

The Tenth Amendment

Roman Mars: In 1916, Congress passed the Keating-Owen Child Labor Act, which was the first federal child labor law.

Elizabeth Joh: The law said if goods were made by a child younger than 14 or by a child between 14 and 16 who is made to work more than eight hours a day or six days a week, those products couldn't be shipped across state lines. What Congress was trying to do, of course, was regulate child labor.

Roman Mars: Regulate child labor specifically by using the Commerce Clause.

Elizabeth Joh: In the early 20th century, tens of thousands of children were employed at canneries, textile mills, furniture factories, and other industrial settings. A 1921 report for the Department of Labor found that children, some of them as young as five and six, were working in dangerous and dirty conditions all over the country. The federal child labor law also led to the creation of the child labor division of the U.S. Children's Bureau. And that division was responsible for making sure that the federal law was administered properly. But their work was short-lived. In 1918, just nine months after the law had gone into effect, the Supreme Court struck it down. The lawsuit had been brought on behalf of Reuben and John Dagenhart by their father, Ronald. All three Dagenharts were employed at the cotton mill of the Fidelity Manufacturing Company in Charlotte, North Carolina. The federal law prevented his sons from working as much as they wanted, argued Ronald, and that was an unconstitutional overreach by Congress.

Roman Mars: The Supreme Court sided with the Dagenharts.

Elizabeth Joh: Congress was trying to control how goods were produced, and that was really the job of the states not the federal government. Not only did Congress go too far in trying to use its constitutional authority under what's called the "commerce power," but in doing so, Congress also violated a different provision of the Constitution, the 10th Amendment. The Court said that Congress lacked the ability to, quote, "destroy the local power always existing and carefully reserved to the states in the 10th Amendment to the Constitution." If the child labor law died a quick death, the case striking it down did, too. In 1941, the Supreme Court decided it had made a mistake about the interpretation of congressional authority and overturned the 1918 case. But the Supreme Court has not stopped being concerned about how to draw the lines of federalism, how much power should be granted to the federal government, and how much to the states.

Roman Mars: The Court doesn't see the 10th Amendment today in exactly the same way it did in 1918, but it does interpret it as a restraint on Congress's power.

Elizabeth Joh: And the 10th Amendment may be a brake on Trump as well. It turns out that this part of the Constitution, the 10th Amendment, helps explain the background of why the legal and political fight over sanctuary cities is about federal funding.

Roman Mars: So, what does the Constitution say about federal power, state power, the 10th Amendment, and sanctuary cities? We're about to find out. This is What Trump Can Teach Us About Con Law--an ongoing series of indefinite lengths, where we take the tweets and executive orders of the 45th President of the United States and use them to examine the balance of powers in the Constitution like we never have before. Our music is from Doomtree Records. Our neighbor and professor is Elizabeth Joh. And I'm your fellow

student and host, Roman Mars. When you read the text of the 10th Amendment, it doesn't sound like much.

Elizabeth Joh: It says, "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."

Roman Mars: It reads both as just an observation and as something that's supposed to set limits on the federal government.

Elizabeth Joh: The Supreme Court cases in this area are complicated, and over time, the interpretation of what the 10th Amendment means has changed. Remember that in 1918, the Court said that Congress could not regulate child labor because the Constitution didn't grant it the authority to do so. That's no longer how the Court interprets federal power over labor. But in the 1990s, the Supreme Court did decide in a couple of very important cases that the 10th Amendment still does set limits on what Congress can do to the states. In 1992, the Court decided that the protection of state authority and the 10th Amendment meant that the federal government could not "commandeer" the state legislatures. "Commandeering" here means that the federal government can't force state legislatures to pass specific laws or to enforce a federal regulatory program. The federal government can directly regulate individuals and corporations. And it can even regulate states when the state is being considered like another business, for example, like an employer. But what the federal government can't do is to order the state in state like ways. It can't force the states to legislate according to federal wishes.

Roman Mars: And that 10th Amendment limitation doesn't just apply to state legislatures.

Elizabeth Joh: In 1993, Congress enacted the Brady Handgun Violence Prevention Act. This was a federal law that required the federal government to establish a national background check system for handguns. This would take time to establish. So, in the short term, the Federal Brady Act required state and local law enforcement officials to assume that responsibility. They were supposed to do the background checks for people who wanted to buy handguns. Two county sheriffs sued. They said that the federal law violated this anti commandeering principle behind the 10th Amendment. And in the 1997 case of *Printz versus the United States*, the Supreme Court agreed with the county sheriffs. Just as it had decided five years earlier that the federal government couldn't force state legislatures to adopt certain programs, the Court decided that Congress couldn't do the same for state and local executive branch officials. The late Justice Scalia wrote the opinion for the Court, and he said, quote:

Roman Mars: "The federal government cannot command the state's officers or those of their political subdivisions to administer or enforce a federal regulatory program."

