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*407 STATE COURTS AND THE TELEPHONE CONSUMER PROTECTION ACT OF 1991: MUST STATES OPT-IN? CAN STATES OPT-OUT?

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[W]e deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts or to control or affect their modes of procedure, but only a question of the duty of such a court, when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress and susceptible of adjudication according to the prevailing rules of procedure. [FN1]
Author's Note: Since the original submission of this Article, a number of very compelling Telephone Consumer Protection Act decisions have been issued, including Hooters of Augusta, Inc. v. Nicholson, 537 S.E.2d 468 (Ga. Ct. App. 2000) (en banc), Schulman v. Chase Manhattan Bank, 710 N.Y.S.2d 368 (N.Y. App. 2000), Physicians Data, Inc. v. US West Wireless, No. 00-CV- 631 (Dist. Ct. Colo. Aug. 14, 2000), Kaufman v. HTOA, Inc., No. BC 222589 (Super. Ct. Ca. Aug. 25, 2000). These courts have all held that there is no need for a state to pass enabling legislation and "opt-in" to the Telephone Consumer Protection Act. I have attempted, within the time constraints for publication, to incorporate relevant citations to these new decisions into the Article.

I. Introduction

Since the unanimous decision in Testa v. Katt, [FN2] the duty of state courts to hear claims arising out of a valid federal law has not been seriously challenged. ***408** In 1991, however, Congress created the Telephone Consumer Protection Act (the "TCPA"), [FN3] and within that statute some courts have found a congressional foray into statutory wilderness, threatening the Testa legacy by allowing states to "opt-in" or "opt-out" of having their courts hear cases arising under that federal statute.

This Article addresses the unique aspects of the TCPA's exclusive state court jurisdiction and the constitutional issues of both allowing a state to close its courts to a federal cause of action and implementing exclusive state court jurisdiction for a federal law. Part II reviews the background of recent court decisions interpreting the unusual jurisdictional aspects of the TCPA. Part III examines the statute and legislative history to shed light on what was actually intended by the drafters. Part IV examines the statute's language in the context of the Supremacy Clause and the balance of sovereign powers. Finally, Part V addresses what one court has called the "unresolved" Testa question [FN4] arising from exclusive state court jurisdiction for a federal cause of action.

After careful consideration of all these issues, it is clear that the TCPA is no different from any other federal law in regard to a state court's ability and obligation to hear such cases. This means that not only are states not required to first "opt-in" or conform their state laws to the TCPA's provisions in order for their courts to hear TCPA actions, but also that the haphazard dicta in International Science & Technology Institute v. Inacom Communications, Inc. [FN5] that concludes states are allowed to "opt-out" and arbitrarily close their courts to TCPA actions is in error. As always, the states have great latitude to establish the structure and jurisdiction of their courts, even when hearing cases brought under federal laws such as the TCPA. [FN6] But a state cannot arbitrarily close its courts to TCPA actions while allowing similar state claims, any more than a state could close its courts to FELA, [FN7] RICO, [FN8] or other federal causes of action. [FN9]

***409** At this point, the terms "opt-out" and "opt-in" present some ambiguity and need to be defined. For this discussion, the term "opt-out" refers to a state legislature enacting a law that carves out a specific exception for the TCPA; for example, a state law that provides: "Civil suits, under 47 U.S.C. § 227 may not be heard in the courts of

this State." The term "opt-in" means action by a state legislature that singles out the TCPA; for example a state law which provides: "Civil suits, under 47 U.S.C. § 227 are hereby authorized to be heard in the courts of this State." "Opt-in" also refers to the concept of a state modifying its own telemarketing laws to conform to the TCPA or codifying the TCPA into the state law as a prerequisite of state courts being able to hear TCPA cases. [FN10]

The Fourth Circuit decision in International Science concluded in dicta that states have the ability to "opt-out" with specific legislative action of the type mentioned above. [FN11] That theory is so far untested and, I believe, constitutionally flawed. [FN12]

***410** II. Background

A. The TCPA

The TCPA is far from a model of legislative draftsmanship or clarity and only recently has the exclusive state court jurisdiction for consumer suits under the statute been firmly established. In the late 1990s, several cases were brought in federal court under the TCPA, but each circuit that addressed the issue held that, although TCPA cases are based upon a federal law, the cases must be brought exclusively in state courts in light of the statute's specific jurisdictional provisions and legislative history. [FN13] However, in an ironic twist of legislative shortsightedness, although the TCPA proscribes a wide range of offensive conduct, private enforcement actions are fully expected to be brought by pro se plaintiffs in small claims ***411** court [FN14] and are essentially limited to such imperfect prosecutions. [FN15] This practically ensures that few TCPA cases will result in well-reasoned appellate decisions. [FN16]

Furthermore, the TCPA has been described by some commentators as an example of "congressional bill drafting [that] is needlessly bad." [FN17] This careless drafting has provided fertile ground for what can only be described as improbable interpretations, [FN18] including an interpretation that the right of a consumer to bring a claim under the TCPA in a state court is conditioned on some action by that state to permit such suits. [FN19] This conclusion has generally been based on the private right of action language in 47 U.S.C. § 227(b)(3): [FN20]

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State: (A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation, (B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is ***412** greater, or (C) both such actions. [FN21]

The ambiguous phrase "if otherwise permitted by the laws or rules of court of a State" has provided for a cacophony of conflicting interpretations. [FN22] Some courts have interpreted it to mean that in order for a consumer in that state to bring a private action under the TCPA, there must be a private right of action in a similar state telemarketing or junk fax statute. [FN23] It has also been construed to mean that a state must "opt-in," and its legislature must take an affirmative act to specifically permit suits under the TCPA. [FN24] Other courts have held just the opposite: that states need not take any action to allow TCPA suits in their courts. [FN25] It has also been interpreted ***413** to mean that a state may "opt-out" and close its courts to TCPA cases by specific legislation. [FN26] The most constitutionally sound interpretation, however, is the one reached by the Fifth Circuit in Chair King v. Houston Cellular, [FN27] which adopted the holding in International Science on subject matter jurisdiction, but concluded in dicta that the phrase in question merely recognized the states' control over administrative procedures of their courts when hearing cases under federal law. [FN28]

B. "Opt-In" Construction Explicitly Rejected

The decision in International Science was the first appellate court decision under the TCPA to address the "opt-in" argument. [FN29] The plaintiff argued that the TCPA provided a private right of action only if the state law allowed private actions under the state's telemarketing laws. [FN30] He further argued that the TCPA would therefore violate the Equal Protection Clause of the Fourteenth Amendment unless there was concurrent federal court jurisdiction for citizens in states that had not "opted-in." [FN31] The court flatly rejected this interpretation of the "if otherwise permitted" language and held specifically that there was no requirement for a state to take any affirmative action to permit suits under the TCPA, finding "[t]he clause in 47 U.S.C. § 227(b)(3) 'if otherwise permitted by the laws or rules of court of a State' does not condition the substantive right to be free from unsolicited ***414** faxes on state approval." [FN32] This holding was adopted by the Second Circuit in Foxhall Realty Law Offices, Inc. v.

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Telecommunications Premium Services, Ltd., when it was faced with the same Equal Protection Clause challenge. [FN33] The court in Murphey v. Lanier also adopted International Science and quoted the Fourth Circuit, which stated that "if the state consents" by not closing its courts, TCPA cases are exclusively heard in state courts. [FN34]

Several state trial courts reached the same conclusion, rejecting an "opt-in" interpretation. [FN35] Probably the most well reasoned and scholarly opinion rejecting the "opt-in" argument is found in Zelma v. Total Remodeling, Inc., which correctly explained that jurisdiction of the state court to hear a TCPA case flowed from the state and federal constitutions, and "that no special legislation is required to enable [the state courts] to do so." [FN36] That court cited the New Jersey Constitution, noting that "'[t] he Superior Court shall have original general jurisdiction throughout this State in all causes.' Among these potential causes of action are those formulated by Congress to confer upon the citizens of the several states certain rights enforceable in state courts." [FN37]

The first state appellate court to decide the question was in Kaplan v. Democrat and Chronicle, [FN38] which cited International Science and held unanimously that there is no requirement for a state to act to authorize TCPA suits in its state courts. [FN39] Other state appellate courts followed, including the New York Supreme Court, Appellate Division in Schulman v. Chase Manhattan Bank, [FN40] and the Georgia Court of Appeals in Hooters of Augusta. [FN41] The only state appellate court to hold otherwise was the Texas ***415** Court of Appeals in Autoflex Leasing, Inc., v. Manufacturers Auto Leasing, Inc. [FN42] which cited several of the federal court TCPA decisions in error and held in a short and poorly reasoned opinion that "Congress intended the states to pass legislation or promulgate court rules consenting to state court actions based on the TCPA . . . ." [FN43]

In addition to being specifically rejected by these courts, no appellate federal court has ever supported the "opt-in" argument. Furthermore, it has been implicitly rejected by the numerous state courts which have heard TCPA claims without any hindrance created by a state having not "opted-in" to the TCPA's enforcement. [FN44] The small number of trial courts that have held otherwise are clearly in error. [FN45]

The International Science court went further, however, and concluded in dicta that there was an ability for a state court to "opt-out" by closing its ***416** courts to TCPA suits. [FN46] Since no state has tested this theory by attempting to "opt-out," the constitutionality of allowing states to "opt- out" has not yet been directly addressed as a justiciable issue in any case. Answering the "opt-out" question requires a much more careful exploration of congressional intent and the constitutional principals involved. [FN47] This exploration also confirms that the decisions rejecting the "opt-in" arguments were rightly decided.

III. What Was Intended? Legislative History of the Private Right of Action

There is very little to aid a court in resolving the ambiguity in the private right of action language. There is only sparse legislative history [FN48] as that clause was added as a late floor amendment and the languageat issue was never altered from the date it was added until passage three weeks later. The only substantive discussion of the intent of this "small" change to the bill comes from the sponsor of the bill, [FN49] Senator Hollings, and is worth repeating here in its entirety:

Mr. President, the substitute bill[[FN50]] I am offering today contains a number of small changes to the bill that was reported by the Commerce Committee[[FN51]]. These changes address concerns that were raised at the hearing in Washington[[FN52]] and hearings in South Carolina[[FN53]], and in the additional comments that were received from the public.

The substitute bill contains a private right-of-action provision that will make it easier for consumers to recover damages from receiving ***417** these computerized calls.[[FN54]] The provision would allow consumers to bring an action in State court against any entity that violates the bill. The bill does not, because of constitutional constraints, dictate to the States which court in each State shall be the proper venue for such an action, as this is a matter for State legislators to determine. Nevertheless, it is my hope that States will make it as easy as possible for consumers to bring such actions, preferably in small claims court. The consumer outrage at receiving these calls is clear. Unless Congress makes it easier for consumers to obtain damages from those who violate this bill, these abuses will undoubtedly continue.

Small claims court or a similar court would allow the consumer to appear before the court without an attorney. The amount of damages in this legislation is set to be fair to both the consumer and the telemarketer. However, it would defeat the purposes of the bill if the attorneys' costs to consumers of bringing an action were greater than the potential damages. I thus expect that the States will act reasonably in permitting their citizens to go to court to

enforce this bill. [FN55]

Divining congressional intent from a short soliloquy of legislative history is always an exercise fraught with peril. Some jurists, particularly Justice Scalia, eschew reliance on legislative history as "the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends." [FN56] But whether the senator is friend or foe, he is in this case the only person in the room. Hollings' above statement is the only expression of intent on the private right of action. [FN57] In construing the private right of action in the TCPA, this is essentially the only aid available. The International Science court faced the same problem, as is demonstrated by the extensive reliance on the statements of Senator Hollings in ***418** that court's rationale. [FN58]

A. Analysis

The key to understanding the purpose behind the "if otherwise permitted" language in the statute is the phrase "[t]he bill does not, because of constitutional constraints, dictate to the States which court in each State shall be the proper venue for such an action, as this is a matter for State legislators to determine." [FN59] It is clear from this language that states will determine which court in a state will hear TCPA claims, but the extent of that choice is which court will hear TCPA cases, and not if the state will allow them. [FN60] This is an important distinction, and consistent with the constitutional requirement that state courts take cognizance of federal actions where their jurisdiction is appropriate to the case. [FN61] To construe this statement to mean states can arbitrarily close all their courts to TCPA actions would do violence to the senator's words, and raise serious constitutional questions. [FN62]

In this statement, Senator Hollings is adamant that the reason the private right of action was added was to make it as easy as possible for consumers to take action against violators. [FN63] Interpreting the TCPA to allow a state to close its courts to those very consumers or to deny consumers a remedy until their state had taken legislative action, would be inconsistent with this intent. As a "private attorney general" statute, this citizen enforcement furnishes a powerful deterrent by providing the equivalent of "neighborhood watch" for telemarketing violations. [FN64] In ErieNet, Inc. v. ***419** Velocity Net, Inc., the Second Circuit recognized that this citizen enforcement "puts teeth into the statute" and is a basic necessity based on the "sheer number" of telemarketing calls. [FN65]

Hollings also knew citizen enforcement was the only realistic enforcement mechanism since the FCC went on the record as unpersuaded that federal action was needed to address telemarketing complaints to date. [FN66] Although the FCC has authority to enforce the provisions of the Communications Act, [FN67] the FCC sent a strong signal to Hollings' committee that at that time the FCC lacked enthusiasm for enforcing telemarketing restrictions because the FCC felt that federal legislation was unnecessary. [FN68] Lack of FCC enforcement was specifically mentioned by Senator Hollings when creating the private right of action. [FN69] Knowing that the FCC had little desire ***420** to enforce the statute, it would be inconsistent for the drafters to allow states to remove the primary enforcement mechanism of citizen suits. As a remedial statute, the TCPA should be liberally interpreted to make the legislative scheme effective. [FN70] The Court in ErieNet recognized that reliance on government enforcement alone would render the TCPA ineffective. [FN71] Abating private enforcement would remove the "teeth" that the court in ErieNet recognized were critical to the statutory scheme and render it ineffective. Congress put those teeth into the statute-it could not have intended for the states to play dentist and remove them. Hollings' statement shows that the states can determine which court will hear a TCPA case-not if the state will hear them.

