

## Tenth Amendment

The Tenth Amendment provides 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." U.S. Const. amend. X. As a textual matter, therefore, the Tenth Amendment "states but a truism that all is retained which has not been surrendered." *United States v. Darby*, 312 U.S. 100, 124 (1941). By its terms, the Amendment does not purport to limit the commerce power or any other enumerated power of Congress.

In recent years, however, the Tenth Amendment has been interpreted "to encompass any implied constitutional limitation on Congress' authority to regulate state activities, whether grounded in the Tenth Amendment itself or in principles of federalism derived generally from the Constitution." *South Carolina v. Baker*, 485 U.S. 505, 511 n.5 (1988). Thus, "the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States." *New York v. United States*, 505 U.S. 144, 157 (1992).

There are numbers of ways in which the federal government is permitted to secure the assistance of state authorities in achieving federal legislative goals. First and most directly, the federal government may coerce the states and their employees into complying with federal laws of general applicability. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). Second, Congress may condition the grant of federal funds on the States' taking governmental action desired by Congress. *South Dakota v. Dole*, 483 U.S. 203 (1987).

State judicial and administrative bodies may be required to apply federal law. *Testa v. Katt*, 330 U.S. 386 (1947); *FERC v. Mississippi*, 456 U.S. 742, 760-61 (1982). The federal government may offer to preempt regulation in a given area, and permit the states to avoid preemption if they regulate in a manner acceptable to Congress. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290-91 (1981).

The federal government has been permitted effectively to compel the states to issue registered rather than bearer bonds. *South Carolina v. Baker*, 485 U.S. 505, 514 (1988). Finally, the federal government has been permitted to require state utility regulators to consider prescribed federal standards in determining regulatory policies. *FERC v. Mississippi*, 456 U.S. at 765. In the course of the latter ruling, the Supreme Court referred to and rejected the "19th century view" that "Congress has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it." *Id.* at 761 (quoting *Kentucky v. Dennison*, 24 How. 66, 107 (1861)). That view, said the Court, "is not representative of the law today." *Id.*

"The federal government has some power to enlist a branch of state government . . . to further federal ends." *Id.* at 762.

*United States v. New York*, 505 U.S. 144 (1992), "a direct order to regulate, standing alone, would . . . be beyond the power of Congress." *Id.* at 176. the Court in *New York* stated: "whether or not a particularly strong federal interest enables Congress to bring state governments within the orbit of generally applicable federal regulation, no Member of the Court has ever suggested that such a federal interest would enable Congress to command a state government to enact state regulation." *Id.* at 178. In the same vein was the Court's conclusion after reviewing the debates at the time of the founding of the Constitution:

We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. E.g., *FERC v. Mississippi*. . . . The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce. *Id.* at 166.

Other decisions of the Supreme Court have recognized this proposition that the federal government cannot coerce States into performing the ultimately sovereign acts of legislating or regulating in a manner specified by the federal government. In *Virginia Surface Mining*, the Court noted that the provision of an alternative of federal regulation rendered federal standards for state regulation permissible; because the State had a constitutional option, "there can be no suggestion that the Act commandeers the legislative processes by directly compelling them to enact and enforce a federal regulatory program." *Virginia Surface Mining*, 452 U.S. at 288 (emphasis added). Similarly, In *FERC v. Mississippi*, the Court noted that the federal command that the State "consider" federal alternatives was constitutional because "[t]here is nothing in PURPA 'directly compelling' the States to enact a legislative program." *FERC v. Mississippi*, 456 U.S. at 765.

"[T]he etiquette of federalism has been violated by a formal command from the National Government directing the State to enact a certain policy, cf. *New York v. United States*, 115 S.Ct. 1624, 1642 (1995) (Kennedy, J., concurring); see also *Board of Natural Resources v. Brown*, 992 F.2d 937, 947 (9th Cir. 1993) ("direct commands to the states to regulate according to Congress's instructions" "violate the Tenth Amendment as interpreted by *New York*").

There are good reasons for focusing Tenth Amendment concern on federal coercion of a State's enactment of legislation or regulations or creation of an

administrative program. These activities are inherently central acts of a sovereign; if an area of state activity is to be protected from direct coercion by an implication drawn from the Tenth Amendment, legislating and regulating are prime candidates. "[T]he power to make decisions and to set policy is what gives the State its sovereign nature." *FERC v. Mississippi*, 456 U.S. at 761. There is a second reason, also, emphasized in *New York* itself. Democratic governments must be politically accountable. When the federal government requires the States to enact legislation, the enacted legislation is state legislation. Thus, it will likely "be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *New York*, 505 U.S. at 169. When the federal government itself imposes a requirement on a state official, the requirement is more clearly an act of the federal government and thus does not, to the same extent, undermine political accountability.

The Tenth Amendment view espoused in *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 107 (1861), overruled by *Puerto Rico v. Branstad*, 483 U.S. 219 (1987), was that "the Federal Government . . . has no power to impose on a State officer, as such, any duty whatsoever . . ." See *Brown*, 521 F.2d at 841. As the Supreme Court has made clear, the view espoused in *Kentucky v. Dennison* is no longer representative of the law. *FERC*, 456 U.S. at 761.

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