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Reclaiming the Constitution: Towards An Agenda for State Action

November 2010
by Ted Cruz &
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Center for Tenth Amendment Studies
Texas Public Policy Foundation

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Reclaiming the Constitution: Towards An Agenda for State Action

by Ted Cruz & Mario Loyola

Executive Summary

The steady expansion of the federal government since the early 20th century has arrived at a crisis point. The federal government is pushing further and further into areas of traditional state governance—and intruding deeper into our lives. This threat to liberty—one that James Madison thought the several States would be strong enough to resist—is now apparent to millions of Americans.

This first publication of the Texas Public Policy Foundation's Center for Tenth Amendment Studies shows that waves of assault on the constitutional constraints meant to limit federal power, combined with the relentless expansion of the federal bureaucracy, has led to a steady erosion of the constitutional constraints on federal power—raising the very dangers to self-government and individual liberty that the Framers feared might lead to tyranny. Though the Federalists—advocates of a strong national government—expected that the States would retain more than enough power and scope to enforce the constitutional limitations on the federal government, the dawn of the industrial age, and America's rise to Great Power status abroad by the start of the 20th century opened the door to an era of steadily expanding federal power.

In recent years, the federal government has been particularly aggressive in its intrusions into Tenth Amendment rights, pushing the scope of federal regulation to the limits of what courts are likely to uphold in areas such as health care, environmental regulation, and control of the purse strings.

In coming months, the Center for Tenth Amendment Studies will work with partners across the country to develop an Agenda for State Action. The Agenda for State Action will explore tools that States can use to stop federal overreach and restore the Constitution's limits on government power.

- Interstate Compact for Health Care Reform
- Constitutional Amendment to Balance the Budget and Limit the Taxing Power
- Opting out of Federal Programs and Federal Funds
- State Lawsuits against the Federal Government
- Federal Legislation

Introduction: Why the Tenth Amendment Matters

For more than a hundred years, the federal government has been expanding its power and reach. The steady concentration of power in Washington has been accompanied by a steady intrusion into areas of state authority that the Framers assumed the federal government would never be involved in. In the Framers' conception of democracy, state-based self-government and individual liberty went hand in hand. It was for this reason that they insisted on a federal government of strictly limited powers. They enshrined this ideal in the Tenth Amendment of the Constitution: "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."

Today the expansion of the federal government proceeds at an unprecedented pace. The current administration has launched what many Americans see as an inevitable federal takeover of health care. It has undertaken environmental regulatory actions of historic sweep, seeking to regulate manifold areas of traditional state jurisdiction, and smothering less-favored industries in regulatory uncertainty. It has unleashed the greatest explosion in federal spending and borrowing in our history.

These policies not only endanger our economic future—they also erode the constitutional constraints that were meant to shield local self-government and individual liberty from the dangerous accumulation of power in Washington. That is why the balance between state and federal powers matters. That is why the Tenth Amendment matters.

The Tenth Amendment is more than a legal construct. It is an expression of the American tradition of self-governance. The propensity to self-organize spontaneously at the local level to solve problems that had been observed by Alexis de Toqueville—

and felt so painfully by the British Army—was essential to American democracy. The Constitution had been designed to protect it, not supplant it. And while a respect and deference to state authority both predated and was implied in the Constitution itself, in the end the Tenth Amendment was deemed necessary to assure that self-governance would never give way to tyranny. In this sense, the Tenth Amendment, coming at the end of the Bill of Rights, was something of a summation of the Framers' whole notion of American democracy—and a salutary warning that those powers granted to the federal government needed to be kept strictly limited within the Constitution's constraints, or else the States and individuals who formed the Union, and the Union itself, would be imperiled. That is also why the Tenth Amendment matters.

This paper will (I) survey the Constitution's vanishing constraints on federal power, (II) examine the main areas of the federal assault, and (III) suggest possible ways of stopping and rolling back the federal government's overreach, and reclaiming our Constitution of limited government by a free people.

Part I: The Constitution's Vanishing Constraints

Our Constitution has withstood the test of time. But the Framers' original design, in which States would protect and nurture the American tradition of self-governance, and federal power would be used only for limited ends, has been undermined. Waves of assault on the constitutional constraints meant to limit federal power, combined with the steady expansion of the federal bureaucracy, have led to a progressive consolidation of power at the federal level. A brief survey of key issues in current constitutional law reveals that the original framework of federalism has grown fragile, and in some ways has substantially collapsed.

The Framers' Vision: Active State Sovereignty and Limited Federal Government

After the Constitutional Convention in Philadelphia in 1787, the Framers returned to their homes to engage in debates centered on the state ratification conventions that would now decide the fate of the proposed Constitution. Three prominent Federalists—John Jay, Alexander Hamilton, and the proposed Constitution's principal author, James Madison—published a series of essays in defense of the proposed Union, which came to be known as the Federalist Papers. Motivated by a deep concern for internal order and public safety, the Federalists argued that the proposed Constitution would pose no danger to individual liberty or to self-government in the States.

