ARE MILITARY TESTAMENTARY INSTRUMENTS UNCONSTITUTIONAL? WHY COMPLIANCE WITH STATE TESTAMENTARY FORMALITY REQUIREMENTS REMAINS ESSENTIAL

NOWELL D. BAMBERGER[†]

I. Introduction

On 30 October 2000, President Clinton signed Public Law 106-398, the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 (the Act). Among the various appropriations and policies that accompany each year's defense authorization, this Act included a little-recognized provision intended to help military attorneys draft wills for Soldiers and their Families without being overly concerned about the various formality requirements of each of the fifty states. Section 551, entitled "Recognition by States of military testamentary instruments," (§ 551) was codified at 10 U.S.C. § 1044d. It provides that wills executed by members of the Armed Forces that comply with certain federal statutory requirements are "exempt from any requirement of form, formality, or recording before probate that is provided for testamentary instruments under the laws of a State."[1] These new documents were called "military testamentary instruments" (MTIs) and immediately became available to servicemembers and their dependents. In so providing, § 551 essentially created an instrument that has been unknown at law since the inception of the United States: a federal will.

In the eight years since its passage, the Act has generated no litigation and no court has considered its validity. Rather than a commentary on its validity, however, this has been a natural consequence of the fact that an MTI's required formality does in fact comply with the formality requirements of most jurisdictions.[2] This means that a properly

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[†] Associate, Cleary Gottlieb Steen & Hamilton, LLP, Wash., D.C.; J.D., 2008, Univ. of Wash. Sch. of Law, Seattle, Wash.; B.A., Political Science, 2005, Univ. of Wash., Seattle, Wash.

[1] 10 U.S.C. § 1044d(a)(1) (2000).

[2] *Compare id.* § 1044d(c) (requiring that the document be in writing, signed by the testator, in the presence of two witnesses, in the presence of a presiding official, and accompanied by a self-proving affidavit), *with* UNIF. PROBATE CODE § 2-502, National Conference of Commissioners on Uniform State Laws, *Uniform Probate Code* (rev. 2006), *available at* http://www.law.upenn.edu.bll/archives/ulc/upc/final2005.htm (requiring that the document be in writing, signed by the testator, in the presence of at least two individuals).

drafted MTI will inadvertently comply with the current formality requirements of most states. In addition, of those few instruments that might not comply with the requirements of the states where presented for probate, few relate to estates large enough to trigger significant litigation.[3] Nonetheless, the creation of MTIs should be of concern to both military estate practitioners and to constitutional scholars. While § 551 purports to simplify the process of drafting military wills—assuring uniform acceptance to probate—it actually creates more uncertainty about whether the instrument will hold up in a true will contest. Moreover, it marks the most significant interference by the federal government with the state-controlled probate process to date. In so doing, it promulgates a procedural requirement for state courts to apply during an in rem proceeding on an exclusively state issue—an unprecedented example of federal commandeering of state institutions that appears to violate the vertical separation of powers that is the touchstone of the federal system.

This article discusses the constitutionality of MTIs, ultimately concluding that their authorizing legislation is an unconstitutional overextension of Congress's power to raise and maintain armies and that the instruments need not be recognized by state courts. Part II discusses the nature of the state probate process and the exclusivity of state jurisdiction therein. Part III explains how MTIs create a direct conflict between federal and state law regarding the admission of military wills to probate. Part IV explains how MTIs violate the constitutional concepts prohibiting the federal government from commandeering state institutions and how current Supreme Court case law does not definitively render the exercise of federal war powers in estate law valid. Part V suggests that, even aside from its co-option of the state probate process, § 551 may be constitutionally invalid because it exceeds Congress's Article I, Section 8 legislative authority. Finally, Part VI discusses possible alternatives to § 551 and why attention to state testamentary formality requirements will remain essential under any foreseeable scenario.

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[3] *See infra* Part III (discussing the reasons that § 551 has yet to be constitutionally challenged).

II. The Probate Process Is Constitutionally Reserved to Exclusive State Control Because It Is an Exercise of Inherent Sovereign Authority

The state probate process has long been recognized by both state and federal courts as the exclusive province of state law.[4] This is due in large part to the nature of the probate proceeding. In the vast majority of jurisdictions, probate proceedings are recognized as in rem or quasi in rem proceedings.[5] Unlike many of the actions entertained in state courts, they descend not from the common law, but rather from the ecclesiastical courts of England.[6] The proceeding and process of devising property is thus universally recognized as created by the state and subject to the inherent sovereign police powers of the state legislature.[7] In light of this, the Supreme Court has recognized that every state legislature retains the exclusive jurisdiction to define how property within its realm is devised, by whom, to whom, and under what circumstances.[8] Indeed, it is within the purview of the state government both to deny the probate process altogether and to attach whatever conditions to admission that it deems appropriate.[9]

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[4] *See* Ronald I. Mirvis, *Modern Status of Jurisdiction of Federal Courts, Under 18 U.S.C.A. § 1332(a), of Diversity Actions Affecting Probate or Other Matters Concerning Administration of Decedent's Estates*, 61 A.L.R. FED. 536 (1983) (explaining and collecting federal and state cases on the proposition that pure probate is beyond federal diversity and other jurisdiction); *see also* E.H. Schopler, *Jurisdiction of Federal Courts, in Cases of Diversity of Citizenship, over Suit Affecting Probate or Other Matters Concerning Administration of Decedent's Estate*, 158 A.L.R. 9 (1945) (collecting pre-1945 cases on this proposition).

[5] *See, e.g.*, *In re* Estates of Salas, 734 P.2d 250 (N.M. Ct. App. 1987) ("The procedure for probating wills and testaments in New Mexico is strictly statutory and is an action in rem."); Green v. Higdon, 870 S.W. 2d 513 (Tenn. Ct. App. 1993) ("A will contest is a proceeding in rem, being the estate of the deceased."); Neill v. Yett, 746 S.W. 2d 32 (Tex.App. Austin 1988) ("Probate proceedings are actions in rem").

[6] *Green*, 870 S.W.2d at 513.

[7] *See* Hall v. Vallandingham, 540 A.2d 1162, 1165 (Md. Ct. Spec. App. 1988) ("The right to receive property by devise or descent is not a natural right but a privilege granted by the State.").

[8] Mager v. Grima, 49 U.S. 490, 494 (1850) ("[T]he law in question is nothing more than an exercise of the power which every state and sovereignty possesses, of regulating the manner and term upon which property, real or personal within its dominion may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it.").

[9] *Id.* ("[I]f a state may deny the privilege altogether, it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy."). It should be noted that the Supreme Court has held in at least one circumstance that a government may not entirely abolish the right to devise property without running afoul of the Just Compensation Clause of the Fifth Amendment. *See* Hodel v. Irving, 481 U.S. 704, 718 (1987) (holding unconstitutional a federal statute eliminating the right to

A. As an In Rem Proceeding, State Adjudication of Will Validity Concerns an Exclusive Question of State Law

The distinguishing characteristic of an in rem proceeding is that it acts upon property rather than upon a person.[10] As such, neither the testator nor any potential heir is a party to the proceeding in the traditional sense. In fact, most states recognize probate proceedings as having no parties at all.[11] The probate of a will is therefore an action based entirely upon a state statute, and the validity of a will is an exclusive question of state law.[12] Because the state creates the right to devise property, it can prescribe whatever formality requirements it thinks proper to assure descent according to the testator's intent. Such formalities are not extrinsic to a will, but rather determine whether or not a given writing constitutes a valid testamentary instrument at all.[13] The practice of barring a nonconforming document from probate is not equitable. It is instead recognition that a nonconforming testamentary instrument is not in fact a legal will.[14]

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devise certain Indian trust lands). In so doing, however, it explained that "[i]n holding that complete abolition of both the descent and devise of a particular class of property may be a taking, we reaffirm the continuing vitality of the long line of cases recognizing the States', and where appropriate, the United States', broad authority to adjust the rules governing the descent and devise of property without implicating the guarantees of the Just Compensation clause." *Id.* The takings analysis in *Irving* is not relevant to this article because there is no indication that any state has attempted to substantively alter the right of servicemembers to devise property, and such legislation would not be effected by § 551's procedural guarantees in any case.

[10] *See* Gelston v. Hoyt, 16 U.S. 246, 313 (1818) (discussing the nature of in rem proceedings in the context of property forfeiture, commenting "the decree of the court act upon the thing in controversy, and settles the title of the property itself").

[11] *See, e.g.*, *In re* Riedlinger's Will, 16 P.3d 549 (Utah 1932) ("[S]uch proceedings are in rem, 'to which strictly there are no parties;' that the purpose is to determine whether the testator died testate or intestate, and if he died testate whether the script propounded, or any part of it is his will."); *see also* Dryden v. Burkhart, 177 P.2d 121 (Okla. 1947) (no parties to probate proceedings); King v. Chase, 115 P. 207 (Cal. 1911).

[12] Spears v. Spears, 162 F.2d 345, 348–49 (6th Cir. 1947) (declining to take jurisdiction of a dispute involving a will, and explaining that the status and validity of a will is an entirely statutory question).

[13] *In re* Seaman's Estate, 80 P. 700 (Cal. 1905) ("The right to make testamentary disposition of one's property is purely of statutory creation, and is available only upon a compliance with the requirements of the statute.").

[14] *Id.* ("The formalities which the legislature has prescribed for the execution of a will are essential to its validity, and cannot be disregarded. The mode so prescribed is the measure for the exercise of the right, and the heir can be deprived of his inheritance only by a compliance with this mode.").

