") (citations omitted).

143. *Id.* at 2380 (quoting *New York*, 505 U.S. at 188).

144. *New York*, 505 U.S. at 149.

145. *See id.* at 151-54 (discussing provisions for monetary incentives, *see* 42 U.S.C. §2021 e (d)(2)(B), and access incentives, *see* 42 U.S.C. §2021 e (e)(2)(A)).

146. 42 U.S.C. §2021 e (d)(2)(C).

147. *See id.* ("If a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State or compact region by January 1, 1996, each state in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1996, as the generator or owner notifies the State that the waste is available for shipment").

148. *New York*, 505 U.S. at 156.

"truism,"<sup>149</sup> its role is to "confir[m] that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States."<sup>150</sup>

Justice O'Connor began her analysis with the Court's established principle that the federal government may not commandeer the legislative processes of the states "by directly compelling them" to enforce a regulatory program.<sup>151</sup> After citing numerous cases for the proposition that the Constitution was adopted with the intent of preserving the states,<sup>152</sup> Justice O'Connor proceeded with a thorough analysis of the Framers' intent.<sup>153</sup> The evidence produced strongly suggests that the Framers chose to end the national government's regulation of states then existing under the Articles of Confederation, and to replace it with the regulation of individuals.<sup>154</sup>

However, the reference to a prohibition on commandeered

149. *See id.* (explaining that the Tenth Amendment "'states but a truism that all is retained which has not been surrendered'" (quoting *United States v. Darby*, 312 U.S. 100 (1941))).

150. *Id.* at 157.

151. *Id.* at 161 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981)).

152. *See id.* at 162; among others, Justice O'Connor cited *Lane County v. Oregon*, 7 Wall. 71, 76 (1869) ("Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the Confederate government, which acted with powers, greatly restricted, only upon the states."), and *Texas v. White*, 7 Wall. 700, 725 (1869) ("[T]he 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. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.").

153. *See New York*, 505 U.S. at 163-65.

154. Justice O'Connor quoted a variety of delegates to the Constitutional Convention from the state ratifying conventions, including the following: Oliver Ellsworth of Connecticut, "This Constitution does not attempt to coerce sovereign bodies, states, in their political capacity . . . . But this legal coercion singles out the individual." 2 J. Elliot, *DEBATES ON THE FEDERAL CONSTITUTION* 197 (2d ed. 1863); Charles Pinckney of South Carolina, "[T]he necessity of having a government which should at once operate upon the people, and not upon the states, was conceived to be indispensable by every delegation present." 4 *id.* at 256; Rufus King of Massachusetts, "Laws, to be effective, therefore, must not be laid on states, but upon individuals." 2 *id.* at 56; Alexander Hamilton of New York, "But can we believe that one state will ever suffer itself to be used as an instrument of coercion? The thing is a dream; it is impossible. Then we are brought to the dilemma—either a federal standing army is to enforce the requisitions, or the federal treasury is to be left without supplies, and the government without support. What, sir, is the cure for this great evil? Nothing, but to enable the national laws to operate on individuals, in the same manner as those of the states do." 2 *id.* at 233; and Samuel Spencer of North Carolina, recognizing that "all the laws of the Confederation were binding on the states in their political capacities . . . but now the thing is entirely different. The laws of Congress will be binding on individuals." 4 *id.* at 153.

state enforcement of a federal regulatory program in *New York* was arguably dicta.<sup>155</sup> Contrary to Justice Stevens' *Printz* dissent, the history cited by Justice O'Connor in *New York* does not suggest that the Constitution was ratified to *augment* the regulation of states with regulation of individuals.<sup>156</sup> Yet Justice O'Connor only tangentially addressed regulation of state executive officials, concentrating instead on regulation of state legislatures. *New York* distinguished the regulation of state courts by Congress from regulation of state legislatures, not only by way of the Supremacy Clause, but also because "all [such cases] involve congressional regulation of individuals, not congressional requirements that states regulate."<sup>157</sup> And as thorough as Justice O'Connor's historical analysis in *New York* is, that opinion also did not rely on a text-based structural analysis of the Constitution as Justice Scalia did in *Printz*.<sup>158</sup> To the extent *New York* was focused on state legislatures, one could argue that the two cases are distinguishable.

