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# The Trouble with Tarble's: An Excerpt from an Alternative Casebook

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# THE TROUBLE WITH *TARBLE'S:* AN EXCERPT FROM AN ALTERNATIVE CASEBOOK

*Daniel A. Farber**

**Ex Parte Printz**

521 U.S. 898, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997)**

Chief Justice O'CONNOR delivered the judgment of the Court and an opinion joined by Justices REHNQUIST, THOMAS, and KENNEDY, and by Justice SCALIA except for footnote 1.

[The Gun Control Act, 18 U.S.C. § 921 et seq., prohibits firearms dealers from selling handguns to any person under 21, to anyone not resident in the dealer's state, to convicted felons, and to certain others. In 1993, the Brady Act (passed after an unsuccessful attempt to assassinate the President) amended the statute, imposing a system of "interim" background checks for purchasers before a system of instant electronic checks goes into effect. The Brady Act requires a "chief law enforcement officer" to make a "reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law." Printz, a local sheriff, refused to comply with the statute, and the Attorney General obtained a federal injunction requiring him to do so. When Printz refused to obey the injunction, he was convicted of criminal contempt and received a three-month

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** *Historical Note.* As indicated in Justice Scalia's concurrence in *Printz*, the "out of control" state judiciary had become a major conservative agenda issue by 1980. Consequently, President Reagan's appointments to the Court were picked at least partly on the basis of their nationalist credentials. Indeed, some argued that rejection of *Tarble*'s was being applied as a litmus test. Although Reagan very nearly selected the more nationalist William Rehnquist as Chief Justice, he apparently concluded that O'Connor, with her background as a state court judge and legislator, would be more palatable to moderates. Undoubtedly, her selection as Chief Justice helped defuse some opposition to the Supreme Court's attack on states' rights.

sentence. He thereupon filed a petition in state court for a writ of habeas corpus, which the state courts granted.]

The state courts held that the Brady Act violates the Tenth Amendment and the guaranty clause of the Constitution. We reverse without reaching the merits of this claim. Printz relies on *Tarble's Case,* 80 U.S. (13 Wall.) 397 (1872), as the basis for state court jurisdiction. It is true that this Court held in *Tarble's Case* that state courts have jurisdiction to inquire into the validity of federal custody—in that case itself, into whether the petitioner was unlawfully enlisted into the Army while a minor.[1] We do not have occasion to question that holding today, though it has been severely criticized by commentators and has been eroded by recent decisions of this Court. See, e.g., Richard H. Fallon, Jr., Daniel J. Meltzer & David L. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 459-461 (4th ed. 1996).

Nevertheless, on the facts of this case, it is clear that the state courts lacked jurisdiction. Inasmuch as Printz is seeking an unprecedented expansion of an existing constitutional rule, his habeas petition is barred by *Teague v. Lane*, 489 U.S. 288 (1989). *Teague* squarely held that a habeas court lacks jurisdiction to consider a "new rule" of constitutional law. This is just such a case.[2]

The sweeping interpretation of the Tenth Amendment sought by Printz would unquestionably be a "new rule" under *Teague*. The lower courts relied largely on our holding in *New York v. United States*, 505 U.S. 144 (1992). But as both the plu-

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1. The key passage in Chief Justice Chase's opinion for the Court reads as follows:

> To deny the right of State courts to issue the writ, or, what amounts to the same thing, to concede the right to issue and to deny the right to adjudicate, is to deny the right to protect the citizen by *habeas corpus* against arbitrary imprisonment in a large class of cases; and, we are thoroughly persuaded, was never within the contemplation of the Convention which framed, or the people who adopted, the Constitution. That instrument expressly declares that "the privilege of the writ of *habeas corpus* shall not be suspended, unless when, in case of rebellion or invasion, the public safety may require it."

There is some historical evidence that Chase's opinion was originally drafted as a dissent.

2. Unlike *Teague*, this case involves state rather than federal habeas. Nevertheless, *Teague* rests on the understanding that "[a]pplication of constitutional rule not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." 489 U.S. at 309. That rationale is fully applicable when a federal conviction is involved, just as it is when a state conviction is under collateral attack. The same is true for *Teague*'s warning about the "harm caused by the failure to treat similarly situated defendants alike," id. at 315, if the rule were to be nonretroactive except in the specific case in which this Court or any lower court, state or federal, first announces a new rule of federal law.

rality opinion by Justice Stevens and the concurring opinion of Justice White make clear, *New York* stands at most for the principle that Congress lacks the power to commandeer state legislatures. It would be an extraordinary expansion of *New York* to extend this principle to state executive officers, particularly in the face of substantial evidence that the Framers intended the state executives to play a central role in enforcing federal law. See Saikrishna Prakash, *Field Office Federalism*, 79 Va. L. Rev. 1957 (1993).

It surely "would not have been an illogical or even a grudging application" of prior law "to decide that it did not extend to the facts" of this case. See *Edwards v. Arizona*, 451 U.S. 477 (1981).[3] That being true, *Teague* blocks the use of state collateral review.

Consequently, the judgment of the lower court is reversed and remanded with instructions to dismiss for lack of jurisdiction.

Justice SCALIA concurring in part and concurring in the judgment.

* * * Power. That is what this suit is about. The allocation of power among the federal government and the state courts in such a fashion as to preserve the equilibrium the Constitution sought to establish. Frequently, an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of a novel principle to undermine the equilibrium of power is not apparent and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.

