HB

8

<TARGET><BILL>HB 8</BILL><SUBJECT>HB 8</SUBJECT><COMM>HJUD27</COMM></TARGET>

ALASKA STATE LEGISLATURE

Interim:
600 East Railroad Avenue
Wasilla, Alaska 99654
Phone (907) 373-1842
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Session:
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REPRESENTATIVE WES KELLER
DISTRICT 14

MEMO

To: Representative Carl Gatto, Chair
House Judiciary Committee

Fm: Representative Wes Keller

Cc:

Date: February 7, 2011

Re: Request for hearing on HB 8 (27-LS0052\A

Please consider this as a request for you to schedule HB 8 "Federal Regulations and Executive Orders" before the House Judiciary Committee. I have included a packet of information and will be glad to provide your committee staff a .pdf version if they so desire.

HB 8 puts in place statutory language that Alaska will review and if necessary nullify federal regulations and executive orders if it is determined they are unconstitutional or improperly filed. More and more the administration is circumventing Congress and imposing its own interpretation of the rule of law. HB 8 gives us a tool to respond.

If you have any questions please feel free to contact my office.

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Thank you

E-Mail: Representative_Wes_Keller@legis.state.ak.us
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REPRESENTATIVE WES KELLER
DISTRICT 14

House Bill 8
Sponsor Statement

"An Act relating to certain federal regulations and presidential executive orders; relating to the duties of the attorney general; and providing for an effective date."

HB 8 clarifies in Alaska Statute that a federal regulation or a presidential executive order that is not properly adopted or is unconstitutional does not preempt state law. The Attorney General will continue to review and report federal regulations and executive orders that appear to have not been properly adopted. Under HB 8 those reports will be forwarded to the legislature for consideration.

HB 8 presumes Alaska Legislative interest in an important legal process called "nullification". Nullification is when a state 'nullifies' a federal law, proclaiming it to be void and inoperative, or 'non-effective' within the boundaries of that state. In other words it is not a law as far as that state is concerned. In HB 8 a negative review by the Attorney General would generate an alert to our Judiciary Committees so nullification legislation can be considered.

There has been disagreement regarding nullification going back to the late eighteenth century. Not surprisingly, federal courts have often leaned toward favoring federal power over state sovereignty in spite of the fact that our founding fathers clearly intended otherwise. Federalism is our historically unique and profound arrangement where sovereign and separate states got together and carefully designed a central government with carefully limited powers. It is an illogical perversion of one of our most important founding principles to presume states must comply with unconstitutional federal laws. HB 8 presumes a proper State responsibility to uphold and protect our constitution.

HB 8 is intended to provide important information to the Alaska State Legislature by tapping the expertise and evaluation of our Attorney General. Certainly the legislature has a responsibility to consider its response whenever there is question of constitutionality of a federal regulation or executive order.

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REPRESENTATIVE WES KELLER
DISTRICT 14

MEMO

To: Members of the Alaska Legislature

Date: February 15, 2011

Re: Sectional of House Bill 8 (27-LS0052\A

House Bill 8 is broken into five sections:

1. Legislative findings that establish an understanding of the Supremacy Clause in relationship to state statute. It also recognizes that the U.S. Supreme Court has ruled that federal regulations, provided they are properly adopted, may also apply in Supremacy rules. The section also indicates that some executive orders and federal regulations do not always meet the constitutional or properly adopted criteria and therefore may not preempt state law.

2. Places into state statute that unconstitutional or improperly adopted executive orders and regulations do not preempt state statute.

3. Directs the Judiciary committee's in each house upon receipt of a report from the Attorney General that an executive order or regulation that preempts state statute and does not meet stated criteria to consider a response to the findings.

4. Directs the Attorney General to submit reports of potential preemptive executive orders or regulations that are unconstitutional or improperly adopted to the appropriate committees and establishes what documents need to be included in that report.

5. Effective date

E-Mail: Representative_Wes_Keller@legis.state.ak.us
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CS FOR HOUSE BILL NO. 8(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES KELLER, Peggy Wilson

A BILL

FOR AN ACT ENTITLED

"An Act relating to certain federal regulations and presidential executive orders; relating to the duties of the attorney general; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** The uncodified law of the State of Alaska is amended by adding a new section to read:

LEGISLATIVE FINDINGS. The legislature finds that

(1) the Supremacy Clause of art. VI, clause 2, Constitution of the United States, provides that the Constitution of the United States and the laws of the United States made under and in conformity with the Constitution of the United States are the supreme law of the land;

(2) the United States Supreme Court, in City of New York v. Federal Communications Commission, 486 U.S. 57 (1988), stated that "[t]he phrase, 'Laws of the United States' encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization";

(3) federal regulations and presidential executive orders that are unconstitutional and not properly adopted in accordance with statutory authority are not laws of the United States for the purposes of the Supremacy Clause; and

(4) federal regulations and presidential executive orders that are not properly adopted in accordance with statutory authority may not preempt state laws that are not in conflict with federal statutory authority and regulations properly adopted in accordance with that statutory authority.

* **Sec. 2.** AS 01.10 is amended by adding a new section to read:

Article 5. Laws of the United States.

Sec. 01.10.200. Federal preemption; effect of certain federal regulations and presidential executive orders. A federal regulation or presidential executive order that is unconstitutional or was not properly adopted in accordance with federal statutory authority may not be considered to preempt a state law.

* **Sec. 3.** AS 24.05 is amended by adding a new section to article 4 to read:

Sec. 24.05.188. Federal regulations and executive orders. After receiving a report from the attorney general under AS 44.23.020(h) that a state law is in conflict with a federal regulation or presidential executive order that is unconstitutional or was not properly adopted in accordance with federal statutory authority, the house and senate committees having jurisdiction over judicial matters may each consider whether legislative action is necessary in response to the findings by the attorney general.

* **Sec. 4.** AS 44.23.020 is amended by adding a new subsection to read:

(h) If the attorney general finds that a federal regulation or presidential executive order would preempt a state law if constitutional and properly adopted in accordance with federal statutory authority but also finds that the federal regulation or presidential executive order is unconstitutional or was not properly adopted in accordance with federal statutory authority, the attorney general shall report the findings to the chairs of the house and senate committees having jurisdiction over judicial matters. The report must include

(1) a copy of the federal regulation or presidential executive order that the attorney general finds was not properly adopted in accordance with federal statutory authority;

(2) a citation to the state law that is in conflict with the federal regulation or presidential executive order identified in (1) of this subsection;

(3) a written opinion explaining

(A) the basis for finding that the federal regulation or presidential executive order is unconstitutional or was not properly adopted in accordance with federal statutory authority;

(B) the conflict between the federal regulation or presidential executive order identified in (1) of this subsection and the state law identified in (2) of this subsection and why, if properly adopted, the federal regulation or presidential executive order would preempt the state law; and

(C) the effect on the state if the state law identified in (2) of this subsection is found by a court to be preempted by the federal regulation or presidential executive order identified in (1) of this subsection; and

(4) other information relevant to the findings by the attorney general.

* **Sec. 5.** This Act takes effect immediately under AS 01.10.070(c).

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version **HB008**
() Publish Date

Identifier (file name): HB008-LAW-CIV-02-15-11
Dept. Affected Law
Title An Act relating to federal reg. and presidential exec. orders; relating to the duties of attorney general; and providing for an effective date.
Appropriation Civil
Allocation Opinions, Appeals and Ethics
Sponsor Representative(s) Keller
Requester (H) Judiciary
OMB Component Number 2716

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	***	***	***	***	***	***	***
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	***	***	***	***	***	***	***

Estimate of any current year (FY2011) cost ***

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by Eileen Donahue, Division Operations Manager
Phone 465-5427
Division Administrative Services
Date/Time 2/15/11 9:15 AM
Approved by John J. Burns, Attorney General
Date 2/15/2011
Department of Law

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB 008

Analysis

HB 008 would require the Attorney General to review federal regulations and presidential executive orders that "may be in conflict with and may preempt state law." If the Attorney General were to find that a federal regulation or executive order (1) is unconstitutional or was not properly adopted and (2) would preempt a state law if it were constitutional and properly adopted, the Attorney General would be required to report those findings to the chairs of the appropriate legislative committees. The Attorney General would be required to include in the report an explanation of the grounds for the findings.

The Code of Federal Regulations includes more than 157,000 pages. This bill would require the analysis as to whether a particular regulation was constitutional, properly adopted, or preemptive.