B. The Second Source of Ambiguity

The phrase "I thus expect that the States will act reasonably in permitting their citizens to go to court to enforce this bill" [FN72] has also been used to infer that a citizen's right to go to court to enforce the TCPA is contingent in some way on their state "permitting" it. [FN73] However, this interpretation of the Senator's words is in error, as it reads those words out of context. Including the immediately prior sentences, the context reads:

Small claims court or a similar court would allow the consumer to appear before the court without an attorney. The amount of damages in this legislation is set to be fair to both the consumer and the telemarketer. However, it would defeat the purposes of the bill if the attorneys' costs to consumers of bringing an action were greater than the potential damages. I thus expect that the States will act reasonably in permitting their citizens to go to court to enforce this bill." [FN74]

In the above context, "acting reasonable" is specifically addressing "attorneys' costs to consumers" in the sense that

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a state should act reasonably in its courts' administrative procedures, and not cause a consumer's attorney fees and costs to exceed the potential damages. In context, the natural reading is one of "permitting the citizen to go to court," as opposed to the ***421** state requiring the citizen to hire an attorney or endure costly fees and other hurdles that could make the costs of bringing the action greater than the potential damage award. [FN75] As the Fifth Circuit mentioned in Chair King, Inc. v. Houston Cellular Corp., after reviewing the above quotation, Senator Hollings simply recognized, like the Supreme Court in the Second Employers' Liability Cases [FN76] and Claflin v. Houseman, [FN77] that states have the discretion over administration of an action in their courts. [FN78]

IV. The Supremacy Clause Mandate

Since the drafting of the Constitution, it has been emphasized that state courts would have original jurisdiction to hear cases arising under federal laws. [FN79] As Justice Powell noted, this "constitutionally mandated balance of power between the States and the Federal Government was adopted by the Framers to ensure the protection of our fundamental liberties." [FN80] The balance of power between the state and federal sovereigns is as important as the balance of power between the three branches of government. The question of a state closing its courts to any federal cause of action therefore involves a basic constitutional question of the relationship between state sovereignty and the superiority of federal law. In this context, the supremacy ***422** of federal law has several well defined parameters which were concisely summarized in Howlett v. Rose:

A state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of "valid excuse." . . . An excuse that is inconsistent with or violates federal law is not a valid excuse: The Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source. . . . States may apply their own neutral procedural rules to federal claims, unless those rules are pre- empted by federal law. [FN81]

It is well-settled that Congress can pass laws enforceable in state courts [FN82] and that state courts have original jurisdiction to hear a case arising under a federal law. [FN83] With that jurisdiction comes a duty to exercise it. [FN84] The Supreme Court "unanimously held [in Testa v. Katt] that Congress could constitutionally require state courts to hear and decide Emergency Price Control Act cases involving the enforcement of federal penal laws." [FN85] Unless Congress explicitly provides otherwise, claims based on a federal ***423** law must be heard by a state court with the proper jurisdiction. [FN86] Therefore, unless a truly neutral procedural rule of a state court prevents it, [FN87] or where an explicit congressional intent to command otherwise appears, state courts of appropriate jurisdiction must hear cases arising under the TCPA. Since the TCPA has no explicit grant of exclusive federal court jurisdiction for the consumer's private right of action, any analysis of the statute's language must begin with the premise that, without additional authorization requirements, state courts of general jurisdiction which hear state law claims of similar size and scope have jurisdiction of, and are required to hear, TCPA claims. [FN88]

A. The TCPA, Federal Supremacy, and Limits of Federalism

This brings us to several questions. Can Congress provide a federal remedy that is unavailable until a state takes some affirmative action to allow its courts to hear those claims? Can Congress give a state authority to arbitrarily close its courts to a federal remedy? [FN89] If Congress could grant states the option of closing their courts to suits under a specific federal law, what effect would it have on the balance of power between the state and federal sovereigns? How must such intent be provided for, and does the language and the history of the TCPA support such an interpretation? Finally, does the TCPA present a Tenth Amendment problem under cases such as New York v. United States [FN90] or Printz v. United States [FN91] by "commandeering" a sovereign state's courts?

The U.S. Constitution provides that federal law "shall be the supreme ***424** Law of the Land" and shall be controlling on every court. [FN92] Under this Supremacy Clause, states cannot simply refuse to enforce a valid federal act. When a federal law is being heard in a state court, [FN93] a state court can use its own procedural rules, but these rules must be neutral in that those local rules or procedures must not discriminate against the federal law or affect the availability of a federal right. [FN94]

There are some recognized limits, however, on what Congress can impose on the sovereign states under the Supremacy Clause. Congress cannot require a state to create new courts to hear claims arising out of federal laws. [FN95] Nor can it "regulate the jurisdiction" or dictate the "modes of procedure" of state courts. [FN96] In New York, the Court explained that it is within the "well established power of Congress to pass laws enforceable in state

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courts," [FN97] but Congress must regulate the activity itself. [FN98] Even where ***425** Congress regulates an activity directly, it can not conscript a state's police powers to enforce federal law. [FN99] Nor can it enforce a federal law by abrogating a state's sovereign immunity and subject the states to suit without their consent in either federal court [FN100] or state court. [FN101]

Using those parameters for guidance, the TCPA presents no constitutional infirmity. It does not require the states to create any courts or take any legislative action. It regulates individual conduct directly and does not require a state to prosecute violators, nor does it abrogate states' sovereign immunity. It does not attempt to regulate the jurisdiction or mandate the modes of procedure of the state courts. The TCPA is simply enforceable under the Supremacy Clause in an appropriate state court in accordance with the laws and rules of the courts of that state, like FELA, RICO, and other federal acts. "Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause." [FN102] Following the line of cases anchored by the unanimous Supreme Court in Testa v. Katt, [FN103] any state court that is competent to hear similar civil suits must also hear TCPA cases, unless otherwise provided by Congress. [FN104] ***426** Therefore, the question is reduced to: "Does the TCPA provide otherwise?"

B. The "Clear Statement Rule" and the Balance of Sovereigns

To put it simply, when the Court is faced with a statute that may alter constitutional balances, the Court asks itself: "Are we sure this is what Congress intended?" The Court will not construe a statute to alter any delicate constitutional balances without being certain that was what drafters clearly intended. [FN105] As Justice O'Connor noted, this requirement "is not a mere canon of statutory interpretation. Instead, it derives from the Constitution itself." [FN106]

Consider how requiring "opt-in" or allowing "opt-out" would affect the balance of powers between the state and federal sovereigns. The state would have a form of veto power over a federal law. This would endow a state with the ability to reject enforcement of a federal law in that state's courts. Allowing such an action would affect the very foundation of federal supremacy [FN107] and Congress must make its intent to bring about such an unprecedented provision "unmistakably clear." [FN108] It takes an explicit statement from Congress to divest state courts of their original jurisdiction-and obligation- to hear claims arising out of federal laws. It logically takes a similar explicit directive from Congress to allow a state to achieve the same result.

Statutory provisions affecting the balance of power or the delicate balance of authority between state and federal sovereigns have traditionally been subject to the "clear statement rule." This rule protects federal supremacy to ensure that an act of Congress does not erode the power of the federal sovereign, by waivers of sovereign immunity, for example, unless ***427** Congress clearly intended to do so. [FN109] The rule also protects against any unintentional encroachment on federal powers, such as allowing taxation or regulation of federal instrumentalities that are otherwise exempt [FN110] and allowing state courts to have jurisdiction over Indian affairs. [FN111] Most important to the issue of construing the TCPA, this rule is always invoked when the Court is faced with a federal statute that purports to allow state action that absent congressional approval would be unconstitutional. [FN112]

The clear statement rule "protects the balance of power between the States and the Federal Government struck by the Constitution," [FN113] as this balance is critical to our basic form of constitutional government. [FN114] The importance of that balance requires the courts to prevent improper tipping of the scales in either direction, just as the balance between the three branches of the federal government must be protected against improper ***428** shifting of power to or from any of the three branches. In short, the clear statement rule is necessary to "forc[e] the political process to pay attention to the constitutional values at stake." [FN115]

The Supreme Court has repeatedly, consistently, and unanimously held that the Constitution requires state courts to hear claims arising under a valid federal law. [FN116] Given this position, the Court will not be quick to conclude that Congress intended a provision to allow states to do exactly what the Supreme Court has repeatedly said that states must not do-refuse to hear a cause of action brought under a valid federal law. It is unquestioned that states cannot obstruct the operation of federal laws. [FN117] Ambiguous language, such as that found in the TCPA, is not explicit enough to allow states this unprecedented veto power over a federal law. [FN118] Congress has implemented citizen suits as a primary enforcement mechanism in many statutes and has never provided that a state may close its courts to such enforcement. The proposition that Congress would venture into the statutory wilderness

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and tinker with the supremacy of federal law with no debate, no committee report, and no deliberative record is just not plausible. "Hence, we are loath to conclude that Congress intended to press ahead into dangerous constitutional thickets in the absence of firm evidence that it courted those perils." [FN119]

C. The "Clear Statement Rule" Applied to Permitting Otherwise Impermissible State Actions

An established body of law applying the clear statement rule in this context is found in the cases involving Congress' approval of state laws that, without such approval, would violate the dormant Commerce Clause doctrine. [FN120] The dormant Commerce Clause will invalidate state actions ***429** that impermissibly burden interstate commerce. [FN121] However, in its plenary powers to regulate interstate commerce, Congress can exercise that power by expressly permitting, rather than preempting, state actions. [FN122] Without such permission, however, the state actions would be an unconstitutional infringement on federal Commerce Clause powers. The Supreme Court has consistently held that if Congress intends to permit state action that would be unconstitutional absent such consent, Congress must make that intent "unmistakably clear." [FN123] Anyone seeking to convince a court that Congress intended to permit otherwise unconstitutional action by a state faces a heavy burden. [FN124]

Congress has allowed states to alter the operation of federal law only in rare cases and only when supported by extensive debate and clear intent to do so. [FN125] When altering the supremacy of federal law, this is the type of deliberative process and explicit legislative result that the Court requires. [FN126] The TCPA is devoid of such a process or record. There is no language in the TCPA to justify "transforming the legal landscape" by allowing a state ***430** to essentially veto enforcement of a federal law in the state's courts.

D. The Clear Statement Rule as Protection Against Unconstitutional Misinterpretations

Philosophically, where constitutional implications are concerned, the clear statement rule is an application of the principle of primum non nocere that was articulated two millennia ago. [FN127] Of paramount importance is that a construing court should "do no harm" to the Constitution. [FN128] A court should not risk such harm by a misinterpretation-hence the requirement of clear statement. [FN129] Congress is presumed to know the rules of construction that the courts employ, [FN130] such as the clear statement rule, and in fact "the requirement of a clear statement by Congress . . . ought to be of assistance to the Congress and the courts in drafting and interpreting legislation." [FN131] If Congress intends to provide that a state may act in a way that would be unconstitutional absent such congressional approval, Congress is presumed to be aware that such intent must be explicit. No such explicit language occurs in the TCPA. Nor is there evidence of such intent in the legislative history. The TCPA therefore fails the clear statement test, and cannot be held to give states "opt-in" or "opt-out" power. [FN132]

E. What "if Otherwise Permitted" Really Means: State Control of Administration and Procedure of State Courts

So what does the clause in the statute "if otherwise permitted" mean? When the clause is read in the context of Senator Hollings' statement of ***431** intent [FN133] and in light of the requirement that state courts have original jurisdiction to hear federal law claims not reserved for exclusive federal court jurisdiction, it reads most naturally that the clause was intended in the jurisdictional sense. This becomes especially clear when this language is considered in the context of the Supreme Court's holdings in the Second Employers' Liability Cases, which state that when a state court hears a case brought under a federal law, local laws control procedure, jurisdiction, administration, and venue. [FN134] It is often said that "federal law takes the state courts as it finds them," [FN135] and that is exactly what the TCPA's "if otherwise permitted by the laws or rules of court" language means.

The particulars of a TCPA case (jurisdiction, [FN136] venue, [FN137] residency, [FN138] amount in controversy, [FN139] etc.) must fit the administrative and jurisdictional rules of the state court hearing the case. [FN140] The Supremacy Clause does not reach these administrative and procedural issues, and these are the issues concerning Hollings that "constitutional constraints" prevented Congress from dictating to the states. Congress cannot command which court in a state has jurisdiction over TCPA claims. Nor can it mandate the "modes of procedure," such as appearing without an attorney, one of the procedures that Senator Hollings desired. [FN141]

As discussed earlier, Hollings wanted to make it as easy as possible for consumers to fulfill the role of enforcer. To accomplish this, he wanted ***432** victims to be "permitted" by the state to go to small claims court as opposed to having to file in upper level courts. [FN142] He wanted victims to be "permitted" by the state to appear without an

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attorney, realizing that a state can erect costly barriers to unrepresented parties, and even require many victims to have an attorney in order to sue. [FN143] ErieNet concluded that Hollings was implying that suits in courts other than state small claims courts would be more costly and burdensome to consumers. [FN144] It is not an accident that the statute specifically mentions meeting conditions of the "laws or rules of court" in the phrase at issue. A state's choice of which court in each state would hear TCPA cases is up to state court jurisdictional statutes and court rules. Small claims courts are usually courts of limited, not general, jurisdiction, so state court rules could close such limited jurisdiction courts to practically any class of action they choose, [FN145] and force a consumer to either bring those actions in a higher court of general jurisdiction or abandon their claim.

The Fifth Circuit realized that this was the intent of the "if otherwise permitted" language, when it skillfully determined that "[t]he statute's text evidences Senator Hollings's [sic] hopes as it provides for the right of action in state court, but gives states discretion over its administration." [FN146] ***433** Discretion over administration is what states have, not a wholesale ability to summarily reject application of a valid federal law.

In one sense, states do have to "do something" to otherwise permit suits in state court under federal statutes-they must have created a state court of general jurisdiction empowered to hear general civil claims. Either by state constitutional provisions or by state statutes, every state has taken that step and provided civil courts of such general jurisdiction. Under Testa, those courts simply must be open to TCPA claims.

V. The Unresolved Testa Question

Exclusive state court jurisdiction for claims arising out of a federal law is not unique to the TCPA. [FN147] However, the court in International Science noted that its conclusion of exclusive state court jurisdiction for the TCPA could present a question "left unresolved by Testa." [FN148] The Supreme Court has consistently required state courts to hear claims arising out of valid federal laws and the TCPA would appear to be no different. However, in those cases considered by the Court in the line of cases anchored by Testa, the underlying federal law giving rise to the cause of action was concurrently enforceable in both federal and state courts. The question of a state court's duty to hear a case arising out of a federal law when there is no concurrent federal court jurisdiction has never been asked directly. [FN149] To state the unanswered Testa question simply: "Can Congress burden state courts with hearing cases arising out of a federal law when federal courts are not equally required to hear those cases?" International Science improperly avoided this question by concluding that if states do not want to hear TCPA cases, they can arbitrarily close their courts to those cases. [FN150] Because this Article takes the opposite position, the unresolved Testa question ***434** must be addressed.

A. The Context of Testa v. Katt

Testa arose from a decision of the Rhode Island Supreme Court [FN151] that held that a complaint under the Emergency Price Control Act was not actionable by a plaintiff in a Rhode Island state court. [FN152] The Rhode Island Supreme Court concluded that the laws of the United States, such as the Emergency Price Control Act, were "foreign" to Rhode Island, and state courts could not be compelled to hear suits under "penal" federal laws against their will. [FN153] A unanimous United States Supreme Court reversed, holding that federal laws were not in any sense foreign to state courts. [FN154] Since that time, "Testa stands for the proposition that state courts cannot refuse to apply federal law-a conclusion mandated by the terms of the Supremacy Clause . . . ." [FN155]

Would exclusive state court jurisdiction make a difference under Testa? The answer is an unqualified "No."

B. Historical Treatment of the State Court's Duty

The early Court tread lightly in this area, but once federal supremacy was unequivocally established by war, the duty of state courts to hear federal law cases was no longer debatable. It is necessary, however, to review the history involved to completely appreciate the question and resolve it in the light of modern federalism.

1. The Source of the State Courts' Role in Adjudicating Federal Law

While drafting the Constitution, some framers felt that a cadre of constitutionally created federal courts would infringe on states' rights. Others argued that without its own distributed system of federal trial courts, the federal

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government "would be the mere trunk of a body, without arms or legs to act or move." [FN156] The resolution of this dilemma was left to what has come to be known as the Madisonian Compromise. [FN157] In lieu of constitutional provisions for a complete system of lower federal courts, the Compromise instead established a single Supreme Court, left for Congress to decide the scope and size of any inferior federal court system, and relied on ***435** a Supremacy Clause binding state courts to federal law. [FN158] This accomplished the dual goals of allowing the young and financially strapped republic to use the existing state court systems for enforcement of federal laws, [FN159] and at the same time placating the anti-federalists, who insisted on state courts as the venue to hear federal claims to "preserve the good old way of administering justice." [FN160] The manifest expectation of the Madisonian Compromise was that in the absence of a whole network and infrastructure of inferior federal courts designed to hear federal claims, the state courts would fulfill that role.

