SUPREMACY CLAUSE

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding." U.S. Const. art. VI, Paragraph 2

Under the Supremacy Clause, everyone must follow federal law in the face of conflicting state law. It has long been established that "a state statute is void to the extent that it actually conflicts with a valid federal statute" and that a conflict will be found either where compliance with both federal and state law is impossible or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Edgar v. Mite Corp., 457 U.S. 624, 631 (1982). Similarly, we have held that "otherwise valid state laws or court orders cannot stand in the way of a federal court's remedial scheme if the action is essential to enforce the scheme." Stone v. City and County of San Francisco, 968 F.2d 850, 862 (9th Cir. 1992), cert. denied, 113 S. Ct. 1050 (1993).

Due to concerns of comity and federalism, the scope of federal injunctive relief against an agency of state government must always be narrowly tailored to enforce federal constitutional and statutory law only. Toussaint v. McCarthy, 801 F.2d 1080, 1089 (9th Cir. 1986), cert. denied, 481 U.S. 1069 (1987). This is critical because "a federal district court's exercise of discretion to enjoin state political bodies raises serious questions regarding the legitimacy of its authority." Id.

In *Pennsylvania v. Nelson*, 350 U.S. 497, 76 S. Ct. 477, 100 L. Ed. 640 (1956), the Supreme Court developed criteria for assessing whether federal law preempts state action when Congress has not specifically stated its intent. These criteria include whether the scheme of federal regulations is "so pervasive as to make the inference that Congress left no room for the States to supplement it," whether the federal interest "is so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject," or whether the enforcement of a state law "presents a serious danger of conflict with the administration of the federal program."

The Tenth Amendment to the U.S. Constitution reads:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.

Ratified in 1791, the Tenth Amendment to the Constitution embodies the general principles of Federalism in a republican form of government. The Constitution specifies the parameters of authority that may be exercised by the three branches of the federal government: executive, legislative, and judicial. The Tenth Amendment reserves to the states all powers that are not granted to the federal government by the Constitution, except for those powers that states are constitutionally forbidden from exercising.

For example, nowhere in the federal Constitution is Congress given authority to regulate local matters concerning the health, safety, and morality of state residents. Known as POLICE POWERS, such authority is reserved to the states under the Tenth Amendment. Conversely, no state may enter into a treaty with a foreign government because such agreements are prohibited by the plain language of Article I to the Constitution.

At the time the states adopted the Tenth Amendment, two primary conceptions of government were under consideration. Many federalists supported a centralized national authority, with power concentrated in a single entity. This type of government was exemplified by the English constitutional system, which vested absolute authority in the monarchy during the seventeenth century and in Parliament during the eighteenth century.

On the other hand, many anti-federalists supported a more republican form of government consisting of a loose confederation of sovereign states that would form an alliance only for the purpose of mutual defense. The Articles of Confederation, which governed the 13 states in national matters until 1787, when the Constitution was ratified, epitomized this form of government. Under the Articles of Confederation, the national government was unable to levy and collect taxes on its own behalf.

Many federalists, such as James Madison, argued that the Tenth Amendment was unnecessary because the powers of the federal government are carefully enumerated and limited in the Constitution. Because the Constitution does not give Congress, the president, or the federal judiciary the prerogative to regulate wholly local matters, Madison concluded that no such power existed and no such power would ever be exercised. However, British oppression had made the Founding Fathers fearful of unchecked centralized power. The Tenth Amendment was enacted to limit federal power. Although it appears clear on its face, the Tenth Amendment has not been consistently applied.

Before the Civil War, nearly every state urged a broad reading of the Tenth Amendment. Although no state wanted a federal government that was impotent against internal enemies or foreign aggressors, many state politicians challenged the authority of the federal government to regulate any matter that could otherwise be handled by local authorities. For example,

immediately after the U.S. Revolution, all 13 states resisted federal efforts to force local governments to return the property of British loyalists taken during the war. During the first half of the nineteenth century, Southern states objected to federal legislation that attempted to limit Slavery. State sovereignty reached its height when 11 states seceded from the Union to form the Confederacy.