In recognition of the exclusivity of state jurisdiction over the probate process and will adjudication, the federal courts have historically refused to assume jurisdiction. As the Supreme Court explains, "as the authority to make wills is derived from the state, and the requirement of probate is but a regulation to make a will effective, matters of pure probate, in the strict sense of the words, are not within the jurisdiction of courts of the United States."[15] In some sense, federal refusal to obtain jurisdiction has been based on a lack of statutory authority.[16] Both the Judiciary Act of 1789[17] and its English counterpart of the same year, the Judicial Code of the English Court of Chancery, recognized a lack of equity jurisdiction over the probate process.[18] At least one court has concluded, however, that the prohibition on federal meddling in the probate process is constitutional.[19]

In *United States v. Security-First National Bank of Los Angeles*,[20] a district court dismissed a suit by the United States claiming a contractual interest in the bank account of a decedent. The court ruled that the United States was constitutionally prevented from preempting the state probate process, which had exclusive jurisdiction over the will and estate of a California resident.[21] It explained that "[n]owhere in the Constitution or amendments is there the slightest suggestion that the right to administer decedents' estates has been delegated to the United States. . . . The Federal statutes are barren of any like provision for the simple reason that the subject matter of determining heirship is a State and not a Federal procedure."[22]

The federal government has acceded to this position in a number of cases to which it has been a party. For instance, appearing in 1944 to assert a claim against the estate of a deceased veteran who died while under the care of the Veterans Administration (VA), the United States explained to the presiding California court that "the federal government has no power to pass laws regulating succession to property by citizens

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[15] O'Callaghan v. O'Brien, 199 U.S. 89, 110 (1905).
[16] *See* Markham v. Allen, 326 U.S. 490, 493 (1946) (recognizing that federal courts may exercise jurisdiction over creditor's suits against an estate in probate, but may not adjudicate the will itself).
[17] 1 Stat. 73 (1789).
[18] *See* Kerrich v. Bransby, 7 Brown P.C. 437 (1789).
[19] United States v. Security-First Nat'l Bank of L.A., 130 F. Supp. 521 (S.D. Cal. 1955).
[20] *Id.*
[21] *Id.* at 522.
[22] *Id.* at 523 n.2.

of the states, that being a power reserved by the Tenth Amendment to the states."[23] The court ultimately found in favor of the United States' claim on the basis that on admission to a VA hospital, a veteran entered into a contract with the United States providing for disposition of property under the contingency of intestate death.[24]

B. Federal Interference with the Probate Process Has Been Historically Reserved to Adjudication of Claims

In recognition of the lack of federal interest or authority over the state probate process, the federal government's role with respect to testacy has traditionally been limited to two areas: (1) adjudicating claims against the estate over which the federal courts otherwise have either concurrent or exclusive jurisdiction, and (2) enforcing the federal constitutional mandates of due process and equal protection that apply to all state proceedings.[25] With the growth in both the power and reach of federal authority, the national government has made some inroads in using federal law to shape the nature of claims against estates. For instance, the Sundry Appropriations Act of 1910[26] gave the United States a paramount claim against the estates of certain veterans while the Soldiers' and Sailors' Civil Relief Act of 1940 (the SSCRA)[27] placed limits on the types of claims and statutes of limitations applicable to those currently in service—thereby affecting which claims survive to be actionable against a deceased Soldier's estate.

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[23] *In re* Lindquist's Estate, 144 P.2d 438 (Cal. App. 1 Dist. 1944).

[24] *Id.* The "contract" theory of the application of the statute in question, 38 U.S.C. § 17-17j, was later rejected in favor of a self-executing interpretation in *United States v. Oregon*, 366 U.S. 643 (1961), on grounds that are distinguishable from the issue at hand. *See infra* Part III.

[25] Sianis v. Jensen, 294 F.3d 994 (8th Cir. 2002) (explaining the difference between those probate-related actions that sound exclusively in state law, and those over which a federal court may exercise jurisdiction); *see also* McKibben v. Chubb, 840 F.2d 1525, 1529 (10th Cir. 1988) ("The standard for determining whether federal jurisdiction may be exercised is whether under state law the dispute would be cognizable only by the probate court.").

[26] 36 Stat. 703, 736 (1910).

[27] Originally codified at 50 U.S.C. app. § 525 and reenacted as the Servicemembers Civil Relief Act, Pub. L. No. 108-189, 117 Stat. 2835 (2003) (codified at 50 U.S.C. app. §§ 501–594).

A fundamental problem associated with federal *legislation* in the area of probate law is that the federal courts lack constitutional *judicial* authority to adjudicate non-constitutional probate claims—primary evidence that federal action in the area is extraconstitutional. Although the federal courts often exercise jurisdiction over claims against estates, they have no jurisdiction over wills or the state probate process itself.[28] As the former Fifth Circuit explains, "[b]y a long series of federal decisions it is established that generally probate matters such as the validity of a will and the administration of a decedent's estate are so far proceedings in rem as not to be among the 'controversies' of which the district courts may be given jurisdiction under Article Three of the Constitution."[29] Even when parties to a probate proceeding enjoy diversity of state citizenship, the federal courts do not have jurisdiction. "Under the probate exception to diversity jurisdiction," the First Circuit explains, "a federal court may not probate a will, administer an estate, or entertain an action that would interfere with pending probate proceedings in state court or with a state court's control of property in its custody."[30] Moreover, federal jurisdiction is not created by a federal interest in claim preservation (other than with respect to debts owing the United States) because potential heirs have no vested property interest in inheritance until the testator dies and the estate is probated.[31]

The bright line delineating the outer limits of federal authority is reached when adjudication or legislation leaves the realm of defining claims at law and attempts to define how the probate process itself will proceed. While the federal government undoubtedly has the authority to adjudicate claims against an estate—just as it does when the testator is alive—it lacks constitutional authority to instruct state courts on how to treat those claims. The Supreme Court explained this distinction in *Commonwealth Trust Co. of Pittsburgh v. Bradford*, concluding that the district court was not divested of jurisdiction to adjudicate a claim by a receiver of a national bank solely because the subject matter was a fund held by a trustee appointed by a state orphan's court.[32] Similarly, the

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[28] *See* Schopler, *supra* note 4 at 37 ("Where no question as to the existence or formal validity of a will is involved Federal courts have undoubtedly jurisdiction to establish an interest in or claims against a decedent's estate.").

[29] Heath v. Jones, 168 F.2d 460, 463 (Former 5th Cir. 1948).

[30] Mangieri v. Mangieri, 226 F.3d 1 (1st Cir. 2000).

[31] *See* McFadden v. McNorton, 69 S.E.2d 445 (Va. 1952).

[32] Commonwealth Trust Co. of Pittsburgh v. Bradford, 297 U.S. 613 (1936) ("The jurisdiction of federal courts to entertain suits against [property held in probate] is clear, when instituted in order to determine the validity of claims against the estate or

federal courts have the power to enforce the due process and other similar requirements that the Constitution imposes on all state proceedings.[33]

The constitutional uncertainty of the Act authorizing MTIs rests on its treatment of the validity of a will executed contrary to state formality requirements, rather than on a claim against or interest in an estate.[34] Because this represents a new federal foray into an area traditionally reserved exclusively to state control, there is likely to be a significant state interest in challenging application of the law.

III. MTIs Create a Potential Conflict Between Federal and State Law as to the Validity of a Servicemember's Will

One of the questions that quickly arises is why MTIs have never been tested in court. One possible explanation is that Army legal assistance and Navy Code 16 attorneys typically draft state-specific instruments notwithstanding their authority under § 551.[35] Another is the relatively modest size of the average deceased servicemember's estate. While the families of Soldiers who die in combat are entitled to life insurance and survivor's benefits, those benefits are typically not subject to probate.[36] By contrast, the average enlisted Soldier's salary was

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claimants' interests therein. Such proceedings are not in rem; they seek only to establish rights; judgments therein do not deal with the property and other distribution; they adjudicate questions which precede distribution.").

[33] *See, e.g.*, Labine v. Vincent, 401 U.S. 532 (1971) (considering whether Louisiana's intestate succession law violated the Equal Protection Clause by denying inheritance to illegitimate children, ultimately concluding that it did not). Although the precedent has been collaterally undermined by later decisions, the Court's jurisdiction was never challenged.

[34] The application of this federal law against the state's judicial *process,* rather than claims or rights themselves, is illustrated by the preamble that the Department of Defense suggests be included in any such instrument, advising "Federal law exempts this document from any requirement of form, formality, or recording that is provided for testamentary instruments under the laws of a State, the District of Columbia, or a commonwealth, territory, or possession of the United States. Federal law specifies that this document shall receive the same legal effect as a testamentary instrument prepared and executed in accordance with the laws of the State in which it is presented for probate." U.S. DEP'T OF DEFENSE, DIR. 1350.4, LEGAL ASSISTANCE MATTERS encl. 1 (28 Apr. 2001) [hereinafter DOD DIR. 1350.4].

[35] *See infra* Part IIIc.

[36] Although Servicemembers' Group Life Insurance (SGLI) benefits are passed directly to a named beneficiary outside of probate, their dispensation may be controlled by an instrument that is subject to probate, such as when SGLI benefits are passed to a

estimated to be between 1.6 and 2.4 times the federal poverty level in fiscal year 2006,[37] making it very difficult to acquire a substantial estate. In addition, nearly 42% of servicemembers are single without dependents, leaving relatively simple estates that are unlikely to be challenged in probate.[38]

In addition to practical considerations, there are procedural reasons that § 551 is difficult to challenge. First, because the federal courts lack jurisdiction over probate questions, the validity of an MTI would first have to be determined in a state court. The majority of states delegate such authority to a court of limited jurisdiction, which might be hesitant to rule unconstitutional a federal statute enacted under congressional war powers.[39] Only after a state court finds the Act to be unconstitutional would a sufficient federal question arise to merit federal jurisdiction. Second, because state intestacy laws would govern if a will was not admitted to probate, any challenge would necessarily have to come from a non-intestate heir attempting to collect what was promised in a will.[40] Most simple wills, by contrast, simply specify the manner in which assets are to be divided among those who would benefit under intestacy anyway.[41] Finally, under most states' comity statutes, wills are admitted

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testamentary trust created in a will. *See* Captain Wojciech Z. Kornacki, *What Every Soldier and Legal Assistance Attorney Should Know About Servicemembers' Group Life Insurance*, ARMY LAW., Nov. 2006, at 51; *see also* Captain Kevin P. Flood, *Estate Planning for the Military*, ABA GEN. PRAC., SOLO & SMALL FIRM DIV. PUBL'N, http://www.abanet.org/genpractice/legalface/pdf/flood.pdf (last visited May 2, 2008) (SGLI not subject to state probate laws). In the Army, naming one's own estate as the beneficiary of SGLI ("by will" beneficiary designation) is prohibited where the testator is a Soldier. U.S. DEP'T OF ARMY, REG. 600-8-1, ARMY CASUALTY PROGRAM para. 12–17a (30 Apr. 2007).

[37] William O. Brown, Jr. & Charles B. Cushman, *Compensation and Short-Term Credit Needs of U.S. Military Enlisted Personnel*, CONSUMER CREDIT RES. FOUND., *available at* http://www.cfsa.net/downloads/compensation_military.pdf (last visited Feb. 10, 2008).

[38] *Id.*

[39] EUNICE L. ROSS & THOMAS J. REED, WILL CONTESTS 2D ED. § 4:3, *Will Contests Before Probate* (2007) (about two-thirds of American jurisdictions follow this practice; the remainder assign probate to their trial courts).

[40] *See id.* § 3:1 (To establish standing in a will contest, a party must have a pecuniary interest in the matter. Because a state's intestate succession law would control in the absence of a valid will, the only parties with standing would be those who would have inherited greater than their intestate share under the will, or those who would not inherit under the state's statute at all.).