2. State Courts Consenting to a Role as Federal Trial Courts

The use of state courts (and in some cases state offices) to effectuate federal policy was not uncommon in the early days of the republic, [FN161] but it came with some negative implications. Several cases challenged the practice, [FN162] and in early cases, the Supreme Court often dodged the question, just as the International Science court did, with dicta concluding that the obligation of state courts to adjudicate federal law was conditioned on the passive consent of the states. [FN163] For example, in United States v. Jones, the court faced a challenge to a federal statute which gave state courts power to determine compensation for certain property acquired by the federal government under eminent domain. [FN164] The Court discussed the duties imposed on state courts:
At different times various duties have been imposed by acts of Congress on State tribunals; they have been invested with jurisdiction in civil suits, and over complaints and prosecutions for fines, penalties, and forfeitures arising under laws of the United States. And though the jurisdiction thus conferred could not be enforced against the consent of the States, yet, when its exercise was not incompatible with State duties, and the States made no objection to ***436** it, the decisions rendered by the State tribunals were upheld. [FN165]

In Kentucky v. Dennison, Chief Justice Taney observed that federal laws "merely give the power to the State tribunals, but do not purport to regard it as a duty, and they leave it to the States to exercise it or not, as might best comport with their own sense of justice, and their own interest and convenience." [FN166] Similarly, in Prigg v. Pennsylvania, the Court noted that "every state is perfectly competent, and has the exclusive right . . . to deny jurisdiction over [federal] cases." [FN167]

However, the dicta in these cases must be read in temporal context. Not unlike recalcitrant children chafing at authority, state legislatures for a long time willingly "consented" sub silentio to their state courts being open to enforce federal law in part because they were not explicitly told they had to. [FN168] The cases in which state courts concluded that states could (and did) say "no" to hearing federal claims [FN169] did not rise to review by the Supreme Court. Congress wisely "made no serious effort" to compel states to hear federal claims. [FN170] Leaving states with the illusion of consent also left them with the illusion of a measure of power to close their courts to federal law if they wanted to.

Had the early Court explicitly held that states had no discretion in this matter, it could have precipitated a rebellious state to challenge such a command. The fact is, states did tacitly consent. Commentators have ***437** noted that having federal laws adjudicated in state courts gave states some measure of control over the interpretation and enforcement of those laws. [FN171] It was the loudest proponents of states rights that insisted on state court jurisdiction for federal claims. [FN172] The question of whether a state legislature could constitutionally close its courts to a federal cause of action was not directly before the Court in cases such as Holmgren v. United States. [FN173] The restraint shown by the Court by not answering an unasked question was both proper and laudable.

3. Consent no Longer an Issue

In the wake of the Civil War, the Court in Claflin v. Houseman sought to dispel the fiction that enforcement of federal laws in state courts was somehow conditioned on state consent. [FN174] Claflin may have been ahead of its time to some degree, as this sea change didn't stick. There was a bit of backsliding dicta a few years later in Jones and Holmgren. But Holmgren is the last Supreme Court decision with dicta implying that state legislatures could arbitrarily close their courts to federal causes of action. Holmgren specifically noted that since the state in question (California) had not attempted to close its courts, the question on the duty of the state court to hear federal causes of

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action was not before the court. [FN175]

The Claflin holding was directly challenged forty years later in the Second Employers' Liability Cases, [FN176] but the Court found its anchor that dicta in Jones and Holmgren had obscured, and reiterated that state courts must remain open to hear suits brought under federal laws in accordance with the state courts' regular modes of procedure. Any remaining doubtwas eliminated when the state of Rhode Island brought the same question to the Court thirty-five years later in Testa v. Katt. [FN177] Once again, the Court ***438** unanimously held that state courts had no power to close their courts to claims based on federal laws. [FN178] There was no discretion for a state to discriminate against, or arbitrarily reject, a federal cause of action in the state's courts. [FN179]

With the advent of the Federal Rules of Civil Procedure came the modern differentiation of "substantive law" versus "procedure." Cases that established the nuances of the Erie Doctrine also clarified the nuances of substantive law and procedure, and firmly established that a court (usually a federal court sitting in diversity) would sometimes need to apply not only the foreign law, but also the foreign procedures where those procedures are a substantive part of the law. [FN180] These concepts dovetailed with the Testa line of cases, especially the Second Employers' Liability Cases, and solidified the modern view that the Supremacy Clause requires state courts to hear suits under federal laws, but allows state courts to retain their local administrative and procedural rules that are not outcome determinative and do not present any obstacle to the enforcement of federal rights.

The pillar of the modern cases on this subject is Howlett v. Rose, which explained that state courts of adequate jurisdiction must be open to suits based on federal laws-with the single exception of a "neutral" procedural rule. [FN181] Howlett noted that it was exceedingly rare, but in those rare cases of a truly neutral rule of procedure, a state court could be closed to a federal cause of action. [FN182] This does not conflict with the Testa line of cases, but seizes on the language from the Second Employers' Liability Cases regarding states' regular "modes of procedure," [FN183] recognizing what many call the "nondiscrimination" doctrine: as long as the neutral rule is nondiscriminatory and evenly applied to claims from both state laws and federal laws, it will usually be allowed. For example in Missouri ex rel. Southern Railway Co. v. Mayfield, [FN184] the Court held that a state court could apply the ***439** doctrine of forum non conveniens to bar a FELA case. In so holding, the Court noted that previous cases had not limited the power of a state to bar FELA cases, provided the state "enforces its policy impartially so as not to involve a discrimination against Employers' Liability Act suits . . . ." [FN185] Federal law truly "take[s] state courts as it finds them." [FN186] To date, such a "neutral procedural rule" remains the only exception the Court recognizes to the requirement that state courts of adequate jurisdiction must hear claims based in federal laws.

A rule or procedure is not neutral, however, if it is a "substantive burden" on persons seeking to enforce a federal right. [FN187] What is not allowed is a state policy that declines jurisdiction over one discrete category of federal claims. [FN188] It would seem fairly clear that a state law declaring that "the courts of this State shall not hear claims under the TCPA" would thus not be "neutral," and thus would not be permissible. Such an act "whether presented in terms of direct disagreement with substantive federal law or simple refusal to take cognizance of the federal cause of action, flatly violates the Supremacy Clause." [FN189]

C. Does Modern Federalism Affect Testa?

Modern federalism has seen subtle changes in the balance of sovereigns and increases in federal power over state actions in some areas (such as matters relating to commerce [FN190]) but at the same time, the Court has found a greater role for state sovereign immunity to suits based in federal laws. In Hilton v. South Carolina Public Railways Commission, [FN191] the Court implied in dicta that exclusive state court jurisdiction raised some unique issues, noting that symmetry in the law avoids "federalism-related concerns that arise when the National Government uses the state courts as the exclusive forum to permit recovery [from a state government] under a congressional statute." [FN192] This was a pre-Alden v. Maine [FN193] decision on a state's liability for suits under FELA, and the Court noted that the symmetry ***440** of the state's liability for suits in both federal court and state court "has much to commend it." [FN194] However, the same decision pointed out that such rules or symmetry may be overcome by statutory language, and where the statute does so, "the Supremacy Clause makes that statute the law in every State, fully enforceable in state court." [FN195]

Then in Alden, riding the crest of the modern state sovereignty tidal wave, the Supreme Court reversed a long standing body of law on state sovereign immunity, and held that the federal government cannot abrogate a state's

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sovereign immunity to suits in the state's own courts. [FN196] Buried in that decision is dicta that "[w]e are aware of no constitutional precept that would admit of a congressional power to require state courts to entertain federal suits [against a state] which are not within the judicial power of the United States and could not be heard in federal courts." [FN197] This isolated phrase may imply that some on the Court would examine exclusive state court jurisdiction for a federal law very carefully.

However, Alden was decided in the shadow of Seminole Tribe, which held that the federal government cannot subject a state to suits in the federal courts under federal laws. [FN198] Under Seminole Tribe, states could not be subjected to suit under a federal law in federal court. The language of Alden must therefore be viewed in the context of its central holding that Congress cannot accomplish through the state courts what it cannot accomplish (i.e. abrogation of state sovereign immunity) in the federal courts. [FN199]

With that in mind, any reliance on the dicta in Alden by detractors of exclusive state court jurisdiction is misplaced. The Alden Court reasoned that because Congress is constitutionally prohibited from abrogating states sovereign immunity in federal courts, Congress cannot constitutionally abrogate that immunity in state courts. [FN200] What Alden stands for is, at most, a proposition that if the federal government is constitutionally prohibited from enforcing a federal law in federal court, it can not constitutionally achieve that enforcement in state courts either.

With the TCPA however, Congress could enforce the TCPA under federal court jurisdiction. Unlike attempting to abrogate states' sovereign immunity in a state's own courts, exclusive state court jurisdiction for the TCPA is not an "end run" around a constitutional prohibition. Congress could have freely, and constitutionally, granted federal court jurisdiction to consumer suits under the TCPA, and unlike the statute struck down in ***441** Alden or Seminole Tribe, no challenge to that enforcement scheme would be sustained. The fact that Congress chose to withhold the grant of federal court jurisdiction does not impart a constitutional defect to a TCPA cause of action in state court. Congress "may give, withhold or restrict . . . [federal court] jurisdiction at its discretion." [FN201]

The folly of the alternative is made obvious by looking at slight variations to the exclusive state court jurisdiction in the TCPA. Consider if there were concurrent federal court jurisdiction for the private right of action, but only against foreign defendants, or perhaps only where the amount in controversy was in excess of $1 million (or $1 trillion-it makes no difference constitutionally). These types of hurdles to federal jurisdiction were common before the advent of modern general federal question jurisdiction in 1980, which removed the amount in controversy bar. [FN202] Until 1980, many cases brought under federal law were left with no option but state courts, and an amount in controversy bar to general federal question jurisdiction was never held to be a constitutional problem. There would be "concurrent" jurisdiction and the unresolved Testa question would evaporate, but the end result would be the same-no TCPA case would ever be brought in federal court. In fact, had the TCPA been passed before 1980, its minimal statutory damages provision would have practically guaranteed that no TCPA case brought by a consumer could be brought in federal court under federal question jurisdiction. That the Testa problem can be so easily defeated evinces how insubstantial it is.

D. Federal Coercion or Congressional Prerogative?

Advocates of limits on federalism deride the TCPA as a heavy-handed way for Congress to achieve federal policy enforcement-principally on the backs of state courts. [FN203] At first blush, it does seem that with exclusive state court jurisdiction, Congress can take credit for solving the problem, without providing the infrastructure or other requirements necessary to make it work. [FN204] It smacks of an unfunded mandate and seems coercive to ***442** some.

But in the final analysis, Congress is not shy about exercising its powers in a coercive fashion to the limits of constitutionality. We no longer have a newly minted union treading carefullyso as not to strain the unproven bonds of federalism. Today, where Congress cannot use its nearly boundless powers under the Commerce Clause, it will wield its spending power to club unwilling states into submission in order to achieve practically any result Congress desires. If a state does not wish to raise its drinking age to twenty- one, it can simply forego its federal highway funds. [FN205] Similarly, if a state does not want to be "burdened" with the Testa legacy of suits in state courts under federal law, it can, as Justice Stevens suggests, choose to have no state courts. [FN206] It may seem Draconian to "choose" to dissolve state civil courts to avoid the burden, but no more so in practical terms than "choosing" to decline millions of dollars of federal funding. There is nothing new in the burden of state courts

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hearing suits under federal laws-or in Congress exercising its constitutional powers to take advantage of it. [FN207]

E. Burden Was Not a Policy Concern of the Drafters

The court in International Science seemed concerned with the "burden" a hypothetical horde of consumers bringing TCPA claims would have on the courts. [FN208] The court concluded it was "readily apparent" that Congress considered the burden on court congestion in providing what that court saw as an ability for states to close their courts to hearing TCPA ***443** cases. [FN209] However, the court cited no reference other than nonspecific findings in the bill to support its conclusory statement. A diligent search of all those findings, committee reports, hearing testimony, congressional record entries, and news articles related to the TCPA and its passage finds no mention whatsoever of such a consideration by Congress. Congress simply determined that over eighteen million telemarketing calls were made each day, [FN210] and from this, the International Science court leapt headfirst to the unfounded conclusion that Congress was concerned that, if even a small number of those calls were illegal under the TCPA, the resulting suits could congest the courts. If Congress did consider the issue of court congestion associated with the private right of action, it never found it significant enough to warrant any mention or consideration in the record. Nor does such a consideration warrant an excuse for a state to decline jurisdiction. [FN211]

It is arguable that a state's burden in hearing federal causes of action where state and federal courts share jurisdiction is less than the burden imposed by the TCPA's exclusive state court jurisdiction. However, this difference is mitigated because the TCPA's enforcement does not lie exclusively in state courts. The TCPA provides federal court jurisdiction for actions by state attorneys general. [FN212] Direct FCC enforcement is available through the FCC's administrative procedures, subject to review by federal courts. [FN213] In addition, consumers have access to both formal and informal complaint procedures against violators under the FCC's complaint process. [FN214]

***444** Regardless of any burden or policy concerns, the unresolved Testa question is in fact resolved by the Constitution itself. It is the Supremacy Clause, not Congress, that "burdens" state courts to hear TCPA claims. [FN215] The Supremacy Clause explicitly directs state courts to enforce federal statutes. [FN216] That burden cannot be considered unconstitutional, since it is the Constitution itself that creates the burden. A state court must respect federal laws as if those laws "emanated from its own legislature." [FN217] This mandate is not conditioned or premised on concurrent federal court jurisdiction of the federal cause of action.

F. Is Federal Court Jurisdiction for a Federal Action Mandatory?

The only remaining questions facing exclusive state court jurisdiction for the TCPA are: "Can Congress withhold federal court jurisdiction for a federal cause of action, and leave jurisdiction solely in state courts?" and "Can Congress rebut § 1331 federal question jurisdiction?" Those who consider the exclusive state court jurisdiction for TCPA private suits an unconstitutional burden on state courts would answer these questions in the negative, insisting that Congress cannot leave adjudication of a federal law purely in the hands of state courts. [FN218]

But these questions are also answered by the Constitution itself. "[J] urisdiction having been conferred may, at the will of Congress, be taken away in whole or in part . . . ." [FN219] Federal courts are courts of limited jurisdiction. [FN220] They acquire no jurisdiction unless granted by the Constitution or Congress, and Congress has always been vested with the power to ***445** withhold the grant of jurisdiction. [FN221] "[Congress] may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution." [FN222] To answer the Testa question by finding that exclusive state court jurisdiction for a federal cause of action is an unconstitutional burden on states would mean that every federal act would be required to have federal court jurisdiction. [FN223] Such a construction would clearly violate the Constitution, as Congress would be stripped of its Article III powers to grant or withhold such jurisdiction.

"If Congress does not confer jurisdiction on federal courts to hear a particular federal claim, the state courts stand ready to vindicate the federal right, subject always to review, of course, in [the Supreme] Court." [FN224] Exclusive state court jurisdiction for a federal cause of action may seem odd, but it is specifically contemplated by the Constitution since the grant of federal court jurisdiction for a federal statute is explicitly left to Congress' discretion. Therefore, the Testa holding that state courts must hear claims arising under a federal statute is valid regardless of whether the state court jurisdiction over the cause of action is exclusive or concurrent with federal court jurisdiction over the same cause of action.

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***446** G. Reinterpret Ambiguity to Avoid an Unconstitutional Result (Once Confirmed That it Actually is an Unconstitutional Result)

Finally, consider how exclusive state court jurisdiction for the TCPA was found. The various courts came to that conclusion not through unambiguous statutory language, but by delving deeply into snippets of legislative history. The mere fact that it took such machinations to deduce the exclusive state court jurisdiction is prima facie proof that significant ambiguity exists. With that in mind, if exclusive state court jurisdiction was held to create an unconstitutional commandeering of state court resources, the proper solution would be to reinterpret the ambiguity to eliminate the constitutional defect by finding concurrent federal court jurisdiction for the TCPA by virtue of § 1331. [FN225]

I have considered that the same argument could be raised that the ambiguity of whether states can or cannot "opt-out" should be interpreted to allow "opt- out" to avoid a potential Tenth Amendment problem (as the International Science court did). But this suggestion confuses two similar (and often confused) doctrines of statutory construction. Judicial restraint instructs us that a court should avoid any constitutional questions if a non-constitutional question is dispositive of the case. [FN226] A different doctrine establishes a presumption that an act of Congress is constitutional, [FN227] and any ambiguity must be interpreted so as to not impart a constitutional infirmity to a statute. [FN228] The former canon avoids a constitutional question. The latter avoids an unconstitutional result after answering a constitutional question. These canons cannot be hybridized to compel a court to construe ***447** any statutory ambiguity in a remedial statute, such as the TCPA, so as to avoid the mere consideration of a constitutional question. At the very least, some minimal inquiry must be made into the question to determine that the proposed construction "would raise serious constitutional problems." [FN229] To reinterpret an ambiguity to avoid an unconstitutional result first requires inquiry and significant indications that the result to be avoided actually is unconstitutional-not merely that it might be.

