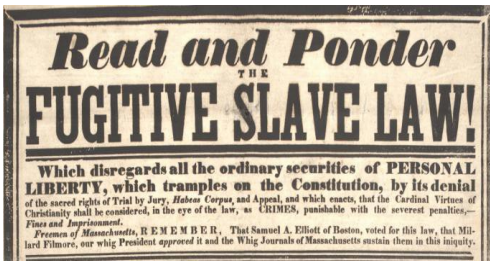
SCOTUS Says States Don't Have to Comply: ANTI-COMMANDEERING DOCTRINE

At the core of the Missouri Second Amendment Preservation Act (SAPA) is the application of the anti-commandeering doctrine.

This essay explains how four landmark U.S. Supreme Court cases ensure the survivability of SAPA in any legal challenge. The two most recent cases are *NFIB v. Sebelius* (Challenging Obamacare) and *Mack / Printz v U.S* (Challenging the Brady gun control act).

The resulting jurisprudence is a prohibition of federal usurpation, or "commandeering" of state resources, like law-enforcement functions and the legislative process. It is a clear affirmation of a state's right to refuse to cooperate or participate in federal actions. The NFIB v. Sebelius opinion also forbids coercion through threats of withholding federal funding.


Read and Ponder
THE
FUGITIVE SLAVE LAW!
Which disregards all the ordinary securities of PERSONAL LIBERTY, which tramples on the Constitution, by its denial of the sacred rights of Trial by Jury, *Habeas Corpus*, and Appeal, and which enacts, that the Cardinal Virtues of Christianity shall be considered, in the eye of the law, as CRIMES, punishable with the severest penalties,—*Fines and Imprisonment.*
Freemen of Massachusetts, REMEMBER, That Samuel A. Elliott of Boston, voted for this law, that Millard Fillmore, our whig President *approved* it and the Whig Journals of Massachusetts sustain them in this iniquity.

Most Americans believe that the federal government stands absolutely supreme.

Nobody can question its dictates.

Nobody can refuse its edicts.

Nobody can resist its commands.

This is simply not true.

Laws passed *in pursuance* of the Constitution do stand as the supreme law of the land. But that doesn't in any way imply the federal government lords over everything and everybody in America.

First off, as James Madison asserted in *Federalist 45,* the powers of the federal government are "few and defined." So federal power actually extends into only a few spheres. Most power and authority was left to the states and the people.

Second, even within those areas that the federal government does exercise authority, it cannot force state or local governments to cooperate in enforcement or implementation. The feds must exercise their authority on their own, unless the state and local governments choose to assist.

THE ANTI-COMMANDEERING DOCTRINE

Simply put, the federal government cannot force state or local governments to act against their will.

This is known as the anti-commandeering doctrine, and it is well established in constitutional jurisprudence. Four Supreme Court opinions dating back to 1842 serve as the foundation for this legal doctrine.

In *Prigg v. Pennsylvania* (1842), Justice Joseph Story held that the federal government could not force states to implement or carry out the Fugitive Slave Act of 1793. He said that it was a federal law, and the federal government ultimately had to enforce it.

> *The fundamental principle applicable to all cases of this sort, would seem to be, that where the end is required, the means are given; and where the duty is enjoined, the ability to perform it is contemplated to exist on the part of the functionaries to whom it is entrusted. The clause is found in the national Constitution, and not in that of any state. It does not point out any state functionaries, or any state action to carry its provisions into effect. The states cannot, therefore, be compelled to enforce them; and it might well be deemed an unconstitutional exercise of the power of interpretation, to insist that the states are bound to provide means to carry into effect the duties of the national government, nowhere delegated or instrusted to them by the Constitution.*

In the early 1990s, the state of New York sued the federal government asserting provisions in the Low-Level Radioactive Waste Policy Amendments Act of 1985 were coercive and violated its sovereignty under the Tenth Amendment. The Court majority in *New York v. United States* (1992) agreed, holding that "because the Act's take title provision offers the States a 'choice' between the two unconstitutionally coercive alternatives–either accepting ownership of waste or regulating according to Congress' instructions–the provision lies outside Congress' enumerated powers and is inconsistent with the Tenth Amendment."

Sandra Day O'Connor wrote for the majority in the 6-3 decision.

> *As an initial matter, Congress may not simply "commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."*

She later expounded on this point.

> *While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.*

O'Connor argues that standing alone, both options offered to the State of New York for dealing with radioactive waste in the act represented an unconstitutional overreach. Therefore, forcing the state to choose between the two is also unconstitutional.

> *A choice between two unconstitutionally coercive regulatory techniques is no choice at all. Either way, "the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."*

MACK / PRINTZ V. UNITED STATES

Printz v. United States (1997) serves as the lynchpin for the anti-commandeering doctrine. At issue was a provision in the Brady Gun Bill that required county law enforcement officers to administer part of the background check program. Sheriffs Jay Printz and Richard Mack sued, arguing these provisions unconstitutionally forced them to administer a federal program. Justice Antonin Scalia agreed, writing in the majority opinion "it is apparent that the Brady Act purports to direct state law enforcement officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme."

Citing the *New York* case, the court majority declared this provision of the Brady Gun Bill unconstitutional, expanding the reach of the anti-commandeering doctrine.

> *We held in New York that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the States' officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-bycase weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.*

Finally, the Court ruled that the federal government cannot force the states to act against their will by withholding funds in a coercive manner. In *Independent Business v. Sebelius* (2012), the Court held that the federal government ***can not compel states to expand Medicaid*** by threatening to withhold funding for Medicaid programs already in place. Justice Robert Kennedy argued that allowing Congress to essentially punish states that refused to go along violates constitutional separation of powers.

> *The legitimacy of Congress's exercise of the spending power "thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' " Pennhurst, supra, at 17. Respecting this limitation is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system. That system "rests on what might at first seem a counter-intuitive insight, that 'freedom is enhanced by the creation of two governments, not one.' " Bond, 564 U. S., at ___ (slip op., at 8) (quoting Alden v. Maine, 527 U. S. 706, 758 (1999)). For this reason, "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." New York, supra, at 162. Otherwise the two-government system established by the Framers would give way to a system that vests power in one central government, and individual liberty would suffer.*

Taken together, these four cases firmly establish a legal doctrine holding that the federal government has no authority to force states to cooperate in implementing or enforcing its acts. Even lawyers cannot dispute the legitimacy of nullification through noncooperation.

BLUEPRINT FOR RESISTING FEDERAL OVERREACH

Madison supplied the blueprint for resisting federal power in *Federalist 46*. The "Father of the Constitution" outlines several steps states can take to stop "an unwarrantable measure," or "even a warrantable measure" of the federal government. Anticipating the anti-commandeering doctrine, **Madison calls for "refusal to cooperate with officers of the Union" as a method of resistance.**

Madison's blueprint, supported by the anti-commandeering doctrine, provides a powerful tool that states can use to stop unconstitutional federal acts in their tracks. In fact, during the federal government shutdown, the National Association of Governors admitted, "States are partners with the federal government in implementing **most federal programs**." That means states can create impediments to enforcing and implementing "most federal programs."

By simply refusing to provide material support to NSA spying, indefinite detention, unconstitutional violations of the Second Amendment and other unwarrantable acts, states have the power to render these actions unenforceable.

In other words, they can nullify them.

Even the Supreme Court agrees.

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