In *Printz*, Justice Scalia did claim that Congress may not circumvent *New York's* prohibition on commandeering state legislatures "by conscripting the State's officers directly,"<sup>159</sup> which brings *Printz* within the confines of the undisputed understanding of the *New York* holding. However, the *Printz* opinion only mentioned this application of the *New York* holding in a concluding paragraph—there is no proof offered therein that conscription of state officers inherently violates the rule against commandeering state legislatures. Instead, the role of *New York* in *Printz* was methodological. Justice O'Connor had enunciated a binding rule on how courts will reach their decision once the structural issue has been addressed, and Justice Scalia applied this rule to protect state executive sovereignty.

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155. See *Printz*, 117 S. Ct. at 2398 (Stevens, J., dissenting) ("The 'take title' provision at issue in *New York* was beyond Congress' authority to enact because it was 'in principle . . . no different than a congressionally compelled subsidy from state governments to radioactive waste producers,' almost certainly a legislative act. The majority relies upon dictum in *New York* to the effect that '[t]he Federal Government may not compel the States to enact or administer a federal regulatory program.'" (citations omitted).

156. Compare *New York*, 505 U.S. at 163-65, with *Printz*, 117 S. Ct. at 2389 (Stevens, J., dissenting).

157. *New York*, 505 U.S. at 178.

158. See discussion, *supra*, at 256 (explaining how Justice Scalia relied on constitutional text which presupposes inviolable state sovereignty).

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

Justice O'Connor's explanation of this rule of decision in *New York*, which is the essence of the *Printz* reasoning, is quoted in its entirety in *Printz* and is as follows:

Much of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form. The result may appear "formalistic" in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.<sup>160</sup>

Because the "form" of our government was determined by the *Printz* majority to require inviolable state sovereignty, and because this structure would be altered if state officers were commandeered to administer a federal regulatory program, *New York* required the *Printz* Court to apply a bright line rule. It is for this reason that, even if the *New York* rule that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program"<sup>161</sup> was dicta, the *Printz* majority had to follow that dicta in light of its own structural analysis.

*Printz's* categorical holding that "[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a regulatory program,"<sup>162</sup> is thus mandated by the Court's understanding of the Constitution's structure.

## CONCLUSION

As shown above, the *Printz* Court could not have reached its result without strict adherence to a structural interpretation based on inviolable, residual state sovereignty. It follows that the Commerce Clause and Necessary and Proper Clause will be insufficient means to authorize commandeering of state officers in any context, no matter how small the burden, or how

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160. *Id.* at 2383 (quoting *New York*, 505 U.S. at 187).

161. *New York*, 505 U.S. at 188.

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

important the government's interest.

*Printz* announced that any variation on the theme of forced participation of state officers in the administration of a federal regulatory program would not be tolerated, except insofar as the power to regulate the subject matter was expressly delegated by a constitutional provision.<sup>163</sup> *Dennison* did not recognize the existence of such provisions.<sup>164</sup> To the extent the *Printz* Court recognized, sub silentio, the legitimacy of *Puerto Rico v. Branstad's* overturning of *Dennison*, however, it did so because it understood the Extradition Act to be "in direct implementation of" the Extradition Clause of the Constitution.<sup>165</sup> Yet the *Dennison* rule only provides a narrow loophole because the only clear examples of such express clauses are the Extradition Clause, the Militia Clauses, certain election provisions, and the requirement that judges enforce federal law under the Supremacy Clause.<sup>166</sup> Notably, the Commerce Clause would not qualify.

It has been suggested that *Printz* did not revive *Dennison* because the Court failed to mention any intent to do so, and because if *Dennison* were revived, the *Printz* opinion would sit poorly with fifty years of prior jurisprudence.<sup>167</sup> As to the first point, Justice Stevens himself recognized that the principle of state sovereignty in *Dennison* "resonates throughout the majority opinion."<sup>168</sup> And, as shown above, the principles and

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163. See *id.* at 2379.

164. See *Dennison*, 65 U.S. 66.

165. *Printz*, 117 S. Ct. at 2371-72, 2372 n.3.