If exclusive state court jurisdiction for the TCPA were actually held to be unconstitutional, [FN230] the ambiguity in the statute can be reinterpreted two ways-either interpret the statute not to rebut § 1331 federal question jurisdiction and allow concurrent federal court jurisdiction; or allow a state to "opt-out." The International Science court simply assumed the exclusive state court jurisdiction might be unconstitutional and read the statute to allow "opt-out" to avoid that problem. [FN231] However, as shown earlier, allowing "opt-out" requires a clear statement, and the existence of ambiguity logically excludes the existence of a clear statement. Additionally, allowing "opt-out" would result in sanctioning an unconstitutional act if "opt-out" was not intended by Congress. On the other hand, allowing federal court jurisdiction under § 1331 would not risk an unconstitutional outcome. The latter option would therefore be the better choice constitutionally.

IV. Conclusion

In closing, consider a scenario where a state passed a law providing that "Suits under the TCPA cannot be heard in the courts of this State." Now consider the result if "TCPA" was replaced with "FELA," "RICO," or one of many other federal acts that are commonly heard by state courts. Such an act by a state would be inconceivable. The constitutional mandate for states to hear cases under federal law is no more compelling for RICO or FELA than it is for the TCPA. The impact on the balance of power between the state and federal sovereigns requires a clear statement if Congress intends to allow otherwise unconstitutional "opt-in" or "opt-out" by states. The statute-and its legislative history-cannot be contorted to support such a conclusion.

[FNa1]. Interim President of the privacy rights group, the National Association Mandating Equitable Databases, Inc. (the NAMED, Inc.) and member of the South Carolina Joint Legislative Privacy Study Committee. I would like to dedicate this article to my grandfather, John M. Dex, who, as my first client, taught me the law is really about people, and not courtrooms.

[FN1]. Mondou v. N.Y., New Haven & Hartford R.R. Co. (Second Employers' Liability Cases), 223 U.S. 1, 56-57 (1912).

[FN2]. 330 U.S. 386 (1947).

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[FN3]. Pub. L. No. 102-243, 105 Stat. 2395 (codified as amended principally at 47 U.S.C. § 227 (1994)). The TCPA amends the Communications Act of 1934, 47 U.S.C. §§ 201-226. In general, the TCPA prohibits unsolicited advertising via facsimile and strictly regulates prerecorded solicitation calls to homes. 47 U.S.C. § 227(b)(1) (1994). The governing regulation also provides for comprehensive regulation of "live" telemarketing calls by FCC regulations, which include, inter alia, requirements to honor a consumer's "do-not-call" request for ten years. 47 C.F.R. § 64.1200(e) (1999). The statute contains various remedies for violations, including a private right of action. 47 U.S.C. § 227(b)(1) (1994).

[FN4]. Int'l Sci. & Tech. Inst. v. Inacom Communications, Inc., 106 F.3d 1146, 1158 (4th Cir. 1997).

[FN5]. Id. at 1156.

[FN6]. Howlett v. Rose, 496 U.S. 356, 372 (1990) ("The States thus have great latitude to establish the structure and jurisdiction of their own courts.").

[FN7]. Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60. (1994).

[FN8]. Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968 (Supp. IV 1998).

[FN9]. For a modern discussion of the parameters of the duty of state courts to hear cases arising under federal laws, see generally Howlett, 496 U.S. at 367-75. See also discussion infra Part IV.

[FN10]. Some parties argue that this has been done in Texas, where the state legislature took action after threats were made by fax advertisers against consumers who tried to enforce the TCPA, and consumers complained to state legislators that the law was unclear on the issue. See Mary Flood, Firm Settles Suit Over Junk Faxes, Wall St. J., Apr. 28, 1999, at T1. Although the consensus of most authorities was that such an "opt-in" was not necessary to aid those consumers, the legislature passed a bill "'to make it crystal clear' that civil lawsuits can be filed in Texas to collect fines from those who send unwanted faxes." Id. (quoting Daniel Gonzalez, aide to Texas State Rep. Tony Goolsby); see also H.B. 23, 76th Leg. (Tex. 1999) (amending Section 35.47 of the Business and Commerce Code to grant a specific right of action in Texas state courts for violations of the TCPA). The relevant portion of that act reads as follows:
(g) A person who receives a communication that violates 47 U.S.C. Section 227, a regulation adopted under that provision, or this section may bring an action against the person who originates the communication in a court of this state for an injunction, damages in the amount provided by this subsection, or both.
H.B. 23, 76th Leg. (Tex. 1999).
This act by Texas, however, is not an "opt-in" to open its courts to suits under the federal law. It actually makes violations of the TCPA and the FCC regulations actionable under state law, so that a consumer could now sue for recovery under the federal law, as well as under state law for TCPA violations. Id. In fact, the Texas statute provides a private right of action for any violation of the TCPA, where the TCPA itself only provides for citizen suits for violations of certain provisions. Id. In at least one reported decision, a New York court using a similar state law (N.Y. Gen Bus. § 399-p (3)(a)) awarded statutory damages of $500 for a TCPA violation, in addition to statutory damages of $50 under state law, for the same act-a single telemarketing call to a consumer's home using a recorded message to deliver a solicitation. Kaplan v. First City Mortgage, 701 N.Y.S.2d 859 (City Ct. 1999).
A statute similar to the Texas law was previously passed in Utah, which makes violations of the TCPA also a violation of Utah state law, and actionable for $500 in statutory damages. The Utah statute specifically notes that the state law cause of action is "[i]n addition to any other remedies." 2B Utah Code Ann. § 13-25a-107 (1999).

[FN11]. Int'l Sci. & Tech. Inst. v. Inacom Communications, 106 F.3d 1146, 1156-57 (4th Cir. 1997) ("Thus, a state could decide to prevent its courts from hearing private actions to enforce the TCPA's substantive rights. . . . Congress included a provision to allow the states to prohibit private TCPA actions in their courts.").

[FN12]. While no state has attempted to test this interpretation and try to "opt-out" of the TCPA's citizen suits provision, at least one defendant has raised the argument in a unique fashion. In a South Carolina case, it was argued that, since South Carolina had amended its own junk fax statute, 7 S.C. Code Ann. § 15-75-50 (Law. Co-op. 1999), after the TCPA was introduced and did not then codify the TCPA or a private right of action into South Carolina law, the failure to incorporate the TCPA's private enforcement into state law should be interpreted as an "opting-out"

from the TCPA's private enforcement provisions. Biggerstaff v. Low Country Drug Screening, No. 99- SC-86-5519 (Magis. Ct. S.C. Nov. 29, 1999). As expected, this argument did not prevail.

[FN13]. Int'l Sci., 106 F.3d at 1150 ("We today reach the somewhat unusual conclusion that state courts have exclusive jurisdiction over a cause of action created by federal law."); see also Murphey v. Lanier, 204 F.3d 911, 915 (9th Cir. 2000); Foxhall Realty Law Offices, Inc. v. Telecommunications Premium Svcs., Ltd., 156 F.3d 432, 438 (2d Cir. 1998); ErieNet, Inc. v. Velocity Net, Inc., 156 F.3d 513, 520 (3d Cir. 1998); Nicholson v. Hooters of Augusta, Inc., 136 F.3d 1287, 1289 (11th Cir. 1998) (Nicholson II); Chair King, Inc. v. Houston Cellular Corp., 131 F.3d 507, 514 (5th Cir. 1997); Braver v. Perry Johnson, Inc., No. CIV-99-1422-W (W.D. Okla. Feb. 8, 2000). But see Kenro, Inc. v. Fax Daily, Inc., 904 F. Supp. 912, 915 (S.D. Ind. 1995), on rehearing, 962 F. Supp. 1162, 1172 (S.D. Ind. 1997) (declining to follow International Science and holding that federal courts have federal-question jurisdiction over TCPA claims under 28 U.S.C. § 1331); ErieNet, 156 F.3d at 521 (Alito, J., dissenting). For a more complete exploration of the federal jurisdiction question of the TCPA, see Fabian D. Gonell, Statutory Interpretation of Federal Jurisdictional Statutes: Jurisdiction of the Private Right of Action Under the TCPA, 66 Fordham L. Rev. 1895, 1912-18 (1998). This plethora of litigation could have been largely avoided if Congress had used less ambiguous language in creating the exclusive state court jurisdiction, as it did in other statutes. See, e.g., 42 U.S.C. § 604a(i) (Supp. IV 1998) ("Any party which seeks to enforce its rights under this section may assert a civil action for injunctive relief exclusively in an appropriate State court against the entity or agency that allegedly commits such violation."). In an interesting TCPA case in California, a defendant removed a TCPA case to federal court based on diversity and supplemental jurisdiction because the complaint included claims under the Fair Debt Collection Practices Act. Kinder v. Citibank, No. 99-CV-2500 W(JAH), available at 2000 WL 1409762, at *1 (S.D. Cal. Sept. 14, 2000). Although the plaintiff dismissed all claims except the TCPA claim after removal, the district court retained jurisdiction on two independent grounds of diversity and supplemental jurisdiction, on the basis that removal is based on the complaint at the time of removal, and subsequent dismissal or dispensation of the cause of action that enable removal would not cause the case to be remanded to the state court. Id. at *1-*2 (citing Sparta Surgical Corp. v. Nat'l Ass'n of Sec. Dealers, Inc., 159 F.3d 1209, 1213 (9th Cir. 1998)). This could prove to be a route to federal court for a plaintiff who can bring a TCPA case under diversity jurisdiction, or bootstrap federal court jurisdiction by including a claim that would have federal court jurisdiction, even if that claim will later be dismissed, leaving the TCPA claim standing alone.

[FN14]. "Nevertheless, it is my hope that States will make it as easy as possible for consumers to bring such [TCPA] actions, preferably in small claims court. . . . Small claims court or a similar court would allow the consumer to appear before the court without an attorney." 137 Cong. Rec. S16204, 16205 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings).

[FN15]. For a brief exploration of problems of enforcing the TCPA in state small claims courts, see Margaret H. Marr, Small Claims Court Enforcement of Federal Unsolicited Fax Law (brief for the Internet Mail Consortium 1998), at http://www.imc.org/imc-spam/smallclaims.html (Jan. 15, 1998) (on file with the Connecticut Law Review).

[FN16]. Some pro se litigants, however, have performed admirably and won significant appellate victories after starting out in small claims courts. See, e.g., Kaplan v. Democrat & Chronicle, 698 N.Y.S.2d 799, 800 (App. Div. 1999) (reversing lower court holding against pro se plaintiff Martin Kaplan), reversing 679 N.Y.S.2d 881, 882 (City Ct. 1998). In addition, several multi- million dollar class actions for junk faxes, which may provide a source of well-funded and well-represented cases, are proceeding in their respective state courts. See, e.g., Parker v. Am. Blaxtfax, Inc., No. 141-182692-00 (Dist. Ct. Tex. Sept. 6, 2000); Nicholson v. Hooters of Augusta, Inc., No. 95-RCCV-616 (Super. Ct. Ga. Aug. 26, 1998) (Nicholson III), aff'd en banc, 537 S.E.2d 468 (Ga. Ct. App. 2000).

[FN17]. Robert A. Barker, When Federal Statutes Prescribe Subject Matter Jurisdiction, N.Y.L.J., Apr. 19, 1999, at 3.

[FN18]. For example, application of the TCPA to intrastate calls has befuddled several courts despite a number of dispositive authorities that make such application crystal clear. See Hilary B. Miller & Robert R. Biggerstaff, Application of the Telephone Consumer Protection Act to Intrastate Telemarketing Calls and Faxes, 52 Fed. Comm. L.J. 667, 670 (2000). In what can only be described as a Kafka-esque interpretation in a small claims case in Virginia, although the FCC's rule under the TCPA require the company to keep a list of people who have asked not

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to receive further telemarketing calls, AT&T argued that the law does not require AT&T to actually refrain from calling those people on the list. Stephen Dinan and Margie Hyslop, States Trying to Restrict Telemarketers, Wash. Times, Feb 3, 2000 at C3. Another telemarketer argued unsuccessfully that the average consumer's message on their home answering machine instructing callers to "leave a message" was "express invitation" to receive pre-recorded telemarketing calls. Agostinelli v. LM Communications, Inc., defendant's memo. of law, No. 00-SC-86-2862 (Magis. Ct. S.C. August 17, 2000).

[FN19]. See cases cited infra note 25.

[FN20]. Substantially identical language is also found in 47 U.S.C.A. § 227(c)(5) (West 2000).

[FN21]. Id.

[FN22]. The din is sometimes contained within the same courthouse. For example, in Hillsboro County, Florida, two nearly identical TCPA cases brought by the same plaintiff resulted in one judge dismissing the claim because Florida had not "opted-in," while the other judge held that there is no need for the state to first "opt-in" for a TCPA suit to be heard. Compare Condon v. Freedom Ford, Inc., No. 99-6701-SC, slip op. at 3 (Hillsborough County Ct. Fla. July 19, 1999) (dismissing plaintiff's claim "[b]ecause the Court holds as a matter of law that Florida has not permitted the Plaintiff to bring a private cause of action under the TCPA in its courts"), with Condon v. Rose, No. 99- 6158-SC (Hillsborough County Ct. Fla. March 8, 2000) (denying defendant's motion to dismiss, holding that because the state has not "opted-out," "the TCPA is enforceable in this Court").

[FN23]. Nicholson v. Hooters of Augusta, Inc., No. 95-00101-CV-1 (S.D. Ga. Sep. 4, 1996), available at 1996 WL 1749407, at *3 (Nicholson I) ("[I]t is evident that Congress intended that state law determine the availability of a private cause of action under the TCPA. In the instant case, Georgia law governs whether Plaintiff Nicholson has a private cause of action under the TCPA." (footnote omitted)), vacated, 136 F.3d 1287 (11th Cir. 1998) (Nicholson II) (with instructions to dismiss for lack of subject matter jurisdiction), modified, 140 F.3d 898 (11th Cir. 1998) (with instructions to remand case to state court rather than dismiss for lack of subject matter jurisdiction).

[FN24]. Freedom Ford, No. 99-6701-SC, slip op. at 3 (dismissing plaintiff's claim "[b]ecause the Court holds that as a matter of law that Florida has not permitted the Plaintiff to bring a private cause of action under the TCPA in its courts"); Kaplan v. Democrat & Chronicle, 679 N.Y.S.2d 881, 882 (City Ct. 1998) (Kaplan I) ("An exhaustive review of [New York's] statutory and regulatory law reveals no authority granted to commence an action under [the TCPA]."), rev'd, 698 N.Y.S.2d 799 (App. Div. 4 Dept. 1999) (Kaplan II); Autoflex Leasing, Inc. v. Mfrs. Auto Leasing, Inc., 16 S.W.3d 815 (Tex. App. 2000), reh'g denied, May 4, 2000.

