

TESTIMONY  
VICKIE SUTTON  
PAUL WHITFIELD HORN PROFESSOR OF LAW,  
TEXAS TECH UNIVERSITY SCHOOL OF LAW  
BEFORE THE COMMITTEE ON STATE AFFAIRS  
CHAIRMAN, SENATOR ROBERT DUNCAN  
PUBLIC HEARING  
9:00 AM, MONDAY, DECEMBER 10, 2012

State sovereignty was at the heart of the controversy to ratify the U.S. Constitution, and the Tenth Amendment was the solution to ensure that states were empowered to respond where the people lived, not be governed by a remote centralized and powerful government. That same idea persisted from the Articles of Confederation to the Constitution. Agreement to ratify the U.S. Constitution was based on the promise that a Bill of Rights including the Tenth Amendment concept would be passed later. Fortunately, they were all true to their promises and that may be the biggest miracle of the Constitution. Here is the text of the Tenth Amendment: "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."

Some Constitutions like the Canadian one, expressly describes the powers of the provinces and dictate that all other powers are held by the federal government. The corollary is true for the U.S. Constitution. The powers of the federal government are expressly described, while all other powers "not delegated" to Congress belong to the states or the individuals. The list of enumerated powers of the federal government is in Art. 1, Sec. 8:

**U.S. Const., Art. 1, Section 8**

- 1: The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;
- 2: To borrow Money on the credit of the United States;
- 3: To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;
- 4: To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;
- 5: To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;
- 6: To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;
- 7: To establish Post Offices and post Roads;
- 8: To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;
- 9: To constitute Tribunals inferior to the supreme Court;
- 10: To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;
- 11: To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
- 12: To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

- 13: To provide and maintain a Navy;
- 14: To make Rules for the Government and Regulation of the land and naval Forces;
- 15: To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
- 16: To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;
- 17: To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;--And
- 18: To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

### **Federal Powers that can Limit State Sovereignty**

Federalism is the model which describes the shared powers of state, tribal and federal governments. To be workable, the structure of the Constitution provides for the balance of powers between governments, with an objective of limited federal powers. I will focus on the federal powers that limit state sovereignty and some of the approaches for avoiding federal encroachment on state sovereignty.

In the Constitutional structural design, the powers of Congress which can limit state sovereignty are (1) the Commerce Clause authority; (2) the taxing and spending power; (3) the Supremacy Clause and its power of preemption; (4) intergovernmental immunities; and (5) treaty power. These powers can be used with the “necessary and proper clause” and similarly with the “general welfare” clause in the preamble.

#### **Commerce Clause Power**

From the early 1900s to 1936, with the action by the federal government to attempt to reach nationwide problems, state sovereignty was challenged in areas of labor law and commercial activity, but the court limited Congress’s power. *Hammer v. Dagenhart* (1918) and *Schechter Poultry v. United States* (1935) were successful challenges to limit federal expansion of power. However, after 1936 and President Roosevelt’s New Deal, the expansion of federal power began, and in the most unusual of actions by the U.S. Supreme Court, it overruled *Dagenhart* in *United States v. Darby* (1941) giving the federal government control over labor standards. Then in the landmark case, *Wickard v. Filburn* (1942), the court upheld the federal statute which prohibited the practice of home grown wheat on the basis that it had an effect on interstate commerce about which Congress could regulate. The 1960s with civil rights legislation and the landmark case *Heart of Atlanta Motel, Inc. v. United States* (1964) found that for example, the interstate sale of bread was affected by the racially discriminatory actions of hotel managers, upholding the enforcement of the Civil Rights Act of 1964 against individuals, based on Commerce Clause power. Even the Mann Act prohibiting the interstate transport of women by men, which clearly was admittedly legislating to remedy a moral wrong, was based on the Commerce Clause. It seemed that the U.S Supreme Court found no set of facts that would limit Congress’s power to infringe on state sovereignty based on the expansive definition of the

Commerce Clause. This continued until 1995 in *United States v. Lopez* where the U.S. Supreme Court found that Congress had exceeded its authority when it legislated the possession of guns within a particular zone of school districts and the federal law was found to be unconstitutional. This was the beginning of a new era in Commerce Clause jurisprudence. It was followed by *United States v. Morrison* (2000) which found unconstitutional the federal civil remedy for the victims of gender-motivated violence, finding it too removed from having a substantial effect on interstate commerce.

The interpretation of the Commerce Clause, finding a “dormant Commerce Clause” power tested the limits of state power to legislate where legislation or actions placed a burden on interstate commerce. State laws which were determined to burden interstate Commerce were found to be unconstitutional based on Commerce Clause power. Further, the court found that just because the federal government had not regulated in a particular area, which did not mean that it was up for jurisdictional capture by states to regulate and fill any gap.

The shift in federalism which saw the passage of federal environmental legislation of the 1970s and 1980s was all based on Commerce Clause authority. When *United States v. Lopez* signaled a shift in now reigning in Congress’s Commerce Clause authority, several environmental statutes were challenged including the Clean Water Act, wetlands section which had reached into areas that were traditional state property law areas. However, the court did not find any of these statutes to exceed Congress’s authority under the Commerce Clause.

