

The Forgotten Preamble:

Introduction to the Bill of Rights Gives More Meaning to the Tenth Amendment

By Joseph E. Schmitz

THE PEOPLE LOSE CONFIDENCE IN THEIR FEDERAL GOVERNMENT when Members of Congress attempt to address complex issues of "national importance" but either cannot or will not decide the most difficult legislative issues. Congress then passes laws with ambiguous wording, after which the agencies and courts, in effect, complete the legislation through a process known as "statutory construction." In so doing, the agencies and courts sometimes encroach upon political powers that neither the states nor the people have ever delegated to the national government.

WHENEVER FEDERAL COURTS AND AGENCIES ARE FORCED to "legislate" by construing legal ambiguities, they should utilize the final Article of the Bill of Rights — "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" — as an interpretive rule to construe ambiguities against the proffering party, i.e., against Congress. (*See United States v. Heth*, 1806.) (Johnson, J.) (In a contractual dispute between a citizen and the federal government, ambiguous statutory "words should be taken most strongly against the proffering party"; *id.* (Paterson, J.) ("[T]he words of a statute, if dubious, ought ... to be taken most strongly against the lawmakers.")

THE OFFICIAL VERSION OF THE BILL OF RIGHTS — A 1789 joint resolution of Congress, enrolled on parchment and

now on permanent display in the Rotunda of the National Archives Building — suggests that its final article was intended to be a rule of construction. The preamble of the official version, which was included in each copy referred to the respective States for ratification, begins as follows:

The Conventions of a number of the States having at the time of their adopting the Constitution expressed a desire, in order to prevent misconstructions or abuses of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the government will best insure the beneficent ends of its institution — Resolved by the Senate and the House

ONE WOULD THINK THAT THIS PREAMBLE, PROVIDING ORIGINAL textual context for the first constitutional amendments ratified by the states, would be taught in every law school and included in every codification and constitutional law treatise. Not so. The preamble to the Bill of Rights appears to have been forgotten along with its first article, which has never mustered the required three-fourths ratification by the respective States. (The Bill of Rights included 12 articles, the first of which would have regulated the number of House Representatives, initially to be "one Representative for every thirty thousand;" the second article was finally ratified by three-fourths of the states in May 1992 as the 27th Amendment, which prevents congressional pay raises from taking effect "until an election of Representatives shall have intervened.")

BOTH THE *UNITED STATES CODE Annotated* and the Congressional Research Service's *The Constitution of the United States of America: Analysis and Interpretation* include the preamble to the Constitution but not to the Bill of Rights. Likewise, this author searched in vain through three constitutional law treatises for even a passing reference to the introductory words

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each person involved in the 18th century constitutional amendment process presumably read before voting on ratification of the first 12 proposed articles (amendments). Each treatise, of course, does include the preamble to the Constitution. It is as if the preamble to the Bill of Rights, like the first article, never existed.

REDISCOVERY OF THE PREAMBLE TO THE BILL OF RIGHTS should be enough to convince any judge, whether judicial or administrative, that: the Bill of Rights was designed to provide practical constraints within the Constitution itself to prevent "misconstructions or abuses of its powers;" and the Tenth Amendment is integral to that design. It can hardly have been mere coincidence that the first sentence of the preamble and the final article of the Bill of Rights both address federal usurpations of state "powers." The preamble frames the problem as "misconstructions or abuses." The Tenth Amendment provides a practical solution in the form of a presumption in favor of power reserved to the States—a ready-made rule of construction for dealing with ambiguities.

FOR THOSE FEDERAL COURTS AND AGENCIES DISINCLINED on their own to construe federal legal ambiguities against the drafters (notwithstanding the preamble and final Article of the Bill of Rights), Senator Ted Stevens of Alaska has introduced the *Tenth Amendment Enforcement Act* of 1996, which concludes with the following rule of construction:

[A]ny ambiguity in this Act, or in any other Law of the United States, shall be construed in favor of preserving the authority of the States and the People.

THIS STATUTORY RULE OF CONSTRUCTION WOULD CODIFY both the Tenth Amendment as applied to acts of Congress that exceed congressional power as well as the spirit of the Tenth Amendment—a presumption in favor of state and personal authority—in instances when Congress passes a law within its constitutional powers, but leaves details of the law to agencies and unelected judges, whether administrative or judicial.

WHAT CONSTITUTIONAL OR PRACTICAL "DOWNSIDE" CAN there be to a rule of construction that merely clarifies what the unabridged text of the Bill of Rights demonstrates its sponsors intended? Any time an agency or court "construes" an ambiguous federal law against Congress, Congress can enact a new law with less ambiguous wording. The sovereign states, on the other hand, are powerless to defend their "powers" against constructive encroachments by non-elected branches of the federal government, namely agencies and courts, none of which are accountable "to the states respectively, or to the people."

A TENTH AMENDMENT RULE OF CONSTRUCTION, OF COURSE, would not solve problems of Congress unambiguously usurping powers "reserved to the states respectively,

or to the people." In such instances, absent an intervening constitutional amendment, the Supreme Court is ultimately responsible for resolving the constitutional limits of Congress' power.

ONE SUCH INSTANCE OCCURRED FOUR YEARS AGO, WHEN the state of New York invoked the Tenth Amendment to challenge an act of Congress that purported to compel states to dispose of hazardous waste generated within their respective borders in a certain manner, with a stiff "take title [and face liability]" penalty for noncompliance. New York claimed that the "take title" edict usurped its sovereign prerogatives. The Supreme Court agreed with New York, confirming the quintessential constitutional analysis in any state power usurpation inquiry: "The question is not what power the Federal Government ought to have but what powers in fact have been given by the [States and] the people." *New York v. United States* (1992) (citing pre-New Deal caselaw).

FOR INSTANCES OF FEDERAL ABUSES NOT SO BLATANT AS *New York v. United States*, a Tenth Amendment rule of construction would provide a practical safeguard against federal encroachments on powers that neither the states nor the people have ever delegated to the national government. By each branch of the federal government agreeing on such a rule of construction, perhaps the Bill of Rights might better "insure the beneficent ends of its institution." ■

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