Elizabeth Joh: So, what that really meant was that the county sheriffs did not have to do the federal government's bidding. Why? Because Justice Scalia said it would be, quote, "fundamentally incompatible with our constitutional system of dual sovereignty."

Roman Mars: So, the Federal Brady Act's provision, even if they were meant to be temporary, violated the 10th Amendment of the Constitution.

Elizabeth Joh: So, what does the 10th Amendment have to do with Trump and sanctuary cities? A lot, it turns out.

Roman Mars: And we've covered aspects of how the Constitution butts up against sanctuary cities before. But the 10th Amendment is the fundamental reason why all the contortions are necessary when the federal government is trying to influence local government.

Elizabeth Joh: First, keep in mind that the term "sanctuary city" or "sanctuary jurisdiction" isn't really a legal term. It doesn't have a fixed definition. But when people talk about sanctuary cities, they usually refer to city and county policies that limit cooperation with federal immigration authorities when they detain, pursue, or want to report undocumented immigrants who have had some contact with local police departments. And one topic that comes up here a lot are so-called "ice detainers." Imagine that someone is arrested for drunk driving, spends a night in jail, is processed, and is then released. If that person is undocumented, federal immigration officials may ask local police to hold that person for a longer period of time--longer than local police normally would, in a so-called "sanctuary city," the police may decline to do that.

Roman Mars: So, here's where things become complicated.

Elizabeth Joh: Local governments and their police departments all over the country get millions of dollars in federal grants for all kinds of purposes. Congress is allowed to use what's called its "spending power" to give money to state and local governments. They can even attach conditions to those grants. The Supreme Court has made it clear that this is okay. Now as a candidate and now as president, Trump has focused heavily on undocumented immigrants and policies he thinks protect undocumented immigrants like sanctuary city policies. On September 17th, 2016, Trump tweeted, "Hillary supports and wants sanctuary cities. We need to provide sanctuary for our OWN citizens, fellow Americans." In a speech on the campaign trail in August of 2016, Trump said, "We will end the sanctuary cities that have resulted in so many needless deaths. Cities that refused to cooperate with federal authorities will not receive taxpayer dollars. And we will work with Congress to pass legislation to protect those jurisdictions that do assist federal authorities." And just a few days after he became president, Trump signed an executive order that said sanctuary cities would no longer be eligible for federal grants. In a Fox News interview from February of 2017, President Trump said, "I don't want to defund anybody. I want to give them the money they need to properly operate as a city or a state. If they're going to have sanctuary cities, we may have to do that. Certainly, that would be a weapon." On January 31st, 2017, San Francisco became the first local government to sue the Trump administration over the order to defund sanctuary cities. Santa Clara County joined San Francisco's lawsuit. And other cities, like Chicago and Philadelphia, filed their own lawsuits over the order as well. Now, these lawsuits vary from one another in many different ways. Some of them challenge different aspects of how the Trump administration is trying to defund them. But there are some very important similarities. Basically, these local governments are saying, "Only Congress has the ability to attach conditions like this to spending. The president doesn't have this kind of authority." At this point, you might ask yourself, "Why is this so complicated? Why doesn't the Trump administration or Congress just tell sanctuary cities, 'Just do what we tell you to do?'" And the answer, of course, is the 10th Amendment and the anti-commandeering principle it contains, according to the Supreme Court's cases. The federal government can't just tell the states and their political subdivisions what to do. Now, what is permissible is for Congress to say, "Well, let's try and persuade you to act the way we want with our spending clause authority. If you want these millions of dollars, then you have to behave the way we want." But even here, Congress has to be careful. The Supreme Court said in the 2012 *Sebelius* case--this was

a case that upheld the individual mandate of the Affordable Care Act--that even the spending clause could not be used in a way that was so coercive it gave the states no choice. Those are the same 10th Amendment principles at work. Now, so far, at least three federal district court judges have sided with the sanctuary cities and decided that the Trump administration can't make these kinds of threats about federal defunding. After a federal district court judge in San Francisco issued an initial decision siding with San Francisco and Santa Clara County, Trump tweeted on April 26th, 2017, at 3:20 a.m., "First, the Ninth Circuit rules against the ban. And now it hits again on sanctuary cities. Both ridiculous rulings. See you in the Supreme Court!"

Roman Mars: "See you in court, Court."