As such, the fiscal impact of this legislation to the Department of Law would likely be substantial but cannot be accurately determined at this time.

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.

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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.

The Free Dictionary by FARLEX 2011

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.

Brion McClanahan holds a Ph.D in American history from the University of South Carolina and is the author of ***The Politically Incorrect Guide to the Founding Fathers*** *(Regnery, 2009).*

Executive Orders

Dateline: 12/18/97

Executive Orders Defined
An Executive Order (EO) is a directive issued to executive-level agencies, department heads, or other employees from the President under the President's statutory, or constitutional powers. In many ways, the EO is similar to written orders, or instructions the president of a corporation might send to department heads or directors.Thirty days after it is officially published in the Federal Register, an EO becomes law. While the EO does bypass the U.S. Congress and the standard legislative law making process, no part of an EO may be illegal or unconstitutional. The first EO was issued in 1789 by none other than George Washington. Not until 1907 were EOs given official numbers.

Reasons for Issuing an Executive Order
Presidents typically issue an EO for one of these purposes:
1. Operational management of the executive branch
2. Operational management of federal agencies or officials
3. To carry out statutory presidential responsibilities

- - *In 1970, President Nixon used this 398 word Executive Order establishing NOAA*.

How Executive Orders May be Vacated
The President can retract an EO at any time. The President may also issue an EO that supersedes an existing one. New incoming Presidents may choose to follow the EOs of their predecessors, replace them with new ones of their own, or revoke the old ones completely. In extreme cases, Congress may pass a law that alters an EO, and the Supreme Court can declare them unconstitutional.

Executive Orders vs. Proclamations
Presidential Proclamations differ from EOs in that they are either ceremonial in nature or deal with issues of trade and may or may not carry legal effect. All EOs become law.

Constitutional Authority for Executive Orders
Article II, section 1 of the Constitution reads, in part, *"The executive power shall be vested in a president of the United States of America."* And, Article II, section 3 asserts that, *"The President shall take care that the laws be faithfully executed..."* Since the Constitution does not specifically define executive power, critics of Executive Orders argue that these two passages do not imply Constitutional authority. But, Presidents of the United States since George Washington have argued that they do.

Modern Use of Executive Orders
Until World War I, the Executive Order was used for relatively minor, usually unnoticed acts of state. A trend that changed drastically with passage of the War Powers Act of 1917. This act passed during WWI granted the President temporary powers to immediately enact laws regulating trade, economy, and other aspects of policy as they pertained to enemies of America. A key section of the War Powers act also contained language specifically excluding American citizens from its effects.

The War Powers Act remained in effect and unchanged until 1933 when a freshly elected President Franklin D. Roosevelt found America in the panic stage of the Great Depression. The first thing FDR did was to convene a special session of Congress where he introduced a bill amending the War Powers Act to remove the clause excluding American citizens from being bound by its effects. This would allow the President to declare "national emergencies" and unilaterally intact laws to deal with them. This massive amendment was approved by both houses of Congress in under 40 minutes without debate.

Hours later, FDR officially declared the depression a "national emergency" and stared issuing a string of Executive Orders that effectively were the "New Deal."

While some of FDR's actions were, perhaps, constitutionally questionable, history recognizes them as averting the growing panic and starting our economy on its way to recovery.

All Those Opposed
Many people strongly oppose the Executive Order as being an unconstitutional, even potentially dictatorial application of power. While the purpose of this article is not to state an opinion, or editorialize either way, I feel it only fair that this alternative point of view be represented.

The WINDS.org - Presidential Executive Orders

The opinions expressed in the web sites linked above are those of their authors, contributors, and representatives only and in no way represent the opinions of this Web site, your Guide, or the Mining Company, Inc.

Constitutional Authority for Executive Orders
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FT.com
FINANCIAL TIMES

US state pensions becoming federal issue

By Nicole Bullock in New York and Hal Weitzman in Chicago
Published: May 19 2010 20:44 | Last updated: May 19 2010 20:44

Illinois used to have a plan to pay off the gaping shortfall in the pension funds that pay retired teachers, university employees, state workers, judges and politicians, Dan Long recalls.

Mr Long, director of the Commission on Government Forecasting and Accountability, the non-partisan auditing arm of the Illinois state legislature, remembers that, back in 1994, the state laid out a proposal that would have paid off most of what was then a $17bn gap by 2011.

But Illinois could not stick to the plan.

With financial year 2011 less than six weeks away, the pension arrears of the 1990s look quaint. Instead of a balanced system, the state faces unfunded liabilities of about $78bn, the biggest pension hole in the US, and contributions of more than $4bn for 2011, the largest single element of its $13bn budget deficit.

Illinois is the poster child of unfunded pensions in the US. But state retirement systems could become a national concern, new research shows.

Joshua Rauh, associate professor of finance at the Kellogg School of Management at Northwestern University said that, without reform, some state pensions might run out within the decade. By 2030, as many as 31 states may not have the money to pay pensions. And, if these funds exhaust their assets, the size of payments for the benefits they have promised will be too large to cover through taxes, putting pressure on the federal government for a bail-out that could potentially cost more than $1,000bn, he says.

"It is more than a local problem," Mr Rauh said. "The federal government could be on the hook."

Estimates put the unfunded liabilities at between $1.000bn and $3.000bn after years of states promising benefits but not contributing enough in both good times and bad to cover them.

Many states base their calculations on an 8 per cent annual return and use an accounting method called smoothing, which staggers gains and losses over several years, two factors that some observers warn could mask the size of the shortfalls. The problem has come to the fore with the financial crisis and recession. Pension funds, like most money managers, suffered losses. The tax revenues that fund annual contributions to pensions, along with essential services such as healthcare and education, have plummeted, leaving little room to reimburse the losses.

States have begun reforms, with some lowering return expectations and raising employee contributions and retirement ages.

Mr Rauh said such measures were cosmetic and states needed comprehensive, federally sponsored reform that would require closing the systems to new members, shifting state workers to Social Security and individual plans similar to those that are used by the private sector in order to obtain incentives to borrow to bridge the gaps.

Mr Rauh said subsidising pension borrowing would cost a net $75bn with new contributions to the national Social Security programme offsetting some of the subsidies.

By his calculations, which assume the 8 per cent return, Illinois would run out by 2018 followed by Connecticut, New Jersey and Indiana in 2019. Some 20 states will have run out by 2025.

Five states would never run out, including New York and Florida, and 17 other states have a horizon of 2030 or beyond.

Robert Megna, New York's budget director, said his state had had to make "tough choices" to keep funding its pensions despite budget shortfalls over the past few years. On March 31, the state made a nearly $1bn payment for the last fiscal year.

"We had to make cuts: education, healthcare, local government support and not-for-profit providers," Mr Megna said of the last year's budget process.

New York's governor has proposed borrowing from the pension system, which is about 94 per cent funded, as the state did after the September 11 attacks, and repaying it with interest if low tax collections persist, Mr Megna said.

For fiscal 2010, Illinois sold $3.5bn of bonds to pay for its annual contribution.

But in an election year, there is no political support in Springfield, the capital of Illinois, for another bond issue, particularly since it requires a two-thirds majority in the state legislature.

The most likely outcome is that the state will defer the issue to next year. "That'll have an impact in terms of lost investment opportunities, and they'll have to sell some of the portfolio to pay the pensions," said Mr Long.

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Utah gov. OKs eminent domain use on federal land

Posted: Mar 28, 2010 11:35 AM Updated: Mar 28, 2010 12:36 PM
By BROCK VERGAKIS
Associated Press Writer

SALT LAKE CITY (AP) - Fed up with federal ownership of more than half the land in Utah, Republican Gov. Gary Herbert on Saturday authorized the use of eminent domain to take some of the U.S. government's most valuable parcels.

Herbert signed a pair of bills into law that supporters hope will trigger a flood of similar legislation throughout the West, where lawmakers contend that federal ownership restricts economic development in an energy-rich part of the country.

Governments use eminent domain to take private property for public use.

The goal is to spark a U.S. Supreme Court battle that legislators' own attorneys acknowledge has little chance of success.

But Utah Attorney General Mark Shurtleff and other Republicans say the case is still worth fighting, since the state could reap millions of dollars for state schools each year if it wins.

More than 60 percent of Utah is owned by the U.S. government, and policy makers here have long complained that federal ownership hinders their ability to generate tax revenue and adequately fund public schools.