166. See Caminker, *supra* note 20, at 1032-33, for a discussion of these clauses. One alternative way to view the *Printz* holding is under an "expressio unius" theory—by implication of those clauses of the constitution which specifically call for commandeering of state officers, any other clauses of the constitution must be interpreted as not granting this power. The expressio unius view has been criticized because of the plausibility in interpreting specific clauses like the extradition clause "to imply the inclusion of unenumerated but relevantly similar items." *Id.* at 1032-33. But Justice Scalia's reliance on clauses which specifically presuppose state sovereignty undermines this critique—if there were no Extradition Clause, it seems clear Justice Scalia would have reached the same result in interpreting the Necessary and Proper Clause. *Printz* thus effects a foundation of inviolable state sovereignty identical to the one in *Dennison*, but with specific exceptions.

167. See Note, *supra* note 26, at 215-17 ("[I]f the Court truly intended a blanket prohibition against all federal commandeering—a return to the 19<sup>th</sup> century view that it overruled in *Puerto Rico v. Branstad*—then its announcement could hardly have been more cloaked, both in light of what *Printz* left unaddressed and, especially, when the decision is read together with the Court's prior fifty years of Tenth Amendment jurisprudence.") *Id.* at 217.

168. *Printz*, 117 S. Ct. at 2400 n.30 (Stevens, J., dissenting).

holding in *Printz* are functionally indistinguishable from *Dennison* in most cases, as the Court only recognized expressly delegated exceptions to *Dennison's* rule. As for prior jurisprudence, *Printz* was clearly in the same analytical spirit as *New York*, and may even have been required by that Court's substantive holding. Any argument that the Court has embarked on a new interpretation of federalism must recognize that the *Printz* doctrine was launched in the 1992 *New York* decision. The formalism of *Printz* precludes any difficulty at all in interpreting its reach in light of precedent-prior jurisprudence which requires balancing tests or case-by-case analysis is simply overruled to that extent. The complexities of enforcing *Printz* only exist within a functionalist framework.

There are important laws which may now be held to contain unconstitutional provisions.<sup>169</sup> As Justice Stevens noted, *Printz* may jeopardize federal requirements "such as registering young adults for the draft, creating emergency response commissions designed to manage the release of hazardous substances, collecting and reporting data on environmental hazard[s], and reporting traffic fatalities [as well as] missing children."<sup>170</sup> Justice Stevens' parade of horrors is little more than a bugbear, however. It is hard to imagine a reason why a state would decline to report traffic fatalities or missing children to the federal government. A requirement that states consent before administering federal programs is only likely to obligate federal enforcement in those circumstances where the federal regulation is unpopular in the particular state, much as the Brady Act may be unpopular in states with populations that strongly believe in the right to bear arms.<sup>171</sup>

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169. See Caminker, *supra* note 20, at 1003, n.3. See also Jackson, *supra* note 27, at 2205 (discussing the range of statutes which may be implicated by *Printz*, depending on the breadth of Justice O'Connor's reservations.) Professor Jackson suggests that generally applicable statutes, such as the Fair Labor Standards Act, the income tax withholding statutes, and Title VII might be affected if *Printz* were extended.

However, one court has already refused to extend *Printz* to the Fair Labor Standards Act, see *West v. Anne Arundel County, Md.*, 137 F.3d 752 (4th Cir. 1998), and another has refused to extend *Printz* to federal statutes enacted pursuant to Congress's powers under Section Five of the Fourteenth Amendment, see *McGarry v. Director, Dept. of Revenue*, --- F.Supp. 2d ---, 1998 WL 289760, \*3-4 (W.D. Mo. May 20, 1998). But see *Condon v. Reno*, 1998 WL 559659, \*9 (4th Cir.(S. C.)) (invalidating the Driver's Privacy Protection Act under *Printz* and rejecting Fourteenth Amendment arguments under *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997)).

170. *Printz*, 117 S. Ct. at 2394.

171. The importance of this right in our constitutional system did not escape Justice

In the long run, *Printz* may represent a shift in doctrine without a corresponding immediate impact on the administration of our government, much as *Lopez* was to the Commerce Clause.<sup>172</sup> Immediately after the decision, several federal courts took note of *Printz* but avoided applying its doctrine to their facts.<sup>173</sup> However, future statutes may be so unpopular in certain regions that they could only be enforced by requiring the commandeering of state officers, and in those situations *Printz* may preserve diversity among the states. As a functional matter, states will at least have better bargaining power due to the revival of their constitutional, structural sovereignty.

