

MODULE 3A

The Tenth Amendment

The failed first attempt · anti-commandeering · political accountability · the limiting principle · prohibitions

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Where Module 3 left the Tenth

Darby, 1941: a truism that adds nothing. New York, 1992: a rule that strikes down statutes.

DARBY • 1941

A truism

“States but a truism that all is retained which has not been surrendered.” It adds nothing. A declaration of the relationship, not a substantive limit.

NEW YORK • 1992

An enforceable rule

The same Amendment, fifty-one years later, striking down an Act of Congress. The text did not change in between.

What changed between 1941 and 1992 — the text, the theory, or only the Court?

The text did not. Hold the question until you have read the cases — the answer is not that the Amendment acquired new content.

Three versions of one question

My frame for the whole topic. Every case in this module answers one of these three.

QUESTION ONE

An independent limit?

A limit on federal power in its own right — or only a restatement of what the enumerated powers already settle?

QUESTION TWO

Invalid anyway?

Can a law otherwise within an enumerated power still fall under the Tenth?

QUESTION THREE

Did it amend Article VI?

Did it cut back the Supremacy Clause, or leave it untouched?

THE ANSWER IN 1920 — MISSOURI v. HOLLAND

“forbidden by some invisible radiation from the general terms of the Tenth Amendment” — Holmes, and his answer is no.

Darby makes it a truism in 1941. New York makes it a rule in 1992. Ask which question each case answers.

Missouri v. Holland, 252 U.S. 416, 433–34 (1920) (Holmes, J.). The three-question frame is mine — it is how I open the Tenth Amendment.

From classifying States to reading commands

The Amendment became enforceable when the question changed — not when the text did.

THE OLD QUESTION • 1976-1985

What is the State doing?

Is this an integral or traditional governmental function?
Judges classify state activities, and the classification decides the case.

*Nine years of lower courts could not draw the line.
Overruled.*

THE NEW QUESTION • 1992-now

What is Congress telling it to do?

Not a subject-matter immunity, not a classification of state activity. A formal question about the direction Congress issues.

Formal questions have answers. A court can actually apply this.

But easier to administer is not the same as more principled. A rule can be perfectly determinate and still track nothing that matters.

A hiccup, and its correction

1976 to 1985 — the Tenth Amendment's failed first career, and why it ended.

1976 — NATIONAL LEAGUE OF CITIES v. USERY

The Tenth Amendment as an affirmative limit:
Congress may not displace the States' freedom to
structure “integral” or “traditional” governmental
functions.

Judges had to sort traditional government from the rest.
Nine years of lower courts produced no usable line.

1985 — GARCIA, AND IT IS OVERRULED

Protection lies in the political safeguards of
federalism — representation in Congress — not in
judicially drawn enclaves.

Blackmun supplied the fifth vote in 1976, then wrote the
opinion overruling it.

Garcia still stands. What arrives in 1992 is not its revival — it is a different doctrine answering a different question.

The charter

New York v. United States (1992) — Congress may pay, tempt and preempt. It may not order a legislature.

THE JUSTIFICATION — POLITICAL ACCOUNTABILITY

“Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate’s preferences ... By contrast, where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished.”

MAY

Attach conditions to federal funds.
Offer a choice between federal standards and preemption. Regulate the private sector directly.

MAY NOT

Order a state legislature to enact a law. That is the holding, and it is about method, not subject matter.

SO THE ANSWER TO DARBY

A truism as to SUBJECT MATTER — the enumerated powers do that work. Not a truism as to METHOD.

Board that sentence. Every later case either applies it or strains it.

Three incentives, one casualty

Map each to its constitutional home, then reconstruct the syllogism that kills the third.

MONETARY INCENTIVES

Spending Clause

Surcharges escrowed and paid out to States that meet deadlines.
This is Dole.

SURVIVES

ACCESS INCENTIVES

Commerce Clause

Regulate to federal standards or be preempted — the Hodel and FERC choice.

SURVIVES

TAKE TITLE

Nothing

Take ownership and liability for the waste, or regulate as Congress directs.

DIES

The syllogism: forced ownership is unconstitutional standing alone; ordered regulation is unconstitutional standing alone; so a choice between them is no choice at all.

Stress-test it against Dole: what lawful option does Dole leave that take title does not?

New York v. United States, 505 U.S. 144 (1992) • South Dakota v. Dole, 483 U.S. 203 (1987) • Hodel; FERC.

The line protects means, not ends

Everyone conceded Congress could reach the waste directly. So what does a State actually keep?

