



Texas Public Policy Foundation

Center for Tenth Amendment Action

84th Texas Legislature in Review

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Those who are alarmed over growing federal encroachment on the states and their citizens found a plethora of reasons to condemn U.S. Supreme Court Chief Justice John Roberts’ opinion for the majority in *N.F.I.B. v. Sebelius*, the 2012 decision upholding the Affordable Care Act. But less noticed by such defenders of the Tenth Amendment is that Roberts’ opinion also offers a practical roadmap for state resistance to federal overreach. Roberts wrote as follows:

In the typical case we look to the States to defend their prerogatives by adopting “the simple expedient of not yielding” to the federal blandishments when they do not want to embrace the federal policies as their own. *The States are separate and independent sovereigns. Sometimes they have to act like it.* (emphasis supplied)

Texas has a proud history of “act[ing] like it,” and the 84th Legislature worked to take the next steps in defending the state and its citizens from unlawful encroachments by the federal government. But, while some progress was made, the overall results were disappointing.

Fighting the EPA

Perhaps the most positive Tenth Amendment development in the 84th Legislature was what it did not do. HB 3069, for one thing, died in committee. It would have required the Texas Commission on Environmental Quality and the Public Utility Commission of Texas to design and submit



State Implementation Plans (SIPs) to comply with the Environmental Protection Agency’s proposed Clean Power Plan (CPP). The CPP is a proposed regulation designed to reduce carbon emissions from the country’s electric power plants—this with the view to

combating supposed climate change. It would fix a target for carbon-dioxide emissions for each state, requiring, in the process, that each state craft a suite of laws over the course of the next year to meet this imposed target.

Understood correctly, the CPP would be an unconstitutional power grab that would ravage Texas’ economy as well

as undermine its prerogatives in energy policy, resulting in massive job losses and raising consumer electricity rates 54 percent for the average Texas household.

HB 3590 (“Relating to the adoption of state rules and the submission of the state implementation plan to comply with certain rules under Section 111[d] of the federal Clean Air Act”) sought to protect Texans from the CPP. The bill would have prohibited the Texas Commission on Environmental Quality and the Public Utility Commission of Texas from cooperating in any way in developing an SIP to comply with the CPP. Unfortunately, the bill died in committee.

Fighting to Regain Control of Texas’ Budget

Another trend that is problematic for the maintenance of state sovereignty is the growing number of disbursements of federal dollars to local governments without having first gone through the state legislature or the governor’s office for approval or even monitoring.

HB 3606 sought to remedy this. It argued that Texas’ state government needs to take a full reckoning of federal grants sent directly to local governments because these funds are never free: They come with federal requirements such as matching components, which build spending requirements into the system. Federal funds that go directly to Texas local governments ineluctably affect the Texas economy as a whole. But regulation of Texas’ internal economy is, under the Tenth Amendment to the U.S. Constitution, a power that belongs to the state government, not the federal government. Therefore, to preserve the conventional understanding of the meaning and intention of the Tenth Amendment, and with it, the rightful duties of Texas’ statewide officeholders, an accounting must be made of the amounts, purposes, and conditions governing disbursement of federal funds to local governments. These programs are tailored to the federal government’s priorities, which may or may not be the priorities of the local-government recipients or of the state as a whole. Moreover, federal funds that go directly to local governments can produce budgetary redundancies.



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Accordingly, HB 3606 would have required that “before a political subdivision may accept or expend a federal grant or other funds that have not been appropriated by the legislature, the political subdivision shall report to the Legislative Budget Board, the comptroller, and the governor both the total amount of federal funds to be received or expended as well as the proposed use of the federal funds.” This would have provided the information needed for Texas to more accurately monitor and assess the impact of these federal funds. Unfortunately, the bill died in the Calendars Committee.

Another desirable proposed bill focusing on federal-state relations was HB 799 (“Relating to a study conducted by the comptroller on the impact to the state of federal regulations and mandates enacted by federal law”). As with HB 3606, the purpose of the bill was to equip Texas to better understand and react to federal involvement with the state’s economy. Although the bill passed in the House, it died in the Senate.

The rationale behind both HB 3606 and HB 799 was provided by another piece of legislation proposed this session: SCR 1 (“Claiming sovereignty under the Tenth Amendment to the U.S. Constitution over all powers not otherwise enumerated and granted to the federal government by the U.S. Constitution”). With this resolution, the fundamental constitutional issue would be illuminated, namely, that over the course of the last century the constitutional rights and powers of the individual states and their citizens have been steadily eroded by flawed federal-court decisions combined with an increasingly aggressive federal regulatory apparatus. Justice Roberts’

opinion for the majority in *N.F.I.B. v. Sebelius* sought to remind states that, under the Constitution, this need not, and should not, be the case. SCR 1 sought to reclaim this lost constitutional ground. The resolution passed in the Senate, but, unfortunately, it died in the House.

States Must Defend the Constitution

Considering influence in the other direction, from state to federal government, under the Constitution, states have two means by which to change national policy: Article V Conventions and Interstate Compacts. HJR 79 (“Applying to the Congress of the United States to call a convention under Article V of the United States Constitution for the limited purpose of proposing an amendment to the constitution to provide for a federal balanced budget”) sought to begin the work of gathering the states to propose amendments needed to balance the federal budget. The resolution passed in the House, but, unfortunately, it died in the Senate.

Similarly, SB 1252 (“Relating to an interstate compact on border security and immigration enforcement”) sought to address the federal government’s dismal performance in border security and enforcement of immigration laws. It would have authorized Texas to join with other compacting states to do the job that Washington, D.C., should be doing but is not. The bill passed in the Senate but died in the House.

Conclusion

In sum, although some in the Legislature made strenuous efforts to get Texas to “act like it” this session, the results were, at best, marginal, and, at worst, ineffectual. ★