As James Madison wrote in Federalist No. 45, “the States will retain, under the proposed Constitution, a very extensive portion of active sovereignty,” chiefly through the specific enumeration of limited powers for the federal government:

The powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

For this reason, and a host of others that Federalist No. 45 was meant to catalogue, “[t]he State government will have the advantage [over] the Federal government.” Hence the Federalists—advocates of a strong national government—expected that the States would retain more than enough power and scope to enforce the constitutional limitations on the federal government.

This conception lasted well into the 19th century. In 1824, the Supreme Court held in the famous case of *Gibbons v. Ogden* that navigation and commerce across state lines fall within the federal government's power to regulate commerce “among the several States, with foreign nations, and with the Indian tribes.” *Gibbons* stands for the principle that “the sovereignty of Congress, though limited to specific objects, is plenary as to those objects.” But Chief Justice John Marshall shared James Madison's vision of the federal system: their view of a federal government of plenary authority within its enumerated powers was predicated entirely on their foundational assumption that those powers would be few and limited, and that States would remain the major agents of regulation and self-government. “It is not intended to say,” wrote Marshall for the Court, “that [the Commerce Clause] comprehended that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does extend to or affect other States. Such a power would be inconvenient and is certainly unnecessary.”

Focusing on the word “among,” the Court explained, “[t]he phrase is not one which would probably have been selected to indicate the completely interior traffic of a State.” In other words, if Congress was supposed to be able to regulate all commerce, there was no reason for the Constitution's drafters to qualify the word “commerce” with the phrase “among the several States.” The Court continued:

The genius and character of the whole government seem to be that its action is to be applied to all the external concerns of the Nation and to those internal concerns which affect the States generally; but not to those which are completely within a particular state, which do not affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself.

In *Gibbons* the Supreme Court observed that “inspection laws, quarantine laws, health laws of every description, as well as law for regulating the internal commerce of a State” were but a few examples “of that immense mass of legislation” not surrendered to the federal government. “No direct power over these objects is granted to Congress,” Marshall observed, “and, consequently, they remain subject to State legislation.” It was only because they were so sure of the stringent limitations on the *scope* of federal power, and the preeminence of States with respect to most areas of legislation, that Marshall, and the Federalists generally, felt so confident asserting the *supremacy* of federal law within its domain.

The Modern Expansion of the Federal Government

In Virginia’s ratification debates, Patrick Henry, a leader of the anti-Federalist movement, railed against the proposed Constitution: “To all common purposes of Legislation it is a great consolidation of Government.”¹ The Federalists agreed that a general consolidation of power would be dangerous and potentially tyrannical. But they saw little risk that would happen, given the power of the States and the many “advantages” Madison thought they would have over the federal government.

For most of the early history of the Republic, the Federalists proved right—the States were able to frustrate the concentration of power in federal hands. During the rest of the 19th century, the commerce power was relied on not to justify the exercise of federal power, but rather to strike down state laws that *discriminated* against interstate commerce. The idea was that States were “preempted” from regulating within areas of exclusive federal regulatory power, such as interstate commerce.

But the cataclysm of the Civil War, the dawn of the industrial age, and America’s rise to Great Power status abroad by the start of the 20th century, greatly increased the scope and power of the federal government. The reconstruction amendments (amend-

ments 13, 14, and 15, ratified between 1865 and 1870); along with Progressive Movement amendments to permit a federal income tax and direct election of U.S. senators (amendments 16 and 17, respectively, both ratified in 1913) all set the stage for a dramatic expansion of federal power in the 20th century.

At the dawning of the 20th century, the Supreme Court was still a major obstacle to federal overreach. But then came the ambitious legislative initiatives of the Progressive Era and the New Deal, which President Roosevelt bolstered at the start of his second term in 1937 with a threat to increase the size of the court by adding pro-New Deal justices. Intimidated, the Supreme Court acquiesced in the New Deal legislation, and began to steadily demolish almost all meaningful limits on the federal government’s power to regulate commerce. The doctrine that anything with a “direct effect” on interstate commerce could be regulated under the federal commerce power was replaced by a rule allowing regulation of anything with a “substantial effect” on commerce (even if indirect). Then came the doctrine that anything which, if “aggregated” across the Nation, had a “substantial effect” on interstate commerce, was properly within the federal commerce power.

Almost any human activity can be said to have a substantial effect on interstate commerce, if you aggregate every instance of it across the country into a whole class of activity. The post-New Deal Supreme Court cases all but erased the limits on the Commerce Clause. Now there was virtually nothing the federal government couldn’t regulate. The fear of the Anti-Federalists now appeared justified: If the power to regulate virtually all human activity had been granted to the federal government in the simple phrase “commerce among the several States,” what was left for the States or for the people? And the federal government has been expanding relentlessly ever since, growing from a 19th century average of 4 percent of GDP to a peacetime peak of 27 percent in 2010.

Constitutional Constraints Today

The battle against unconstrained federal supremacy continues in federal courts, and recent years have given at least some ground to hope for a more originalist approach to the Constitution and a government of limited powers. The following survey of these “constitutional law” issues is useful to lay the groundwork for the rest of this paper.