Utah spends less per student than any other state and has the nation's largest class sizes. Under the measure Herbert has approved, the state will set aside $3 million to defend the law.

Lawmakers recently slashed education funding by $10 million and raised taxes on cigarettes by $1 a pack. Democrats have decried the eminent domain measure as a waste of money, and Democratic gubernatorial hopeful Peter Corroon is making it an issue in this year's special election.

But if the law is as bad as Democrats say it is, a court will quickly overturn it and the state won't have to spend much money defending it, Herbert said.

Initially, the state would target three areas for the use of eminent domain, including the Kaiparowits plateau in Grand Staircase-Escalante National Monument, which is home to large coal reserves.

Many people in Utah are still angry that then-President Bill Clinton's designated the area as a national monument in 1996, a move that stopped development on the land and greatly pleased environmentalists as he ran for re-election.

Utah lawmakers contend the federal government should have long ago sold the land it owns in the state. Because it hasn't, the federal government has violated a contract made with Utah when statehood was granted, they say.

Eminent domain would also be used on parcels of land where Interior Secretary Ken Salazar last year scrapped 77 oil and gas leases around national parks and wild areas.

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The States Can Stop Obama

By Sheriff Richard Mack (Ret.)

By now we have all heard the cliches and seen the posters from the "Tea Parties" espousing freedom, less government, and perhaps most of all, how the federal government had better back off trying to shove their national healthcare down our otherwise healthy throats. The truth of the matter is all the slogans of "Don't Tread On Me" or "Give Me Liberty Or Give Me Death" or "We're Mad As Hell And We're Not Taking It Anymore," don't mean a thing when compared to reality; the real and actual answer to all the protests, marches, and outrage. The answer is in our own backyards! *The States can stop every bit of it!* That's right, the individual States can stop "Obamacare" and all other forms of out-of-control federal government mandates and "big brother" tactics. If Arizona, Hawaii, New Hamshire, Texas, etc. want nothing to do with National Healthcare as proposed by Barack Obama or Congress, then all they have to do is say "No!"

For you skeptics who think the States could no more do this than fly to the moon, let's look at the law. First, the U.S. Constitution is the ultimate and supreme law of the land. More specifically, the Bill of Rights was established, because some of our Founding Fathers, feared that the Constitution did not go far enough in restricting or limiting the central government. Hamilton was one of a select few who wanted a bigger and powerful federal government. However, several key states and powerful delegates such as Patrick Henry, said they would not support the formation of a new government if the Constitution did not contain a Bill of Rights, a supreme law to establish basic and fundamental human rights that could never, for all future American generations, be violated, altered or encroached upon by *government*. So the Framers of our Constitution came up with ten; ten God-given freedoms that would forever be held inviolable by our own governments.

The last of these basic foundational principles was the one to protect the power, sovereignty, and the autonomy of the States; the Tenth Amendment. This amendment and law underscores the entire purpose of the Constitution **to limit** government and forbids the federal government from becoming more powerful than the "creator." Let's be very clear here; the States in this case were the creator. They formed the federal government, not the other way around. Does anyone believe rationally that the States intended to form a new central government to control and command the States at will? Nothing could be further from the truth. Article 1, Section 8 of the Constitution details what duties the federal government will be responsible for under our new system of "balanced power." Anything not mentioned in Article 1, Sec. 8, is "reserved to the States respectively, or to the people." (Tenth Amendment) Hence, the federal government was not allowed creativity or carte blanche to expand or assume power wherever and whenever they felt like it. The feds had only discrete and enumerated and very limited powers. Omnipotency was the last thing the Founding Fathers intended to award the newly formed federal government. They had just fought the Revolutionary War to stop such from Britain and their main concern was to prevent a recurrence here in America.

In perhaps the most recent and powerful Tenth Amendment decision in modern history, the U.S. Supreme Court ruled in Mack/Printz v U.S. that "States are not subject to federal direction." But today's federal Tories argue that the "supremecy clause" of the U.S. Constitution says that the federal government is supreme and thus, trumps the States in all

matters. Wrong! The supremacy clause is dealt with in Mack/Printz, in which the Supreme Court stated once and for all that the only thing "supreme" is the constitution itself. Our constitutional system of checks and balances certainly did not make the federal government king over the states, counties, and cities. Justice Scalia opined for the majority in Mack/Printz, that "Our citizens would have two political capacities, one state and one federal, each protected from incursion by the other." So yes, it is the duty of the State to stop the Obamacare "incursion." To emphasize this principle Scalia quotes James Madison, "The local or municipal authorities form distinct and independent portions of the *Supremacy,* no more subject within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere." The point to remember here is; where do we define the "sphere" of the federal government? That's right; in Article 1, Section 8 of the Constitution and anything not found within this section belongs to the States or to the People. So where does health care belong? The last place it belongs is with the President or Congress. It is NOT their responsiblity and the States need to make sure that Obama does not overstep his authority.

Just in case there is any doubt as to what the Supreme Court meant, let's take one more look at Mack/Printz. "This separation of the two spheres is one of the Constitution's structural protections of liberty. Hence, a double security arises to the rights of the people. The different governments will control each other..." What? The Constitution, the supreme law of the land, has as a "structural protection of liberty" that States will keep the federal government in check? No wonder it was called a system of "checks and balances." The States (and Counties) are to maintain the balance of power by keeping the feds within their proper sphere.

So do the States have to take the bullying of the federal government? Not hardly! The States do not have to take or support or pay for Obamacare or anything else from Washington DC. The States are not subject to federal direction. They are sovereign and "The Constitution protects us from our own best intentions." (Mack/Printz) Which means the States can tell national healthcare proposals or laws to take a flying leap off the Washington monument. We are not subject to federal direction!

In the final order pursuant to the Mack/Printz ruling Scalia warned, "The federal government may neither, issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. Such commands are fundamentally incompatible with our constitutional system of dual sovereignty." It is rather obvious that nationalized healthcare definitely qualifies as a "federal regulatory program."

Thus, the marching on Washington and pleas and protests to our DC politicians are misdirected. Such actions are "pie in the sky" dreaming that somehow expects the tyrants who created the tyranny, will miraculously put a stop to it. Throughout the history of the world such has never been the case. Tyrants have never stopped their own corrupt ways. However, in our system of "dual sovereignty," the States *can* do it. If we are to take back America and keep this process peaceful, then state and local officials will have to step up to the plate. Doing so is what States' Rights and State Sovereignty are all about.

WorldNetDaily wnd commentary
Friday, February 11, 2011

The perversion of the U.S. Constitution

Posted: July 08, 1998
1:00 am Eastern

By Joseph Farah
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"Stroke of the pen. Law of the land. Kinda cool."
--Clinton presidential aide Paul Begala, July 1998

"All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."
--Article 1, U.S. Constitution, 1789

The greatest fear of the Founding Fathers was the establishment of a strong central government and an ambitious, power-hungry political leader at the center of that government. They had had their fill of kings and dictators. They believed the best assurance against centralized authority was a loose association of sovereign states, which maintained most governmental power at the local level.

President Clinton's glib announcement that he will issue a barrage of executive orders to further his legislative agenda while bypassing Congress is the ultimate fulfillment of those fears. More chilling yet is the timing of the ominous announcement. It comes less than two months after Clinton issued, while on foreign soil, Executive Order 13083, which annihilates the principles of federalism that have guided the nation for the last 200 years.

The 10th Amendment states: "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." Under EO 13083, Clinton has effectively tacked on to that clear, forthright, inspired, unambiguous statement a list of exceptions. He has done it single-handedly, with the stroke of a pen. And, no Mr. Begala, there is nothing cool about totalitarianism.

Say what you will about him, Bill Clinton is a bright and educated man. His actions and his words are carefully considered. He knows what he is doing. That's what makes this trend so frightening. Where does he want to take the nation? How far from its founding principles are we to stray? Is America about to transform itself from a nation governed by laws to a nation ruled by men?

How far we've come from the days of statesmen like James Madison, who believed "That all power is originally vested in, and consequently derived from, the people. That government is instituted and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty and the right of acquiring property, and generally of pursuing and obtaining happiness and safety. That the people have an indubitable, unalienable, and indefeasible right to reform or change their government whenever it be found adverse or inadequate to the purpose of its institution."

Note that Madison said "the people" -- not the government -- have a right to change their government. Bill Clinton has taken on this mission as his own God-given responsibility. He is acting like a strongman, an ayatollah, a czar, a potentate, a Fuhrer.