Everyone conceded Congress could regulate the generators directly and preempt any state law it disliked. Federal power over the outcome was never in doubt.

So what does a State keep that it would otherwise lose?

THE ANSWER THE COURT GIVES

Control over who takes the political blame — not a small thing, the Court says, but the whole point.

Commandeering is attractive because the States, not the federal treasury, pay.

WHITE, DISSENTING

New York's own officials negotiated this bargain, testified for it, and took seven years of access to other States' dumps before suing.

The Court answers with a separation-of-powers analogy. But the branches share one electorate and the States have their own. Does that cut for the Court or against it?

What the Brady Act asked of sheriffs

Printz (1997) — the facts first, because the holding is built on what the statute actually required.

WHAT WAS REQUIRED

State and local law enforcement officers had to run background checks on handgun purchasers for the federal government — temporarily, until federal agencies were ready to take over.

WHAT IT EXTENDS

New York barred Congress from commanding a state legislature. Printz carries that to the state executive.

THE WORD

No “dragooning” of state officials. That the task was temporary, minor and ministerial does not save it.

Interim, minor and ministerial was the Government’s best argument. If the doctrine is really about political accountability, why should a temporary clerical duty fail?

When the text gives out

Printz (1997) — no constitutional provision on point, and Scalia builds the rule out of three materials.

HISTORY

Early Congresses never commandeered state executives. A negative inference — and Stevens says non-use proves nothing.

STRUCTURE

Madison's double security. Federal power "would be augmented immeasurably" if it could impress the States' police officers into its service at no cost.

PRECEDENT

Called "most conclusive" — but New York was about legislatures, not sheriffs. Is it doing the work, or wearing a costume?

Which of the three actually decides the case? Scalia says precedent. Read it again and see whether you believe him.

And the facts bite back. Printz and Mack became minor celebrities by publicly fighting the Brady Act. If the electorate can tell who to blame, what is left of the argument?

The commandeering scoreboard

Three branches of state government, three answers. Why do judges get different treatment?

STATE COURTS

MAY BE COMMANDED

Testa v. Katt (1947). A state court may not refuse to hear a federal claim because it dislikes the policy. Reaffirmed in Brackeen, 2023.

STATE LEGISLATURES

MAY NOT BE

New York (1992). Congress may not order a legislature to enact a law.

STATE EXECUTIVE OFFICERS

MAY NOT BE

Printz (1997). Congress may not conscript them to administer a federal programme.

Two hooks for the asymmetry: the Supremacy Clause names “the Judges in every State,” and the Madisonian Compromise left lower federal courts optional.

Do they explain the asymmetry, or decorate it? Stevens calls the judge/sheriff line perverse. Is he wrong?

Testa v. Katt, 330 U.S. 386 (1947) • New York (1992) • Printz (1997). U.S. Const. art. VI, cl. 2.

The limiting principle

Reno v. Condon (2000) — unanimous, and it tells you where the doctrine stops.

NOT COMMANDEERING

The Act regulates the States as OWNERS of databases — sellers in the information market — rather than commanding them to regulate their citizens or conscripting their officers.

AND EXPRESSLY RESERVED

Whether general applicability is a constitutional REQUIREMENT. “We need not address the question.” A reserved question is not a decided one. Brackeen answers it in operation in 2023.

The working test: is Congress telling the State what to do in its own operations, or telling the State how to govern its citizens?

Without this case *Garcia* would be overruled by implication, and every generally applicable federal law would face a Tenth Amendment defence.

A prohibition is a command too

Murphy v. NCAA (2018) — Congress forbade the States to legalise sports betting. Same rule.

Congress did not ban sports betting. It forbade the States to legalise it — and the rule has no carve-out for statutes that prohibit rather than compel.

THE MOVE WITH CONSEQUENCES BEYOND GAMBLING

To stop this swallowing preemption, the Court recasts ALL preemption as the regulation of private actors. Conflict, express and field work the same way: Congress imposes restrictions or confers rights on private actors, and a conflicting state law gives way. A valid preemption provision must be readable as regulating private conduct.

What happens to a preemption clause that cannot be read that way? That question is now live in every field of federal regulation.

And notice the problem: New Jersey's voters knew Congress was the obstacle. Nobody was going to blame Trenton.

The doctrine's current edge

Haaland v. Brackeen (2023) — the challenge loses, and the rule finally gets a working test.

THE TEST THAT DECIDED IT

“When a federal statute applies on its face to both private and state actors, a commandeering argument is a heavy lift.”

STATE COURTS, AGAIN

Congress may require state courts — unlike state executives and legislatures — to enforce federal law. The doctrine applies “distinctively” to their adjudicative work.