Commerce Clause

Perhaps the most important power granted to Congress (though the Framers did not intend this to be the case) has turned out to be the power “To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.” As has been widely noted, the principal motivation for granting this power to the federal government was the concern that individual States might erect tariff barriers, and thereby discriminate against interstate commerce. During the 19th century, the Commerce Clause was invoked chiefly to overturn state laws that discriminated against interstate commerce. But as late as the early 20th century, the Supreme Court was unwilling to allow this power to reach commercial activity that was purely intrastate.

But starting in 1914, the Supreme Court began to embrace an ever-widening interpretation of the Commerce Clause. In the *Shreveport Rate* cases, the Court articulated a novel basis for intruding on purely intrastate commerce: Where interstate and intrastate commerce were so mingled that regulation of interstate commerce required incidental regulation of intrastate commerce, the activity fell within the commerce power, because of their “close and substantial relation.” As it happened, the victim of this first expansion of federal commerce power was Texas: the Court had ruled that the federal government could regulate the fees charged by a railway between Dallas and Marshall, Texas. The law protected those purely intrastate carriers who faced penalties for disobeying the regulations of the Texas Railroad Commission in order to comply with federal mandates.

In the 1935 case of *Schechter Poultry v. U.S.*, the Court once again asserted its role as a powerful guardian of constitutional constraints, striking down federal regulation of labor conditions in a purely intrastate business because the activity in question bore only an “indirect” relation to interstate commerce. The Court reasoned that otherwise “there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government.”

The Court was no doubt correct about the looming danger of unlimited federal power and “a completely centralized government,” but the political winds were blowing against it. FDR won a landslide reelection in 1936, and in an address to Congress in early 1937 threatened to pack the Supreme Court with additional justices, implicitly warning that if the Court did not acquiesce in his New Deal legislation, he and the Congress would break its power. The Supreme Court reacted that very year, in the case of *NLRB v. Jones & Laughlin Steel Corp.*, by casting aside the categories of direct and indirect effects, and holding instead that Congress could regulate activities that “have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions” in state law.

With that, the Court opened the door to all but eliminating the Constitution’s constraints on federal power exercised under the Commerce Clause. The stage was now set for the 1942 decision of *Wickard v. Filburn*, in which the Supreme Court held that a farmer’s private cultivation of wheat for purely personal use on his own farm could nevertheless be regulated pursuant to the Commerce Clause, because any activity which, in the aggregate across the Nation, could have a substantial effect on interstate commerce, was properly within the power to regulate commerce “among the several States.” If this purely personal activity affected interstate commerce, then every activity falls within the power of the federal government. *Wickard* expanded the Commerce Clause to

its outermost limits—so much so, indeed, that it arguably made the other enumerated powers of the Article I, Section 8 superfluous. If the Framers had intended to grant the federal government a power to regulate commerce as expansive as that defined in *Wickard*, there was no need to enumerate so many other powers in addition to the Commerce Clause. Why specifically authorize Congress to create a Post Office (Art. I, Section 8, cl. 7), or regulate bankruptcies (Art. I, Section 8, cl. 4), or protect patents and copyrights (Art. I, Section 8, cl. 8) if anything that in the national aggregate might have an effect on commerce—as all of those surely do—could be regulated already under the Commerce Clause?

It was not until nearly 60 years later that the Supreme Court once again struck down a law of Congress as an impermissible exercise of the commerce power. In *U.S. v. Lopez* (1995) the Court took up the Gun-Free School Zones Act, which made it a federal offense to carry a firearm in a school zone. The majority opinion, by Chief Justice William Rehnquist, rests on previous Commerce Clause cases to demonstrate that there were indeed some limits to what the federal government could regulate pursuant to the commerce power. The impact of the opinion was limited, however, by the majority's desire to stay within existing precedents, which after *Wickard* left very little room for defining meaningful limits to the commerce power. Some commentators have noted that the opinion stands for the simple proposition that there must be *something* Congress cannot regulate under the commerce power, and that the possession of handguns in a school zone must be in that category.

The concurring opinion by Justice Clarence Thomas has received considerable attention because it urges returning to the original understanding of the Framers, and of the *Gibbons* Court in 1824. Justice Thomas relied on contemporary texts such as the Federalist Papers to show that “agriculture, commerce, manufactures,” etc., were considered to be separate endeavors. He pointed out that “if Congress had been given authority over matters that

substantially affect interstate commerce” (as the controlling precedents have ruled) then most of the other enumerated powers in the Constitution were superfluous, because almost everything “substantially affects” interstate commerce, especially in the aggregate. “An interpretation of [the Commerce Clause] that makes the rest of [the Constitution's enumerated federal powers] superfluous simply cannot be correct.” Under *Wickard*, wrote Justice Thomas, “Congress can regulate whole categories of activities that are not themselves either ‘interstate’ or ‘commerce’ The aggregation principle is clever, but it has no stopping point.”