[41] Of course, specifying the beneficiaries of an estate is not the only—or often even primary—purpose for drafting a will. Often, such documents are drafted to establish how property will be managed after the testator's death and to establish conditions on inheritance. A will contest on these matters seems less likely when a will is dishonored,

to probate notwithstanding their failure to comply with a state's formality requirements provided that the will complies with the requirements of the jurisdiction where the will was executed.[42]

A. Although Potential Conflicts Between State Formality Requirements and MTI Provisions Are Limited, Strict Application of Some State Provisions Could Render MTIs Invalid

Because it seems so unlikely that a MTI would ever be challenged on the basis of nonconformity with state formality procedures, it is enticing to consider the question of their constitutionality simply moot. Take the following foreseeable example, however: Imagine a Soldier stationed at Fort Sill, Oklahoma, who is also an Oklahoma resident. Before deploying to combat duty overseas, he executes an MTI that complies with § 551. As provided in the statute, the will is witnessed by two disinterested persons, also Soldiers in his unit, who sign self-executing affidavits. Assume further that the Soldier is killed in action halfway through his one-year deployment, his family submits his testamentary instrument for probate in Oklahoma, and the will is contested by his ex-wife. Finally, consider that the witnesses to the Soldier's will execution are not available, because they continue to serve overseas.

Under federal law, this Soldier's testamentary instrument must be admitted to probate because it complies with the requirements of the statute.[43] Under Oklahoma law, however, the instrument may not be a valid will. Oklahoma does not recognize self-proving affidavits in contested will situations.[44] Thus, assuming that the will's validity cannot

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however, because the beneficiary is likely to benefit from intestacy and the testator is not present to vindicate his wishes.

[42] *See, e.g.*, WASH. REV. CODE. § 11.12.020(1) (1990) (recognizing wills valid where executed); MONT. CODE ANN. § 72-2-526 (1993) (same); MD. CODE ANN. ESTATES AND TRUSTS § 4-104 (1974) (recognizing wills valid where executed or where testator is domiciled, if executed outside of Maryland). The same is true in many common law jurisdictions internationally. *See* JAMES SCHOULER, LAW OF WILLS EXECUTORS AND ADMINISTRATORS 893 (1915) ("[T]he English statute 24 & 25 Vict. C. 114, provides that wills made by British subjects out of the kingdom shall be admitted to probate, if made according to the law of the place where made, or where the testator was domiciled or had his domicile of origin.").

[43] 10 U.S.C. § 1044d(a)(2) (2000).

[44] OLKA. STAT. WILLS AND SUCCESSION 84, § 55(5) (1998); *see also* ROBERT L HOFF & VARLEY H. TAYLOR, JR., OKLAHOMA PROBATE LAW AND PRACTICE § 150 (2008) ("In the

be proven without the testimony of witnesses, the court is left with a question as to whether to follow its own probate law or federal law when deciding whether to admit the will. Application of Oklahoma law might result in invalidity if witnesses cannot be produced or the validity of the will cannot otherwise be proved, while federal law requires the acceptance of properly executed self-executing affidavits.

There are many other foreseeable situations where a will might be considered invalid under the law of the state where it is executed, but is purportedly valid under the MTI Act. Among other discrepancies, the Act makes no mention of where on the testament the testator must sign, while many states require it to be signed at the end.[45] The Act also provides for certification of affidavits by a military officer or "presiding attorney," while many states require certification by a notary public.[46]

Finally, premising § 551's validity on the fact that its requirements mirror those of state law does not answer the constitutional question.[47] If § 551's state-recognition mandate is constitutionally within Congress's powers, then Congress could just as easily require recognition of an entirely different style of instrument. Moreover, even those states that have adopted the Uniform Probate Code retain virtually unlimited authority to alter the formality requirements applied to instruments presented in their courts.[48] Section 551 provides no mechanism for modification of its execution procedure in light of changes to state law.[49] Even if § 551's only effect is to federally codify the current state of testamentary formality law among the various states, it both gives rise to unforeseen future conflicts and unconstitutionally infringes on the right of state governments to evolve their formality requirements if they desire to do so. The fundamental question of whether federal law can control this area is important because it determines the prospective validity of

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event there is a contest, the affidavit is not admissible and the witnesses or their depositions will have to be produced.").

[45] 79 AM. JUR. 2D *Wills* § 222 (2007) (reviewing state attestation requirements).

[46] This is one reason that the Air Force advises military attorneys to use civilian notaries even when drafting MTIs. *See* U.S. DEP'T OF AIR FORCE, INSTR. 51-504, LEGAL ASSISTANCE, NOTARY, AND PREVENTIVE LAW PROGRAMS (27 Oct. 2003) [hereinafter AFI 51-504].

[47] Indeed, the argument that § 551 is valid *because* it complies with existing state law appears less compelling with respect to the provision's constitutionality than as a commentary on its irrelevance.

[48] *See supra* Part II.

[49] *See* 10 U.S.C. § 1044d(c) (2000) (statutorily prescribing an execution procedure).

many military wills currently in existence or soon to be drafted that could just as easily be made to conform with state requirements.

B. Section 551 Was Initially Passed to Guarantee State Recognition of Otherwise Nonconforming Wills by Military Servicemembers

Far from hypothetical, the question of whether a will hastily drafted by a Soldier or Sailor is valid has been litigated recurrently throughout the history of the state-administered probate process. For instance, in 1939 a New York probate court refused to admit to probate an unattested testamentary letter written by a Soldier while in service during World War II.[50] The court reasoned that although the New York Probate Code made provision for recognition of the unwritten will of a Soldier or Sailor while in actual military service, that exception did not dispose of the requirement that the will be subscribed by two witnesses.[51] The court explained, "In the face of these provisions it is difficult to see how an unattested letter can be probated as a will even when written by a Soldier."[52] Recognizing the injustice of such decisions, many states have enacted statutes allowing for probate of wills executed by Soldiers and Sailors while in actual service, notwithstanding their noncompliance with state formality provisions.[53] In many states, this was an extension of a pre-existing equitable doctrine granting Soldiers and mariners privileged status to make enforceable informal testamentary gifts.[54]

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[50] *In re* Zaiac's Will, 18 N.E.2d 848 (N.Y. 1939).
[51] *Id.* at 850.
[52] *Id.*
[53] *See, e.g.*, WASH. REV. CODE § 11.12.025 (1965); N.Y. ESTATE POWERS & TRUSTS § 3-2.1 (1974) (recognizing nuncupative wills made inter alia by a member of the Armed Forces); N.C. GEN. STAT. § 31-18.4 (1919).
[54] This privilege, the current status of which is discussed in Part VI *infra*, is a relic of the original Statute of Frauds, 1677, 29 Car. II, c. 3, sec. V, and the English Wills Act of 1837, 7 Wm. IV and I Vict., c. 26 § IX. While the first required a writing for the disposition of real property, the second modified this requirement to exempt certain testamentary transfers by Soldiers and Sailors in actual military service. For some American authority explaining the adoption of the concept, see, e.g., *In re* O'Connor's Will, 121 N.Y.S. 903, 905 (1909) ("Soldiers and mariners were regarded as a favored or privileged class of testators; and there was no suggestion that their right to make an oral testament when, in one case, upon actual military service or, in the other case, at sea, was dependent upon illness or fear of death therefrom."); *see also* Leathers v. Greenacres, 53 Me. 561, 570 (1866) (recognizing that the right to make nuncupative wills was restricted to mariners in actual service at sea).

While they did a great deal to solve the problem of battlefield testamentary gifts, such provisions did little to remedy the ambiguous circumstance where a non-conforming will is written prior to deployment or actual combat. In addition, while Soldiers themselves may enjoy privileged testamentary status, their Families typically do not enjoy such standing—yet the complications associated with executing wills for military Family members are just as pronounced.

In 1988, the need for a formal resolution of the problem of military wills was made plain. On 11 December 1985, an Arrow Air DC-8 chartered by the U.S. Army crashed on takeoff from Gander, Newfoundland.[55] The flight was bound for Fort Campbell, Kentucky carrying 248 members of the 101st Airborne Division on rotation back from Cairo, Egypt.[56] In what proved to be the worst peacetime aviation disaster in U.S. military history, everyone on board was killed.[57]

The most surprising part of the Gander disaster was that several of the wills of the deceased servicemembers were later found to be invalid, prompting some state courts to distribute property contrary to the wishes of testators.[58] In the one published decision to come out of the incident, an Arkansas court refused to recognize a copy of a will that was drafted for one of the deceased Soldiers by a Judge Advocate officer because insufficient testimony was available to establish that the will was actually executed.[59]

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[55] CANADIAN AVIATION SAFETY BD., AVIATION OCCURRENCE REP. NO. 85-H50902 (28 Oct. 1988), *available at* http://www.sandford.org/gandercrash/investigations/majority_/majority_report/html/_i.shtml.

[56] *Id.*

[57] Ed Magnuson, *The Fall of the Screaming Eagles*, TIME MAG. (Dec. 23, 1985). Although the Canadian Aviation Safety Board conducted the longest investigation in its history, it was unable to definitively determine the cause of the incident, resulting in a split accident report. The majority concluded that the crash was caused by leading-edge wing icing, while the minority credited claims of responsibility from various terrorist groups, concluding that the incident was retribution for the U.S. role in shipping arms to Iran. Roy Rowan, *Gander: Different Crash, Same Answers*, TIME MAG. (Apr. 27, 1992).

[58] Gerry W. Beyer, *Introduction to Military Wills* (2003), *available at* http://www.professorbeyer.com/Articles/Military_Wills.htm.

[59] Conkle v. Walker, 742 S.W.2d 892 (Ark. 1988).

In response to the apparent injustice that resulted when American Soldiers died in service only to have their last wishes dishonored by state courts, and after years of inaction, Congress included § 551 in the 2001 Authorization Act without much discussion.[60] Its purpose was to guarantee acceptance of military wills, but it may in fact serve as an inducement for military attorneys to ignore state formality requirements that they otherwise would carefully heed. Thus, § 551 may make it more—not less—likely that some military testaments will be enforced.

C. The Services' Current Policies Regarding Use of MTIs Reflect Operational Realities Rather than Constitutional Considerations

Among the offices that establish policy for drafting testamentary instruments in each of the military services there is a difference of opinion regarding the usefulness of § 551.[61] While the Air Force requires the drafting of MTIs,[62] Army legal assistance[63] and Navy-Marine Corps Code 16 attorneys[64] draft state-specific testamentary instruments. Only the Coast Guard leaves the decision of whether to draft an MTI or state-specific will to the legal assistance attorney's discretion in all cases.[65] These respective policy differences, however, reflect operational decisions made by each of the services rather than concern over the constitutional validity of MTIs in general.[66]

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[60] Federal legislation on this matter had been proposed for a number of years both by military practitioners and scholarly observers. *See*, *e.g.*, Edwin A. Wahlen, *Soldier's and Sailor's Wills: A Proposal for Federal Legislation*, 15 U. CHI. L. REV. 702 (1948).

[61] E-mail from Major Dana Chase, Trusts & Estates Professor, Admin. & Civil Law Dep't, The Judge Advocate General's Legal Ctr. & Sch., to author (Apr. 10, 2008) (on file with author).

[62] AFI 51-504, *supra* note 46.

[63] U.S. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM (21 Feb. 1996) [hereinafter AR 27-3].