[FN25]. Int'l Sci. & Tech. Inst. v. Inacom Communications, 106 F.3d 1146, 1156 (4th Cir. 1997) ("The clause in 47 U.S.C. § 227(b)(3) 'if otherwise permitted by the laws or rules of court of a State' does not condition the substantive right to be freefrom unsolicited faxes on state approval."); see also Foxhall Realty Law Offices, Inc. v. Telecommunications Premium Svcs., Ltd., 156 F.3d 432, 438 (2d Cir. 1998) (quoting the above passage from International Science); Condon v. Rose, No. 99-6158-SC (Hillsborough City Ct. Fla. Mar. 8, 2000) (denying defendant's motion to dismiss, holding that because the state has not "opted-out," "the TCPA is enforceable in this Court"); Nicholson v. Hooters of Augusta, Inc., No. 95-RCCV-616 (Super. Ct. Ga. Aug. 26, 1998) (Nicholson III), order denying defendant's motion to dismiss, at 8-9 (July 13, 1999) (no need for states to opt-in), aff'd en banc, 537 S.E.2d 468 (Ga. Ct. App. 2000); Zelma v. Total Remodeling, Inc., 756 A.2d 1091, 1093 (N.J. Super. 2000) ("The court finds that the common-sense meaning of the language 'if otherwise permitted by the laws or rules of Court of a State' manifests a Congressional intent that does not condition state court jurisdiction over private enforcement of TCPA claims on an affirmative legislative act creating such jurisdiction, where the state [court] already has the ability to hear such cases."); Kaplan, 698 N.Y.S.2d at 800 (Kaplan II) (holding that state courts have jurisdiction over TCPA claims without state action needed to enable suits); Biggerstaff v. Low Country Drug Screening, No. 99-SC-86-5519, slip op. at 4 (Magis. Ct. S.C. Nov. 29. 1999) ("A cause of action under the TCPA is therefore available in this State's courts to all citizens of this State without any requirement for the State to 'opt-in' to the TCPA."); Schulman v. Chase Manhattan Bank, 710 N.Y.S.2d 368 (N.Y. App. 2000); Physicians Data, Inc. v. US West Wireless, No. 00-CV-631 (Dist. Ct. Colo. Aug. 14, 2000).

[FN26]. Int'l Sci., 106 F.3d at 1156 (concluding in dicta that "a state could decide to prevent its courts from hearing

private actions to enforce the TCPA's substantive rights"); see also Foxhall, 156 F.3d at 438 (reasoning that states may refuse to exercise jurisdiction over TCPA actions); Nicholson, No. 95-RCCV-616, order denying defendant's motion to dismiss, at 8-9 (Nicholson III) (interpreting International Science to mean "that States were given 'veto power' over the TCPA and could prevent or prohibit or forbid private TCPA actions"), aff'd en banc, 537 S.E.2d 468 (Ga. Ct. App. 2000); Zelma v. Total Remodeling, Inc., 756 A.2d 1091, 1094 (N.J. Super. 2000) (finding International Science "persuasive" and concluding the TCPA allows states to "opt-out"); Schulman, 710 N.Y.S.2d at 370; Physicians Data, Inc., slip op. at 5.

[FN27]. 131 F.3d 507 (5th Cir. 1997).

[FN28]. See id. at 513 ("The statute's text evidences Senator Hollings's [sic] hopes as it provides for the right of action in state court, but gives states discretion over its administration.").

[FN29]. Int'l Sci., 106 F.3d at 1156-58, Foxhall, 156 F.3d at 438, and Murphey v. Lanier, 204 F.3d 911 (9th Cir. 2000), are the only circuit courts that reached an actual holding on the question (due to the Equal Protection Clause challenge based on an "opt-in" interpretation). The other circuit courts all followed International Science, but none of those other courts faced an Equal Protection Clause challenge to the TCPA, so any conclusions on "opt-in" or "opt-out" in those other courts are considerably suspect. See cases cited supra note 13.

[FN30]. See Int'l Sci., 106 F.3d at 1153.

[FN31]. See id. at 1156. The plaintiff's purpose was to bootstrap federal jurisdiction by alleging that lack of concurrent federal jurisdiction would violate the Equal Protection Clause, and to compel the court to find federal court jurisdiction in order to avoid that constitutional infirmity. See id. This challenge was rejected by the court's conclusion that there was no "opt- in" requirement that state law authorize TCPA suits. See id.

[FN32]. Id. Various defendants have argued that this phrase is dicta, but a close analysis reveals that this conclusion is one of the grounds, and thus necessary to the holding that the TCPA presents no Equal Protection Clause problem, and is therefore entitled to the same weight as the holding. See, e.g., Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 67 (1996) ("When 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."); Woods v. Interstate Realty Co., 337 U.S. 535, 537 (1949) ("[W]here a decision rests on two or more grounds, none can be relegated to the category of obiter dictum.").

[FN33]. Foxhall, 156 F.3d at 438.

[FN34]. Murphey, 204 F.3d at 914.

[FN35]. See Condon v. Rose, No. 99-6158-SC (Hillsborough City Ct. Fla. Mar. 8, 2000); Nicholson v. Hooters of Augusta, Inc., No. 95-RCCV-616 (Super. Ct. Ga. Aug. 26, 1998) (Nicholson III), aff'd en banc, 537 S.E.2d 468 (Ga. Ct. App. 2000); Zelma v. Total Remodeling, Inc., 756 A.2d 1091 (N.J. Super. 2000); Physicians Data, Inc. v. US West Wireless, No. 00-CV- 631 (Dist. Ct. Colo. Aug. 14, 2000); Kaufman v. HOTA, Inc., No. BC 222589 (Super. Ct. Ca. Aug. 25, 2000).

[FN36]. Zelma, 756 A.2d at 1093.

[FN37]. Id.

[FN38]. 698 N.Y.S.2d 799 (App. Div. 1999) (Kaplan II).

[FN39]. See id. at 800. ("In the absence of a State statute declining to exercise the jurisdiction authorized by the statute, a State court has jurisdiction over TCPA claims.").

[FN40]. 710 N.Y.S.2d 368 (App. Div. 2000) (holding that state courts have exclusive jurisdiction over private rights of action brought under TCPA).

[FN41]. Hooters of Augusta, Inc. v. Nicholson, 537 S.E.2d 468, 470-71 (Ga. Ct. App. 2000) (en banc) (holding that

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consumers had a private right of action conferring jurisdiction upon state courts under TCPA).

[FN42]. Autoflex Leasing, Inc., v. Mfrs. Auto Leasing, Inc., 16 S.W.3d 815 (Tex. App. 2000), reh'g denied, May 4, 2000.

[FN43]. Id. at 817. The Autoflex decision exhibited a number of errors, including quoting Senator Hollings out of context (see discussion infra Part III.B) and concluding (wrongly) that "the majority of federal courts that have addressed the issue" had held the TCPA requires a state to "opt-in"-claiming that Nicholson II, Chair King, and Murphey had done so. See id. at 817 & nn. 14-15. Those cases reached no such holdings and are quoted out of context. The citing of Murphey is particularly troubling since neither party in that case advanced any arguments against "opt-in" so there was no argument on that point before the court. See Murphey v. Lanier, 204 F.3d 911 (9th Cir. 2000). The citation of Nicholson II as "approving" the trial court's "opt-in" interpretation is simply inept. The quote Autoflex relies on is only the Nicholson II court reciting the holdings of the trial court below it-no endorsement of the trial court's holding is implied. See Nicholson v. Hooters of Augusta, Inc., 136 F.3d 1287, 1288 (11th Cir. 1998) (Nicholson II). Finally, the Chair King citation is merely that court's restatement of the statute's language-not holding or even dicta. See Chair King, Inc. v. Houston Cellular Corp., 131 F.3d 507, 511 (5th Cir. 1997). The Autoflex decision has been strongly criticized by at least one court. "[T]he Texas Court of Appeals [in Autoflex] does not consider the fact that general subject matter jurisdiction normally is afforded state trial courts." Kaufman v. HTOA, Inc., No. BC 222589 (Super. Ct. Ca. Aug. 25, 2000).

[FN44]. See, e.g., Charvat v. Colo. Prime, 1998 WL 634922, at *4 (Ohio App. Sept. 17, 1998) (affirming lower court's award of damages under the TCPA), cert. denied, 704 N.E.2d 578 (Ohio 1999); Szefczek v. Hillsborough Beacon, 668 A.2d 1099 (N.J. Super 1996) (awarding $2,000 in damages under the TCPA). But see Zelma v. Total Remodeling, Inc., 756 A.2d 1091, 1095 (N.J. Super. 2000) ("This court does not find Szefczek probative as the issue was not reviewed."). In addition, at least one consumer watchdog group, Private Citizen, Inc., reports that over the past four years, consumers have brought over 100 TCPA suits and collected over $500,000 in TCPA actions, either by settlement or at trial. Telephone interview with Robert Bulmash, President, Private Citizen, Inc. (Jan. 14, 2000) (on file with author).

[FN45]. At least one of those erroneous opinions, Kaplan I, has already been reversed. See Kaplan v. Democrat & Chronicle, 698 N.Y.S.D.2d 799, 801 (A.D. 4 Dept. 1999) (Kaplan II) (reversing Kaplan I). Two other opinions supporting the "opt-in" argument, Chair King and Nicholson I, were vacated on appeal. See Chair King, 131 F.3d at 514; Nicholson, 136 F.3d at 1289 (Nicholson II). Nicholson I was thoroughly discredited after remand to state court. Nicholson v. Hooters of Augusta, Inc., No. 95-RCCV-616 (Super. Ct. Ga. Aug. 26, 1998) (Nicholson III), aff'd en banc, 537 S.E.2d 468 (Ga. Ct. App. 2000). In fact, all but one of the cases supporting "opt-in," cited supra note 25, are under appeal, reversed, or vacated.

[FN46]. See Int'l Sci. & Tech. Inst. v. Inacom Communications, Inc., 106 F.3d 1146, 1157 (4th Cir. 1997) ("Congress included a provision to allow the states to prohibit private TCPA actions in their courts.").

[FN47]. Until some state actually attempts to "opt-out" and close its courts, this question may remain only a subject of academic study, and this author's fascination.

[FN48]. For a comprehensive survey of the legislative history of the TCPA in general, see Gonell, supra note 13.

[FN49]. "It is the sponsors that we look to when the meaning of the statutory words is in doubt." NLRB v. Fruit Packers, 377 U.S. 58, 66 (1964) (citing Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394-95 (1951)).

[FN50]. S. 1462, 102d Cong. (1991).

[FN51]. S. Rep. No. 102-177 (1991); S. Rep. No. 102-178 (1991), reprinted in 1991 U.S.C.C.A.N. 1968-79.

[FN52]. S. 1462, The Automated Telephone Consumer Protection Act of 1991; S. 1410, The Telephone Advertising Consumer Protection Act; S. 857, Equal Billing for Long Distance Charges: Hearing before the Subcomm. on Communications of the Senate Comm. on Commerce, Sci., and Transp., 102d Cong. (1991) [hereinafter July TCPA

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Hearings].

[FN53]. Computerized Telephone Sales Calls and 900 Service: Hearings before the Senate Comm. on Commerce, Sci., and Transp., 102d Cong. (1991).

[FN54]. At this point, the bill (S. 1462) had not yet been merged with the Telephone Advertising Consumer Rights Act of 1991, S. 1410, 102d Cong. 1st Sess. (1991), which expanded S. 1462 to include "live" solicitation calls.

[FN55]. 137 Cong. Rec. S30821-22 (1991) (statement of Sen. Hollings) (emphasis added) [hereinafter Statement of Sen. Hollings]. The private enforcement provisions that were added to S. 1462 were also added to S. 1410 the same day. See id. at 30911 (Pressler Amendment No. 1310).

[FN56]. Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in judgment). While Justice Scalia's skepticism of reliance on isolated tidbits of legislative debates is well-founded, I feel nevertheless, it is important to examine Senator Hollings' remarks since the courts construing the TCPA have themselves relied on those remarks in large part.

[FN57]. Before it was added to the bill, a private right of action was mentioned by at least two witnesses in the July TCPA Hearings. Robert Bulmash, President and founder of Private Citizen, Inc., recommended a provision to provide for civil action by the consumer for a violation of the law, and Michael Jacobson, cofounder of the Center for the Study of Commercialism, recommended $500 in liquidated damages plus attorney fees. See July TCPA Hearings, supra note 52, at 29, 42.

[FN58]. See Int'l Sci. & Tech. Inst. v. Inacom Communications, Inc., 106 F.3d 1146, 1152-54 (4th Cir. 1997).

[FN59]. Statement of Sen. Hollings, supra note 55 (emphasis added).

[FN60]. "Senator Hollings indicated the question of proper venue within the state was left for state legislatures to decide as this was constitutionally a matter for the states, not the federal government, to decide." Chair King, Inc. v. Houston Cellular Corp., 131 F.3d 507, 513 (5th Cir. 1997).

[FN61]. See Second Employers' Liability Cases, 223 U.S. 1, 56-57 (1912) ("[W]e deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts or to control or affect their modes of procedure, but only a question of the duty of such a court, when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress and susceptible of adjudication according to the prevailing rules of procedure."). See also discussion infra Part IV.

[FN62]. See discussion infra Part IV.

[FN63]. See Chair King, 131 F.3d at 513 ("Senator Hollings indicated the intent of the bill was for consumers to easily be able to enforce the bill by recovering damages. He emphasized states should facilitate this by providing fora in which consumers could appear without an attorney.").

[FN64]. This type of citizen enforcement has often been used by Congress where widespread violations rendered government enforcement insufficient. See, e.g., Bowles v. Am. Stores, 139 F.2d 377, 379 (D.C. Cir. 1943) ("Congress foresaw that the task of enforcing the [Emergency Price Control] Act against retailers would be too vast for the Administrator to accomplish without the help of consumers. The plain purpose of the $50 [mandatory statutory damages] clause is to enlist the help of consumers in discouraging violations."). Other examples can be readily found in the statutory damages provisions of statutes such as the Fair Credit Reporting Act, 15 U.S.C. § 1681(n) (Supp. IV 1998); Cable Communications Policy Act, 47 U.S.C. § 551(f) (1994); and Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1854(c) (1994).

[FN65]. ErieNet, Inc. v. Velocity Net, Inc., 156 F.3d 513, 515 (3d Cir. 1998).
Although actual monetary losses from telemarketing abuses are likely to be minimal, this private enforcement provision puts teeth into the statute by providing for statutory damages and by allowing consumers to bring actions

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on their own. Consumers who are harassed by telemarketing abuses can seek damages themselves, rather than waiting for federal or state agencies to prosecute violations. Although § 227(f)(1) of the statute does authorize states to bring actions on their citizens' behalf, the sheer number of calls made each day-more than 18,000,000-would make it impossible for government entities alone to completely or effectively supervise this activity.
Id. (emphasis added).

[FN66]. July TCPA Hearings, supra note 52, at 54 (statement of FCC Chairman Alfred C. Sikes) ("It is not clear, however, that sweeping Federal legislation is required. . . . [T]his may be a situation where continued regulatory scrutiny and monitoring, subject to Congressional review and oversight, is preferable to passage of legislation."). For background on the FCC's position, see In re Unsolicited Telephone Calls, 77 F.C.C.2d 1023 (1980).

[FN67]. 47 U.S.C. § 503(b) (1994); see also infra note 213.

[FN68]. See July TCPA Hearings, supra note 52, at 54. It is worth noting that the FCC took no public TCPA enforcement action until 1999, when there was a dramatic increase in junk-fax complaints to the FCC, and when the responsibility for TCPA enforcement was transferred from the Network Services Division of the Common Carrier Bureau to the new Enforcement Bureau, reporting directly to the Commission. On July 16, 1999, nearly seven years after passage of the TCPA, the FCC issued the first public citations under the TCPA to five junk faxers, one of whom made the mistake of sending unsolicited fax advertisements to the fax machine at the FCC's Enforcement Bureau office. See FCC Issues Citations to Several Alleged Violators of the Telephone Consumer Protection Act, 1999 WL 503617 (F.C.C.), available at http:// www.fcc.gov/Bureaus/Common_Carrier/News_Releases/1999/nrcc9049.html (last modified July 16, 1999). The first ever monetary forfeitures imposed by the FCC for violations of the TCPA were levied against Get-Aways Travel, Inc. on December 15, 1999 for sending unsolicited fax advertisements. See Federal Communications Commission Proposes Forfeiture for Violation of the Telephone Consumer Protection Act, available at http:// www.fcc.gov/Bureaus/Enforcement/News_Releases/1999/nren9002.html (last modified Dec. 15, 1999). As of this writing, however, FCC enforcement actions under the TCPA have only addressed junk faxes, and no public citations or forfeitures have been imposed on telemarketers.

[FN69]. Statement of Sen. Hollings, supra note 55.
Several parties, including the Federal Communications Commission (FCC) itself, raised concerns that the FCC might not have the resources to pursue violators of this bill. The will of the FCC to enforce the bill rigorously was also questioned, especially since the chairman of the FCC submitted testimony at the July hearing to indicate that he believed the bill was unnecessary.
Id.