Some commentators have gone even further. Michael Greve, of the American Enterprise Institute, writes, “there is no way to squeeze *Wickard* or any Commerce Clause case after it into the intellectual framework of enumerated powers. If Congress may aggregate trivial activities into ‘substantial effects,’ it may regulate virtually anything; if it may not do so, it is prohibited from regulating most of the things it now regulates.”

In *U.S. v. Morrison* (2000) the Supreme Court again struck down a federal law, this time a provision of the Violence Against Women Act. Chief Justice Rehnquist, writing for the same majority that had decided *Lopez*, wrote “[gender]-motivated crimes of violence are not [economic] activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.” He went on to say that the “concern we expressed in *Lopez* that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority seems well-founded.” He concluded, “the Constitution requires a distinction between what is truly national and what is truly local. In recognizing this fact we preserve one of the few principles that have been consistent since the Clause was adopted.”

Five years later, however, in *Gonzalez v. Raich* (2005), the Supreme Court seemed to retreat from its reinvigoration of the Commerce Clause, and it has not revisited the issue since then.

As the crisis of 1937 shows it is difficult for the Supreme Court to uphold constitutional constraints against federal power when the President, Congress, and popular opinion are all against it. The Supreme Court is not supposed to be a political branch, but its perceived legitimacy is vital to the rule of law, and that legitimacy depends on political consensus. In other words, in our democratic republic, even the Supreme Court ultimately derives its power from the people. The other side of the coin is that the better Americans understand the vital importance of a federalist framework in the Constitution, the more strongly they yearn for a return to the Constitution's founding principles, and the easier it will be for the Supreme Court to reassert its role as guardian of enumerated powers constraints.

Disentangling nearly 100 years of Commerce Clause precedent is a tall order, but *Gibbons v. Ogden* might offer a way forward. Chief Justice Marshall's opinion in *Gibbons* has been often quoted for the proposition that the federal government's power is supreme and complete within its enumerated powers. This observation was entirely predicated on Marshall's basic understanding of federalism, in particular the stringent constraints on federal power, which restricted its scope to just a few areas of regulation, and left the "great mass" of legislation to the States. A more complete reading of *Gibbons* could help guide the Supreme Court back to the original understanding of the commerce power. Defining the Commerce Clause should not be just a matter of defining the scope of "interstate commerce" from the point of view of federal power; equally important is the other side, the great mass of regulation that is not interstate commerce and was meant to be left to the States. The Supreme Court has had trouble devising a precise definition of what interstate commerce is partly because it stopped focusing on what it *isn't*—namely those things that were meant to be left to the States.

As Michael Greve argues, the Court must reclaim its role as guardian of constitutional constraints on federal power. It can take its cue from the people, and their desire to return to a more decentralized and responsive system. This desire underpins the promise of a constitutional renaissance now sweeping the Nation.

Federal Funds for States and the Spending Clause

In the years following the Great Depression, agricultural production boomed worldwide, leading to a crash in agricultural commodities prices. Congress passed the Agricultural Adjustment Act of 1933—another unfortunate pillar of New Deal legislation—to "stabilize" agricultural production through price controls. The Act imposed a tax on the production of certain agricultural commodities, the proceeds of which were to subsidize farmers who agreed to restrict their production. In the 1936 cases of *U.S. v. Butler*, the Supreme Court struck down the law, noting, "At best it is a scheme for purchasing with federal funds submission to federal regulation of a subject reserved to the States."

But, signaled the Court, "the power of Congress to authorize expenditure of public moneys for public purposes is not limited the direct grants of legislative power found in the Constitution." Thus was laid to rest a dispute that had existed since Alexander Hamilton and James Madison clashed over the issue during ratification. The first clause of Article I, Section 8 of the Constitution provides that "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts, and Excises shall be uniform throughout the United States." Madison thought that this taxing power could only be used for a purpose that fell within one of the other enumerated powers of the federal government, but Hamilton disagreed. Hamilton thought that the taxing clause was an independent grant of power, and that it could be used for any public purpose. In *Butler*, the Supreme Court adopted Hamilton's view.

Perhaps the purest Tenth Amendment cases in constitutional law have to do with congressional enactments that “commandeer” instrumentalities of state government.

The power to appropriate for the “general Welfare” was thus given the widest possible interpretation, another example of the New Deal Supreme Court’s deference to the expansion of federal power.

The practice of providing federal funds to the States with conditions and mandates attached has been challenged because of the potential for subverting state government and policies to federal ends—an obvious danger to state and local authority. Two years after *Butler*, the Supreme Court ruled in *Steward Machine Co. v. Davis* that the Social Security Act could impose a tax on certain employers and provide a 90 percent credit if they contributed to their state’s unemployment fund. The Court reasoned that while economic coercion was impermissible, “encouraging” state compliance with federal policy goals did not run afoul of the Constitution.

In *South Dakota v. Dole* (1987) the state of South Dakota challenged a federal law that empowered the Secretary of Transportation to withhold five percent of federal highway funds allocated to a state that refused to raise its drinking age to 21. South Dakota argued that the statute violated both 21st Amendment (repeal of prohibition) and the Spending clause.