[64] U.S. DEP'T OF NAVY, JUDGE ADVOCATE GENERAL INSTR. 5801.2A, NAVY-MARINE CORPS LEGAL ASSISTANCE PROGRAM (26 Oct. 2005) [hereinafter NI 5801.2A].

[65] *See* U.S. DEP'T OF HOMELAND SECURITY, COMMANDANT INSTR. 5801.4E, LEGAL ASSISTANCE PROGRAM (26 Oct. 2005) [hereinafter CGI 5801.4E].

[66] Letter from George Reilly, Deputy Division Director, Navy OJAG Legal Assistance, to author (12 May 2008) [hereinafter Reilly Letter] (explaining that the Navy's decision to use state specific instruments was for practical, rather than Constitutional, reasons).

The differences in approach are in part explained by the circumstances under which each of the services operates. The Army and Navy-Marine Corps are the largest service branches,[67] with the largest legal assistance operations, and the most clients. By contrast, the Coast Guard relies much more substantially than the other services on reserve officers, civilian attorneys, and other military legal assistance offices to provide services,[68] making the provision of a uniform policy more difficult.

As demonstrated by the promulgation of regulations under § 551, the various military departments believe that the section is constitutional, and those responsible for promulgation of such regulations do not believe that using § 551 authority presents a risk to military testators.[69] Rather, the hesitance of the services to use the instruments appears to reflect two operational realities: (1) the majority of testamentary instruments are drafted with the assistance of commercially-developed will-drafting software, such as "DL Wills," that necessarily produce state-specific instruments,[70] and (2) compared to the instruments typically drafted by military practitioners using such software, MTIs are relatively simplistic instruments that may not meet the more complicated needs of servicemembers and their Families.[71]

In contrast to civilian practice, military legal assistance attorneys face unique drafting difficulties. Any given legal assistance attorney will draft instruments for any U.S. jurisdiction, although he is likely admitted to only one. Although the military services advise servicemembers to draft wills before deployment, instruments are often written during deployment or mobilization, in which case attorneys must attempt to meet the same standards of client counseling and drafting under often

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[67] U.S. DEP'T OF DEFENSE, STATISTICAL ANALYSIS DIVISION, ACTIVE DUTY MILITARY PERSONNEL STRENGTHS BY REGIONAL AREA AND BY COUNTRY (309A) (31 Dec. 2007), *available at* http://siadapp.dmdc.osd.mil/personel/MILITARY/history/hst0712.pdf.

[68] *See* CGI 5801.4E (7), *supra* note 65.

[69] There is no instruction or policy promulgated by the Department of Defense or other military departments warning or otherwise indicating that MTIs are constitutionally questionable.

[70] *See, e.g.*, NI 5801.2A, *supra* note 64, para. 7-2.b (2) (requiring the use of will drafting software approved and distributed by the Navy); AR 27-3, *supra* note 63, para. 1-4 (requiring Army legal assistance offices to provide computer software, such as the Legal Automation Army-Wide System (LAAWS), for drafting of instruments such as wills).

[71] Reilly Letter, *supra* note 66.

unusual circumstances.[72] Moreover, the controlling state law is not always apparent because the testator is very likely outside of his home state and may be outside of the country when the instrument is executed.[73]

In this complicated environment, MTIs may be considered by some as an acceptable "basic" or "form" instrument that can be drafted without the use of software or under emergency situations.[74] Although MTIs are intrinsically superior to the holographic or nuncupative wills that might otherwise be drafted under such circumstances, the latter are statutorily recognized by many states while the former are likely not.[75] The § 551 statutory will is not a substitute for these more crude instruments because they are never hand-drafted by the testator[76] and do not otherwise comply with the state statutes that authorize holographic instruments.

Notwithstanding the differences of approach, the extent to which the various military services use MTIs rather than drafting state-specific instruments is not relevant to the question of their constitutionality,

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[72] *See* AR 27-3, *supra* note 63, para. 3-6 (b)(2) ("The same legal and professional standards that apply to preparing and executing wills within an Army legal office apply to those that are prepared and executed during EDREs, REMOBEs, MODREs, SRPs, and NEOs"); NI 5801.2A, *supra* note 64, para 7-2(b), ("it is recognized that in some emergency situations or under field conditions, "individually and privately" [the requirement for client consultation] may involve the attorney and client meeting at a table in a gymnasium or in a mess tent, for example, instead of a private office").

[73] Indeed, there is a question as to whether a will prepared by a military attorney on a military base is even prepared "within" a given state for purposes of probate. Although logic would suggest the application of state law where no corresponding federal law addresses the matter, the federal courts have long recognized a complete lack of state jurisdiction over matters occurring on federal property. *See, e.g.*, W. Union Tele. Co. v. Chiles, 214 U.S. 274 (1909) (Virginia has no jurisdiction to prescribe requirements for commercial matters on military bases); Miller v. Hickory Grove Sch. Bd., 178 P.2d 214 (Kan. 1947) (recognizing a military base as outside of the jurisdiction of the state); Lowe v. Lowe, 133 A. 729 (Md. 1926) (resident of military base not a resident of the state and therefore not entitled to state divorce proceeding); Chaney v. Chaney, 201 P.2d 782 (N.M. 1949) (parties residing on military base not entitled to family law proceedings before state courts).

[74] Because the § 551 preamble and execution requirements can be pre-printed and used for all servicemembers—regardless of the state of residency—this is an attractive option for simple estates, particularly during deployments.

[75] *See infra* Part VI (discussing recent changes in state law and the trend toward recognition of nuncupative wills).

[76] *See* RESTATEMENT (THIRD) OF PROPERTY § 3.2 (1999) (setting forth the general requirements of holographic wills, including that they must be drafted and in some cases dated in the handwriting of the testator).

except that the low rate of utilization may explain why their use has not yet been tested in court.

IV. Because the MTI Authorizing Legislation Requires State Courts to Follow Federal Policy in Applying State Law, It Unconstitutionally Commandeers State Institutions

MTIs exist at the murky intersection of Congress's virtually unlimited authority over all things military and the constitutional doctrine that it cannot commandeer state government to accomplish its policy objectives, however legitimate. Of course, the federal government is one of delegated powers. Thus, "the powers which the general government may exercise are only those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the numerated powers."[77] When Congress acts within the realm of powers that it can properly wield, however, it has broad discretion to select the means of achieving its purposes. It has been observed that "to a constitutional end many ways are open; but to an end not within the terms of the Constitution, all ways are closed."[78] Although this appears fundamental to any seasoned practitioner, it is important to recall that the creation of a federal government of limited authority was a conscious decision by the Framers not to create a government of general jurisdiction, as the various states all were at the time.[79] Review of Article I, Section 8 of the Constitution thus reveals only one possible constitutional hook on which federal enactment of §

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[77] Carter v. Carter Coal Co., 298 U.S. 238 (1936) (ruling the Bituminous Coal Conservation Act of 1935 unconstitutional on the grounds that Congress's power to regulate interstate commerce did not extend to regulation of local industry). Although the Court's ultimate interpretation of the Congress's Commerce Clause powers has expanded over ensuing decades, its insistence that exercise of legislative authority be rooted in constitutional authorization has not.

[78] *Id.* at 291.

[79] *See* Martin v. Hunter's Lessee, 14 U.S. 304, 326 (1816). In the foundational case outlining the limited nature of American national government, Justice Story explained "[t]he constitution was not, therefore, necessarily carved out of existing state sovereignties, nor a surrender of powers already existing in state institutions, for the powers of the states depend on their own constitutions . . . the sovereign powers vested in the state governments, by their respective constitutions, remain unaltered and unimpaired, except so far as they were granted to the government of the United States." *Id.*

551 could plausibly be hung: the power to raise and maintain armies and navies.[80]

A. The Tenth Amendment Prohibits Congress From Using State Governments Or Institutions To Affect Federal Policy

In recognition that a primary motive for the creation of a national government was to provide for the common defense, Congress is granted extensive leeway in interpreting and applying its power over military affairs. Congress's authority in this area has been described as "broad and sweeping." [81] When Congress exercises its power over military affairs, its actions are subject to much greater judicial respect than when it legislates on commercial or other matters of general interest. As the Court has explained, "Congress is permitted to legislate both with greater breadth and with greater flexibility" when the statute involved relates to military affairs because "the military mission requires a different application of [constitutional] protections."[82] Thus, courts "must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces."[83] Congressional authority in the realm of military affairs is not limitless, however, and cloaking congressional action with the aura of military necessity will not excuse legislative overreaching.[84]

Opposite to Congress's admittedly pervasive legislative authority in the realm of military affairs is the so-called "anti-commandeering"

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[80] Article I, Section 8 of the Constitution provides "The Congress shall have power . . .To raise and support armies . . . To provide and maintain a navy." U.S. CONST. art. I, sec. 8. Although the legislative catch-all of the Commerce Clause may provide a basis for regulating disposition of property—particularly that of a commercial nature—it has not yet been read to extend to the regulation of purely intrastate state court proceedings.

[81] Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 58 (2006) (Congress's power to raise armies includes power to require high schools that accept federal funds to admit military recruiters) (citing United States v. O'Brien, 391 U.S. 367, 377 (1968) (congressional authority over military affairs supersedes First Amendment right to destroy Selective Service registration certificates)).

[82] Parker v. Levy, 414 U.S. 733, 756 (1974).

[83] Middendorf v. Henry, 425 U.S. 25 (1976) (dismissing a due process claim in the context of summary court-martial procedures).

[84] Rostker v. Goldberg, 453 U.S. 57, 67 (1981) (refusing to set aside the exclusion of women from military combat positions under the due process clause, commenting, "None of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs. In that area, as any other, Congress remains subject to the limitations of the Due Process Clause.").

principle of American federalism. The doctrine comes from *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*,[85] wherein the Court noted that Congress could not simply "commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." Striking down a section of the Low-Level Radioactive Waste Policy Amendments Act of 1985, the Court gave teeth to the doctrine in *New York v. United States*,[86] explaining that "[w]hile Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress's instructions."[87] Justice Kennedy explained the distinction, dissenting in *Alaska Dep't of Envtl. Conservation v. EPA* and commenting that "[t]he Federal Government is free, within its vast legislative authority to impose federal standards. For States to have a role, however, their own governing process must be respected."[88] The point here is fundamental: an act of Congress may be within Congress's legislative authority, but may *still* be unconstitutional because it commands the action of state governments rather than acts upon the people directly.