[FN70]. "[T]he familiar canon of statutory construction [is] that remedial legislation should be construed broadly to effectuate its purposes." Tcherepnin v. Knight, 389 U.S. 332, 336 (1967). "We are also mindful that the TCPA is a remedial statute and 'should be liberally construed and should be interpreted (when that is possible) in a manner tending to discourage attempted evasions by wrongdoers."' Biggerstaff v. Low Country Drug Screening, No. 99-SC-86-5519 (Magis. Ct. S.C. Nov. 29, 1999) (quoting Scarborough v. Atlantic Coast Line R. Co., 178 F.2d 253, 258 (4th Cir. 1949)).

[FN71]. See ErieNet, Inc. v. Velocity Net, Inc., 156 F.3d 513, 515 (3d Cir. 1998).

[FN72]. Statement of Sen. Hollings, supra note 55.

[FN73]. See Int'l Sci. & Tech. Inst. v. Inacom Communications, Inc., 106 F.3d 1146, 1156 (4th Cir. 1997) (restating Plaintiff's argument); see also Autoflex Leasing, Inc. v. Mfrs. Auto Leasing, Inc., 16 S.W.3d 815 (Tex. App. 2000), reh'g denied, May 4, 2000.

[FN74]. Statement of Sen. Hollings, supra note 55.

[FN75]. See infra notes 142-45; see also Chair King, Inc. v. Houston Cellular Corp., 131 F.3d 507, 513 (5th Cir. 1997) ("[T]he benefits of a private right of action would be defeated if attorney fees proved greater than potential damages under the statute."). As an illustration, in one case (Margulis v. Schenberg, No. 21 C 97-010581 (Assoc.

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Cir. Ct. St. Louis County Mo. Dec. 10, 1997)) a plaintiff was awarded only $50 plus $53 in court costs for a prerecorded solicitation call violation, even though the statute at 47 U.S.C. § 227(b)(3)(B) requires a mandatory $500 for each such violation. Because of the defendant's obfuscatory and dilatory tactics, prosecuting the case required the plaintiff (a practicing attorney) to attend three hearings, respond to twelve motions and spend over 100 hours of his time. Telephone interview with Max Margulis, a member of the Missouri bar (Dec. 3, 1998).

[FN76]. Second Employers' Liability Cases, 223 U.S. 1, 57-58 (1912).

[FN77]. Claflin v. Houseman, 93 U.S. 130, 136-37 (1876).

[FN78]. Chair King, 131 F.3d at 513 ("The statute's text evidences Senator Hollings's [sic] hopes as it provides for the right of action in state court, but gives states discretion over its administration.").

[FN79]. See The Federalist No. 82, at 132 (Alexander Hamilton) (Edward Gaylord Bourne ed., 1947).
State courts . . . in every case in which they were not expressly excluded by the future acts of the national legislature, they will of course take cognizance of the causes to which those acts may give birth. . . . When in addition to this we consider the State governments and the national governments, as they truly are, in the light of kindred systems, and as parts of ONE WHOLE, the inference seems to be conclusive, that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited.
Id. Even the anti-federalists supported this same conclusion:
[I]ndeed for ought I see every case that can arise under the constitution or laws of the United States, ought in the first instance to be tried in the court of the state . . . . This method would preserve the good old way of administering justice, would bring justice to every man's door, and preserve the inestimable right of trial by jury.
Anti-Federalist No. 82 (Robert Yates), unpaginated edition at http:// www.constitution.org/afp/ brutus14.htm (last modified Sept. 15, 1999).

[FN80]. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) (quotations omitted).

[FN81]. Howlett v. Rose, 496 U.S. 356, 369-72 (1990) (citations omitted).

[FN82]. New York v. United States, 505 U.S. 144, 178 (1992) (citing Testa v. Katt, 330 U.S. 386 (1947); Palmore v. United States, 411 U.S. 389, 402 (1973); Second Employers' Liability Cases, 223 U.S. 1, 57 (1912); and Claflin v. Houseman, 93 U.S. 130, 136-37 (1876) as discussing congressional authority "to pass laws enforceable in state courts").

[FN83]. See Tafflin v. Levitt, 493 U.S. 455, 458 (1990).
We begin with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause. Under this system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States.
Id.; see also Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 n.4 (1981) ("If Congress does not confer jurisdiction on federal courts to hear a particular federal claim, the state courts stand ready to vindicate the federal right, subject always to review, of course, in this Court.").

[FN84]. Second Employers' Liability Cases, 223 U.S. at 58 ("The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication."); see also Donnelly v. Yellow Freight Sys., Inc., 874 F.2d 402, 409 (7th Cir. 1989), aff'd, 494 U.S. 820 (1990) ("Once Congress has vested jurisdiction over a federal claim in the state courts, the state courts, including the courts of Illinois, are under a constitutional obligation to exercise jurisdiction."); Segarra v. Banco Central Y Economias, 14 B.R. 870, 877 (Bankr. D. P.R. 1981) ("The state court cannot refuse to take jurisdiction of an action based on Federal law, and the state court must enforce the federal right even though it feels it is contrary to state policy." (footnotes omitted)); Egner v. Texas City Indep. Sch. Dist., 338 F. Supp. 931, 938 n.11 (S.D. Tex. 1972) ("[When] a state court [has] competent jurisdiction in other respects, . . . a State would not be free to refuse enforcement of a federally created right within its concurrent jurisdiction." (citations omitted)). Some commentators refer to this as the "power-therefore-duty" principle. See, e.g., Martin H. Redish & John E. Muench, Adjudication of Federal Causes of Action in State Court, 76 Mich. L. Rev. 311, 347 n.159 (1976).

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[FN85]. Palmore, 411 U.S. at 402 (emphasis added).

[FN86]. See Printz v. United States, 521 U.S. 898, 906 n.1 (1997) ("The Second Employers' Liability Cases stand for the proposition that a state court must entertain a claim arising under federal law when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws." (internal quotations omitted)); Claflin, 93 U.S. at 137 ("If an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a State court."); see also Howlett, 496 U.S. at 369-70.

[FN87]. The Supreme Court gives close scrutiny to any claim of such a neutral procedural rule by state courts and has only rarely found a state's rule is genuinely neutral, and therefore, allowable. Howlett, 496 U.S. at 374 ("On only three occasions have we found a valid excuse for a state court's refusal to entertain a federal cause of action. Each of them involved a neutral rule of judicial administration." (citing Douglas v. N.Y., New Haven & Hartford R.R. Co., 279 U.S. 377 (1929); Missouri ex rel. S. Ry. Co. v. Mayfield, 340 U.S. 1 (1950); and Herb v. Pitcairn, 324 U.S. 117 (1945))).

[FN88]. Absent exclusive federal court jurisdiction, suits under federal laws may be brought "in the State courts, wherever those courts were invested with appropriate jurisdiction, suited to the nature of the case." Claflin, 93 U.S. at 143.

[FN89]. It is evident to most authorities that Congress has that power. See, e.g., Redish & Muench, supra note 84, at 346 ("Congress may desire to provide the state courts an opportunity to decline to hear federal cases that is broader than that required by the Constitution."). I have necessarily assumed Congress has that power for the purposes of this Article, since the alternative would render the discussion largely moot, as any "opt-in" or "opt-out" options would be impossible.

[FN90]. 505 U.S. 144 (1992).

[FN91]. 521 U.S. 898 (1997).

[FN92]. U.S. Const. art. VI, cl. 2.

[FN93]. This situation is often referred to as a "reverse-Erie" case, implying that the rule established in Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (holding that a federal court sitting in diversity must apply the law and procedures of the state court where they are outcome determinative), is bilateral and reciprocal, so that a state court hearing a federal cause of action must apply federal law and procedure where outcome determinative. See, e.g., Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 223 (1986) (discussing the reverse-Erie doctrine). Although it is manifestly true that a state court hearing a federal cause of action must apply any federal law and procedures if those procedures are outcome determinative, see cases cited infra note 94, the justification for that requirement lies in the supremacy of federal law, and not in the forum shopping and "inequitable administration of the laws" considerations that underlay the decision in Erie. See generally Alfred Hill, Substance and Procedure in State FELA Actions-The Converse of the Erie Problem?, 17 Ohio St. L.J. 384 (1956) (analyzing the effect of Erie on state FELA actions).

[FN94]. See Brown v. W. Ry. of Ala., 338 U.S. 294, 298 (1949) ("Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws."); Davis v. Wechsler, 263 U.S. 22, 24 (1923) ("Whatever springes [sic] the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. . . . [I]t is necessary to see that local practice shall not be allowed to put unreasonable obstacles in the way."); see also Felder v. Casey, 487 U.S. 131, 138 (1988) (concluding that the Wisconsin notice-of-claim statute is preempted when state court hears a civil rights claim arising out of federal law); Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359, 363 (1952) (holding that the right to a jury trial for a FELA case cannot be denied by state court); Engel v. Davenport, 271 U.S. 33, 38-39 (1926) (holding that state court must use federal statute of limitations for claims based in federal laws); New Orleans & N.E. R.R. v. Harris, 247 U.S. 367, 370-71 (1918) (holding that when hearing a claim based in federal law, state court must apply federal standards for burdens of proof even if state practice is different); Cent. Vt. Ry. Co. v. White, 238 U.S. 507, 511- 12 (1915) (holding that

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when a state court hears federal cases, the burden of proof in contributory negligence is on the defendant, even if state practice is different, since that is the federal rule). But see sources cited infra notes 137-40, 145.

[FN95]. Howlett v. Rose, 496 U.S. 356, 372 (1990) ("The requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented.").

[FN96]. Second Employers' Liability Cases, 223 U.S. 1, 56-57 (1912).

[FN97]. New York v. United States, 505 U.S. 144, 178 (1992).

[FN98]. "The Constitution instead gives Congress the authority to regulate matters directly, and to pre-empt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents." Id. at 178. But see cases cited infra note101.

[FN99]. "The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' [executive] officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." Printz v. United States, 521 U.S. 898, 935 (1997). But see Voting Rights Coalition v. Wilson, 60 F.3d 1411, 1415 (9th Cir. 1995), cert. denied, 516 U.S. 1093 (1996) ("Congress may conscript state agencies to carry out voter registration for the election of Representatives and Senators."); accord Ass'n of Cmty. Orgs. for Reform Now (ACORN) v. Edgar, 56 F.3d 791, 794 (7th Cir. 1995) ("Congress can . . . regulate federal elections and force the state to bear the expense . . . .").

[FN100]. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 47 (1996) (holding that the Indian Commerce Clause does not grant jurisdiction over a nonconsenting state).

[FN101]. Some notable exceptions remain, however, such as when Congress subjects states to suit under the Fourteenth Amendment power to enforce the Civil War Amendments. "We have held also that in adopting the Fourteenth Amendment, the people required the States to surrender a portion of the sovereignty that had been preserved to them by the original Constitution, so that Congress may authorize private suits against nonconsenting States pursuant to its § 5 enforcement power." Alden v. Maine, 527 U.S. 706, 756 (1999). Another exception is when Congress acts under its Article I powers to regulate the time, place, and manner of federal elections. See, e.g., National Voter Registration Act of 1993 (the "Motor Voter" bill), 42 U.S.C. § 1973gg-3 (1994); see also Voting Rights Coalition, 60 F.3d at 1413-14 (discussing that no limits are placed on Congress' power over registration of voters); Ass'n of Cmty. Orgs. for Reform Now (ACORN), 56 F.3d at 793 (discussing that there is no reference to registration of voters in Article I, sec. 4 of the Constitution).

[FN102]. New York, 505 U.S. at 178-79.

[FN103]. 330 U.S. 386 (1947).

[FN104]. The dissenting justices in Printz noted that "[a]s Testa held, because the 'Laws of the United States . . . [are] the supreme Law of the Land,' state courts of appropriate jurisdiction must hear federal claims whenever a federal statute, such as the Emergency Price Control Act, requires them to do so." Printz v. United States, 521 U.S. 898, 968 (1997) (Stevens, Souter, Ginsberg, Breyer, JJ., dissenting) (alteration in original). The Court in Miles v. Illinois Central Railroad Co., 315 U.S. 698 (1942), agreed:
By virtue of the Constitution, the courts of the several states must remain open to such litigants on the same basis that they are open to litigants with causes of action springing from a different source. This is so because the Federal Constitution makes the laws of the United States the supreme law of the land, binding on every citizen and every court and enforceable wherever jurisdiction is adequate for the purpose.
Id. at 703-04.

[FN105]. See, e.g., Will v. Mich. Dept. of State Police, 491 U.S. 58, 65 (1989); William N. Eskridge, Jr. & Phillip P. Frickey, Quasi Constitutional Law: Clear Statement Rules on Constitutional Lawmaking, 45 Vand. L. Rev. 593, 597 (1992).

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[FN106]. Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 209 (1991) (O'Connor, Scalia, JJ., dissenting). But see Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 790 (1991) (Blackmun, Marshall, and Stevens, JJ., dissenting) ("Despite the Court's attempt to give it a constitutional cast, the clear-statement rule, at bottom, is a tool of statutory construction like any other.").

[FN107]. See Lawrence v. State Tax Comm'n, 286 U.S. 276, 282 (1932) ("[C] onstitutional rights are denied as well by the refusal of the state court to decide the question, as by an erroneous decision of it."); see also Michael G. Collins, Article III Cases, State Court Duties, and the Madisonian Compromise, 1995 Wis. L. Rev. 39, 45 (1993) ("[A] state court's refusal to hear a case may undercut the supremacy of federal law to the same degree as a failure to apply it or an erroneous interpretation of it."); Redish & Muench, supra note 84, at 347 (stating that if state courts could "declin[e] to adjudicate the federal claims, then the concept of federal supremacy would be considerably undercut").

[FN108]. Will, 491 U.S. at 65 ("[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute."') (citing Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)).

[FN109]. See, e.g., United States v. Nordic Vill., Inc., 503 U.S. 30, 33- 34 (1992) ("Waivers of the Government's sovereign immunity, to be effective, must be 'unequivocally expressed."') (quoting Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990) (quoting United States v. Mitchell, 445 U.S. 535, 538 (1980), and United States v. King, 395 U.S. 1, 4 (1969))).

[FN110]. See United States v. New Mexico, 455 U.S. 720, 742 (1982) (holding that building contractor not protected by federal immunity from state taxes when the contract was with the federal government and the government provided advanced funding for the project).

[FN111]. See Bryan v. Itasca County, 426 U.S. 373, 385 (1976) (holding that states may not have the authority to impose property taxes on Native Americans, but states have been granted jurisdiction over matters between Native Americans or in controversies which involve Native Americans and a citizen of that state).

[FN112]. "An unambiguous indication of congressional intent is required before a federal statute will be read to authorize otherwise invalid state legislation . . . ." Maine v. Taylor, 477 U.S. 131, 139 (1986); "Congress must be 'unmistakably clear' before we will conclude that it intended to permit state regulation which would otherwise violate the dormant Commerce Clause." C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 408 (1994) (O'Connor, J., concurring) (quoting S.-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 91 (1984)).
Congress can, however, only grant permission for acts if Congress itself is not restricted from similar acts. For example, in Mississippi University for Women v. Hogan, 458 U.S. 718, 732 (1982), the Court stated in dicta that while Congress could exempt the university from Title IX, "neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment." Id. at 732-33. A (short) line of three cases decided in the early 1900s (S. Pac. Co. v. Jensen, 244 U.S. 205, 218 (1917); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 163 (1920); Washington v. W.C. Dawson & Co., 264 U.S. 219, 222-23 (1924)) held that congressional power over maritime matters was so exclusive that Congress was without power to permit state laws such as workers' compensation statutes to apply to maritime workers. This line of cases has been tacitly disavowed and no longer represents good law. "Although these cases have not been explicitly overruled by the Court, they rest on a strong nondelegation doctrine the likes of which has not been seen since the 1930s." Calhoun v. Yamaha Motor Corp., 40 F.3d 622, 629 n.8 (3d Cir. 1994); see also Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 321 n.29 (1955) (stating that the contention that Congress cannot consent to state regulation of marine insurance "is so lacking in merit that it need not be discussed.").