Chief Justice Rehnquist’s majority opinion upheld the statute, but did set out several markers for proper uses of the spending power. The funds must be appropriated for the “general Welfare;” conditions must be unambiguously stated in the law; conditions must be related to the federal interest sought to be advanced in the appropriation; the purpose must not be barred by the Constitution; and the condition must not rise to the level of economic coercion

such that refusing to comply with the congressional mandate would result in a prohibitive fiscal penalty. This last marker appears to offer the most promise of an effective protection of state authority and citizen sovereignty, and suggests that if the funds to be withheld had been significantly higher than five percent of the state’s allocation of federal highway funds, the condition may have been impermissible.

Justice Sandra Day O’Connor’s dissent argued that the law was an unconstitutional attempt to regulate the sale of liquor, and that there was not a “reasonable relation” to a permissible federal interest. She warned that if Congress can regulate activity within States with such an attenuated relation to a federal interest, it can regulate in almost any area of a state’s social, political, and economic policies.

Subsequent lower-court rulings have shed further light on the import of *South Dakota v. Dole*. For example, the Fourth Circuit ruled against West Virginia in a challenge to a provision of the federal Medicaid program that requires States to recoup Medicaid expenditures from the estates of deceased beneficiaries. But the court nevertheless warned that a coercive law could theoretically violate the Tenth Amendment if it deprived States of any reasonable ability to regulate an area of traditional state authority that falls outside the federal government’s enumerated powers.

Two situations are generally thought to constitute violations of the Tenth Amendment through conditions attached to federal spending: First, where the federal government forces States to impose substantial burdens on citizens, and second, where it specifically requires some specific form of political or institutional structure for state or local government. Thus, conditions and mandates attached to federal funds could run afoul of the “commandeering” doctrine of the Supreme Court’s federalism jurisprudence.

Commandeering

Perhaps the purest Tenth Amendment cases in constitutional law have to do with congressional enactments that “commandeer” instrumentalities of state government. The “commandeering” doctrine offers

additional grounds for hoping that the Supreme Court will vindicate local authority and roll back federal overreach. In *New York v. U.S.* (1992) the Court struck down a federal law that required States to take title to nuclear waste. In *Printz v. U.S.* five years later, the Court struck down a part of the Brady Act that required States to conduct background checks on prospective gun purchasers.

These cases do not rely on enumerated powers constraints as a basis for decision. Thus, they did not address general federal authority to regulate either nuclear waste or gun purchases. What the federal government cannot do, under *New York* and *Printz*, is to order instrumentalities of state and local government to serve as instrumentalities of the federal government.

As Michael Greve notes in *Real Federalism: Why It Matters, How It Could Happen* (1999), “what the Supreme Court *has* done is to elevate the Tenth Amendment into an extratextual, judge-made principle of intergovernmental immunity.” Greve argues that the “genius” of Justice Scalia’s majority opinion in *Printz* is to locate that intergovernmental immunity in the “structure” of the Constitution:

First Justice Scalia explains that the Constitution establishes a system of “dual sovereignty,” wherein the States and the national government occupy separate “spheres.” The Tenth Amendment is only one of the indicia of federalism so understood. Second, Justice Scalia maintains that the congressional commandeering of state and local officers would undermine the federal executive: by dragooning state and local officers into federal law enforcement, Congress could subvert and circumvent the President’s constitutional authority to ensure the faithful execution of the law. Third, Justice Scalia argues that Congress lacked the constitutional authority to enact the background check requirements under, of all things, the Necessary and Proper Clause of the Constitution, which empowers Congress to “make all laws which

be necessary and proper” to the enforcement of its delegated powers. A law that presses state and local officers into federal service, Justice Scalia maintains, cannot be “proper.” Each of these three claims points beyond the seemingly limited holding in *Printz*. Each implies a notion of federalism, not as a mere protection of state immunity but as a direct constraint on the federal government.

Justice Scalia’s opinion takes aim at the danger of requiring States to enforce federal laws, particularly the danger of diminishing political accountability:

By forcing state government to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for “solving” problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects.

One promising area of Tenth Amendment jurisprudence is therefore what meaning can be attached to the word “proper” within the final clause of Article I, Section 8 of the Constitution, which grants Congress the power “To make all Laws which shall be *necessary and proper* for carrying into Execution the foregoing Powers.” To follow Justice Scalia’s opinion in *Printz*, a law that upsets the federalist structure of the Constitution by infringing on the “quasi-sovereign” status of States might not be “proper.”

Part II: Major Areas of Federal Infringement on Tenth Amendment Rights

The federal government has taken advantage of Supreme Court rulings to dramatically expand the scope of its intrusions into Tenth Amendment

rights. In recent years, the federal government has been particularly aggressive in this regard, pushing the scope of federal regulation to the limits of what courts are likely to uphold, apparently accepting the risk of judicial invalidation in some cases on the logic that some or most federal actions will survive judicial scrutiny. These actions tend to set precedents, and the precedents become the basis for future expansions, thereby continuing the steady erosion of the Constitution's constraints on federal power.