The Court in *New York* admitted that federal Tenth Amendment jurisprudence had "traveled an unsteady path."[89] Yet, it noted that "this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations,"[90] and "even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts."[91] Ultimately, the Court held that a provision requiring state governments to take title of low-level radioactive waste within their jurisdictions was unconstitutional. Although the regulation of radioactive waste—particularly that in interstate commerce—was an accepted matter of federal legislative

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[85] 452 U.S. 264, 288 (1981) (upholding the Surface Mining and Reclamation Act on the basis that state enactment of complimentary legislation was optional, without which the Federal government would exercise its own Commerce Clause powers to regulate questioned steep-slope mining practices).
[86] 505 U.S. 144 (1992).
[87] *Id.* at 162.
[88] 540 U.S. 461 (2004) (Kennedy, J., dissenting).
[89] 505 U.S. at 160.
[90] *Id*. (quoting *Hodel*, 456 U.S. at 761–62).
[91] *Id.* (quoting FERC v. Mississippi, 456 U.S. 742, 762 (1982) (striking down the Public Utility Regulatory Policies Act of 1978 on the basis that it required state public utilities to comply with certain federal standards)).

action, Congress was not permitted to use state governments to accomplish its policies.[92]

B. The Supreme Court Has Recognized Congressional Authority to Regulate the Intestate Disposition of Veterans' Estates

Congressional authority in the area of estate law has been tested repeatedly since the founding of the Republic.[93] The tension arises because the right to control disposition of the estates of citizens is one of the paramount and most fundamental sovereign rights of their government.[94] Indeed, state power over the property of a deceased person within its territory has been recognized as "plenary" and "unlimited."[95] As World War II came to a close, however, Congress began to recognize a federal interest in the estates of the unprecedented number of veterans who were receiving care from the VA.[96] In 1941, it

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[92] *Id.* at 177. It should be noted that the Court acknowledged that in certain circumstances federal legislation does act upon state governments. For instance, when Congress enacts a law of general application that acts upon the citizenry, it may have implications on the ability of a state to legislate in the same area. *See* EEOC v. Wyoming, 460 U.S. 226 (1983). Similarly, under the Supremacy Clause Congress may pass federal laws that are enforceable in state courts. This authority is limited to situations, however, where the *substance* of the federal law enacted is proper—such as where state courts are called upon to adjudicate property disputes arising from federal treaties. *See* Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 695 (1979). Finally, the federal courts undoubtedly have the power to take action *against* state governments for violations of federal constitutional mandates.

[93] *See supra*, Part II B.

[94] *See* 23 AM. JUR. 2D *Descent and Distribution* § 7 (2007); *see also* Irving Trust Co. v. Day, 314 U.S. 556 (1942) ("Rights of succession to the property of a deceased, whether by will or by intestacy, are of a statutory creation, and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction.").

[95] Dep't of Soc. & Health Servs. v. Olver (*In re* Estate of Burns), 928 P.2d 1094, 1105 n.11 (Wash. 1997) (quoting *In re* Estate of Sherwood, 211 P.2d 734, 737 (Wash. 1922) ("The right of the owner of property to direct what disposition shall be made of it after his death is not a natural right which follows from mere ownership. On the contrary, the right has its sanction in the laws of the state . . . the state may, if it so chooses, take to itself the whole of such property, or it may take any part thereof less than the whole and direct the disposition of the remainder; and this without regard to the wishes or direction of the person who died possessed of it, and without regard to the claims of those whom he has directed that it be given. Stated in another way, the states' power over such property is plenary, and its right to direct its disposition is unlimited.")).

[96] During the two years following the war, the number of veterans receiving some benefit from the Veterans Administration increased by a record fifteen million. In the same

amended the 1910 Sundry Appropriations Act[97] to provide that the estates of veterans who die intestate while under the care of the VA would escheat to the benefit of the operating fund of the facility, rather than according to state intestacy law.[98] The revision was designed to take advantage of veterans' estates to increase financial support for the VA hospital system. As Representative Jennings explained, "would it not be much better to let that money go into a fund that would inure to the benefit of other veterans than to let some State clear across the continent undertake to [obtain it]?"[99] With Congress's enactment of a new federal intestacy provision directly at odds with the laws of every state, it was virtually inevitable that the new law would be challenged.

On 1 March 1956, Adam Warpouske, a veteran of the first World War, was admitted to the Marquam Hill VA hospital in Portland, Oregon.[100] On admission, Warpouske was brain dead as a result of a severe cerebral hemorrhage.[101] He never regained consciousness, passing away on 19 March 1956—only eighteen days after admission.[102] Warpouske died intestate and, while his personal assets at death totaled only $28, it turned out that his estate had inherited $12,727.67 from a brother who had predeceased him by a few days.[103]

Appearing in Multnomah County Probate Court, the United States claimed an exclusive interest in Warpouske's estate based on the escheat provisions of the Sundry Appropriations Act.[104] The State of Oregon, citing its own escheat law,[105] also claimed an interest, setting the stage

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period, the number of VA staff members increased from 16,966 to 20,008. Resources were scarce as construction of facilities to meet emerging needs taxed federal coffers. U.S. Dep't of Veterans Affairs, *History of the Department of Veterans Affairs*, ch. 5, at 1, http://www1.va.gov/opa/feature/history/docs/history5.pdf (last visited Apr. 18, 2008).

[97] The original act was enacted as 36 Stat. 703, 736 (1910). The 1941 amendments were enacted as 55 Stat. 868 (1941) and codified at 38 U.S.C. § 17–17j (1952) (repealed 1958).

[98] *See* 38 U.S.C. § 17 (1952) (repealed 1958).

[99] 87 CONG. REC. 5203-04 (1941) (statement of Rep. Jennings).

[100] Warpouske v. United States, 352 P.2d 539, 541 (Or. 1960).

[101] *Id.*

[102] *Id.* at 541.

[103] *Id.*

[104] 38 U.S.C. § 17a (1952) (repealed 1958).

[105] OR. REV. STAT. § 120.10 (1951) (repealed 1969) ("Immediately upon the death of any person who dies intestate without heirs, leaving any real, personal or mixed property, interest or estate in this state, the same escheats to and vests in the state, subject only to the claims of the creditors and as provided in *ORS 120.06* to *120.13*; and the clear proceeds derived therefrom shall be paid into and become a part of the Common School Fund of this state and be loaned or invested by the State Land Board, as provided by

for Oregon and federal courts to finally resolve whether the federal government could regulate the disposition of veterans' estates.

The Oregon courts ultimately dodged the constitutional question, choosing instead to determine that the federal escheat provision did not apply to the facts at issue.[106] The Oregon Supreme Court relied on § 17a of the Sundry Appropriations Act, which provided that a contractual agreement between the veteran and the United States was to be "conclusively presumed" from his death in a VA administered facility.[107] The court applied Oregon's ordinary contract law to conclude that Warpouske could not have acceded to any such contract because, given his lack of brain activity, he lacked capacity to contract.[108]

Granting certiorari in 1961, the United States Supreme Court overruled the Oregon decision, finding that the act operated automatically.[109] In the very concise reasoning of *United States v. Oregon*, far from an intrusion on states' sovereignty, the escheat provisions reflected "[t]he solicitude of Congress for veterans."[110] Much of the opinion written by Justice Black was a recitation of the services and other benefits granted to veterans by the government, and a policy justification of the intrinsic equity of allowing the United States to provide veterans' services with "whatever little personal property veterans without wills or kin happen to leave when they die."[111] The

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law."). Oregon's current escheat provision is codified at OR. REV. STAT. § 112.055 (1969).

[106] *Warpouske*, 352 P.2d at 542 ("the Act of 1941 by its four corners it sounds in contract").

[107] "§17a. . . . The fact of death of the veteran (admitted as such) in a facility or hospital, while being furnished care or treatment therein by the Veterans' Administration . . . shall give rise to a conclusive presumption of a valid contract for the disposition in accordance with this subchapter." 38 U.S.C. § 17a (1952) (repealed 1958).

[108] *Warpouske*, 352 P.2d at 542 ("There is no record indicating who made the decision for the transfer. Certainly, the veteran had no capacity to do so nor did he then have a guardian or relatives to act in his behalf. His presence in the Veterans Hospital can only be said to have been an involuntary admission, even though there was no question as to his right to be there by reason of his disabilities and war service status.").

[109] Part of the Court's rationale was that the contractual language was added to the statute in part as a saving provision in the event that the automatic vesting provision was found unconstitutional. As the Court explained "it seems plain to us that these 'contractual' provisions were included . . . for the purpose of reinforcing . . . the provisions of § 1—the thought apparently being that there was some chance that the Act would be attacked as unconstitutional." United States v. Oregon, 366 U.S. 643, 646 (1961).

[110] *Oregon*, 366 U.S. at 647.

[111] *Id*.

extent of the Court's constitutional analysis could be found in just two sentences:

> Congress undoubtedly has the power—under its constitutional powers to raise armies and navies and to conduct wars—to pay pensions, and to build hospitals for veterans. We think it plain that the same sources of power authorize Congress to require that the personal property left by its wards when they die in government facilities shall be devoted to the comfort and recreation of other ex-service people . . . .[112]

Although devoid of the usual analysis of the limits of Congress's war powers, Black's conclusory decision in *Oregon* established the foundation of congressional power to meddle in state's probate processes for the coming half-century. Justices Douglas and Whittaker, in a stinging and constitutionally-charged dissent, pointed to the many flaws in Justice Black's analysis, with Douglas commenting "[n]ever before, I believe, has a federal law governing the property of one dying intestate been allowed to override a state law."[113] Reaching the logical conclusion that Justice Black's analysis was not limited to veterans who die intestate, or even those whose deaths occur in VA facilities, Douglas explained "if the United States can go as far as we allow it to go today, it can[] supersede any will a veteran makes."[114]

Despite Douglas's impassioned dissent, *United States v. Oregon* remains the law of the land and appears to confirm Congress's authority to enact that legislation which it believes is necessary and proper to provide for the care of veterans—even to the extent that it conflicts with state law or policy.[115]

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[112] *Id.* at 648–49. Black added, "Although it is true that this is an area normally left to the States, it is not immune under the Tenth Amendment from laws passed by the Federal Government which are, as is the law here, necessary and proper to the exercise of a delegated power."

[113] *Id.* at 650 (Douglas, J., dissenting).

[114] *Id.* at 653 (Douglas, J., dissenting).