Following the Civil War, the Tenth Amendment was virtually suspended. For a number of years during the Reconstruction era, the federal government occupied the former Confederate states with military troops and required each occupied state to ratify the Civil War Amendments, which outlawed slavery, gave African Americans the right vote, and declared the equality of all races. To a large extent the federal government ran local matters in Southern states during this period.

In 1883, the Tenth Amendment regained some of its force. In that year the Supreme Court invalidated the federal CIVIL RIGHTS ACT of 1875 (18 Stat. 335), which criminalized RACIAL DISCRIMINATION in public accommodations, such as hotels and restaurants, because it violated state sovereignty under the Tenth Amendment (CIVIL RIGHTS CASES, 109 U.S. 3, 3 S. Ct. 18, 27 L. Ed. 835 [1883]). In 1909, the Supreme Court struck down the White Slave Traffic Act (34 Stat. 898), which Congress had passed to prohibit the harboring of alien women for the purposes of prostitution, because it violated the Tenth Amendment (*Keller v. United States*, 213 U.S. 138, 29 S. Ct. 470, 53 L. Ed. 737 [1909]).

Nine years later the Court struck down another congressional law prohibiting the interstate shipment of products that had been manufactured by certain businesses that employed children under the age of 14 (HAMMER V. DAGENHART, 247 U.S. 251, 38 S. Ct. 529, 62 L. Ed. 1101 [1918]). "In interpreting the Constitution," the Court said in *Hammer*, "it must never be forgotten that the nation is made up of states to which are entrusted the powers of local government. And to them the powers not expressly delegated to the national government are reserved."

During the depth of the Great Depression, the Tenth Amendment returned to a dormant condition. President FRANKLIN ROOSEVELT

worked with Congress to pass the New Deal,a series of programs designed to stimulate the troubled economy. After the Supreme Court upheld a provision of the National Labor Relations Act (mandatory Collective Bargaining) in NLRB V. JONES & LAUGHLIN STEEL CORP., 301 U.S. 1, 57 S. Ct. 615, 81 L. Ed. 893 (1937), Congress began exercising unprecedented lawmaking power over state and local matters. For the next 40 years, the Supreme Court upheld congressional authority to regulate a variety of matters that had been traditionally addressed by state legislatures. For example, in one case the Supreme Court upheld the Agricultural Adjustment Act of 1938 (7 U.S.C.A. §§ 1281 et seq.) over objections that it allowed Congress to regulate individuals who produced and consumed their own foodstuffs entirely within the confines of a family farm (*Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 [1942]).

The Tenth Amendment enjoyed a brief resurgence in 1976 when the Supreme Court held that the application of the Fair Labor Standards Act of 1938 (29 U.S.C.A. §§ 201 et seq.) to state and local governments was unconstitutional. In *National League of Cities v. Usery*, 426 U.S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 245 (1976), the Court said that the Minimum Wage and maximum hour provisions of this act significantly altered and displaced the states' abilities to structure employment relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation. These services, the Court emphasized, are historically reserved

to state and local governments. If Congress may withdraw from the states the authority to make such fundamental employment decisions, the Court concluded, "there would be little left of the states' separate and independent existence," or of the Tenth Amendment.

National League of Cities proved to be an unworkable constitutional precedent. It cast doubt on congressional authority to regulate many aspects of local affairs that most of society had come to rely upon. It was unclear, for example, whether the Occupational Safety and Health Administration (OSHA), a federal agency established by Congress to regulate workplace safety, retained any constitutional authority after the Supreme Court announced its decision in *National League of Cities.*

The Supreme Court eliminated these concerns by overturning *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985). In *Garcia* the Court upheld the minimum wage and maximum hour provisions of the Fair Labor Standards Act as it applied to a city-owned public transportation system. In reaching this decision, the Court said that if certain states are worried about the extent of federal authority over a particular local matter, the residents of such states should contact their senators and representatives who are constitutionally authorized to narrow federal regulatory power through appropriate legislation. Judicial Review of federal regulations under the Tenth Amendment, the Supreme Court suggested, is not the proper vehicle to achieve this end.