Even before Clinton abused his office so egregiously, the United States was in grave danger of concentrating too much power in Washington and too much power in the Oval Office. Clinton, ever the opportunist, has taken full advantage of Americans' ignorance of their constitutional heritage and usurped much of the remaining congressional legislative authority.

Potentially, the worst abuse of all is the executive order. For 30 years, Americans have lived under the shadow of executive orders that could -- as Mr. Begala inelegantly stated it -- with "the stroke of a pen," turn America into just another fascist dictatorship. Fortunately, America has been blessed with leaders -- some good, some bad -- who have restrained themselves from signing away our freedoms.

Without congressional approval, the president has the power to relocate whole populations of Americans, the power to shut down the free press, to force a national registration of all people. There doesn't need to be a war to justify such an action -- just a crisis, be it domestic or foreign, violent or merely economic.

I count at least a dozen executive orders, today standing as the law of the land, which would suspend the Constitution and the Bill of Rights in their entirety with such a stroke of the pen. Such power should not be in the hands of any one man -- particularly one as ambitious, driven and morally contemptible as Bill Clinton.

Oh, what a delicate thread from which our liberty is suspended.

ZIP code or keyv

Topix

Null. Void. Of No Effect.

Michael Boldin Tenth Amendment Center
January 21, 2011

When Washington D.C. violates the constitution – as it does every single day – the essential question is –"what do we do about it?"

For countless decades, Americans have been responding through protests, lawsuits, and "voting the bums out." Yet, year in and year out, federal power always grows. And it doesn't matter which political party is in power, or what person occupies the white house either.

THE RIGHTFUL REMEDY

In 1798, Thomas Jefferson wrote that

"whensoever the general government assumes undelegated powers….a nullification of the act is the rightful remedy."[emphasis added]

Notice that TJ didn't advise us to use nullification as a remedy "once in a while." And he certainly didn't tell us that a nullification is the rightful remedy after "we vote some bums out" or "we sue the federal government in federal court" or after anything else for that matter. Jefferson was pretty straightforward and recommended that every single time the federal government exercises powers not delegated to it in the constitution (there's about 30 powers and nothing more), that we're to reject and nullify those acts on a state level as they happen.

HAPPENING NOW

Already, more than two dozen states have virtually stopped the 2005 Real ID act dead in its tracks. How? By refusing to implement it. Fifteen states – most recently Arizona – are using the principles of the 10th Amendment to actively defy federal laws (and a supreme court ruling, too!) on marijuana. Eight states have passed Firearms Freedom Acts in an attempt to reject some federal gun laws and regulations. And seven states have passed Health Care Freedom Acts to block health care mandates from being enforced.

NULL. VOID. OF NO EFFECT.

Get used to reading these words, because the political climate is starting to swing a new direction. There is a growing number of people in America that are recognizing a simple truth – Asking, demanding, or suing to get the federal government to fix problems caused by the federal government just doesn't work.

Take, for example, the Federal Health Care Nullification Act, first introduced in Texas as HB297, and now also introduced in Montana (SB161), Wyoming (HB0035), Oregon (SB498) and Maine (LD58). Here's an excerpt:

"the federal law known as the "Patient Protection and Affordable Care Act," signed by President Barack Obama on March 23, 2010, is not authorized by the Constitution of the United States and violates its true meaning and intent as given by the Founders and Ratifiers, and is hereby declared to be invalid, shall not be recognized, is specifically rejected, and shall be considered null and void and of no effect."

But these bills, as introduced in Texas, Maine, Montana, Oregon, and Wyoming are far more than mere declarations or position statements

ENFORCEMENT

Implied in any nullification legislation is enforcement of the state law. In the Virginia Resolution of 1798, James Madison wrote of the principle of interposition:
That this Assembly doth explicitly and peremptorily declare, that it views the powers of the federal government, as resulting from the compact, to which the states are parties; as limited by the plain sense and intention of the instrument constituting the compact; as no further valid that they are authorized by the grants enumerated in that compact; and that in case of a deliberate, palpable, and dangerous exercise of other powers, not granted by the said compact, the states who are parties thereto, have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them.

In his famous speech during the war of 1812, Daniel Webster said:

"The operation of measures thus unconstitutional and illegal ought to be prevented by a resort to other measures which are both constitutional and legal. It will be the solemn duty of the State governments to protect their own authority over their own militia, and to interpose between their citizens and arbitrary power. These are among the objects for which the State governments exist"

Here Madison and Webster assert what is required of nullification laws to be successful – that state governments not only have the right to resist unconstitutional federal acts, but that, in order to protect liberty, they are "duty bound to interpose" or stand between the federal government and the people of the state.

All five bills explicitly include this principle, and if passed, would impose penalties on federal agents for attempting to enforce National Health Care mandates in their state. For example, from Wyoming's HB35:

Any official, agent, employee or public servant of the state of Wyoming as defined in W.S. 6-5-101, who enforces or attempts to enforce an act, order, law, statute, rule or regulation of the government of the United States in violation of this article shall be guilty of a felony punishable by a fine of not more than five thousand dollars ($5,000.00), imprisonment in the county jail for not more than two (2) years, or both.

Sources close to the Tenth Amendment Center tell us to expect approximately ten states to introduce such bills in the 2011 legislative session.

[CONFERENCE PRINT]

112TH CONGRESS
1ST SESSION

H. RES. 5

Adopting rules for the One Hundred Twelfth Congress.

IN THE HOUSE OF REPRESENTATIVES

M__._____ submitted the following resolution; which was referred to the Committee on _____

RESOLUTION

Adopting rules for the One Hundred Twelfth Congress.

Resolved, That the Rules of the House of Representatives of the One Hundred Eleventh Congress, including applicable provisions of law or concurrent resolution that constituted rules of the House at the end of the One Hundred Eleventh Congress, are adopted as the Rules of the House of Representatives of the One Hundred Twelfth Congress, with amendments to the standing rules as provided in section 2, and with other orders as provided in sections 3, 4, and 5.

SECTION 2. CHANGES TO THE STANDING RULES.

(a) CITING AUTHORITY UNDER THE CONSTITUTION.—

(1) In clause 7 of rule XII, add the following new paragraph:

"(e)(1) A bill or joint resolution may not be introduced unless the sponsor submits for printing in the Congressional Record a statement citing as specifically as practicable the power or powers granted to Congress in the Constitution to enact the bill or joint resolution. The statement shall appear in a portion of the Record designated for that purpose and be made publicly available in electronic form by the Clerk.

"(2) Before consideration of a Senate bill or joint resolution, the chair of a committee of jurisdiction may submit the statement required under subparagraph (1) as though the chair were the sponsor of the Senate bill or joint resolution.".

(2) In clause 3(d) of rule XIII, strike subparagraph (1) (and redesignate the succeeding paragraphs accordingly).

(b) THREE-DAY AVAILABILITY FOR UNREPORTED MEASURES.—In rule XXI, add the following new clause:

"11. It shall not be in order to consider a bill or joint resolution which has not been reported by a committee

Senate Resolution 632

By: Senators Pearson of the 51st, Rogers of the 21st, Williams of the 19th, Wiles of the 37th, Mullis of the 53rd and others

ADOPTED SENATE

A RESOLUTION

Affirming states' rights based on Jeffersonian principles; and for other purposes.