Recently, the *Printz* doctrine of dual sovereignty has found a sympathetic ear in the courts. The Driver's Privacy Protection Act (DPPA) is a federal statute which regulates disclosure of personal information from motor vehicle records.<sup>174</sup> Among its provisions is a prohibition against "any person" knowingly disclosing such information,<sup>175</sup> as well as the following rule: "[a]ny State department of motor vehicles . . . shall be subject to civil penalty imposed by the Attorney General of not more than \$5,000 a day for each day of substantial noncompliance."<sup>176</sup> Moreover, there is a criminal fine and civil cause of action against anyone who knowingly violates the statute.<sup>177</sup>

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Thomas's attention. See *Printz*, 117 S. Ct. at 2385 (Thomas, J., concurring) ("This Court has not had recent occasion to consider the nature of the substantive right safeguarded by the Second Amendment. If however, the Second Amendment is read to confer a personal right to 'keep and bear arms,' a colorable argument exists that the Federal Government's regulatory scheme, at least as it pertains to purely intrastate sale of possession of firearms, runs afoul of that Amendment's protections. As the parties did not raise the argument, however, we need not consider it here.").

172. See Stephen R. McAllister, *Is There a Judicially Enforceable Limit to Congressional Power Under the Commerce Clause?*, 44 U. KAN. L. REV. 217, 219 (1996) ("[I]t does not appear that the Court's decision worked any revolutionary curtailment of congressional power."); and see *id.* at 219 n.20 (citing Supreme Court actions immediately following the *Lopez* decision which curtailed its effect).

173. See, e.g., *City of New York v. U.S.*, 971 F. Supp. 789 (S.D.N.Y. 1997); *West v. Anne Arundel County*, 137 F.3d 752 (1998); *McGarry v. Director, Dept. of Revenue*, --- F.Supp.2d ---, (W.D. Mo. May 20, 1998); *Strahan v. Cox*, 127 F.3d 155 (1st Cir. 1997); *Deer Park Indep. School Dist. v. Harris County Appraisal Dist.*, 132 F.3d 1095 (1998); *Pryor v. Reno*, 998 F. Supp. 1317 (1998); *Gillespie v. City of Indianapolis*, --- F. Supp.2d ---, 1998 WL 310477 (S.D. Ind. 1998).

174. See 18 U.S.C.A. §§ 2721-25 (West Supp. 1998).

175. *Id.* § 2722(a).

176. *Id.* at § 2723(b).

177. See *id.* §§ 2723(a), 2724(a).

One district court distinguished the DPPA from the statute in *Printz* on the grounds that it “requires no affirmative action by the State or its officer,” but “[r]ather, the DPPA merely prohibits States from disclosing personal DMV records for any impermissible purpose.”<sup>178</sup>

In contrast, a number of district courts held that *Printz* was controlling.<sup>179</sup> In *Condon v. Reno*,<sup>180</sup> the Fourth Circuit, citing *Printz* and *City of Boerne v. Flores*,<sup>181</sup> ruled that Congress lacked the authority under the Commerce Clause or Section Five of the Fourteenth Amendment to enact the DPPA.<sup>182</sup> Judge Williams held that the DPPA is not a generally applicable law of the *Garcia* sort because only state governments run departments of motor vehicles.<sup>183</sup> As a result, the DPPA was subject to the strict requirements of *Printz*. It is noteworthy that the Fourth Circuit was constrained by the formal, structuralist nature of *Printz*. Despite the Court’s agreement with the United States’ argument that the DPPA differed from the Brady Act because it “does not conscript state officers to enforce the regulations established by Congress,” the Court followed *Printz* because “[n]evertheless, state officials must, as the district court found, administer the DPPA.”<sup>184</sup>

As this article goes to press, the Seventh and Tenth Circuits have both disagreed with the Fourth Circuit.<sup>185</sup> The crux of their reasoning is that the DPPA regulates information dissemination, and only impacts states incidentally,<sup>186</sup> or as market participants<sup>187</sup>—the exception for generally applicable

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178. *Pryor v. Reno*, 998 F. Supp. 1317, 1329 (M.D. Ala. 1998).

179. *See, e.g., Condon v. Reno*, 972 F. Supp. 977, 985 (D.S.C. 1997); *Travis v. Reno*, No. 97-C-701-C, 1998 WL 307747, \*7 (W.D. Wis. June 9, 1998); *Oklahoma v. United States*, 994 F. Supp. 1358, 1363 (W.D. Okla. 1997).