[115] Preemption of Oregon's escheat provision was recognized by the Court under the Supremacy Clause based on Article I, Section 8's grant of the power to raise armies and navies, as well as under the Necessary and Proper Clause. As Justice Douglas noted, "the Supremacy Clause is not without limits. For a federal law to have supremacy it must be made 'in pursuance' of the Constitution. The Court, of course, recognizes this; and it justifies this federal law governing devolution of property under the Necessary and Proper Clause. . . . Only recently we warned against an expansive construction of [that

C. Because They Act upon the Probate Process, Rather than a Claim Against the Estate, MTIs Are an Unconstitutional Commandeering of the State Probate Process

In light of *Oregon*, it seems an entirely reasonable conclusion that Congress's authority to enact § 551 is firmly established under the Necessary and Proper Clause as ancillary to Congress's plenary authority over the Armed Forces. Indeed, this is the analysis promulgated by most scholars[116] and government practitioners.[117] Yet such analysis fails to recognize the strict distinction in federal jurisprudence between regulation of claims against decedents' estates—a proper subject of federal action—and federal intrusion into the procedural integrity of the probate process itself. Both the majority and dissent in *Oregon* conflate the two, with even Justice Douglas commenting, "I do not see how a scheme for administration of decedents' estates . . . can possibly be necessary and proper."[118] What Douglas failed to point out, however, was that the federal provision for veteran decedents' estates escheat to the United States—though constitutionally suspect—was not in fact a *scheme* for disposition of assets, but rather a *claim* against Mr. Warpouske's estate. This fact is reflected both in the legislative history of the Act[119] and in the venue where the United States' claim was initially propounded: Oregon State Probate Court. Procedurally, *Oregon* took the same course as any creditor's claim against an estate. The only question was whether or not the United States' claim on Warpouske's estate superseded Oregon's claim by virtue of the Supremacy Clause. Although the Supreme Court concluded that it did, no attempt was made

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clause, stating] . . . it is 'not a grant of power, but a *caveat* that the Congress posses all the means necessary to carry out' its enumerated powers." *Id.* at 651-53 (Douglas, J., dissenting).

[116] *See, e.g.*, Beyer, *supra* note 58 ("In light of the precedence established in *United States v. Oregon*, a challenge to § 1044d seems unlikely under the Tenth Amendment").

[117] *But see* Major Jonathan E. Cheney, *Beyond DL Wills: Preparing Wills for Domiciliaries of Louisiana, Puerto Rico, Guam, American Samoa, Northern Mariana Islands, and the U.S. Virgin Islands*, ARMY LAW., Oct. 2005, at 2 (explaining that the question of § 551's constitutionality is not definitively resolved).

[118] *Oregon*, 366 U.S. at 654 (Douglas, J., dissenting).

[119] Considering whether the proposed legislation would be constitutional, Representative Pheiffer noted "there is a chance of there being a serious conflict in some cases between the State laws and the Federal laws. In practically every State, the property would naturally escheat to the State." Representative Rankin replied, "there cannot possibly be any conflict, because the veteran agrees to this arrangement when he enters the hospital . . . If he does not agree, then this does not apply." 87 CONG. REC. 5203 (1941).

in the case to circumvent or procedurally alter Oregon's probate process.[120]

The history of the Tenth Amendment suggests, appropriately, greater constitutional scrutiny of those provisions directed *at* state government than those that simply have an incidental effect on the administration of state processes. The Sundry Appropriations Act[121] is a provision of the latter variety. As opposed to state government itself, that Act was directed at the estates of deceased veterans—superimposing the United States' claim ahead of the state's remainder escheat provision.[122] By contrast, § 551 cannot be said to be directed at anyone or anything *other* than the states. The Department of Defense's implementing directive confirms this fact, providing for a mandatory preamble on each document directing "[f]ederal law specifies that this document shall receive the same legal effect as a testamentary instrument prepared and executed in accordance with the laws of the state in which it is presented for probate."[123] This command recognizes the inherent tension between § 551 and the formality requirements enacted by each state, and directs the state government through its probate court to implement the federal, rather than state, policy.

The proscription on federal commandeering of the state to implement its policy is not a mere federalist nicety. On the contrary, it undergirds the founders' concern that a federal government could implement unpopular policies using state governments as its executor and thus insulate itself from electoral ramifications.[124] Even accepting the *Oregon* analysis as valid in allowing the federal government to implement its own policy with respect to decedent veterans, under the *New York* precedent Congress is given only two constitutional choices: "offer the States the choice of regulating that activity according to federal standards or have[] state law pre-empted by federal regulation."[125] Under this

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[120] That the *Oregon* decision did not alter the fundamental nature of the probate process should not have rendered it constitutionally permissible. Rather, this distinguishing feature of the decision simply limits its controlling authority over § 551.
[121] 55 Stat. 868 (1941).
[122] 38 U.S.C. § 17 (1952) (repealed 1958).
[123] DOD DIR. 1350.4, *supra* note 34.
[124] Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 61 (1988) ("Federal attempts to appropriate state governmental resources in this manner deny the states a republican form of government. . . . Directives that the states consider, adopt, or enforce federal programs, moreover, permit federal officials to escape responsibility for their own initiatives.").
[125] New York v. United States, 505 U.S. 144, 167 (1992).

choice, Congress could direct states either to provide in their own law for the recognition of military wills,[126] or, failing that, it could implement its own probate process for deceased members of the Armed Forces.[127] What Congress cannot do—and what § 551 does—is require states to bear the resources burden of implementing their own probate processes, but require that they be administered according to federal mandates.

Admittedly, the burden on state resources of probating a will that varies slightly from state formality requirements is not great. Many states would admit a non-conforming military will to probate anyway, yielding no incremental cost.[128] Other states would have accepted the will if it had conformed, making any "cost" merely theoretical.[129] A relatively insignificant demand on state resources cannot, however, be used to justify federal hijacking of the state's sovereign right to administer its own probate process. The Supreme Court instructs "[t]here are no *de minimis* violations of the Constitution—no constitutional harms so slight that the courts are obliged to ignore them."[130]

The most obvious criticism of the theory that a federal dictate to state probate courts violates the anti-commandeering principle is that virtually all of the Supreme Court's decisions on that matter have involved dictates to the legislative and executive branches.[131] Indeed, it is rather common for state courts to both interpret and enforce federal law in the course of exercising their ordinary jurisdiction.[132] Early in the Republic, state judicial forums were routinely invoked to enforce, inter alia, the

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[126] Indeed, many states currently have such provisions. *See infra* Part VI.

[127] In the context of estate law, this latter proposition would raise additional constitutional questions—such as the ability of the federal government to obtain jurisdiction over those portions of servicemembers' estates not located on federal property—that are not addressed in this article.

[128] *See infra* Part VI.

[129] It is difficult to characterize the probate of a non-conforming will as an additional "cost" to state government because doing so suggests a state financial interest in invalidating wills. Therefore, it appears that the increased cost of admitting a non-conforming instrument to probate does not exceed that which the state has already undertaken to accept.

[130] Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 37 (2004).

[131] *See, e.g.*, New York v. United States, 505 U.S. 144, 144 (1992) (collecting cases).

[132] *See* Printz v. United States, 321 U.S. 898, 907 (1996) ("the Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power").

Carriage Tax Act,[133] the Fugitive Slave Act,[134] the Naturalization Act,[135] the Alien Enemies Act,[136] and offenses under the postal laws.[137] More recently, state courts have been empowered to enforce airline safety regulations,[138] manage federally-regulated retirement accounts,[139] and implement consumer protection measures.[140] By contrast, the Supreme Court's enunciation of the anti-comandeering principle has been based primarily on interferences with the state executive function: requiring states to take title to low-level radioactive waste in *New York*[141] and participate in a federally-administered firearm background check program in *Printz*.[142]

The failure of the federal courts to strike down mandates directed at states' judicial authority, however, is more a reflection of Congress's propensity to direct its mandates at the executive than an exception to the anti-commandeering principle. The jurisdiction of state courts is defined by the state legislature and state constitutions. To the extent that Congress calls upon the state courts to enforce federal mandates, it may do so only to the extent that such mandates are themselves constitutional and where the state legislature has granted the state court judicial authority to consider questions of the sort.[143]

Yet, like the justification of § 551 under Congress's war powers, an analysis that places interpretation of wills within the judicial authority of state courts fails to comprehend what a probate court actually does when it decides whether to admit a will to probate or not. The sovereign authority that breathes legal life into a testamentary instrument is of a legislative, not judicial, character. The very right to devise property is

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[133] 1 Stat. 373 (1794).
[134] 1 Stat. 302 (1794).
[135] 1 Stat. 414 (1795).
[136] 1 Stat. 577 (1798).
[137] *See, e.g.*, 1 Stat. 728-33 (1799).
[138] Manfredonia v. Am. Airlines, Inc., 68 A.D.2d 131, 139 (N.Y. App. 1979).
[139] *Ex Parte* Gurganus, 603 So. 2d 903, 906 (Ala. 1992) (construing the Employee Retirement Income Security Act of 1974 (ERISA)).
[140] Smith v. Walt Bennett Ford, Inc., 864 S.W. 2d 817, 822 (Ark. 1993) (state court providing civil private cause of action under federal odometer-tampering laws).
[141] New York v. United States, 505 U.S. 144 (1992).
[142] Printz v. United States, 521 U.S. 898 (1996).
[143] *See* United States v. Jones, 109 U.S. 513, 519–20 (1883) (considering state enforcement of naturalization policy, and explaining "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 it, the decisions rendered by the State tribunals were upheld").

statutory in nature, and it is the legislative branch alone that is empowered to exercise statutory authority.[144] As the California Supreme Court explained in an often-cited 1926 case, "[t]he right of any person to execute a will, as well as the form in which it must be executed, or the manner in which it may be revoked, are matters of statutory regulation. The power of the legislature to limit the class of persons who shall be competent to make a will [etc.] . . . is unquestioned."[145] This legislative authority is one of inherent state rather than federal competency. Indeed, "[t]here is nothing more deeply imbedded in the Tenth Amendment . . . than the disposition of the estates of deceased people."[146]

The right of the state legislature to set its own policies for both the administration of its probate courts and the descent of its citizens' assets has been historically inviolable. Even in those cases where the federal government has given state courts authority to enforce federal actions, it has always done so subject to the procedural rules of each state. Indeed, only when procedural requirements are central to the substance of a federal cause of action have the federal courts insisted that states apply federal procedures.[147]

Viewing § 551 within the proper context of the probate process as defined by state statutes, Congress's purpose in substituting federal for state policy, and then requiring states to use their probate apparatus to accomplish it, is unmistakable. A "will" is simply a piece of paper without the state legislation and processes that give it effect. At least in the context of such documents, what "the legislature giveth, . . . the

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[144] *See* 16 AM. JUR. *Descent and Distribution* § 12, *cited with approval in* McFadden v. McNorton, 193 Va. 455, 460 (1952) ("any participation in the estate of a deceased person is by grace of the sovereign power which alone has any natural or inherent right to succeed to such property").

[145] *In re* Estate of Berger, 243 P. 862, 863 (Cal. 1926), *cited with approval in* Parker v. Foreman, 39 So. 2d 574 (Ala. 1949); White v. Conference of Claimants Endowment Comm'n, 366 P.2d 674 (Idaho 1959); *In re* Estate of Stolte, 226 N.E.2d 615 (Ill. 1967); *In re* Estate of Hemmingsen, 333 N.W.2d 880 (Minn. 1983); *In re* Will of McCauley, 565 S.E.2d 88 (N.C. 2002); *In re* Mo-Se-Che-He's Estate, 107 P.2d 999 (Okla. 1940); *In re* Ziegner's Estate, 264 P.2d 12 (Wash. 1928).

[146] Oregon v. United States, 366 U.S. 643, 654 (1961) (Douglas, J., dissenting).