WHEREAS, the Ninth Amendment of the United States Constitution states "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people" and the Tenth Amendment states "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE that this body reaffirms the principles of government expressed by Thomas Jefferson in a resolution written for the Kentucky legislature in 1798 stating that the several States composing the United States of America, are not united on the principle of unlimited submission to their General Government; but that, by a compact under the style and title of a Constitution for the United States, and of amendments thereto, they constituted a General Government for special purposes, -- delegated to that government certain definite powers, reserving, each State to itself, the residuary mass of right to their own self-government; and that whensoever the General Government assumes undelegated powers, its acts are unauthoritative, void, and of no force; that to this compact each State acceded as a State, and is an integral party, its co-States forming, as to itself, the other party: that the government created by this compact was not made the exclusive or final judge of the extent of the powers delegated to itself; since that would have made its discretion, and not the Constitution, the measure of its powers; but that, as in all other cases of compact among powers having no common judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress; and

That the Constitution of the United States, having delegated to Congress a power to punish treason, counterfeiting the securities and current coin of the United States, piracies, and felonies committed on the high seas, and offences against the law of nations, slavery, and no other crimes whatsoever; and it being true as a general principle, and one of the amendments to the Constitution having also declared, that "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," therefore all acts of Congress which assume to create, define, or punish crimes, other than those so enumerated in the Constitution are altogether void, and of no force; and that the power to create, define, and punish such other crimes is reserved, and, of right, appertains solely and exclusively to the respective States, each within its own territory; and

That it is true as a general principle, and is also expressly declared by one of the amendments to the Constitution, that "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;" and that no power over the freedom of religion, freedom of speech, or freedom of the press being delegated to the United States by the Constitution, nor prohibited by it to the States, all lawful powers respecting the same did of right remain, and were reserved to the States or the people: that thus was manifested their determination to retain to themselves the right of judging how far the licentiousness of speech and of the press may be abridged without lessening their useful freedom, and how far those abuses which cannot be separated from their use should be tolerated, rather than the use be destroyed. And thus also they guarded against all abridgment by the United States of the freedom of religious opinions and exercises, and retained to themselves the right of protecting the same. And that in addition to this general principle and express declaration, another and more special provision has been made by one of the amendments to the Constitution, which expressly declares, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press": thereby guarding in the same sentence, and under the same words, the freedom of religion, of speech, and of the press: insomuch, that whatever violated either, throws down the sanctuary which covers the others, and that libels, falsehood, and defamation, equally with heresy and false religion, are withheld from the cognizance of federal tribunals. That, therefore, all acts of Congress of the United States which do abridge the freedom of religion, freedom of speech, freedom of the press, are not law, but are altogether void, and of no force; and

That the construction applied by the General Government (as is evidenced by sundry of their proceedings) to those parts of the Constitution of the United States which delegate to Congress a power "to lay and collect taxes, duties, imports, and excises, to pay the debts, and provide for the common defense and general welfare of the United States," and "to make all laws which shall be necessary and proper for carrying into execution the powers vested by the Constitution in the government of the United States, or in any department or officer thereof," goes to the destruction of all limits prescribed to their power by the Constitution: that words meant by the instrument to be subsidiary only to the execution of limited powers, ought not to be so construed as themselves to give unlimited powers, nor a part to be so taken

as to destroy the whole residue of that instrument: that the proceedings of the General Government under color of these articles, will be a fit and necessary subject of revisal and correction; and

That a committee of conference and correspondence be appointed, which shall have as its charge to communicate the preceding resolutions to the Legislatures of the several States; to assure them that this State continues in the same esteem of their friendship and union which it has manifested from that moment at which a common danger first suggested a common union: that it considers union, for specified national purposes, and particularly to those specified in their federal compact, to be friendly to the peace, happiness and prosperity of all the States: that faithful to that compact, according to the plain intent and meaning in which it was understood and acceded to by the several parties, it is sincerely anxious for its preservation: that it does also believe, that to take from the States all the powers of self-government and transfer them to a general and consolidated government, without regard to the special delegations and reservations solemnly agreed to in that compact, is not for the peace, happiness or prosperity of these States; and that therefore this State is determined, as it doubts not its co-States are, to submit to undelegated, and consequently unlimited powers in no man, or body of men on earth: that in cases of an abuse of the delegated powers, the members of the General Government, being chosen by the people, a change by the people would be the constitutional remedy; but, where powers are assumed which have not been delegated, a nullification of the act is the rightful remedy: that every State has a natural right in cases not within the compact, (*casus non foederis*), to nullify of their own authority all assumptions of power by others within their limits: that without this right, they would be under the dominion, absolute and unlimited, of whosoever might exercise this right of judgment for them: that nevertheless, this State, from motives of regard and respect for its co-States, has wished to communicate with them on the subject: that with them alone it is proper to communicate, they alone being parties to the compact, and solely authorized to judge in the last resort of the powers exercised under it, Congress being not a party, but merely the creature of the compact, and subject as to its assumptions of power to the final judgment of those by whom, and for whose use itself and its powers were all created and modified: that if the acts before specified should stand, these conclusions would flow from them: that it would be a dangerous delusion were a confidence in the men of our choice to silence our fears for the safety of our rights: that confidence is everywhere the parent of despotism -- free government is founded in jealousy, and not in confidence; it is jealousy and not confidence which prescribes limited constitutions, to bind down those whom we are obliged to trust with power: that our Constitution has accordingly fixed the limits to which, and no further, our confidence may go. In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution. That

this State does therefore call on its co-States for an expression of their sentiments on acts not authorized by the federal compact. And it doubts not that their sense will be so announced as to prove their attachment unaltered to limited government, whether general or particular. And that the rights and liberties of their co-States will be exposed to no dangers by remaining embarked in a common bottom with their own. That they will concur with this State in considering acts as so palpably against the Constitution as to amount to an undisguised declaration that that compact is not meant to be the measure of the powers of the General Government, but that it will proceed in the exercise over these States, of all powers whatsoever: that they will view this as seizing the rights of the States, and consolidating them in the hands of the General Government, with a power assumed to bind the States, not merely as the cases made federal, (*casus foederis*,) but in all cases whatsoever, by laws made, not with their consent, but by others against their consent: that this would be to surrender the form of government we have chosen, and live under one deriving its powers from its own will, and not from our authority; and that the co-States, recurring to their natural right in cases not made federal, will concur in declaring these acts void, and of no force, and will each take measures of its own for providing that neither these acts, nor any others of the General Government not plainly and intentionally authorized by the Constitution, shall be exercised within their respective territories; and

That the said committee be authorized to communicate by writing or personal conferences, at any times or places whatever, with any person or person who may be appointed by any one or more co-States to correspond or confer with them; and that they lay their proceedings before the next session of the General Court.

BE IT FURTHER RESOLVED that any Act by the Congress of the United States, Executive Order of the President of the United States of America or Judicial Order by the Judicatories of the United States of America which assumes a power not delegated to the government of the United States of America by the Constitution for the United States of America and which serves to diminish the liberty of the any of the several States or their citizens shall constitute a nullification of the Constitution for the United States of America by the government of the United States of America. Acts which would cause such a nullification include, but are not limited to:

I. Establishing martial law or a state of emergency within one of the States comprising the United States of America without the consent of the legislature of that State.

II. Requiring involuntary servitude, or governmental service other than a draft during a declared war, or pursuant to, or as an alternative to, incarceration after due process of law.

III. Requiring involuntary servitude or governmental service of persons under the age of 18 other than pursuant to, or as an alternative to, incarceration after due process of law.

09

IV. Surrendering any power delegated or not delegated to any corporation or foreign government.

V. Any act regarding religion; further limitations on freedom of political speech; or further limitations on freedom of the press.

VI. Further infringements on the right to keep and bear arms including prohibitions of type or quantity of arms or ammunition; and

That should any such act of Congress become law or Executive Order or Judicial Order be put into force, all powers previously delegated to the United States of America by the Constitution for the United States shall revert to the several States individually. Any future government of the United States of America shall require ratification of three quarters of the States seeking to form a government of the United States of America and shall not be binding upon any State not seeking to form such a government.

BE IT FURTHER RESOLVED that the Secretary of the Senate is authorized and directed to transmit an appropriate copy of this resolution to the President of the United States, each member of the United States Congress.

HOUSE RESOLUTION NO. 9

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SIXTH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVES KELLY, Johnson, Keller, Harris, Gatto, Johansen, Dahlstrom, Wilson

Introduced: 2/25/09
Referred: Rules

A RESOLUTION

Relating to sovereign powers of the state.

BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES:

WHEREAS the Tenth Amendment to the Constitution of the United States 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"; and

WHEREAS the Tenth Amendment defines the total scope of federal power as being that specifically granted by the Constitution of the United States and no more; and

WHEREAS the scope of power defined by the Tenth Amendment means that the federal government was created by the states specifically to be an agent of the states; and

WHEREAS some federal actions weaken states' rights protected by the Tenth Amendment to the Constitution of the United States; and

WHEREAS the Tenth Amendment assures that we, the people of the United States of America and each sovereign state in the Union of States, now have, and have always had, rights the federal government may not usurp; and

WHEREAS art. IV, sec. 4, Constitution of the United States, reads, "The United States shall guarantee to every State in this Union a Republican Form of Government," and

the Ninth Amendment to the Constitution of the United States reads, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"; and

WHEREAS the United States Supreme Court has ruled in New York v. United States, 112 S.Ct. 2408 (1992), that the United States Congress may not simply commandeer the legislative and regulatory processes of the states; and

WHEREAS all states, including Alaska, find themselves regularly facing proposals from the United States Congress that weaken states' rights protected by the Tenth Amendment;

BE IT RESOLVED that the House of Representatives hereby claims sovereignty for the state under the Tenth Amendment to the Constitution of the United States over all powers not otherwise enumerated and granted to the federal government by the Constitution of the United States; and be it

FURTHER RESOLVED that this resolution serves as Notice and Demand to the federal government, as our agent, to cease and desist, effective immediately, mandates that are beyond the scope of these constitutionally delegated powers; and be it

FURTHER RESOLVED that all compulsory federal legislation that directs states to comply under threat of civil or criminal penalties or sanctions or requires states to pass legislation or lose federal funding be prohibited or repealed.