Health Care

The Patient Protection and Affordable Care Act of 2010 ("Obamacare") is a dramatic expansion of the federal government's reach into our daily lives, on an unprecedented scale. It has already begun to unleash a cascade of unintended consequences, including the fact that employers will be increasingly incentivized to stop providing health insurance for their employees. The legislation fixes few of the problems we face in health care, and in fact makes several of them markedly worse. It takes us further away from what should be the goal of health care reform, namely patient-driven, market-based, affordable and accessible health care in which health insurance is primarily a means of spreading the risk of catastrophic illness, rather than the cost of routine care.

Obamacare is an unconstitutional federal overreach and violation of Tenth Amendment rights, in at least two ways:

- **Individual Mandate.** The mandate that individuals purchase health insurance would be the first time that the federal government has required citizens to purchase a good or service as an exercise of the commerce power. Under *Lopez*, health insurance is neither a channel nor an instrumentality of interstate commerce, so the mandate would have to rest on the argument that health insurance is an activity that substantially affects interstate commerce. The mandate, tied to a penalty, may also violate the Due Process Clause of the Constitution.

- **Mandatory State Medicaid Expansion/Health Insurance Exchange.** Obamacare requires that States dramatically expand their Medicaid programs, and establish new health insurance markets to be regulated as utilities for the socialization of health care costs. As such, under *Printz*, Obamacare may well constitute a "commandeering" of state agencies and budgets because it turns them into instrumentalities of the federal government.

Environmental Regulations

Since their rise in the 1960s and 1970s, environmental standards adopted by the federal government and implemented chiefly by States have achieved enormous improvements in environmental quality. But over time, the main federal regulatory agencies in the environmental field have grown increasingly heavy-handed. With today's clean energy and environmental agenda, the field of environmental regulations has become a central front in the battle to preserve the Constitution's balance of federalism. Today, the Environmental Protection Agency and Department of Interior are using regulatory power to invalidate highly successful state programs that are entirely within the law; to accomplish climate-change policies that have been rejected by Congress; to create stifling regulatory uncertainty in those sectors of industry that compete with the goals of radical environmentalists; and to punish States that pursue a free-market, limited-government regulatory model. By expanding the scope of environmental regulation to the very limits of what courts will allow, and often overstepping the boundary, the federal government's energy and environmental agenda threatens the very foundations of our federal system.

Here in Texas, it is also increasingly viewed as a threat to the state's economic future. The new regulations target state programs that have been highly successful in improving air quality. From 2000 to 2008, Texas lowered ozone emissions by 22 percent while the Nation as a whole achieved only an eight percent reduction. This progress in air quality occurred while

the Texas economy was growing a third faster than the Nation as a whole.

The Environmental Protection Agency's decision to regulate CO₂ as a pollutant under the Clean Air Act is another attempt to accomplish through regulation the very climate change bills that Congress has repeatedly rejected. By fiat, EPA declared that States must now regulate greenhouse gases as pollutants beginning January 2, 2010 or EPA will do it for them. Announcing their intention to sue the government in federal court, Texas Attorney General Greg Abbott and chief environmental regulator Bryan Shaw wrote, in a letter to EPA, "we write to inform you that Texas has neither the authority nor the intention of violating, ignoring, or amending its laws to require the regulation of greenhouse gases."

Yet another example is EPA's invalidation in July 2010 of a state permit program that had been operating for 16 years under EPA oversight. The Texas "Flexible Permitting Program" is one of the most innovative and successful air-quality programs in the country. The program sets strict emission caps for facilities as a whole and allows some operational flexibility under the caps. Yet because it deemed that the permits were not detailed enough, EPA invalidated the state permitting rules.

Overnight, legal authorization for most of the refineries, large manufacturers, and some power plants in Texas were thrown into legal limbo. Although EPA has yet to conclude how the state rules should be changed, EPA decreed the individual facilities holding Texas flexible permits to be in violation of the Clean Air Act. Although the flex permit holders comply with the state issued permits, EPA elects to use coercion under the guise of a "voluntary" audit ending with an enforcement decree.

EPA's actions jeopardize major commercial projects on which thousands of new jobs depend. Across Texas, planned expansions in capacity and employment now face a potentially prohibitive degree of regulatory risk. The dispute over permits has struck at the

heart of the state's industrial base, one of the vital engines of the U.S. economy, which produces more than 25 percent of the country's transport fuel and more than 60 percent of its industrial chemicals.

EPA also announced that it plans to adopt a new ozone standard this fall. As Dr. Roger McClellan, former chairman of EPA's own scientific advisory committee recently testified, the new standard "is a policy judgment based on flawed science and inaccurate presentation of the science that should inform policy decisions." Moreover, of 3,000 counties in America, only 85 fail to attain the current standard, but according to the Congressional Research Service, the number could increase to 650 counties. Non-attainment of the ozone standard will shackle state authority and economic growth.