[147] *See* Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006) (explaining that the federal courts do not enjoy supervisory authority over the state courts, and therefore have no authority to impose the Fourth Amendment exclusionary rule in state court proceedings, except to the extent that it is mandated by the Vienna Convention on Consular Relations, enacted under the executive treaty-making power).

legislature [may] taketh away."[148] Such state legislation does not automatically become a matter of congressional concern simply because the legislature taketh from the estate of a member of the Armed Forces. Neither does the state legislative process come under the plenary military authority of Congress simply because a statute may hypothetically operate upon Soldier, Sailor, or Airman.

Even the SCRA,[149] which operates to limit certain state actions against current service members, is limited in its application to matters of strict federal concern. That Act operates primarily on matters of interstate commerce, including market interest rates, mortgage foreclosure, and civil law suits, to enhance readiness by protecting servicemembers from certain state actions during deployment.[150] Similarly, § 551 could be characterized as tending to the psychological readiness of Soldiers during deployment. Such a rationale, however, would provide an extremely overbroad justification for federal legislation. While the SCRA prevents Soldiers from being penalized in a state proceeding by the very fact of their inability to appear in court due to military service, § 551 affirmatively changes the status of a purported testament under state law. Thus, although the SCRA simply perpetuates a claim that already exists, § 551 creates one that never did. Because it would be irrational to suggest that the nonconformity of Soldiers' testament resulted from their military service, § 551 cannot properly be characterized as remedial in the same way that the SCRA undoubtedly is. Most important, the SCRA operates to protect the current assets of *current* members of the Armed Forces. As the New Jersey Supreme Court[151] noted, Congress has the power under the Constitution to prevent state courts from taking action against current Soldiers and Sailors. Without such authority, the several states would be empowered to constructively dismantle both the membership and the morale of the Armed Forces by operation of their civil laws. By contrast, § 551, to the extent that it affects servicemembers at all, operates only on those who

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[148] Hall v. Vallandingham, 540 A.2d 1162, 1165 (Md. Ct. Spec. App. 1988). For application of the same principal, see Cape Coral v. GAC Utils., Inc., 281 So. 2d 493 (Fla. 1973); Veterans of Foreign Wars v. Childers, 171 P.2d 618 (1946).

[149] Servicemembers Civil Relief Act, 50 U.S.C. app. §§ 501–594.

[150] *See id.* §§ 521–571.

[151] The only court to pass on constitutionality of the SSCRA was the Supreme Court of New Jersey. *See* Van Heest v. Veech, 58 N.J. Super. 427, 431–35 (Law Div. 1959) (justifying the act under Congress's war powers as designed "to provide persons in military service with peace of mind so far as the cares and burdens of civil litigation are concerned, so that they may more successfully devote their energies to the military needs of the nation").

are deceased. Unlike when a state enters default judgment against a currently deployed Soldier, deceased servicemembers, by definition, will not be handicapped in their ability to "successfully devote their energies to the military needs of the nation"[152] by application of state law to their estates. Absent any military necessity, Congress treads on very thin Constitutional ground justifying passage of the Act under its war powers.

At its most basic level, § 551 substitutes a federal interpretation of state law to assure that military wills are probated—violating the federalist truism that "state courts have the final authority to interpret a state's legislation."[153] That Congress believes it to be wise policy does not save its statute from constitutional scrutiny. In the end, § 551 is not supported by the federalist structure of American government. There are any number of matters on which Soldiers and their Families interact with their state governments. Probate of wills is among the most fundamental. The constitution simply does not permit Congress to dictate the terms of those interactions any more than it may instruct the states on how to administer any of the myriad policies and programs that constitute the exercise of state sovereign powers.

V. Federal Legislation to Guarantee Probate of Military Wills Is Not "Necessary and Proper" Because It Bears No Rational Relationship to Congress's Ability to Raise and Maintain the Armed Forces

There is an alternative analysis. Section 551 may be facially unconstitutional if, subject to the extreme deference owed Congress's exercise of war powers, the admission of military wills to state probate process is neither a necessary nor proper corollary to the power to raise armies and navies. In other words, even if § 551 does not commandeer state institutions, it may be facially invalid because Congress simply lacks authority over the subject matter of the legislation. In light of *Oregon*, however, such an argument would undoubtedly be an uphill battle.

Unfortunately, the Supreme Court's analyses of what constitutes a necessary and proper extension of Congress's war powers have been largely perfunctory. In *Oregon*, for instance, the Court made no effort to

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[152] *Id.*

[153] United States v. Dixon, 509 U.S. 688, 745 (1993) (citing Brown v. Ohio, 432 U.S. 161, 165 (1977).

define precisely how confiscation of the intestate estates of veterans is necessary and proper—leaving Justice Douglas to conclude "[t]he need of the Government to enter upon the administration of veterans' estates—made up of funds not owing the United States—is no crucial phase of the ability of the United States to care for ex-service men and women or to manage federal fiscal affairs."[154] Judicial application of the Necessary and Proper clause has placed primary emphasis on the constitutionality of the *purpose* for the legislative enactment rather than the means employed, on which Congress is granted substantial deference.[155]

What, then, is a plausible constitutional purpose for § 551? The legislative history of the Act provides little guidance, as the provision appears to have been introduced and passed without discussion in either the House or Senate.[156] In *Oregon*, the Court relied on the legitimate federal purpose of providing for the "comfort and recreation" of veterans in retirement homes.[157] In the SCRA congress considered it proper that military servicemembers should not be deprived of their state legal rights simply because they were currently serving and could not assert them.[158] Both of these appear facially, and without substantial analysis, to be legitimate concerns ancillary to the maintenance of the Armed Forces. Section 551, however, neither protects Soldiers' legal interests from the interference of federal military service (as in the SCRA), nor does it purport to raise funds for the maintenance of federal services for the retired (as in *Oregon*). As such, there appears little constitutional justification for its passage.

Indeed, in the present military environment where wills are typically written in advance of deployment,[159] it is no more difficult for a military

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[154] Oregon v. United States, 366 U.S. 643, 654 (1961) (Douglas, J., dissenting).

[155] *See* Katzenbach v. Morgan, 384 U.S. 641, 650 (1966) (discussing the Equal Protection Clause, "Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain . . . is brought within the domain of congressional power.") (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional")).

[156] *See* 146 CONG. REC. H9053-01 (Oct. 6, 2000), H.R. No. 5408 (Conf. Rep.).

[157] *Oregon*, 366 U.S. at 649.

[158] Van Heest v. Veech, 156 A.2d 301, 303 (N.J. Super. 1959).

[159] The Army Judge Advocate General's Corps's Legal Assistance Policy Division, for instance, strongly advises that members eligible for services under 10 U.S.C. § 1044

servicemember to conform his will to state law requirements than it is for any other person to do so. That said, the preparation of wills during deployment remains a significant obstacle for military attorneys. Moreover, the burden on military attorneys of preparing wills that comply with the legal technicalities of over fifty jurisdictions presents a unique challenge that is unheard of in civilian practice.

It should also be noted that Congress's purpose in enacting § 551 is consistent both with a desire to safeguard the interests of its servicemembers, and with state law presumptions against intestacy.[160] Yet, that presumption coupled with congressional goodwill is not constitutionally sufficient to overcome the principle that testacy law is the exclusive province of the states.[161] The federal interest in the disposition of military estates—particularly where the United States is not claiming an interest in those estates—is properly characterized as minimal. Benefits that include federal funds, such as those provided by the VA, are not affected by servicemembers' wills.[162] Indeed, such benefits cannot be directed by testament even where a will is recognized.[163] Similarly, there is no federal concern about the government undertaking a financial obligation in the event of a servicemember's intestate death. Unlike in *Oregon*, failure of a state to probate a servicemember's will would not give rise to a federal

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(which includes uniformed servicemembers and their families) prepare and execute a will before they are even given notice of an upcoming deployment. *See* DEP'T OF ARMY, ESTATE PLANNING TOOL KIT FOR MILITARY & FAMILY MEMBERS (2002), *available at* https://www.jagcnet.army.mil/Legal.

[160] *See, e.g.*, Swearingen v. Giles, 565 S.W.2d 574 (Tex. App. 1978) ("strong presumption against intestacy"); Mercantile-Safe-Deposit & Trust Co. v. Mercantile-Safe Deposit & Trust Co., 228 A.2d 289 (Md. 1967) (same); *In re* Estate of Gundelach, 263 Cal. App. 2d 825 (1968) ("There is a strong presumption against intestacy, total or partial"); Harrison v. Harrison, 120 S.W.3d 144 (Ark. App. 2003) (same); Graham v. Patton, 202 S.E.2d 58 (Ga. 1973) ("The strong presumption against intestacy is but one of many guides utilized in the construction of a will, and it may be overcome where the intention of the testator to do otherwise is plain and unambiguous, or necessarily implied."); *In re* Gill, 11 N.Y.2d 463 (N.Y. 1962) ("An interpretation that produces intestacy as to any part of an estate is to be avoided. The making of the will in statutory formality raises a very strong presumption against leaving property undisposed by will.").

[161] Indeed, even the state preference for testacy is not absolute. *See In re* Estate of Bellamore, 33 Misc. 2d 256 (N.J. Surr. Ct. 1962) ("while it is true that there is a strong presumption against intestacy it is not so strong that in a particular instance it could not be held to be inapplicable"); *In re* Englis' Will, 141 N.E.2d 556 (N.Y. 1957) ("This is not a case where the presumption against intestacy is available.").

[162] Department of Veterans Affairs, *Federal Benefits for Veterans and Dependents* 80 (2007 ed.), *available at* http://www1.va.gov/opa/vadocs/Fedben.pdf.

[163] *Id.*

obligation to ascertain and transport the person's household possessions to a distant jurisdiction. Finally, unlike with the SCRA, the intestate death of a servicemember is unlikely to affect the morale of servicemembers because, through intestacy, that person's assets will devise to immediate family anyway.[164]

Finally, the Supreme Court has explained a significant policy reason for not upholding this type of statute: electoral responsibility. In *New York*, considering a commandeering challenge, the Court explained that it was important for local legislators to be held responsible for the policies they enact—and for Congress to be similarly evaluated.[165] In the case of military wills, each state's legislature has considered whether honoring the last wishes of its citizens-turned-Soldiers is sufficiently important that their wills should be specially exempted from testamentary formality requirements. Several states have decided that it is.[166] Those that have not are held accountable, not to Congress but to their own constituencies. For Congress to circumvent that process by implementing its own requirements, it must show that the Constitution grants it legislative power to deal with this matter. Lacking a rational justification under its power to raise and maintain armies and navies, however, Congress has likely facially exceeded its constitutional authority in enacting § 551.