[FN113]. Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 209 (1991).

[FN114]. See New York v. United States, 505 U.S. 144, 181 (1992) ("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.") (quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)).

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[FN115]. Eskridge & Frickey, supra note 105, at 597.

[FN116]. See supra notes 88 and 104 and accompanying text. This has not always been as clear, however. As Justice Stevens noted in his dissent in Printz, dicta in United States v. Jones can support the proposition that "the requirement that state courts of appropriate jurisdiction hear federal questions . . . 'could not be enforced against the consent of the States."' Printz v. United States, 521 U.S. 898, 950 n.9 (1997) (Stevens, Souter, Ginsburg and Breyer, JJ., dissenting) (quoting Jones, 109 U.S. 513, 520 (1883)). He notes, however, "[t]hat view was unanimously resolved to the contrary thereafter in the Second Employers' Liability Cases, and in Testa v. Katt." Id. (citations omitted).

[FN117]. Printz, 521 U.S. at 913.

[FN118]. See United States v. Bass, 404 U.S. 336, 349 (1971). ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.").

[FN119]. Public Citizen v. DOJ, 491 U.S. 440, 466 (1989) (rejecting interpretation of ambiguous statutory provision that would diminish President's Article II power to nominate federal judges, and thereby alter the balance of power).

[FN120]. See, e.g., Milwaukee County Pavers Ass'n v. Fiedler, 922 F.2d 419, 424 (7th Cir. 1991) ("If Congress wants, it can authorize states to engage in activities that but for the authorization would violate the dormant [C] ommerce [C]lause." (citations omitted)). One of the earliest examples of congressional action in this regard is the case of the Wheeling Bridge over the Ohio River. First held to interfere with interstate commerce in Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518 (1851), Congress passed legislation onAugust 31, 1852, declaring in part "'[t]hat the said bridges be declared to be and are established post-roads for the passage of the mails of the United States, and that the Wheeling and Belmont Bridge Company are authorized to have and maintain their bridges at their present site and elevation. . . .'" Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 429 (1855) (citation omitted). There, the Court held that Congress was within its authority to make such a declaration and permit the structure to remain. Id. at 434-35.

[FN121]. See, e.g., Di Santo v. Pennsylvania, 273 U.S. 34, 37 (1927).

[FN122]. See W. & S. Life Ins. Co. v. Bd. of Equalization, 451 U.S. 648, 652 (1981) ("Congress may confer upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy") (internal quotation and alteration omitted); Hazardous Waste Treatment Council v. South Carolina, 945 F.2d 781, 790 (4th Cir. 1991) ("Congress, of course, may permit the states to engage in practices otherwise unconstitutional under the Commerce Clause.") (citation omitted); see generally, William Cohen, Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma, 35 Stan. L. Rev. 387, 400 (1983) (articulating a cogent bright line test that "[i]f the limits on state power are wholly inapplicable to Congress, Congress can remove those limits from the states. If the limits on state power are matched by identical limits on federal power, Congress has no more power than the states to ignore them.").

[FN123]. See, e.g., S.-Central Timber Dev. Inc. v. Wunnicke, 467 U.S. 82, 91-92 (1984) ("[F]or a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear. The requirement that Congress affirmatively contemplate otherwise invalid state legislation is mandated by the policies underlying dormant Commerce Clause doctrine."); see also supra note 114.

[FN124]. Hazardous Waste Treatment Council, 945 F.2d at 790 ("Parties seeking to argue that Congress has authorized the otherwise invalid [state] legislation face a heavy burden.").

[FN125]. For an example of the use of a clear statement from Congress that does alter the balance of power between the sovereigns, consider the McCarran- Ferguson Act, 59 Stat. 33 (1945) (codified as amended at 15 U.S.C. §§ 1011- 1015 (1994)). The McCarran-Ferguson Act allows state insurance laws to preempt conflicting federal laws of general applicability. It was specifically intended to "transform the legal landscape" and alter the supremacy of federal law with regard to state regulation of the business of insurance. United States Dep't of Treasury v. Fabe, 508 U.S. 491, 507 (1993).

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[FN126]. See United States v. Bass, 404 U.S. 336, 349 (1971) ("In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of [a] clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.").

[FN127]. "First do no harm." The phrase is generally attributed to Hippocrates but that exact wording is not found in the body of Hippocrates' work. Some historians differ on the source of the phrase. See, e.g., William Weitzel, A Later Addition to Hippocratic Oath, Wall St. J., Nov. 25, 1996, at A19 (attributing the phrase to the physician Galen).

[FN128]. The principle is also embodied in other canons of construction, such as the doctrine of judicial restraint in avoiding addressing a constitutional question at all, if another issue is dispositive of the case. See Lorillard v. Pons, 434 U.S. 575, 577 (1978).

[FN129]. The trend of late by the Supreme Court has been to increasingly demand such clear statements from Congress when constitutional issues are raised by statutes. See Eskridge & Frickey, supra note 105, at 597.

[FN130]. McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 496 (1991) ("It is presumable that Congress legislates with knowledge of our basic rules of statutory construction."); King v. St. Vincent's Hosp., 502 U.S. 215, 220 n.9 (1991) ("We will presume congressional understanding of such interpretive principles.").

[FN131]. Hilton v. South Carolina Public Railways Commission, 502 U.S. 197, 206 (1991).

[FN132]. Some would simply point to the statute and claim to be interpreting the "plain and ordinary meaning" of the statute's language in construing it to mean a state has to "opt-in" or can "opt-out." See, e.g., Autoflex Leasing, Inc. v. Mfrs. Auto Leasing, Inc., 16 S.W.3d 815, 817 (Tex. App. 2000), reh'g denied, May 4, 2000. However, "plain language" is a lower threshold, and something quite different from a "clear statement." The widely divergent opinions on the construction of the TCPA belie existence of any "clear" statement. Compare id. ("plain and ordinary meaning" requires states to "opt-in"), with Zelma v. Total Remodeling, Inc., 756 A.2d 1091, 1093 (N.J. Super. 2000) ("common-sense meaning" of the statute is that states do not have to "opt-in").

[FN133]. See Statement of Sen. Hollings, supra note 55.

[FN134]. "We conclude that rights arising under the [federal] act in question may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local laws, is adequate to the occasion." Second Employers' Liability Cases, 223 U.S. 1, 59 (1912) (emphasis added).

[FN135]. Henry M. Hart, Jr., The Relations Between State and Federal Law, 54 Colum. L. Rev. 489, 508 (1954), quoted in Howlett v. Rose, 496 U.S. 356, 372 (1990).

[FN136]. See infra note 145.

[FN137]. State venue rules are generally not disturbed by a federal cause in a state court. See, e.g., Burlington N. R.R. Co. v. Ford, 504 U.S. 648, 648 (1992) (permitting Montana's state venue rules in FELA case).

[FN138]. As is often seen in divorce cases, states may set reasonable length of residency requirements on access to their civil courts. See, e.g., Sosna v. Iowa, 419 U.S. 393, 404-10 (1975).

[FN139]. See, e.g., Stein v. Aintablian, 100 N.Y.S.2d. 90, 94 (Sup. Ct. 1950) (determining that the county court properly declined jurisdiction where the damages requested ($5,883) exceeded the jurisdictional limit ($3,000) of the county court set by state statute, and finding that the supreme court, a trial court of general jurisdiction, was a proper court to hear the case).

[FN140]. States apply their own jurisdictional and administrative rules as long as they are not outcome determinative and are applied equally to state and federal claims. See Howlett, 496 U.S. at 372 ("The States thus have great latitude to establish the structure and jurisdiction of their own courts." (citations omitted)); Restatement (Second) of the Conflict of Laws § 122 (1971) ("A court usually applies its own local law rules prescribing how

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litigation should be conducted even when it applies the local law rules of another state to resolve other issues in the case.").

[FN141]. See Second Employers' Liability Cases, 223 U.S. 1, 56-57 (1912). However, this constitutional restriction has not stopped some legislators in Congress from attempting to exercise control of procedures in state courts that Congress arguably does not have. See, e.g., S. 1530, 105th Cong. (1997) (attempting to prohibit class actions, joinder of parties, and aggregation of claims in suits brought in state courts under state laws for "health related claims arising from the use of a tobacco product.").

[FN142]. See Statement of Sen. Hollings, supra note 55. One aspect of this concern is that consumers are often faced with state laws or court rules that close small claims courts to artificial entities. In some states, parties in small claims court are barred from using an attorney, but businesses may be barred from appearing in any court in that state without an attorney. See cases cited infra note 143. This effectively prevents any TCPA actions in small claims courts in such states since a defendant telemarketer will practically always be a business. For a brief exploration of other problems enforcing the TCPA in state small claims courts, see Marr, supra note 15, at 8-10.

[FN143]. Hollings was adamant that he wanted victims to be able to go to court without the burden and costs of an attorney, but he knew that a federal law could not mandate it. Since many victims of junk faxes are small businesses, they can not bring suit without an attorney in states that require artificial entities to be represented by counsel. See, e.g., In re Estate of Nagel, 950 P.2d 693, 694 (Colo. App. 1997); Tom Edwards Chevrolet, Inc. v. Air-Cel, Inc., 300 N.E.2d 312, 313 (Ill. App. 1973); State ex rel. Western Parks, Inc. v. Bartholomew County Ct., 383 N.E.2d 290, 292 (Ind. 1978); Alliance Group, Inc. v. Rosenfield, 685 N.E.2d 570, 575 (Ohio App. 1996); Plantations Legal Def. Srvs., Inc. v. Grande, 403 A.2d 1084, 1085 (R.I. 1979); Tuttle v. Hi-Land Dairyman's Ass'n, 350 P.2d 616 (Utah 1960). But see Eckles v. Atlanta Tech. Group, 485 S.E.2d 22, 25 (Ga. 1997); Feldman v. Mazzei, 631 N.Y.S.2d 241, 241 (1995); In re Unauthorized Practice of Law, 422 S.E.2d 123, 124 (S.C. 1992). See generally Jay M. Zitter, Propriety and Effect of Corporation's Appearance Pro Se Through Agent Who Is Not Attorney, 8 A.L.R. 5th 653 (1992).

[FN144]. ErieNet, Inc. v. Velocity Net, Inc., 156 F.3d 513, 518 (3d Cir. 1998) ("Senator Hollings' statements indicate that an overriding concern in the creation of the private right of action was to make it easier for consumers to recover damages-'preferably in small claims court.' The implication is that suits in courts other than state small claims courts would be more costly and burdensome to consumers." (quoting Statement of Senator Hollings, supra note 55) (internal citation omitted)).

[FN145]. For example, the TCPA explicitly provides for injunctive relief, but many state small claims courts do not have jurisdiction to provide injunctive relief, and the federal law cannot give them the jurisdiction to do so. See Second Employers' Liability Cases, 223 U.S. at 56. Since the lack of injunctive relief is equally applied to state and federal causes in those courts, it is "neutral" and there is no constitutional problem under the Supremacy Clause or Testa.

[FN146]. Chair King, Inc. v. Houston Cellular Corp., 131 F.3d 507, 513 (5th Cir. 1997).

[FN147]. See Blackburn v. Portland Gold Mining Co., 175 U.S. 571, 588 (1900) (holding that adverse party land claims made under federal law were properly heard exclusively by state courts); Shoshone Mining Co. v. Rutter, 177 U.S. 505, 512-13 (1900) (same). Federal law also placed jurisdiction for actions involving compensation for certain federal takings claims exclusively in state court. 18 Stat. 506 (1875), construed in Jones v. United States, 4 N.W. 519, 521-22 (Wis. 1880), aff'd, 109 U.S. 513 (1883). In a historical context, the Court in Printz cited several instances of federal laws conferring exclusive jurisdiction for various ministerial and adjudicative duties. Printz v. United States, 521 U.S. 898, 905-09 (1997).

[FN148]. Int'l Sci. & Tech. Inst. v. Inacom Communications, Inc., 106 F.3d 1146, 1158 (4th Cir. 1997).

[FN149]. In Shoshone Mining and Blackburn, the Court found exclusive state court jurisdiction for cases raising federal law land claims, but a state court's duty to hear those cases was not questioned. See Shoshone, 177 U.S. at 512-13; Blackburn, 175 U.S. at 587-88.

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[FN150]. The International Science court avoided the Equal Protection Clause challenge by concluding that states did not have to "opt-in." Going further and concluding that states could "opt-out," however, was unnecessary to resolving the case before that court, and judicial restraint should have prevented this unnecessary conclusion and the constitutional questions it raises. In avoiding one constitutional question under Testa, the court unwittingly raised another. See Int'l Sci., 106 F.3d at 1155-58.

[FN151]. 47 A.2d 312 (R.I. 1944).

[FN152]. See Testa v. Katt, 330 U.S. 386, 388 (1947).

[FN153]. See id.

[FN154]. See id. at 392-94.

[FN155]. Printz v. United States, 521 U.S. 898, 928 (1997).

[FN156]. See James Madison, The Debates in the Federal Convention of 1787 (June 5, 1787), available at http://www.constitution.org/dfc/dfc_0605.htm.

[FN157]. Richard H. Fallon et al., Hart and Wechsler's Federal Courts and the Federal System 8 (4th ed. 1996).

[FN158]. See, e.g., U.S. Const. art. VI, cl.2; 15 James Wm. Moore et al., Moore's Federal Practice 100 App.-3 to 100 App.-7 (3d ed. 1999).

[FN159]. See United States v. Jones, 109 U.S. 513, 519-20 (1883) ("Their use has not been deemed violative of any principle or as in any manner derogating from the sovereign authority of the federal government; but as a matter of convenience and as tending to a great saving of expense.").

[FN160]. Anti-Federalist No. 82, supra note 79.

[FN161]. Many examples are expertly researched and recited in both the majority and the dissent in Printz. See Printz v. United States, 521 U.S. 898, 905-09 (1997); id. at 949-51 (Stevens, Souter, Ginsberg, Breyer, JJ., dissenting).

[FN162]. See, e.g., Fox v. Ohio, 46 U.S. (5 How.) 410, 437-39 (1847); Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 615-16 (1842); United States v. Bailey, 34 U.S. (9 Pet.) 238, 259-60 (1835); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 334-37 (1816).

[FN163]. See Int'l Sci. & Tech. Inst. v. Inacom Communications, Inc., 106 F.3d 1146 (4th Cir. 1997).

[FN164]. United States v. Jones, 109 U.S. 513, 517-18 (1883).

[FN165]. Id. at 520 (internal citation omitted). An interesting aspect of Jones is that the United States Attorney argued that the federal statute granting state court jurisdiction for those claims was unconstitutional. See id. at 518.

[FN166]. Kentucky v. Dennison, 65 U.S. (24 How.) 66, 109 (1860). Dennison must, however, be read in the context of a rising tide of abolitionism. Kentucky sought the return from a non-slave state (Ohio) of a fugitive accused of illegally assisting a slave to escape servitude. See id. at 105-06. The Court held that the federal government was without power to "compel" the governor of Ohio to discharge his duty under federal law (Extradition Act of 1793, 1 Stat. 302-305) to return the accused, and alluded that the entire "general Government" was without that power. Id. at 109-10. Procedurally, Kentucky should probably have sought enforcement by President Buchanan, but it is quite unlikely the President would have used his enforcement powers to oblige Kentucky's request.
In contrast, a century later President Eisenhower used his executive authority (and the 101st Airborne) in an analogous situation of state recalcitrance in Little Rock, Arkansas, to enforce school desegregation, compelling state executives to discharge their duties in compliance with federal law. Once again, timing is everything.

[FN167]. Prigg, 41 U.S. (16 Pet.) at 614.

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[FN168]. Professor Collins alludes to this as a "Golden Age of cooperation . . . when state courts were rather more willing to do what they later refused to do." Collins, supra note 107, at 157. See also Dennison, 65 U.S. at 108-09 ("And these powers were for some years exercised by state tribunals, readily, and without objection . . . . And in these cases the co- operation of the States was a matter of comity, which the several sovereignties extended to one another for their mutual benefit.").