180. 155 F.3d 453 (4th Cir.(S.C.)).

181. 117 S. Ct. 2157 (1997).

182. *See Condon*, 155 F.3d at 463, 465.

183. *See id.* at 461 (“Of course, there is no private counterpart to a state Department of Motor Vehicles.”).

184. *Id.* at 460.

185. *See Travis v. Reno*, 1998 WL 871038 (7th Cir. 1998); *State of Oklahoma v. United States*, 161 F.3d 1266 (10th Cir. 1998).

186. *See State of Oklahoma*, 161 F.3d at 1271 (“Unlike the federal statute in *New York*, the DPPA does not commandeer the state legislative process by requiring state to enact legislation regulating the disclosure of such information and preempts contrary state law.”).

187. *See Travis*, 1998 WL 871038 at \*4 (“Because the Driver’s Privacy Protection Act affects states as owners of data, rather than as sovereigns, it does not commandeer states in violation of the Constitution. Wisconsin is no more a regulator or law enforcer

laws need not require regulation of both states and private parties in the same statute.<sup>188</sup> This interpretation of *Printz* may leave its structural holding intact depending upon how quick courts are to find "general applicability."<sup>189</sup>

But Judge Easterbrook's declaration in the Seventh Circuit—"[T]he anticommandeering rule comes into play only when the federal government calls on the states to use their sovereign powers as regulators of their citizens"<sup>190</sup>—although it may be dictum in support of his view that the DPPA does not regulate states as sovereigns, is overly narrow and could be read by other courts in such a way as to permit laws whose object is to command state governments.<sup>191</sup>

The initial case law stemming from *Printz* leaves it unclear to what extent courts will apply the doctrine of dual sovereignty to federal statutes without the balancing tests of old. As the Supreme Court now holds, the Constitution's structure demands no less:

Where . . . it is the whole object of the law to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty . . . a 'balancing' analysis is inappropriate. It is the very principle of separate state sovereignty that such a law offends and no

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when it decides what information to release from its database than is the corner Blockbuster Video outlet.").

188. *See id.* at \*5 ("Discrimination against states is forbidden, but a nondiscriminatory system may take more than one law to implement."). Although Judge Easterbrook rightly rejects discrimination against states, the Seventh and Tenth Circuit's apparent view that the presence of commandeering depends on the type of governmental function implicated is slightly different from Justice Scalia's test, which is based on the object of the federal law and makes no such distinction. A federal law, for example, which created one minimum wage for states and another for private industry could have as its object the commandeering of the state, despite the fact that employment is a non-governmental function. The discrimination in this example would be an indicator of the commandeering, and thus its presence would coincide with the statute's unconstitutionality, but it is not the discrimination itself that *Printz* controls, but the not incidental infringement of sovereignty.

189. In this respect, the Tenth Circuit opinion is troubling for its occasional resort to functionalism. *See State of Oklahoma*, 161 F.3d at 1271 ("Oppressive federal regulation that 'commandeers' a state's sovereign functions is less likely to arise where the law is aimed at both private and public entities. This is so because generally applicable laws are not aimed at uniquely governmental functions. Moreover, laws affecting both private and public interests are subject to stricter political monitoring by the private sector.").

190. *Travis*, 1998 WL 871038, at \*4.

191. For example, Judge Easterbrook's interpretation might permit federal statutes whose object was to regulate state administrative functions, on the theory that such functions have private counterparts and do not regulate citizens, yet this would seem to be a very meddlesome form of encroachment on state sovereignty.

comparative assessment of the various interests can overcome that fundamental defect.<sup>192</sup>

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192. *Printz*, 117 S. Ct. at 2383. It is also arguable that a statute which on its face does not violate state sovereignty could run afoul of the *Printz* rule, although this issue is unaddressed in *Printz*. Professor Van Alstyne has suggested that statutes which have as their true object the "illegitimate use" of an enumerated power may be unconstitutional despite otherwise meeting the test for an enumerated power. See William Van Alstyne, *Federalism, Congress, the States, and the Tenth Amendment: Adrift in the Cellophane Sea*, 1987 DUKE L. J. 769 ("The argument presented here is that the same kind of 'illegitimate use' analysis Justice Frankfurter invoked in the cellophane-wrapped tax case is, contrary to the conventional view, equally applicable to commerce power cases and every other enumerated power case as well.").