Ultimately, the question of whether a court would consider this statute to be "necessary and proper" difficult to predict with any accuracy. That question depends, in large part, on the facts of the case presented and whether or not the judge or justices consider providing military members peace of mind in knowing that their wills will be probated trumps the states' interest in preserving the state-law integrity

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[164] *See*, *e.g.*, UNIF. PROBATE CODE § 2-101, National Conference of Commissioners on Uniform State Laws, *Uniform Probate Code 2006 rev.*, *available at* http://www.law.upenn.edu.bll/archives/ulc/upc/final2005.htm. ("The intestate share of a decedent's surviving spouse is (1) the entire estate if: (i) no descendant or parent of the decedent survives the decedent; or (ii) all of the decedents surviving descendents are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent . . . .").

[165] New York v. United States, 505 U.S. 144, 168 (1992) ("[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. . . . [W]here the Federal Government directs the States to regulate, it may be sate officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.").

[166] *See infra* Part VI (surveying state testamentary privileges for military wills).

of the probate process. This is a value judgment without a legally calculable solution.

VI. Attention to State Testamentary Formality Requirements Will Remain Essential Under Any Foreseeable Legislative Solution

Enactment of § 551 recognizes the importance of providing testamentary security to members of the Armed Forces under unique circumstances. While a uniform federal policy would create obvious efficiencies, such a solution does not appear viable in light of very real constitutional questions. The most attractive alternative to federal action would be uniform state action. Adoption of a uniform state policy exempting military wills from certain testamentary formality provisions would be consistent both with constitutional federalism and with the existing policies of many states. While such a policy would still require that military attorneys consult state law in drafting wills, it would make state law more forgiving by granting military wills privileged status and admitting them to probate notwithstanding minor formality nonconformities.

Although the Uniform Probate Code (UPC), which has currently been adopted by eighteen states,[167] does not grant privileged status to military testators,[168] a declining number of states currently do. In 1979 twenty-nine states and the District of Columbia had statutory provisions granting a testamentary privilege to servicemembers' wills that did not conform with testamentary formality requirements.[169] Since then, eleven of those states have repealed the provisions.[170] Little evidence explains

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[167]Cornell University Law School Legal Information Institute, *Uniform Probate Code Locator*, http://www.law.cornell.edu/uniform/probate.html (last visited May 1, 2008).

[168] National Conference of Commissioners on Uniform State Laws, *Uniform Probate Code 2006 rev.*, *available at* http://www.law.upenn.edu.bll/archives/ulc /upc/final2005.htm.

[169] *See* Major Steven F. Lancaster, *Probate and the Military: What's It All About*, 85 MIL. L. REV. 60 (1979) (reviewing state probate code provisions addressing nonconforming wills made by Soldiers in military service).

[170] These states are Alabama (ALA. CODE § 43-1-35 (1975) (repealed 1981)); Alaska (ALASKA STAT. § 13.11.158 (1933) (repealed 1996)); California (CAL. PROB. CODE § 55 (1931) (repealed 1982)); Kentucky (KY. REV. STAT. § 394.050 (1942) (repealed 1972)); Maine, though it added a provision recognizing holographic wills (ME. REV. STAT. tit. 18, § 51 (1954) (amended 1979)); Michigan (MICH. COMP. LAWS § 702.6 (1948) (repealed 1978)); Nevada (NEV. REV. STAT. §133.100 (1929) (amended 1999)); New Jersey (N.J.

this phenomenon, except that many of these provisions were repealed in the context of adopting the UPC (which does not include such a provision) or recognizing holographic wills (which may have been seen as an effective substitute). [171]

Even when such statutes exist, they are of little value to military practitioners because their provisions vary so widely. For instance, while some states will probate any writing by a servicemember that evidences testamentary intent,[172] other states only provide an exception that covers oral wills, applying ordinary formality requirements to those instruments that are in fact written.[173] Moreover, state laws vary in their requirement that servicemembers have been in actual military service at the time of execution, and on what satisfies actual military service.[174] Finally, most states limit nonconforming military wills to disposition of a limited amount of personal property, leaving excess and real property to disposition through intestacy.[175]

In consideration of the constitutional deficiencies of § 551, there is a pressing need for state legislatures and the National Conference of Commissioners on Uniform State Laws, which drafts the UPC, to consider enactment or re-enactment of provisions exempting instruments drafted by military attorneys from testamentary formality

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STAT. ANN. § 3A:3-5 (1952) (repealed 1982)); South Dakota (S.D. COMP. LAWS § 29-2-9 (1939) (repealed 1995)); and Texas (TEX. PROB. CODE §§ 64, 65 (1955) (repealed 2007)).

[171] In at least two states, the statute providing special recognition for military wills was literally substituted with a provision recognizing holographic wills, indicating that one was viewed as a substitute for the other. *See* CAL. PROB. CODE § 55 (1931) (repealed 1982); ME. REV. STAT. 18, § 51 (1979).

[172] *See, e.g.*, WASH. REV. CODE § 11.12.025 (1965).

[173] *See, e.g.*, N.Y. ESTATES, POWERS, & TRUSTS § 3-2.1 (1974).

[174] For instance, while New Jersey has held that a Soldier who has embarked to join his unit in active combat is in actual military service, *In re* Knight's Estate, 93 A.2d 359 (N.J. 1952), Rhode Island does not apply the privilege to mariners embarked as passengers on vessels traveling through a war zone enroute to take command of another vessel, *Warren v. Harding*, 2 R.I. 133 (1852). In some states a Soldier's will is only privileged if executed in fear of impending death, *In re* Hickey's Estate, 184 N.Y.S. 399 (N.Y. Sup. Ct. 1920), while in others there is no such requirement. *See* Ray v. Wiley, 69 P. 809 (Okla. 1902).

[175] *See, e.g.*, IND. CODE § 29-1-5-4 (1999) (limiting application to personal property under $10,000); TENN. CODE ANN. § 31-1-106 (1976)(same limitation); D.C. STAT. § 18-107 (1981) (limiting application to personal property, but with no value limit). *But see* MISS. CODE ANN. § 91-5-21 (1968) (providing no limit on disposition of real or personal property directed by a decedent while on active duty).

requirements.[176] Since § 551 made them seem irrelevant, these provisions have not attracted significant attention.[177] Their mootness, however, is undermined by the questionable constitutionality of § 551. If that provision is ever invalidated the next logical inquiry would be whether a given non-conforming instrument was exempted under state law. Even under existing state law provisions, the circumstances required for probate of a nonconforming instrument (often including execution in fear of impending death, actual combat, or during deployment)[178] render the provisions virtually useless to the military in establishing a prospective uniform policy for drafting military testaments.

Notwithstanding the desirability of states ratifying military will exemption statutes, it will remain essential that military attorneys continue to consult the provisions of the state laws applicable to their clients. Even if the states do exempt military instruments from their formality requirements, it is improbable (and in any case undesirable) that they would devise *different* requirements for military instruments the way § 551 has. In the absence of a uniform federal policy, military attorneys would need to continue to draft state-specific instruments relying on the state exemption statutes only in case of error. In addition, while there is a tradition of providing exemption for Soldiers and mariners, there is no legal tradition of exempting wills prepared by military practitioners for servicemembers' dependents. Because drafting wills for dependents is a substantial part of a legal assistance attorney's workload, attention to state formality requirements cannot be avoided. Finally, as with all uniform state laws, it will remain necessary for attorneys to first determine if, and to what extent, such an exemption has been enacted and modified by each state's respective legislature.

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[176] The current language of Mississippi's statute, which is similar to that of other states, is a sound model:

> Any person of sound mind eighteen years of age or older and being in the Armed Forces of the United States of America, in active service at home or abroad or being a mariner at sea, may devise, dispose of, and bequeath his goods and chattels or property, real and personal, anything in this chapter to the contrary notwithstanding.

MISS. CODE ANN. § 91-5-21 (1968). *Compare* 14 VT. STAT. ANN. § 7 (2005) *and* VA. CODE § 64.1-53 (1950) (both providing similar language).

[177] Indeed, there are no published decisions addressing state servicemember exemption statutes in the last decade.

[178] *See* Lancaster, *supra* note 169, at 12.

While state exemption statutes for nonconforming military instruments would not create the same drafting efficiencies as § 551, they would provide security to members of the military and their families that testamentary wishes will be honored. This technical fix to state probate codes would accomplish the major objective of § 551 while promoting military readiness. Yet, given the extent to which the states exercise exclusive legislative authority over their probate processes, it appears certain that compliance with state testamentary formality requirements will remain essential.

VII. Conclusion

The problem of how to assure that deceased servicemembers' wills are admitted to probate notwithstanding slight nonconformity with state formality requirements is one without a federal solution. It is also an example of how congressional attempts to redress all ills through legislation can result in an erosion of the federalist principle that legislative action be taken at the political level closest to the citizen.

There is no more basic principle of the federal structure of the Constitution than that the states are the repository of the general sovereign power granted by the people. The federal government, by contrast, is one of delegated authority. Within the realm of Congress's powers are those to raise, maintain, equip, and provide for the Armed Forces. Congressional action justified under these "war powers" is subject to extreme judicial deference because the courts view themselves as ill-equipped to make the national security decisions that were delegated to Congress and the Executive by the Constitution. An equally basic principle of federalism is that Congress is not empowered to use its legislative authority against state governments. Rather, the founders intended that both the federal and state governments operate directly upon the citizen—leaving each government's independent sovereign legislative process intact.

Federal and state precedent firmly establishes wills and the probate process that implements them as the exclusive province of state law. Probate, as an in rem proceeding operating without formal parties on the estate of a deceased state resident, is a privilege granted by the state in its sovereign capacity. This privilege can be removed, modified, or withheld entirely at any time without affecting any vested right or obligation. Because wills and the probate process are created by state

government, they do not fall within the legislative authority of Congress except to the extent that Congress defines claims against decedents' estates under another enumerated power.

Section 551 violates Tenth Amendment separation of powers by directing state governments on implementation and operation of their probate processes. Through the operation of federal law, Congress intends that a document which the state would otherwise not recognize as testamentary be given legal effect. Because Congress lacks the authority to pass legislation directed at the disposition of estates under the state probate process—particularly where no federal interest is asserted—§ 551 is facially unconstitutional. Because, in any case, Congress cannot short-circuit a state's legislative process and judgment to accomplish its goals, § 551 is not respectful of the constitutional vertical separation of powers. Finally, because Congress cannot involuntarily commandeer a state-created regulatory paradigm to enforce its policy objectives—no matter how laudable—a reviewing court is likely to find § 551 unconstitutional.

In light of § 551's constitutional questionability, it is increasingly important that state legislatures turn their attention to the problems faced by military practitioners. With exclusive legislative authority over their probate processes comes an electoral and moral responsibility for states to provide mechanisms for the recognition of military testaments notwithstanding technical deficiencies. Yet, even if the states do enact exemptions for military testaments, it is likely that their value will be to save otherwise invalid instruments rather than to provide a prescription for prospective drafting of a multi-state instrument. To avoid the invalidation of a servicemember's will in any event, it remains essential that military attorneys conform military wills to the requirements of the state where the will is expected to be presented for probate.