An area of traditional state authority which has seen great expansion of federal control is the forced acceptance by states of hazardous waste despite the state’s legitimate and traditional role in rejecting it based on public health and safety governmental purposes, a traditional state authority, beginning a line of cases with *Philadelphia v. New Jersey* (1978). The U.S. Supreme Court held that this unconstitutionally burdens interstate commerce, and that one state’s hazardous waste could not be distinguished from another state’s hazardous waste. I would propose that if a state could make this distinction, for example with a unique treatment requirement, it would present a formidable obstacle to finding that the state could not limit the flow of hazardous waste from other states into its jurisdiction.

## **Taxing and Spending Power**

Taxing and spending power has been recognized as a “necessary and proper” means to enforce its regulatory powers as a way to raise revenue which carries out its powers. It was not until the federal power based on the Commerce Clause began to be reined in by the U.S. Supreme Court, did the federal government turn to the taxing and spending power with renewed importance.

The most important case to use the taxing power was in the U.S. Supreme Court’s interpretation of the Patient Protection and Affordable Care Act as a tax, despite the text of the Act itself describing the payment as a penalty against the individual who failed to obtain health insurance, in *National Federation of Independent Business v. Sebelius* (2012). This is a landmark opinion in part because of its focus on *mandating* an activity, rather than *regulating* an activity. But even more unusual is that the basis is the Necessary and Proper Clause as “necessary” to the Act’s insurance reforms, but arguably not a “proper” exercise of power.

The spending power was limited in *United States v. Butler* (1946) to use the grant of power to tax and spend for the general national welfare by confining those legislative activities

to the enumerated powers of Congress. This Act sought to raise farm prices by reducing supply and collected benefit payments to the farmers from a tax on processors of that commodity. This, the court opined, was not among the enumerated powers.

The case which draws the line between constitutional power and coercion is where the federal government power relies on the dependency on federal grants. In *South Dakota v. Dole* (1987), the federal government used what some might call coercion to compel states to comply with a federal requirement to limit the age for purchase or public possession of alcoholic beverages to twenty-one. Failure to pass legislation to effect this standard would result in the withholding of 5% of federal highway funds to the state. The U.S. Supreme Court held that the spending power must be in pursuit of the general welfare and for one of the main purposes of highway funds – safe interstate travel. The Court opined that “the spending power may not be used to induce the States to engage in activities that would themselves be unconstitutional,” and concluded that making the drinking age 21 would not violate the constitutional rights of anyone.

So what is coercion? The fact that the withholding of funds which amounted to 5% of total highway funds seemed to factor into the weakness of any perceived coercion.

### **The Supremacy Clause and Preemption**

The Supremacy Clause stands alone as a federal power to regulate in areas with a national scope or purpose. Preemption occurs where state laws interfere with federal laws and one of three conditions exist: (1) federal legislation expressly intends to preempt state law; (2) federal law preempts state law whenever there is a conflict; and (3) federal law preempts state law, even if the federal law conflict does not exist, if the federal law has manifested the intent to occupy the field in which it is regulating.

### **Intergovernmental immunities**

A line of U.S. Supreme Court cases attempted to draw a line between activities that are regulated by the federal government and those by the state government, where the activities are traditionally in the area of state government. In *Garcia v. San Antonio Metropolitan Transit Authority* (1985), the U.S. Supreme Court upheld federal labor standards against a local municipality; abandoning the “traditional” state activity standard. The test to emerge seems to be whether the action of the federal government is “destructive to state sovereignty” and abandoned the criteria for traditional state activities. The Court opined that this expanded power of the federal government to regulate in areas that may have been state activities was a process because of the changing activities of states.

### **Treaties as Congressional Power to limit State Sovereignty**

The landmark case for this power is *Missouri v. Holland* (1920), and is worth discussing because as one power may become more limited, another power may become useful to Congress. Such may be the case for the future of using treaties as Congressional powers. Art. 6 declares treaties to be the law of the land, requiring Senate ratification, and authorizes Congressional

implementation through the “necessary and proper” means to implement those powers. In *Missouri v. Holland*, Congress sought to implement the Migratory Bird Treaty, which required imposing protection of the birds on state sovereign jurisdiction over the land where the birds flew. While the court raised concerns about the Tenth Amendment, they found nothing about the Tenth Amendment that would forbid this Congressional action. The court opined that as long as the treaty did not give Congress the power to do something it could otherwise not do, then implementing the treaty, if a legal one, was within the power of Congress. With the increasing participation of the United Nations in international law and the adoption of international law in opinions by the U.S. Supreme Court, this may be another power on the horizon for Congressional empowerment.

## **Conclusion**

The Tenth Amendment jurisprudential law has interpreted the Tenth Amendment to be a weak protection to state sovereignty where the question asked is not, whether state sovereignty is infringed by this legislation; but rather the question the courts are asking is the corollary --- whether anything in the Tenth Amendment forbids the legislation. This is probably the wrong question since the Tenth Amendment is not a prohibitory, proscriptive directive.