COPIES of this resolution shall be sent to the Honorable Barack Obama, President of the United States; the Honorable Joseph R. Biden, Jr., Vice-President of the United States and President of the U.S. Senate; the Honorable Nancy Pelosi, Speaker of the U.S. House of Representatives; the Honorable Lisa Murkowski and the Honorable Mark Begich, U.S. Senators, and the Honorable Don Young, U.S. Representative, members of the Alaska delegation in Congress; and all other members of the 111th United States Congress.

Delete page 2, line 8 through line 20:

Delete page 2, lines 22 through line 29:

Insert

"(h) If the attorney general finds that a federal regulation or presidential executive order has the effect of preempting state law and that the regulation or order is unconstitutional or was not properly adopted, the attorney general shall report the findings to the chairs of the house and senate committees having jurisdiction over judicial matters. The report must include"

486 U.S. 57

108 S.Ct. 1637

100 L.Ed.2d 48

CITY OF NEW YORK, City of Miami, City of Wheaton and National League of Cities, Petitioners
v.
FEDERAL COMMUNICATIONS COMMISSION et al.

No. 87-339.

Argued March 29, 1988.

Decided May 16, 1988.

Syllabus

In 1974, after two years of unsatisfactory experience with conflicting federal and local technical standards governing the transmission of cable television broadcast signals, the Federal Communications Commission (FCC or Commission) promulgated regulations pre-empting the field of signal-quality regulation. In 1984, this Court broadly approved the pre-emptive authority that the FCC had asserted over cable system regulation. *Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691, 104 S.Ct. 2694, 81 L.Ed.2d 580. A few months later, Congress enacted the Cable Communications Policy Act of 1984 (Cable Act or Act), which empowers state or local authorities to enfranchise cable systems and to specify the facilities and equipment that franchisees could use, but which also authorizes the FCC to establish technical standards for such facilities and equipment. Pursuant to the latter provision, the FCC adopted regulations establishing technical standards governing the quality of cable signals and forbidding local authorities to impose more stringent technical standards. Petitioners sought review of the regulations in the Court of Appeals, contesting the scope of the FCC's claimed pre-emptive authority and asserting that franchising authorities could impose stricter technical standards than the Commission's. The court upheld the regulations.

Held: The FCC did not exceed its statutory authority by forbidding local authorities to impose technical cable signal quality standards more stringent than those set forth in the Commission's regulations. Pp. 63-70.

(a) Whether a federal agency has properly determined that its authority in a given area is exclusive and pre-empts any state regulatory efforts does not depend on the existence of express congressional authorization to displace state law. Rather, the correct focus is on the agency itself and on the proper bounds of its lawful authority to undertake such action. If the agency's decision to pre-empt represents a reasonable accommodation of conflicting policies committed to the agency's care by statute, the accommodation should not be disturbed unless it appears from the statute or its legislative history that the accommodation "is not one that Congress would have

sanctioned." *United States v. Shimer*, 367 U.S. 374, 383, 81 S.Ct. 1554, 1560, 6 L.Ed.2d 908. Pp. 63-64.

(b) In adopting the regulations at issue, the FCC explicitly stated its intent to continue its prior policy of exercising exclusive authority and of pre-empting state and local regulation, in order to address the potentially serious adaptability and cost problems created for cable system operators and consumers by technical standards that vary from community to community. Thus, this case does not turn on whether there is an actual conflict between federal and state law, or whether compliance with both federal and state standards would be physically impossible. Pp. 65-66.

(c) The FCC acted within its authority under the Cable Act when it pre-empted state and local regulation. In adopting the statute, Congress acted against a 10-year background of federal pre-emption on this particular issue and at a time shortly after *Crisp* approved FCC pre-emption in very similar respects. Nevertheless, Congress sanctioned in relevant respects the regulatory scheme that the Commission had already been following, without indicating explicit disapproval of the Commission's pre-emption of local technical standards. Given the difficulties the FCC had experienced with inconsistent local standards, it is doubtful that Congress would have meant to overturn pre-emption without discussion or even any suggestion that it was doing so. To the contrary, the legislative history makes clear that the Cable Act was not intended to work any significant change. Thus, nothing in the Act compels the conclusion that the decision to pre-empt "is not one that Congress would have sanctioned." Pp. 66-70.

259 U.S.App.D.C. 191, 814 F.2d 720 (1987), affirmed.

WHITE, J., delivered the opinion for a unanimous Court.

Stephen J. McGrath, New York City, for petitioners.

Lawrence G. Wallace, Washington, D.C., for federal respondent, F.C.C.

H. Bartow Farr, III, Washington, D.C., for respondent, National Cable Television.

Justice WHITE delivered the opinion of the Court.

1

The Federal Communications Commission has adopted regulations that establish technical standards to govern the quality of cable television signals and that prohibit local authorities from imposing more stringent technical standards. The issue is whether in doing so the Commission has exceeded its statutory authority.

2

* This case deals with yet another development in the ongoing efforts of federal, state, and local authorities to regulate different aspects of cable television over the past three decades. See *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700-705, 104 S.Ct. 2694, 2700-2703, 81

L.Ed.2d 580 (1984); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 161-178, 88 S.Ct. 1994, 1996-2005, 20 L.Ed.2d 1001 (1968). With the incipient development of cable television in the 1950's and 1960's from what had been more generally known as community antenna television systems, the Federal Communications Commission began to assert regulatory authority in this area. See *CATV Second Report and Order,* 2 F.C.C.2d 725 (1966). In 1972, the Commission first asserted authority over technical aspects of cable television and devised technical standards to govern the transmission of broadcast signals by cable, though without pre-empting regulation of similar matters by state or local franchising authorities. *Cable Television Report and Order,* 36 F.C.C.2d 143, on reconsideration, 36 F.C.C.2d 326 (1972), aff'd *sub nom. American Civil Liberties Union v. FCC,* 523 F.2d 1344 (CA9 1975).1 Within two years, however, the Commission became convinced from its experience with conflicting federal and local technical standards that there is "a compelling need for national uniformity in cable television technical standards" which would require it to pre-empt the field of signal-quality regulation in order to meet the "necessity to rationalize, interrelate, and bring into uniformity the myriad standards now being developed by numerous jurisdictions." *Cable Television Report and Order,* 49 F.C.C.2d 470, 477, 480 (1974). The Commission explained that a multiplicity of mandatory and nonuniform technical requirements undermined "the ultimate workability of the over-all system," could have "a deleterious effect on the development of new cable services," and could "seriously imped[e]" the "development and marketing of signal source, transmission, and terminal equipment." *Id.* at 478-479.2

3

In 1984, the Court approved the pre-emptive authority that the Commission had asserted over the regulation of cable television systems. We held that in the Communications Act of 1934, Congress authorized the Commission "to regulate all aspects of interstate communication by wire or radio," including the subsequently developed medium of cable television, and that the Commission's authority "extends to all regulatory actions 'necessary to ensure the achievement of the Commission's statutory responsibilities.' " *Crisp, supra,* 467 U.S. at 700, 104 S.Ct. at 2701, quoting *FCC v. Midwest Video Corp.,* 440 U.S. 689, 706, 99 S.Ct. 1435, 1444, 59 L.Ed.2d 692 (1979). Although the state law that was invalidated in *Crisp* regulated commercial advertising on cable television, rather than the technical quality of cable television signals, the Court recognized that for 10 years the Commission had "retained exclusive jurisdiction over all operational aspects of cable communication, including signal carriage and technical standards." *Crisp, supra,* 467 U.S. at 702, 104 S.Ct. at 2702.