The ebb and flow of Tenth Amendment Jurisprudence reflects the delicate constitutional balance created by the Founding Fathers. The states ratified the Constitution because the Articles of Confederation created a national government that was too weak to defend itself and could not raise or collect revenue. Although the federal Constitution created a much stronger centralized government, the Founders did not want the states to lose all of their power to the federal government, as the colonies had lost their powers to Parliament. The Tenth Amendment continues to be defined as courts and legislatures address the balance of federal and state power.

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When Idaho Governor C.L. “Butch” Otter signed HO391 into law on 17 March 2010, the “national” news media circled the wagons and began another assault on State sovereignty. The bill required the Idaho attorney general to sue the federal government over insurance mandates in the event national healthcare legislation passed. The lead AP reporter on the story, John Miller, quoted constitutional “scholar” David Freeman Engstrom of Stanford Law School as stating that the Idaho law would be irrelevant because of the “supremacy clause” of the United States Constitution.

In his words, “That language is clear that federal law is supreme over state law, so it really doesn’t matter what a state legislature says on this.” Now that Barack Obama has signed

healthcare legislation into law, almost a dozen States have filed suit against the federal government, with Idaho in the lead. Battle lines have been drawn. Unfortunately, the question of State sovereignty and the true meaning of the "supremacy clause" may be swallowed up in the ensuing debate.

Engstrom's opinion is held by a majority of constitutional law "scholars," but he is far from correct, and Idaho and the thirty seven other States considering similar legislation have a strong case based on the original intent of the powers of the federal government vis-à-vis the States.

The so-called "supremacy clause" of the Constitution, found in Article 6, states, "This Constitution, and the Laws of the United States *which shall be made in Pursuance thereof;* and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding [emphasis added]."

The key, of course, is the italicized phrase. All laws made in pursuance of the Constitution, or those clearly enumerated in the document, were supreme, State laws notwithstanding. In other words, the federal government was supreme in all items clearly listed in the document.

A quick reading of the Constitution illustrates that national healthcare is not one of the enumerated powers of the federal government, so obviously Engstrom's blanket and simplistic statement is blatantly incorrect, but his distortion of the supremacy clause goes further.

The inclusion of such a clause in the Constitution was first debated at the Constitutional Convention on 31 May 1787. In Edmund Randolph's initial proposal, called the Virginia Plan, the "national" legislature had the ability to "legislate in all cases to which the separate states are incompetent…" and "to negative all laws passed by the several states contravening, in the opinion of the national legislature, the Articles of Union…." John Rutledge, Pierce Butler, and Charles Pinckney of South Carolina challenged the word "incompetent" and demanded that Randolph define the term. Butler thought that the delegates "were running into an extreme, in taking away the powers of the states…" through such language.

Randolph replied that he "disclaimed any intention *to give indefinite powers to the national legislature*, declaring that he was entirely opposed to such an inroad on the state jurisdictions, and that he did not think any considerations whatever could ever change his determination [emphasis added]." James Madison, the author of the Virginia Plan, was not as forthcoming as to his sentiment. Ultimately, Madison preferred a negative over State law and wished the national legislature to be supreme in call cases. But he was not in the majority.

The Convention again broached a federal negative on State law on 8 June 1787. Charles Pinckney, who presented a draft of a constitution shortly after Randolph offered the Virginia Plan, believed a national negative necessary to the security of the Union, and Madison, using imagery from the solar system and equating the sun to the national government, argued that without a national negative, the States "will continually fly out of their proper orbits, and destroy the order and harmony of the political system." Such symbolism made for a beautiful picture, but it belied reality.

To most of the assembled delegates, the national government was not the center of the political universe and the States retained their sovereignty. Hugh Williamson of North Carolina

emphatically stated he "was against giving a power that might restrain the states from regulating their internal police."