The federal government has shown itself increasingly inimical to the domestic production of fossil fuels. Indeed the intended effect of the Department of Interior's moratorium on new deepwater offshore drilling was to halt virtually all new exploration—and the result has been crippling harm and job losses throughout the Gulf Coast economies, already struggling in difficult times. Tellingly, many of the scientists whose names were cited as having recommended a blanket ban have since loudly protested that they did no such thing, and Under Secretary of Commerce Rebecca Blank recently testified that the administration didn't bother to assess what the economic impact might be before it issued the ban. The administration now admits that the ban will result in more than 8,000 job losses on the Gulf Coast. The ban had no basis in the Oil Pollution Act, which permits the federal government to halt drilling on a case-by-case basis but not for the industry as a whole. Three federal courts struck down the moratorium as an illegal "arbitrary and capricious" exercise of regulatory power, but the administration simply ignored them and reissued the moratorium in a slightly different form.

The States and the people will be forced into a “one size fits all” approach to public policy . . . at odds with both the American tradition of self-government and the Constitution that codifies that tradition.

By the time Secretary of the Interior Ken Salazar declared an end to the offshore drilling moratorium on October 12, 2010, the regulatory uncertainty had already driven five major drilling rigs to other countries, with millions of dollars in disrupted contracts. The new head of the Bureau of Ocean and Minerals Management assures environmentalists that he won't be in any hurry to approve new permits, and industry leaders have taken that as further evidence of a hostile regulatory environment. For example, the processing of permit applications for shallow water drilling (in less than 500 feet of water) has slowed to a tiny fraction of what it was before the BP spill—putting at risk perhaps 40,000 jobs on the Gulf Coast. This is in addition to the tens of thousands of jobs at risk because of the moratorium on offshore drilling and its long-term effects.

Thus, the current administration has devised a sophisticated and highly effective way of using regulatory uncertainty to shut down economic activity that it sees as incompatible with its agenda. Not even federal court judgments against its policies have impeded their effectiveness in stifling economic activity. This is an example of the federal government exercising powers illegally—according to explicit judgments of federal courts—in an effort to impose radical federal policies on States and the economic freedom of individuals.

If these unilateral environmental actions are allowed to stand, the consequences will be simple and devastating: States will lose control of their economic policies, and the Nation's economic policies will be

increasingly driven by whatever ideology, environmental or otherwise, happens to prevail in Washington. The “laboratory of democracies” that has allowed States to innovate and compete in order to develop the most successful models, will be increasingly impaired, replaced by the virtual nationalization of a big-government approach that consistently leaves unemployment and lost opportunity in its wake. The States and the people will be forced into a “one size fits all” approach to public policy, a top-down mode that is at odds with both the American tradition of self-government and the Constitution that codifies that tradition.

Impact of Conditional Federal Funds on State Budgets and State Autonomy

The practice of conditioning federal grants to the States on state compliance with federal policy priorities is among the most insidious and dangerous practices to have developed over the past sixty years. The federal stimulus bill dramatically increased the federal share of state budgets, and imposed a myriad of requirements on the disbursement of funds. The practice of taxing citizens and returning the money to their States only on condition of state compliance with federal wishes subverts the structure of federalism by coercing States to give up their autonomy, and ignore the will of their citizens, under threat of an increasingly unbearable fiscal and economic penalty. Whether by interstate compact or federal legislation or constitutional amendment, the practice of conditional federal subsidies to state budgets has to be reined in if the States' sovereign status within our Constitution's framework is to be restored.

In the current Texas budget, federal funds make up 36 percent of all the funds in the budget, a dramatic increase over the 30 percent federal share in the previous state budget. More than half of this sum is devoted to health and human services, subject to a host of restrictions and regulations. Another 24 percent is devoted to education, again with a host of onerous restrictions and mandates, many of them unfunded

mandates. Another 16 percent is devoted to business and economic development, again with strings attached. In all of these areas, the federal conditions and mandates are incrementally approaching a nationalization of state policy in the areas affected—health & human services, education, and economic development—areas that the Framers expressly intended to leave to the States.

Part III: Towards an Agenda for State Action

This paper has tried to highlight major issues and problem areas at the vanishing boundary between the federal government's domain and that of the States and individuals.

In coming months, the Foundation's Center for Tenth Amendment Studies will work with partners across the country to develop an Agenda for State Action. We will identify and share those tools that States can use to stop federal overreach and restore the Constitution's limits on government power. In collaboration with partners such as the Goldwater Institute in Arizona, we are developing tools such as the following:

- **Interstate Compact for Health Care Reform.** Interstate compacts are an effective way to regulate areas of mutual concern among two or more States. In areas of overlapping state and federal jurisdiction, or where state legislation is preempted by an enumerated federal power, the Constitution requires congressional consent (Art. I, sec. 10). The Supreme Court has held that such congressional consent trumps prior federal law and may even subordinate federal agencies to agencies created by the interstate compact. Although Congress has generally consented to interstate compacts through regular legislation signed by the President, congressional consent does not necessarily require presidential signature; the Supreme Court has suggested that con-

gressional consent may even be inferred from acquiescence. Interstate compacts have enormous unexplored potential as a way of shielding areas of traditional state authority from the concentration of power in Washington.