AND A DOUBT

Requirements placed on a State as litigant probably do not implicate the Tenth Amendment at all.

This is Reno's reserved question, answered in operation. General applicability was never made a formal requirement — but a statute that has it is very hard to attack.

Haaland v. Brackeen, 599 U.S. 255 (2023) (Barrett, J.). Indian Child Welfare Act. The Fifth Circuit had held several ICWA provisions unconstitutionally commandeering; on the anticommandeering claims the Court REVERSED.

Has the doctrine floated free?

The rule was justified by accountability. Test the justification against the cases that apply it.

NEW YORK • 1992

FITS

A legislature forced to enact a federal waste scheme takes the political heat for someone else's choice.

PRINTZ • 1997

STRAINS

Printz and Mack became minor celebrities by publicly fighting the Brady Act. The electorate could tell who to blame.

MURPHY • 2018

INVERTS

New Jersey's voters knew Congress was the obstacle. Any confusion ran in the opposite direction.

Two honest answers, and both are defensible: a rule whose stated reason does not explain its applications is doing something it will not say — or a doctrine has simply outgrown its first rationale, and the real principle is structural.

Notice that Printz's argument was structural, not accountability-based. The two rationales were never the same.

New York (1992) • Printz (1997) • Murphy (2018).

What Congress still has

The doctrine leaves three tools on the table. Ask how much work it actually does.

1

CONDITIONAL SPENDING

Grants conditioned on enacting a conforming statute. Dole governs — watch NFIB's coercion limit.

2

CONDITIONAL PREEMPTION

Enact a conforming statute, or federal standards apply of their own force. Hodel and FERC — the workhorse.

3

DIRECT REGULATION

Regulate the private firms and skip the States entirely. Always available, always more expensive for Congress.

PRACTICE — THE DATA SECURITY ACT OF 2028

A State that fails to enact a conforming data-breach statute shall either assume liability for its residents' losses or enforce the federal code as state law. Say why it fails, then redraft it three ways.

Which redraft keeps the coercive punch? If conditional preemption gets you most of the way, the rule is a drafting requirement, not a limit on power.

Will Federalist 45 bear the weight?

Every anti-commandeering opinion leans on it. Read it and decide whether it can carry the load.

The federal powers are “few and defined”; those remaining with the States are “numerous and indefinite.”

DESCRIPTION, OR PROMISE?

Madison was arguing for ratification against the charge that the new government would swallow the States. He is predicting, and persuading.

IF IT IS FALSE, WHAT FOLLOWS?

Either the bargain was broken and the Court is restoring it — or the sentence described an eighteenth-century economy and only the economy changed.

AND THE SHARPEST VERSION

A court quoting Federalist 45 to justify a limit is using a ratification-debate prediction as an operative legal standard.

Last session Federalist 42 had Madison treating the commerce power as uncontroversial. Same author, same project, opposite implication.

The current case

City & County of San Francisco v. Trump — conditions on federal funds to sanctuary jurisdictions.

THE ANTI-COMMANDEERING QUESTION

Is the federal government requiring state and local officers to administer federal immigration law — Printz — or merely declining to fund jurisdictions that will not cooperate?

THE SPENDING QUESTION

Are the conditions unambiguous, related to the purpose of the funds, and non-coercive? Dole, with NFIB's coercion limit on top of it.

Printz is today the constitutional shield for state and local refusal to honour federal immigration detainers. A doctrine built around a handgun background check now does its heaviest work in immigration.

Does your intuition about the rule survive the change in politics — and should it matter that it does not?

A district court opinion, April 2025. Binding nowhere. Assigned for the argument, not the outcome.

City & County of San Francisco v. Trump, No. 25-cv-01350-WHO (N.D. Cal. Apr. 24, 2025) (Orrick, J.).

The inverse of Module 3

Last session the categorical move kept failing. Here it is the one that works.

MODULE 3

The category kept failing

Knight's taxonomy. Direct against indirect. Jackson refuses nomenclature by name. Lopez brings a category back and Souter calls it Carter Coal renamed.

MODULE 3A

The category is what worked

Usery's functional test could not be applied. The formal question — what is Congress directing the State to do — can be.

So the lesson is not that formalism is good or bad. It is about FIT. A formal rule works when the formal question tracks the thing you care about. Manufacture against commerce did not. Command against encouragement does.

And Murphy is where the fit comes apart — exactly how Knight looked in 1895.

Next: Module 4 — The Taxing and Spending Power. Dole returns, and so does NFIB.