4

A few months after the Court's decision in *Crisp,* Congress enacted the Cable Communications Policy Act of 1984 (Cable Act or Act), 98 Stat. 2780, 47 U.S.C. §§ 521-559 (1982 ed., Supp. IV). Among its objectives in passing the Cable Act, Congress purported to "establish a national policy concerning cable communications" and to "minimize unnecessary regulation that would impose an undue economic burden on cable systems." 47 U.S.C. §§ 521(1), (6) (1982 ed., Supp. IV). The Act was also intended to "establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems" through procedures and standards that "encourage the growth and development of cable systems and which assure that cable

systems are responsive to the needs and interests of the local community." §§ 521(3), (2) (1982 ed., Supp. IV).

5

The Cable Act left franchising to state or local authorities; those authorities were also empowered to specify the facilities and equipment that franchisees were to use, provided such requirements were "consistent with this title." Cable Act, §§ 624(a), (b), 47 U.S.C. §§ 544(a), (b) (1982 ed., Supp. IV). Section 624(e) of the Cable Act provided that "[t]he Commission may establish technical standards relating to the facilities and equipment of cable systems which a franchising authority may require in the franchise." 47 U.S.C. § 544(e) (1982 ed., Supp. IV).

6

In 1985, the Commission promulgated regulations that would establish technical standards governing signal quality for one of four different classes of cable television channels and that would forbid local cable franchising authorities to impose their own standards on any of the four classes of channels. 50 Fed.Reg. 7801, 7802 (1985), 47 CFR pt. 76 (1986). The Commission eventually adopted a modified version of these regulations, which reaffirmed the Commission's established policy of pre-empting local regulation of technical signal quality standards for cable television. 50 Fed.Reg., at 52462, 52464-52465. The Commission found its statutory authority to adopt the regulations in § 624(e) of the Cable Act, 47 U.S.C. § 544(e) (1982 ed., Supp. IV), and in 47 U.S.C. §§ 154(i) and 303(r). 50 Fed.Reg., at 52466. Petitioners (the cities of New York, Miami, and Wheaton, and the National League of Cities) sought review of the regulations in federal court, where they contested the scope of the pre-emptive authority claimed by the Commission and insisted that franchising authorities could impose stricter technical standards than those specified by the Commission.

7

The Court of Appeals granted partial relief to petitioners. 259 U.S.App.D.C. 191, 814 F.2d 720 (1987). It noted that the Commission had adopted technical standards applicable to one class of cable television channels, but had left the other three classes of channels completely unregulated. It agreed with petitioners that the Commission had acted arbitrarily and capriciously when it did not adopt technical standards for the latter three classes of channels, yet prohibited local authorities from adopting such standards and ignored the apparent conflict between these actions and the language of the Cable Act. It therefore vacated this part of the rule and remanded to the Commission for further proceedings. The court's holding was unanimous on this point, and that part of its decision is not at issue here.3

8

The Court of Appeals divided, however, over the propriety of the Commission's technical standards that apply to the first class of cable channels and that pre-empt more stringent local regulations. The majority of the panel upheld pre-emption, ruling that Congress intended federal regulations like these to supersede local law and that the Commission acted within the broad

confines of the pre-emptive authority delegated to it by Congress when it adopted the regulations with respect to this one class of channels. One judge dissented, contending that the majority had sanctioned pre-emption without a clear manifestation of congressional intent, contrary to this Court's decisions. We granted certiorari, 484 U.S. 962, 108 S.Ct. 449, 98 L.Ed.2d 389 (1987), and we now affirm.

II

9

When the Federal Government acts within the authority it possesses under the Constitution, it is empowered to pre-empt state laws to the extent it is believed that such action is necessary to achieve its purposes. The Supremacy Clause of the Constitution gives force to federal action of this kind by stating that "the Laws of the United States which shall be made in Pursuance" of the Constitution "shall be the supreme Law of the Land." U.S. Const., Art. VI, cl. 2. The phrase "Laws of the United States" encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization. For this reason, at the same time that our decisions have established a number of ways in which Congress can be understood to have pre-empted state law, see *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 368-369, 106 S.Ct. 1890, 1898-1899, 90 L.Ed.2d 369 (1986), we have also recognized that "a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation" and hence render unenforceable state or local laws that are otherwise not inconsistent with federal law. *Id.*, at 369, 106 S.Ct. at 1898-1999.

10

This case involves the latter kind of pre-emption, and here the inquiry becomes whether the federal agency has properly exercised its own delegated authority rather than simply whether Congress has properly exercised the legislative power. Thus we have emphasized that in a situation where state law is claimed to be pre-empted by federal regulation, a "narrow focus on Congress' intent to supersede state law [is] misdirected," for "[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law." *Fidelity Federal Savings & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 154, 102 S.Ct. 3014, 3023, 73 L.Ed.2d 664 (1982). Instead, the correct focus is on the federal agency that seeks to displace state law and on the proper bounds of its lawful authority to undertake such action. The statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof. Beyond that, however, in proper circumstances the agency may determine that its authority is exclusive and pre-empts any state efforts to regulate in the forbidden area. *Crisp*, 467 U.S., at 700, 104 S.Ct. at 2700; *De la Cuesta, supra*, 458 U.S., at 152-154, 102 S.Ct., at 3022-3023. It has long been recognized that many of the responsibilities conferred on federal agencies involve a broad grant of authority to reconcile conflicting policies. Where this is true, the Court has cautioned that even in the area of pre-emption, if the agency's choice to pre-empt "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have

sanctioned." *United States v. Shimer,* 367 U.S. 374, 383, 81 S.Ct. 1554, 1560, 6 L.Ed.2d 908 (1961); see also *Crisp, supra,* 467 U.S., at 700, 104 S.Ct., at 2700.

III

A.

11

In this case, there is no room for doubting that the Commission intended to pre-empt state technical standards governing the quality of cable television signals. In adopting the regulations at issue here, the Commission said:

12

"Technical standards that vary from community to community create potentially serious negative consequences for cable system operators and cable consumers in terms of the cost of service and the ability of the industry to respond to technological changes. To address this problem, we proposed in the *Notice* to retain technical standards guidelines at the federal level which could be used, but could not be exceeded, in state and local technical quality regulations.

13

* * * * *

14

"After a review of the record in this proceeding, we continue to believe that the policy adopted in 1974 was effective, should remain in force, and is entirely consistent with both the specific provisions and the general policy objectives underlying the 1984 Cable Act. This pre-emption policy has constrained state and local regulation of cable technical performance to Class I channels and has prohibited performance standards more restrictive than those contained in the Commission's rules. The reasons that caused the adoption of this policy appear to be as valid today as they were when the policy was first adopted." 50 Fed.Reg., at 52464.

15

As noted above, the policy adopted by the Commission in 1974, which was continued in effect by the 1985 regulations, was a pre-emptive policy applying in the area of technical standards governing signal quality. 49 F.C.C.2d, at 477-481. Since the Commission has explicitly stated its intent to exercise exclusive authority in this area and to pre-empt state and local regulation, this case does not turn on whether there is an actual conflict between federal and state law here, or whether compliance with both federal and state standards would be physically impossible. *De la Cuesta, supra,* 458 U.S., at 153, 102 S.Ct., at 3022.

B

16

The second part of the inquiry is whether the Commission is legally authorized to pre-empt state and local regulation that would establish complementary or additional technical standards, where it clearly is possible for a cable operator to comply with these standards in addition to the federal standards. We have identified at least two reasons why this part of the inquiry is crucial to our determination of the pre-emption issue. "First, an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency." *Louisiana Public Service Comm'n,* 476 U.S., at 374, 106 S.Ct., at 1901. The second reason was particularly relevant in *Louisiana Public Service Comm'n* because there we were obliged to assess the import of a statutory section in which Congress appeared to have explicitly limited the Commission's jurisdiction, so as to prohibit it from pre-empting state laws concerning the manner in which telephone companies could depreciate certain plant and equipment. *Id.,* 476 U.S., at 369-376, 379, 106 S.Ct., at 1899-1902, 1904, construing 47 U.S.C. § 152(b).

17

We conclude here that the Commission acted within the statutory authority conferred by Congress when it pre-empted state and local technical standards governing the quality of cable television signals. When Congress enacted the Cable Act in 1984, it acted against a background of federal pre-emption on this particular issue. For the preceding 10 years, the Commission had pre-empted such state and local technical standards under its broad delegation of authority to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter [the communications laws, Title 47 of the U.S. Code, Chapter 5]," as a means of implementing its legitimate discretionary power to determine what the "public convenience, interest, or necessity requires" in this field. 47 U.S.C. §§ 303 and 303(r); see also 49 F.C.C.2d, at 481; 47 U.S.C. § 154(i). The Court's decision in *Crisp,* which was handed down during the time Congress was considering the legislation that within a few months became the Cable Act, broadly upheld the Commission's pre-emptive authority in very similar respects. 467 U.S., at 701-705, 104 S.Ct., at 2701-2703.