Elizabeth Joh: And October 13th, 2017, Trump tweeted, "Hard to believe that the Democrats, who have gone so far LEFT that they are no longer recognizable, are fighting so hard for sanctuary crime." What are some of the cases the district courts have cited in order to come to their conclusions? The anti-commandeering 10th Amendment cases of the 1990s. And Trump's comments that defunding could be a weapon? That's a really unfortunate characterization for the federal government. Chief Justice Roberts said in the Affordable Care Act case that the federal funding can't be used as a, quote--and I'm using his words--"gun to the head of the states." That would cross the constitutionally permissible line. Now, these cases are far from over, but they show us that even with what looks like really arcane debates about federalism and the proper division of authority between the states and the federal government, these are some fundamental issues at stake. In November of 2017, a federal district court judge in Philadelphia sided with the city of Philadelphia in suing the federal government. Philadelphia said it was unconstitutional to threaten to defund the city over sanctuary city policies. And Judge Baylson ended his decision this way: "Mephistopheles grants Faust eternal knowledge and pleasure on the condition that Faust surrenders his soul. The courts, in interpreting the Constitution, and Congress, in enacting laws, have interposed restrictions on the ability to impose conditions on the transfer of benefits to local governments."

Roman Mars: And I think you can interpret that to mean the federal government has to keep its hands off the soul of local governments. Irony laced updates and questions about federalism are answered when Trump Con Law continues.

Elizabeth Joh: So, remember the Dagenhart case from 1918. The father, Ronald Dagenhart, sued on behalf of his sons, John and Reuben. And of course, the Dagenharts won. Congress could not regulate child labor. Well, in 1923, a journalist named Lowell Mellett found and interviewed Reuben Dagenhart about his days working in a North Carolina cotton mill. Reuben said, "Look at me. 105 pounds. A grown man. And no education. I may be mistaken, but I think the years I've put in in the cotton mills stunted my growth. From 12 years old on, I was working 12 hours a day--from 6:00 in the morning till 10:00 at night--with time out for meals. It would have been a good thing for all the kids in this state if that law they passed had been kept." And the journalist then asked him, "Just what did you and John, your brother, get out of that suit then?" "Well, we got some automobile rides when them big lawyers from the north was down here. Oh, yes. And they brought both of us a Coca-Cola. That's all we got out of it."

Roman Mars: That is so grim. Because of my own political bent, I feel like during most of my life, states' rights arguments were used by people who I disagreed with to do things that I disagreed with. But it seems that that is changing. And I'm learning that the principles are value neutral and that the intent of them is to be value neutral.

Elizabeth Joh: So, it is really interesting because until Trump became president, most of the time, we've associated this idea of 10th Amendment limitations and these very rigid ideas about federalism that the Supreme Court has sometimes put out in its decisions as saying, "Wow. Doesn't this just protect states from doing things that we really don't agree with?" We want them to, you know, behave in ways that are more in time with what people want in terms of civil rights laws and things like that. And we want the federal government to be able to strongly persuade them to keep up with the times. And so that's always been the standard critique. But what the Trump administration and its sanctuary city policies, for example, have shown us is that--well--come to think of it, sometimes those limitations can actually be a kind of protection for the states. Of course, it depends on your political beliefs. But in the case of sanctuary cities, the cities and counties have brought these lawsuits, basically taking the very same cases that many of them might have lamented in another period, and said, "Look, these principles protect us. You cannot be a bully to us, federal government." And that's been one of the most interesting sort of teaching moments for someone who thinks about these cases--to say, "Well, when a Supreme Court decision comes down, don't ever think about it just on it's deciding this particular dispute between these two parties." Of course, it is. But what the Court's really trying to do is articulate a principle that's supposed to last for a long time. And sometimes, even though you disagree violently with the way a particular case comes out, a couple of decades later, you realize, "Well, this might be used for totally different purposes--maybe in a way that the Supreme Court hadn't even anticipated or none of us had until this moment."

Roman Mars: It's hard to imagine that people arguing this unfair balance of the commerce power and the 10th Amendment to try to keep their diners segregated in Alabama--you were basically making the same argument down the line to help undocumented immigrants stay in a city.

Elizabeth Joh: Right. And that's the fascinating thing about the law. The law isn't designed to be, you know, just for your own political ends. It's a set of principles. And sometimes they'll be used one way, and sometimes they'll be used another. And that's kind of fascinating on the one hand. It can be a little bit scary, too--for us to realize, depending on which side you stand on a particular issue, you might embrace these ideas that before you'd found really incompatible with your beliefs. But it's really not about the policies that people are fighting for—it is these basic principles of federalism. And the Court has made it clear that they feel that they're here to guard these principles of federalism, even if nobody else wants them to do it.

Roman Mars: This show is produced by Elizabeth Joh and me, Roman Mars. You can find us online at trumpconlaw.com, on Facebook, and on Twitter. All the music in Trump Con Law is provided by Doomtree Records, the Midwest Hip-Hop Collective. Music in this specific episode is from SHREDDERS. But I got a preview of the new Dessa album recently, and it's predictably amazing. You should get it. You can find out all about Doomtree Records, get merchandise, and learn about current tours at doomtree.net. We are a proud member of Radiotopia from PRX, supported by listeners just like you.