Elbridge Gerry of Massachusetts was against an unlimited negative, and Gunning Bedford of Delaware believed a national negative was simply intended "to strip the small states of their equal right of suffrage." He asked, "Will not these large states crush the small ones, whenever they stand in the way of their ambitious or interested views?"

When the negative power was put to a vote, seven States voted against it and three for it, with Delaware divided (and Virginia only in the affirmative by one vote). Roger Sherman of Connecticut summarized the sentiment of the majority when he stated he "thought the cases in which the negative ought to be exercised might be defined." Since the negative did not pass, such a definition was unnecessary.

Thus, the federal government was supreme only in its enumerated powers and it did not have a negative over State law. Supremacy had limits.

By the time the Constitution was debated in the several State ratifying conventions in 1787 and 1788, the "supremacy clause" galvanized opponents of the document. The Constitution, they said, would destroy the States and render them impotent in their internal affairs. The response from *proponents* of ratification illuminates the true intent of the clause. William Davie, a delegate to the Constitutional Convention from North Carolina and proponent of the Constitution, responded to attacks levied on the "supremacy clause" by stating that:

This Constitution, as to the powers therein granted, is constantly to be the supreme law of the land. Every power ceded by it must be executed without being counteracted by the laws or constitutions of the individual states. Gentlemen should distinguish that it is not the supreme law in the exercise of power not granted. It can be supreme only in cases consistent with the powers specially granted, and not in usurpations [emphasis added].

Davie wasn't alone in this opinion. Future Supreme Court justice James Iredell of North Carolina argued that, "This clause [the supremacy clause] is supposed to give too much power, when, in fact, it only provides for the execution of those powers which *are already given in the foregoing articles*….If Congress, under pretence of executing one power, should, in fact, usurp another, they will violate the Constitution [emphasis added]."

Furthermore, in a foreshadowing of nullification, Iredell argued that, "It appears to me merely a general clause, the amount of which is that, when they [Congress] pass an act, if it be in the execution of a power given by the Constitution, it shall be binding on the people, *otherwise not* [emphasis added]. Other ratifying conventions had similar debates, and proponents of the Constitution continually reassured wavering supporters that the Constitution would only be supreme within its delegated authority.

Most bought their assurances, though to staunch opponents, the Constitution still vested too much power in the central authority. The States would lose their sovereignty, they argued, and as a result, these men demanded an amendment to the Constitution that expressly maintained the sovereignty of the States and placed limits on federal power. Even several moderate supporters of the Constitution embraced this idea.

Ultimately, the three most powerful States in the Union, New York, Massachusetts, and Virginia, demanded that a bill of rights be immediately added to the Constitution; near the top of those recommended amendments on every list, a State sovereignty resolution. These ultimately became the Tenth Amendment to the Constitution, which reads, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Clearly the intent of this amendment was to mitigate any design the federal government had on enlarging its powers through the "supremacy clause." If the power was not enumerated in the Constitution and the States were not prohibited by the Constitution from exercising said power, then that power was reserved to the States.

Several other constitutional "scholars" have weighed in on the debate in the last week, and each has invoked the "supremacy clause" to defend their opposition to State action against healthcare. Duke Law Professor Neil Siegel went so far as to suggest that the States are not reading the Tenth Amendment correctly. In perhaps the most outlandish statement of the debate, he also said, "Any talk of nullification bothers me because it's talk of lawlessness."

I guess Mr. Siegel has failed to consider that Idaho bill HO391 was passed by a legitimate legislative body elected by the people of the State. That would make it lawful.

Of course, this debate ultimately boils down to loose interpretation verses strict construction. Thomas Jefferson had the best line on this issue. When asked to read between the lines to "find" implied powers, Jefferson responded that he had done that, and he "found only blank space."

The original intent of both the "supremacy clause" and the Tenth Amendment indicate that Idaho and the other States challenging Obamacare are justified and correct and that the legal profession is either in the tank for the federal government or has not read either the debates of the Constitutional Convention and/or the State ratifying debates. This should make people like Engstrom and Siegel, rather than legitimate State law directed at unconstitutional authority, irrelevant.

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