Indeed, this is a wolf that has come before, time and again. Fortunately, the decision in *Tarble's Case* itself came too late to affect the course of the civil war. But only a few decades later, it began to prove its ability to upset the balance of federalism. By the late 19th Century, labor-oriented state courts were routinely granting habeas to union leaders jailed for contempt of federal injunctions. By the middle of the next century, Congress was finding it difficult to conduct investigations of serious threats to

3. It is true that we have suggested an exception to *Teague* where the petitioner's "primary conduct" is immune from government regulation. See *Penry v. Lynaugh*, 492 U.S. 302 (1989). Here, however, the conduct was contempt of a federal injunction, which arguably does not qualify as "primary" conduct at all since it took place in the course of litigation, and in any event is not in itself conduct outside the scope of government regulation, whatever the underlying validity of the injunction.

our national security, as its contempt orders were met with state habeas writs issued by judges whose motivations themselves were, in the eyes of many, suspect. True, those writs were generally reversed by this Court, but not until much valuable time had been wasted. But worse was to follow. Although previous war efforts had been too popular to meet resistance from the state courts, the Vietnam War was different. By 1968, a flurry of state habeas petitions had begun to interfere seriously with conscription. Several state trial judges held that the war was unconstitutional. These rulings sparked mass demonstrations that led to the 1969 Paris peace talks, which brought the war to an ignominious end before any of the state decisions reached this Court for review.[4] More recently, some state courts have applied unduly expansive views of the Bill of Rights to overturn federal criminal convictions, with (sad to say) support from members of this Court. See William Brennan, *State Courts and the Protection of Individual Rights*, 61 N.Y.U. L. Rev. 535 (1986). Again, the power of this Court to review the state judgments proved in practice inadequate as a safeguard. It is little wonder that state habeas—and the banner of "states' rights" more generally—has become the darling of certain political forces within our society, who are unable to muster nationwide majorities for their preferred political positions.[5]

The dissent has mistaken a Kulturkampf for a jurisdictional spat. At root, the dispute is between those favoring the orderly national resolution of political or legal disputes, versus those who favor an anarchistic riot of local self-determination. The majority opinion is not the manifestation of a "bare desire to restrict constitutional rights" but is rather a modest attempt to preserve national judicial power against the efforts of a locally pow-

4. As this history shows, the ultimate ability of this Court to review aberrant state decisions is cold comfort indeed, particularly given the docket constraints that make it impossible for us to hear more than a fraction of the cases in which review is granted.

5. Some have even traced *Tarble's* back to pre-Civil War cases in which state courts granted habeas to fugitive slaves held in federal custody. See Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (Yale U. Press, 1975). Such commentators might have found the rule in *Tarble's Case* a good deal less acceptable, however, had it not been for our decision in *Cooper v. Aaron*, 358 U.S. 1 (1958), which brought an early end to the use of state courts to block federal desegregation decrees. *Cooper* recognized an exception to state habeas jurisdiction in cases where the federal government was acting pursuant to its powers to enforce the Fourteenth Amendment, on the grounds that the Fourteenth Amendment revised the otherwise applicable structure of federalism and that allowing state interference with federal enforcement of the Fourteenth Amendment would conflict with the policy underlying *Tarble's*, which was intended to protect individual rights through state enforcement, not undermine federal enforcement of those rights.

erful majority to undermine that authority through use of the state courts.

Under the dissent's view, it would now be open season upon the enforcement powers of the federal courts. The dissent essentially says to the federal government: "Trust the state courts. They will make sure that you are able to accomplish your constitutional role." I think that the Constitution gives the federal government—and the people—more protection than that. It is time to overrule *Tarble's Case* and bring this sorry aspect of our nation's history to an end.

Justice STEVENS, joined by Justice SOUTER, Justice GINSBURG, and Justice BREYER, dissenting.

Poor Printz!

Deprived of his liberty by a federal court enforcing an unconstitutional federal statute, yet with no place to turn for relief but the same federal courts that issued the injunction—courts largely manned by judges appointed by the same President and Congress that passed the law in question.

Unfortunately, the majority turns its back on established case law and would erect a formidable new barrier to relief. From the majority's exposition, one might infer that its novel fabrication will work no great change in the availability of state habeas. Nothing could be further from the truth. The state courts are a bulwark of our liberties, as one leading scholar has aptly observed. See Akhil Amar, *Using State Law to Protect Federal Constitutional Rights: Some Questions and Answers About Converse-1983*, 64 U. Colo. L. Rev. 159 (1993). Until today, no question has ever been raised about the power of the state courts to intervene when Congress oversteps its constitutional powers. But why then, we must ask, did the Supremacy Clause specifically impose the duty of applying the Constitution on state judges? For make no mistake: however clear our own power of judicial review may be, that power is only implied from the overall structure of the Constitution. But the mandate to the state courts is explicit and undeniable.

Liberty finds no refuge in a jurisprudence of doubt. Our Constitution is a covenant running from the first generation of Americans to us and then to future generations. It is a coherent succession. Each generation must learn anew that the Constitution's written terms embody ideas and aspirations that must survive more ages than one. We must accept our responsibility not

to retreat from interpreting the full meaning of the covenant in light of all of our precedents. Today, the Court again sadly fails to protect the freedom guaranteed by the Constitution's own promise, the promise of liberty, protected by the state judiciary as well as by this Court itself.

We respectfully dissent.