18

In the Cable Act, Congress sanctioned in relevant respects the regulatory scheme that the Commission had been following since 1974. In § 624 of the Cable Act, Congress specified that the local franchising authority could regulate "services, facilities, and equipment" in certain respects, and could enforce those requirements, but § 624(e) of the Act grants the Commission the power to "establish technical standards relating to the facilities and equipment of cable systems which a franchising authority may require in the franchise." 47 U.S.C. §§ 544(a)-(e) (1982 ed., Supp. IV). This mirrors the state of the regulatory law before the Cable Act was passed, which permitted the local franchising authorities to regulate many aspects of cable

services, facilities, and equipment but not to impose technical standards governing cable signal quality, since the Commission had explicitly reserved this power to the Federal Government.

19

It is also quite significant that nothing in the Cable Act or its legislative history indicates that Congress explicitly disapproved of the Commission's pre-emption of local technical standards.[4] Given the difficulties the Commission had experienced in this area, which had caused it to reverse its ground in 1974 after two years of unhappy experience with the practical consequences of inconsistent technical standards imposed by various localities, we doubt that Congress intended to overturn the Commission's decade-old policy without discussion or even any suggestion that it was doing so. To the contrary, the House Report which discusses this section of the Act portrays it as nothing more than a straightforward endorsement of current law:

20

"Subsection (e) allows the Commission to set technical standards related to facilities and equipment required by a franchising authority pursuant to a franchising agreement. This provision does not affect the authority of a franchising authority to establish standards regarding facilities and equipment in the franchise pursuant to section 624(b) which are not inconsistent with standards established by the FCC under this subsection." H.R.Rep. No. 98-934, p. 70 (1984), U.S.Code Cong. & Admin.News, 1984, pp. 4655, 4707.

21

This passage from the House Report makes clear that the Act was not intended to work any significant change in the law in the respects relevant to this case. By noting that § 624(e) authorizes "the Commission to set technical standards related to facilities and equipment" and that it "does not affect the authority of a franchising authority to establish standards regarding facilities and equipment" that are not inconsistent with Commission standards, the House Report indicates both that Congress did not intend to remove from the Commission its longstanding power to establish pre-emptive technical standards, and that Congress did not intend to "affect the authority of a franchising authority" to set standards in these and similar matters regarding cable facilities and equipment. In particular, Congress did not manifest any intent to "affect the authority" of local franchising authorities by giving them the power to supplement the technical standards set by the Commission with respect to the quality of cable signals, a power which they generally had not been permitted to exercise for the last 10 years and which, according to the Commission's consistent view, disserves the public interest.[5] Petitioners insist that under § 624, as evidenced by the passage from the House Report quoted above, a franchising authority may specify any technical standards that do not conflict with Commission standards and hence may set stricter standards for signal quality. But this disregards the Commission's own power to pre-empt, an authority that we do not believe Congress intended to take away in the Cable Act. And it also disregards the Commission's explicit findings, based on considerable experience in this area, that complementary or additional technical standards set by state and local authorities do conflict with the basic objectives of federal policy with respect to cable television—findings that

the Commission first articulated in 1974 and then reiterated in 1986. See 49 F.C.C.2d, at 478-479; 50 Fed.Reg., at 52464-52465.

22

In sum, we find nothing in the Cable Act which leads us to believe that the Commission's decision to pre-empt local technical standards governing the quality of cable signals "is not one that Congress would have sanctioned." *Shimer,* 367 U.S., at 383, 81 S.Ct. at 1560.6 We therefore affirm the judgment of the Court of Appeals.

23

It is so ordered.

1

The "technical standards" established by the Commission describe, in quantitative terms, various electrical characteristics of the audio and video components of the signals delivered by the cable system to its subscribers, including such specific items as visual carrier frequency, aural center frequency, visual signal level, terminal isolation, and radiation and signal leakage. See 47 CFR §§ 76.601, 76.605 (1987).

2

Although the Commission recognized that "[t]he broad pre-emptive policy we are adopting today will ultimately affect all cable systems," 49 F.C.C.2d, at 480, it fashioned this policy to have a more gradual effect. Because "many of the pre-existing technical standards adopted by cities and states cannot be shown to adversely affect our stated goals," the Commission decided to extend a "grandfather" approval to those technical standards that were already operational or certified to the Commission by January 1, 1975. *Ibid.* In addition, a mechanism was established (and remains in effect) that allows state and local authorities to impose "different or additional technical standards" if they obtain a specific waiver from the Commission. *Id.,* at 480-481; see n. 5, *infra.*

3

At argument, petitioners contended that the question of the Commission's statutory authority to regulate these other three classes of cable channels is properly presented to the Court in this case. Tr. of Oral Arg. 5-7, 9-10. We disagree. The Court of Appeals explicitly failed to resolve this question because it agreed "with petitioner's alternative argument that the FCC's . . . rulemaking was arbitrary and capricious." 259 U.S.App.D.C. 191, 197-198, 814 F.2d 720, 726-727 (1987). The Court of Appeals' disposition with respect to these three classes of cable channels was to vacate those portions of the rule and to remand to the Commission for further proceedings. In their brief, moreover, petitioners refer specifically to "a vote of 2-1 [in] the Court of Appeals" in stating the questions presented, which was the disposition below only with respect to the one class of cable channels. Brief for Petitioners i.

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Petitioners argue that by empowering local franchising authorities to take into account whether "the quality of the operator's service, including signal quality . . . has been reasonable in light of community needs," 47 U.S.C. § 546(c)(1)(B) (1982 ed., Supp. IV), Congress implicitly recognized that local franchising authorities would need a comprehensive set of additional technical standards in order to carry out this task. Yet this argument simply ignores the fact that local authorities are able to assess signal quality against the technical standards set by the Commission, which it has found are adequate to ensure "an acceptable quality of service at the worst subscriber location and thus a better quality of service to the average subscriber." 50 Fed.Reg. 52462, 52463, n. 2 (1985).

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Petitioners and other state and local authorities remain free, of course, to petition the Commission for an individualized waiver that would permit them to "impose additional or different requirements," which they may seek to obtain by demonstrating that particular local conditions create special problems that make the federal technical standards inadequate. See 47 CFR § 76.7 (1987).

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Since we conclude that the Commission is authorized under § 624(e) of the Cable Act to pre-empt technical standards imposed by state and local authorities, we need not also consider whether the Commission retains the same broad pre-emptive authority in the area of cable television under §§ 4(i) and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303, that it had exercised before the Cable Act was enacted in 1984. In adopting the regulations at issue here, the Commission claimed to possess statutory authority under those two sections of the Communications Act as well as under the new Cable Act. 50 Fed.Reg., at 52466. Petitioners claim that the Cable Act withdrew such authority from the Commission, and their claim draws some support from new language in 47 U.S.C. § 152(a) (1982 ed., Supp. IV), which states that "[t]he provisions of [the Communications Act] shall apply with respect to cable service . . . as provided in [the Cable Act]." On the other hand, the House Report suggests that this language is merely a more explicit grant of "exclusive jurisdiction" to the Commission over specified aspects of cable service, see H.R.Rep. No. 98-934, pp. 95-96 (1984), U.S.Code Cong. & Admin.News 1984, pp. 4732, 4733, which settles matters that had occasionally been in dispute. In addition, § 303 of the Communications Act continues to give the Commission broad rulemaking power "as may be necessary to carry out the provisions of this chapter," 47 U.S.C. § 303(r), which includes the body of the Cable Act as one of its subchapters. But since in any event the Commission possesses statutory authority to adopt the regulations at issue in this case under § 624(e) of the Cable Act, we do not decide whether the Commission's actions are authorized on this alternative basis as well.

HB 8 Conceptual Amendment – Adopted in HJUD 02.16.11

Delete page 2, lines 22 through line 29:

Insert

"(h) If the attorney general finds that a federal regulation or presidential executive order has the effect of preempting state law and that the regulation or order is unconstitutional or was not properly adopted, the attorney general shall report the findings to the chairs of the house and senate committees having jurisdiction over judicial matters. The report must include"