We propose an interstate compact to create an alternative state-based regulation of health care. The compact would provide that member States are free to choose their preferred model for health care policy; that they may opt out of Obamacare entirely; that they may choose to receive federal Medicaid funds as block grants without strings attached; and would otherwise accommodate maximum state flexibility. The compact could create a regional commission to allow the sharing of certain risks that require a larger pool than a single State to reach efficient scale. The compact would contain a "notwithstanding" clause providing that the operation of any federal law contrary to the provisions of the compact is suspended as to the signatory States. Congressional consent would be sought, and once obtained, would transform the compact into federal law.

- **Constitutional Amendment to Balance the Budget.** Constitutional amendments aimed at controlling taxing and spending would respond to one of the issues that Americans today worry about most: runaway federal spending. Congress itself can propose the amendment, or States can petition Congress to call a constitutional convention under Article V. The call of the States could be limited to proposing amendments that will rein in the spending and taxing powers of the federal government. Amendments could include: a balanced-budget amendment, a line-item veto, and the requirement of a super-majority to raise taxes.
- **Opting out of Federal Programs and Federal Funds.** The problem of federal funding with conditions and mandates attached is an increasingly serious threat to the constitutional balance of federalism. It is a problem that States

must address in a concerted manner. We propose that States consider reciprocal legislation or an interstate compact, providing that in state budgets none of them will accept federal funds with mandates and conditions attached (but accommodating federal funds in the form of block grants for a specified purpose). The laws could be triggered to go into effect once a certain number of States—for example 38 (three-fourths of the States, enough to compel Congress to call a constitutional convention)—have adopted them. This would alter the politics of federal appropriations significantly, and focus more attention on the way in which taxes paid into general federal revenue are diverted to States other than their States of origin, creating enormous economic penalties for those States that refuse to comply with federal policies that they are under no legal obligation to obey.

- **Federal Lawsuits.** States have been fighting back against the federal government by suing in federal court. More than 20 States have sued the federal government to escape the impositions of Obamacare. Texas has filed at least eight separate federal actions seeking relief from various Obama administration environmental actions. More States should join in existing lawsuits, and state legislatures can adopt laws requiring their attorney general to file suit in defense of specific rights.

State legislation can help strengthen the state's ability to use the federal courts. One way is to pass a law that requires the state attorney general to file suits when an independent commission determines that, e.g., state constitutional provisions are being violated by some federal action. Another is to pass a law providing, e.g., that individuals don't have to comply with the individual mandate in Obamacare. On its face, such a law is null and void under the Supremacy Clause of the Constitution—unless Obamacare is itself unconstitutional. In this way, the state's attorney general will be able to establish standing to challenge the constitutionality of the federal statute in federal court.

- **Federal Legislation.** Our representatives in Congress can have an important role in stopping federal overreach. A simple amendment to the Administrative Procedures Act could establish that the Supremacy Clause of the Constitution (Article VI) shall not apply to regulatory action, and that in cases of conflict between an administrative agency rulemaking and state law, state law prevails. Federal laws could modify entitlement programs to allow States to opt into “block grant” arrangements, either singly, or through interstate compacts. Other federal laws could modify canons of construction and rules of decision for federal courts, instructing them to construe statutory ambiguities in favor of Tenth Amendment rights, thereby establishing a legal presumption against federal power.

Conclusion

The steady expansion of the federal government since the early 20th century has arrived at a crisis point. The federal government is pushing further and further into areas of traditional state governance—and intruding deeper into our lives. The threat to liberty that Madison thought States would be strong enough to resist has now become apparent to millions of Americans.

The federal courts are a necessary instrument of the solution, but the vital solution lies in self-governance itself, what John Locke might have called a “government properly so-called.” We the People have a responsibility to engage and understand the issues that affect the fate of our democracy. By elevating our understanding of the need to preserve the authority of the States, and ultimately the sovereignty of the people—the most contentious and important agreement reached at the Constitutional Convention in Philadelphia more than two centuries ago—we can continue to forge a more perfect Union. ★

About the Authors

Ted Cruz served as Solicitor General for the State of Texas—the chief appellate lawyer for the State—from 2003 to 2008. He was the first Hispanic Solicitor General in Texas, and when appointed, was the youngest Solicitor General in the United States. Ted has authored more than 80 U. S. Supreme Court briefs and presented 38 oral arguments, including eight before the U.S. Supreme Court. He has been named by *Texas Lawyer* magazine as one of the “25 Greatest Texas Lawyers of the Past Quarter Century;” by *American Lawyer* magazine as one of the “50 Best Litigators under 45 in America;” and by *National Law Journal* as one of the “50 Most Influential Minority Lawyers in America.” A graduate of Princeton University and Harvard Law School, Ted previously served as a law clerk to Chief Justice William H. Rehnquist on the U.S. Supreme Court; as Domestic Policy Advisor to President George W. Bush on the 2000 Bush-Cheney Campaign; and as Associate Deputy Attorney General at the U.S. Department of Justice.

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Mario has written extensively for national and international publications, including features for *National Review* and *The Weekly Standard*, and op-eds in *The Wall Street Journal*. He has appeared on The Glenn Beck Show, CNN International, BBC Television, Radio America, and more.

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