[FN169]. See, e.g., Davidson v. Champlin, 7 Conn. 244, 250 (1828); Haney v. Sharp, 31 Ky. (1 Dana) 442, 442-43 (1833); In re Stephens, 70 Mass. (4 Gray) 559, 562 (1855); Mattison v. State, 3 Mo. 421, 433 (1834); State ex rel. Rushwort v. Judges of Inferior Court of Common Pleas, 58 N.J.L. 97, 100-01 (1895); United States v. Lathrop, 17 Johns. 4, 20 (N.Y. 1819); State v. McBride, 24 S.C.L. (Rice) 400 (1839); Jackson v. Rose, 4 Va. (1 Va. Cas.) 34, 41 (1815).

[FN170]. Collins, supra note 107, at 167.

[FN171]. See id. at 48.

[FN172]. See id. at 141 (noting that anti-federalists welcomed the concept that state courts would "play an enforcement role" in federal law (citing Richard E. Levy, New York v. United States: An Essay on the Uses and Misuses of Precedent, History, and Policy in Determining the Scope of Federal Power, 41 Kan. L. Rev. 493, 524-25 (1993))). See also Anti-Federalist No. 82, supra note 79.

[FN173]. 217 U.S. 509, 517 (1910).

[FN174]. Claflin v. Houseman, 93 U.S. 130, 137 (1876). ("But this is no reason why the State courts should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent, and notdenied.").

[FN175]. Holmgren, 217 U.S. at 517 ("The question is not here presented whether the states can be required to enforce such naturalization laws against their consent . . . ."). The Fourth Circuit Court of Appeals in International Science would have done well to follow the pristine example of abstention shown in Holmgren. Other examples of the appropriateness of abstention on the question of states' ability to refuse a federal cause of action in their courts are found in more recent cases such as Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n, 515 U.S. 582, 587 (1995) ("For purposes of this case, we will assume without deciding that state courts generally must hear § 1983 suits.").

[FN176]. 223 U.S. 1 (1912).

[FN177]. 330 U.S. 386 (1947). The Rhode Island court, as had many other state courts at that time, seized upon a "penal" provision in the governing federal law, and relied on state precedent that the duty to hear a penal federal law was different than the duty to hear a remedial federal law. Id. at 388. Besides noting that states are part of the Union, and the laws of the Union are not "foreign" in any sense to states, the Court noted specifically that the Rhode Island courts do hear cases involving penal multiplied damages based on state laws. Id. at 389, 394. This dicta can be read to imply that if a state has barred the awarding of multiplied punitive damages in its courts, that such a bar is "neutral" and could bar the awarding of multiplied damages based on a federal law. It is likely, however, that any punitive multiplied damages provisions in a federal statute would be considered an inseparable part of the congressional policy embodied in the federal statute, and thus "bound up" in the federal claim. See cases cited supra note 94. In that scenario, the state court would have to adjudicate the multiplied damages claim even if that was contra to the state practice.

[FN178]. Testa, 330 U.S. at 390-91, 394.

[FN179]. Id. at 394.

[FN180]. See Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); see also supra note 93 and accompanying text.

[FN181]. Howlett v. Rose, 496 U.S. 356, 380 (1990).

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[FN182]. See id. at 374 ("On only three occasions have we found a valid excuse for a state court's refusal to entertain a federal cause of action.").

[FN183]. See Second Employers' Liability Cases, 223 U.S. 1, 56-57 (1912).

[FN184]. 340 U.S. 1 (1950).

[FN185]. Id. at 3 (citation omitted). The "neutrality" of such a position is underscored by the decision in American Dredging Co. v. Miller, 510 U.S. 443 (1994), where a state court denied forum non conveniens objections in a suit brought under federal maritime law, when that same objection would have been sustained in federal court. See id. at 450.

[FN186]. Hart, supra note 135, at 508; see also discussion supra Parts IV.D & E.

[FN187]. Felder v. Casey, 487 U.S. 131, 141 (1988).

[FN188]. Howlett v. Rose, 496 U.S. 356, 380 (1990).

[FN189]. Id. at 380-81.

[FN190]. See, e.g., Reno v. Condon, 528 U.S. 141 (2000) (upholding federal regulation of states' use and dissemination within the state of the states' own driver's license and motor vehicle records). "The volume of interstate commerce and the range of commonly accepted objects of government regulation have, however, expanded considerably in the last 200 years, and the regulatory authority of Congress has expanded along with them." New York v. United States, 505 U.S. 144, 157 (1992).

[FN191]. 502 U.S. 197 (1991).

[FN192]. Id. at 206.

[FN193]. 527 U.S. 706 (1999).

[FN194]. Hilton, 502 U.S. at 206.

[FN195]. Id. at 207.

[FN196]. Alden, 527 U.S. at 748.

[FN197]. Id. at 754.

[FN198]. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 75 (1996).

[FN199]. Alden, 527 U.S. at 748.

[FN200]. See id.

[FN201]. Kline v. Burke Constr. Co., 260 U.S. 226, 234 (1922).

[FN202]. "From the beginning suits between citizens of different states, or involving federal questions, could neither be brought in the federal courts nor removed to them, unless the value of the matter in controversy was more than a specified amount." Healy v. Ratta, 292 U.S. 263, 269-70 (1934). The amount originally set by the Judiciary Act of 1789 was $500, exclusive of costs, and climbed to $10,000 by 1958. Snyder v. Harris, 394 U.S. 332, 334 nn.1-4 (1969). This bar to general federal question jurisdiction remained until 1980. Federal Question Jurisdiction Amendments Act of 1980, Pub. L. No. 96-486, Section 2(a), 94 Stat. 2369 (1980) (amending 28 U.S.C. § 1331 to remove the amount in controversy requirement forgeneral federal question jurisdiction).

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[FN203]. These advocates are finding that Congress is providing an ever increasing number of targets for their wrath besides the TCPA. See infra note 207.

[FN204]. "By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for solving problems without having to ask their constituents to pay for the solutions with higher federal taxes." Printz v. United States, 521 U.S. 898, 930 (1997).

[FN205]. See 23 U.S.C. § 158 (Supp. IV 1998), construed in South Dakota v. Dole, 483 U.S. 203 (1987); see also Fullilove v. Klutznick, 448 U.S. 448, 478-80 (1980) (upholding the state participation requirement of the minority business enterprise provision of the Public Works Employment Act of 1977); Lau v. Nichols, 414 U.S. 563, 568-69 (1974) (requiring the San Francisco school system, a recipient of federal funds, to take affirmative steps to open instructional programs to non-English speaking children); Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127, 142-44 (1947) (requiring the state of Oklahoma, a recipient of federal funds, to abide by Section 12 of the Hatch Act).

[FN206]. Printz, 521 U.S. at 950 n.9 (Stevens, Souter, Ginsberg, and Breyer, JJ., dissenting) ("[I]f it chooses to have no courts . . . [a state] may avoid Testa.").

[FN207]. Congress seems somewhat enamored of exclusive state court jurisdiction for some federal claims, and has implemented that policy in several pieces of recent legislation other than the TCPA. See, e.g., Deceptive Mail Prevention and Enforcement Act, Pub. L. No. 106-168, Sec. 3017(e) (codified at 39 U.S.C. § 3017(e) (Supp. IV 1998)) (injunction/recovery with respect to prohibited mailings); 42 U.S.C. § 604a(i) (Supp. IV 1998) (enforcement/compliance with respect to public welfare grants to states); 15 U.S.C. § 3207(b) (1994) (enforcement of natural gas retail sales regulation).

[FN208]. See Int'l Sci. & Tech. Inst. v. Inacom Communications, Inc., 106 F.3d 1146, 1157-58 (4th Cir. 1997). The actual number of TCPA cases filed in state courts is impossible to determine with certainty. Speaking from observations and experience, I believe that between 250 and 400 TCPA cases have actually been filed in the entire country between 1992, the year the law took effect, and 1999. Based on this estimate, there is less than one TCPA case filed per state, per year. This rate is, however, increasing.

[FN209]. Int'l Sci., 106 F.3d at 1157 ("We believe that it is readily apparent from the congressional findings contained in the TCPA itself that Congress considered the effect that a newly created private right of action would have on judicial administration.").

[FN210]. Id.

[FN211]. "In . . . [Testa] the Court unanimously held that state courts of appropriate jurisdiction must occupy themselves adjudicating claims brought by private litigants under the federal Emergency Price Control Act of 1942, regardless of how otherwise crowded their dockets might be with state-law matters." Printz, 521 U.S. 898, 967 (1997) (Stevens, Souter, Ginsberg, and Breyer, JJ., dissenting); see also Second Employers' Liability Cases, 223 U.S. 1, 58 (1912) ("The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication.").

[FN212]. 47 U.S.C. § 227(f) (1994). Several such cases have been filed. See, e.g., Missouri v. Fax.com, Inc., No. 4:00CV1265LOD (E.D. Mo. Filed Aug 12, 2000); Missouri v. Am. Blastfax, Inc., No. 4:00CV00933snl (E.D.Mo. Filed Aug. 12, 2000); Texas v. Am. Blastfax, Inc., No. A 00CA085SS (W.D. Tex. filed Feb 8, 2000); Washington v. Tri-Star Marketing, No. C99-1888 (W.D. Wash. filed Nov. 11, 1999); Washington v. Stellar Network, No. C99-0744 (W.D. Wash. filed May 11, 1999); Washington v. DFD Telebroadcasting, Inc., No. C99-0648 (W.D. Wash. filed Apr. 27, 1999); AG Sues Junk Fax Company, http:// www.wa.gov/ago/releases/rel_fax_051799.html (last modified May 18, 1999) (on file with author).

[FN213]. See, e.g., In re Get-Aways, Inc., 15 F.C.C.R. 1805 (1999) (levying a $85,500 forfeiture against Get-Aways, Inc. for TCPA violations).

[FN214]. See, e.g., Consumer.Net, v. AT&T Corp., 15 F.C.C.R. 281 (1999) (formal complaint proceeding filed by a

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consumer organization against AT&T for TCPA telemarketing violations); Get-Aways, Inc., 15 F.C.C.R. 1805 (issuing forfeitures following investigation in response to informal consumer complaints).

[FN215]. See Int'l Sci., 106 F.3d 1146, 1151 (4th Cir. 1997).

[FN216]. New York v. United States, 505 U.S. 144, 178-79 (1992) ("Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal direction of state judges is mandated by the text of the Supremacy Clause.").

[FN217]. Howlett v. Rose, 496 U.S. 356, 371 (1990) (citing Second Employers' Liability Cases, 223 U.S. 1, 57 (1912)) ("That policy is as much the policy of [the State] as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State." (alteration in original)). "[T]he Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature." Id. at 367.

[FN218]. This question also touches on another constitutional question that scholars continue to debate, namely, whether Congress was compelled to create inferior Article III courts. Rather than take this discussion off onto a fascinating tangent, I refer the reader to Professor Collins' superb work. See Collins, supra note 107, at 157.

[FN219]. Kline v. Burke Constr. Co., 260 U.S. 226, 234 (1922).

[FN220]. See, e.g., Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994) ("Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute . . . ."); Bush v. Lucas, 462 U.S. 367, 373 (1983) ("[F]ederal courts are courts of limited jurisdiction whose remedial powers do not extend beyond the granting of relief expressly authorized by Congress."); Aldinger v. Howard, 427 U.S. 1, 15 (1976) ("[F]ederal courts, as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction marked out by Congress.").

[FN221]. Donnelly v. Yellow Freight Sys., Inc., 874 F.2d 402, 405-06 (7th Cir. 1989) ("Because federal courts are courts of limited jurisdiction, state courts must stand ready to vindicate federal rights, subject to review by the Supreme Court, should Congress decide not to confer jurisdiction upon the federal courts to hear a particular federal claim." (internal citations omitted)), aff'd, 494 U.S. 820 (1990).

[FN222]. Kline, 260 U.S. at 234.

[FN223]. While general federal question jurisdiction (28 U.S.C. § 1331) does achieve this effect in most cases, Congress retains the power to make a specific grant to provide for a particular law to operate contra to § 1331 (or even repeal § 1331 in part, or in whole). See, e.g., ErieNet, Inc. v. Velocity Net, Inc., 156 F.3d 513, 519 (3d Cir. 1998) ("Congress' intent to preclude consumer suits under [the] TCPA in federal court trumps the general grant of federal question jurisdiction in § 1331."); Connors v. Amax Coal Co., Inc., 858 F.2d 1226, 1230 (7th Cir. 1988) (concluding that, even if plaintiff's claims arose under ERISA, federal district court jurisdiction under the general provision of § 1331 could not rebut specific provisions of the Longshore and Harbor Workers' Compensation Act and Black Lung Benefits Act conferring exclusive jurisdiction in the federal courts of appeals); see also 47 U.S.C. § 402(b) (Supp. IV 1998) (placing jurisdiction for suits challenging certain classes of FCC decisions in the Court of Appeals for the District of Columbia Circuit). Similarly, Congress has rebutted general removal provisions of 28 U.S.C. § 1441 in specific acts. See, e.g., 15 U.S.C. § 77v(a) (Supp. IV 1998) (Securities Act of 1933) ("No case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States."); see also 28 U.S.C. § 1445 (Supp. IV 1998) (barring removal of several types of suits that otherwise could have been removed to federal court, including suits against railroads under FELA and civil actions under Section 40302 of the Violence Against Women Act of 1994).

[FN224]. Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 n.4 (1981); see also Marathon Oil Co. v. Ruhrgas, 145 F.3d 211, 216 (5th Cir. 1998) ("To the extent that Congress elects to confer only limited jurisdiction on the federal courts, state courts become the sole vehicle for obtaining initial review of some federal and state claims."), rev'd on other grounds, 526 U.S. 574 (1999).

[FN225]. I do not suggest that the exclusive state court jurisdiction for the TCPA was not the best alternative facing

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those courts. A number of policy concerns, rightly or not, make concurrent federal court jurisdiction for claims under the TCPA undesirable. See, e.g., Kevin N. Tharp, Federal Court Jurisdiction over Private TCPA Claims: Why the Federal Courts of Appeals Got It Right, 52 Fed. Comm. L.J. 189 (1999) (discussing one such policy concern). I only point out that ambiguity exists and can be revisited as a solution to any conclusion that exclusive state court jurisdiction poses a Tenth Amendment problem. Exploring possible changes to the TCPA will be the subject of a future article which will include a recommendation that Congress amend the statute to clearly establish concurrent jurisdiction in state and federal courts for private suites under the TCPA, but, like the Securities Act of 1933, FELA and Jones Act cases, prevent removal to federal court by a defendant. The amended statute would provide that pro se consumers can have their day in state small claims courts without threat of removal to federal courts, but for those plaintiffs that desire to be in federal court (such as actions to obtain nationwide injunctive relief or plaintiffs bringing class actions) the federal venue will be open to them. This approach would enable federal courts to provide uniform interpretation and applicatioers' private right of action in the TCPA by adjudicating the cases where the TCPA plaintiffs choose to be in federal court. It would also have the added benefit that the authoritative decisions in federal courts would likely be class actions or other large cases that would presumably be litigated by competent and highly motivated counsel. This would serve to counter the divergent case law produced by state courts hearing TCPA cases. See supra notes 22-26 and accompanying text.

[FN226]. See Lorillard v. Pons, 434 U.S. 575, 577 (1978).

[FN227]. See Clements v. Fashing, 457 U.S. 957, 963 (1982).

[FN228]. See United States v. Haines, 855 F.2d 199, 201 (5th Cir. 1988).

[FN229]. DeBartolo Corp. v. Florida Gulf Trades Council, 485 U.S. 568, 575 (1988) (emphasis added).

[FN230]. Assuming the preceding discussion you have just read has been suffsive, please suspend a sense of disbelief for the moment.

[FN231]. See Int'l Sci. & Tech. Inst. v. Inacom Communications, Inc., 106 F.3d 1146, 1157 (4th Cir. 1997).

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