COERCION THROUGH NEGATION?
WHY "BIG" FEDERAL WAIVERS OF STATE LAWS WARRANT A NEW TENTH AMENDMENT TEST

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I. INTRODUCTION

Under the Tenth Amendment, the federal government is prohibited from commandeering state government or state resources. Congress may not force a state to legislate or expend resources against its will. In the past decade, Congress has relied increasingly on external waivers to navigate the complexities of overlapping and conflicting laws. Does waiving state laws regulating spheres of traditional state authority amount to commandeering state government? Is there a limit to the federal government's power to waive state legal requirements, which effectively strip the state of the power to regulate?

On September 12, 2017, Acting Secretary of the Department of Homeland Security ("DHS") Elaine Duke (hereinafter referred to as the "Secretary") waived numerous California state and local environmental laws to expedite construction of the Trump Administration's promised border wall along the US-Mexico border.[1] The following week, California filed suit against DHS, alleging the waiver both on its face and as applied violates the APA, NEPA, CZMA, and myriad constitutional doctrines and provisions, including the Tenth Amendment.[2]

This article evaluates California's Tenth Amendment argument in light of modern Tenth Amendment jurisprudence. I argue that federal waiver of state laws – especially those within the traditional scope of the state police power, such as the environmental protections waived here –

[1] Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 82 Fed. Reg. 42829 (September 12, 2017).
[2] Complaint for Declaratory and Injunctive Relief, No. 3:17-cv-01911-W-BLM (S. Dist. Cal. Sep. 20, 2017), available at https://oag.ca.gov/system/files/attachments/press_releases/Complaint%20for%20Declaratory%20and%20Inj.%20Relief.pdf.

raises important policy and federalism issues that the current commandeering test cannot adequately address. Given Congress' increasing reliance on these waivers to navigate overlapping and conflicting regulatory schemes, I conclude that a new framework is necessary that weighs the desirability and usefulness of legislating through waivers against the interests of state and local governments in enforcing their laws consistently and in knowing when their laws will be enforced.

II. THE WAIVER

To understand California's legal argument regarding the effect of the federal waiver on California's state sovereignty, it is first important to understand the waiver mechanism itself. A "waiver" is a statutory provision exempting certain persons, projects, or categories of activities from some or all of the requirements of other statutory provisions.[3] Waiver provisions can be internal or external. Internal (also called "small") waiver provisions allow the Executive to suspend all or portions of the law of which they are a part. External (also called "big") waiver provisions allow the Executive to suspend the requirements of other laws. [4]

a. Waiver Authority: The REAL ID Act of 2005

The waiver provision challenged by California, Section 102(c) of the REAL ID Act of 2005[5], which amended the 1996 Immigration Reform and Immigrant Responsibility Act ("IIRIRA") [6], is an external waiver. The REAL ID Act provides for improvements to physical barriers at U.S. borders, specifically in areas of "high illegal entry."[7] Section 102 grants the Secretary of Homeland Security, "notwithstanding any other provision of law…the authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction" of the border wall." [8] The waiver becomes valid upon the Secretary's publication of her determination in the Federal Register. By invoking the REAL ID waiver, the Secretary "effectively amends the waived external statutes to contain an

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[3] R. Craig Kitchen, *Negative Lawmaking Delegations: Constitutional Structure and Delegations to the Executive of Discretionary Authority to Amend, Waive, and Cancel Statutory Text*, 40 Hastings Const. L.Q. 525, 555 (2013).
[4] *Id*.
[5] Pub. L. No. 109-13, div. B, § 102(c), 119 Stat. 302, 306 (2005), reprinted in 8 U.S.C. § 1103 note (2006) (Improvement of Barriers at Border).
[6] Pub. L. 104-208, div. C, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8 and 18 U.S.C.).
[7] Pub. L. No. 109-13, supra note 3, at §102(a).
[8] *Id*. at §102(c).

exception for border fence construction."[9] Finally, Section 102 permits only constitutional challenges to the waiver, and strips federal appellate courts of jurisdiction, to the effect that decisions of district courts are final unless the U.S. Supreme Court grants certiorari.[10]

b. The San Diego and Calexico Waivers

On September 12, 2017, Secretary Duke published a determination in the Federal Register that the border areas in San Diego and Calexico are areas of "high illegal entry." Pursuant to Section 102(c), she then waived some twenty-eight federal statutes and "all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of" those statutes.[11] The statutes listed pertain to environmental and wildlife protection, historic preservation, and Native American religious freedom. Secretary Duke waived these legal requirements with respect to a broad range of activities associated with border wall construction: "accessing the Project area…site preparation, installation and upkeep of physical barriers, roads, supporting elements, drainage, erosion controls, and safety features."[12] It is the seemingly limitless duration of this waiver, as well as its far-reaching scope, that California contends infringes on its state sovereignty in contravention of the Tenth Amendment.

III. TENTH AMENDMENT JURISPRUDENCE

The Constitutional Framers "split the atom of sovereignty," dividing the powers of government between the national government and the states, each "protected from incursion by the other."[13] They delegated to the national government a set of limited, enumerated powers, such as the power to declare war, coin money, and regulate interstate commerce. These limited delegations by implication left all remaining sovereign power to the states. Yet, under pressure from states which wished to confirm explicitly their retained rights, Congress quickly passed the Tenth Amendment, providing that those "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively." Accordingly, states have long been understood as having the right to regulate spheres such as

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[9] Kitchen, supra note 3 at 555.
[10] Deena Mueller, *Immigration Reform's Unintended Consequence: Providing Greater Justification for Border Patrol to Waive Environmental Compliance at the U.S.-Mexico Border*, 37 Wm. & Mary Envtl. L. & Pol'y Rev. 785, 798 (2013).
[11] 82 Fed. Reg. 42829, supra note 1.
[12] *Id*.
[13] *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

education, marriage, public safety, purely intrastate commerce, and land use. State and federal powers overlap in certain areas such as levying taxes and law enforcement, and state regulation in these "gray areas" is subject to federal preemption under the Supremacy Clause.

In addition to helping delineate *what* the federal government may regulate, the Tenth Amendment has been interpreted to guide *how* the federal government may regulate. The Supreme Court has held that Congress may incentivize states to adopt a federal regulatory scheme. For example, in *South Dakota v. Dole*, the Court found that conditioning states' receipt of a small portion of federal highway funds on their increasing their state drinking age to twenty-one – alcohol being a sphere of traditional state regulation – did not violate the Tenth Amendment.[14]

The federal government similarly did not violate the Tenth Amendment when it preempted state regulation of private surface coal mining.[15] In *Hodel v. Virginia Surface Mining & Reclamation Association*, the State of Virginia argued that federal regulation of surface coal mining impinged on the state's traditional right to regulate land use. However, the Court held that Congress "does not invade areas reserved to the States by the Tenth Amendment" when it displaces states' exercise of their police powers, so long as it does so while exercising one of its delegated authorities. Here, the Court explained, Congress had found that surface coal mining pollution adversely affected interstate commerce, so it could displace state regulation under its Commerce Clause authority.[16]

However, the Court did find an impermissible intrusion into state sovereignty where Congress required states to either develop their own low-level nuclear waste disposal facilities or take title to the waste and incur any liability derived therefrom.[17] *New York v. U.S.* involved a federal statute adopted after a compromise with the states regarding the need for these disposal facilities. Despite the states' apparent acquiescence, the Court accepted their argument that the take-title provision violated the Tenth Amendment because it "crossed the line distinguishing encouragement from coercion."[18] Offering the states the false "choice" of either regulating the

[14] *South Dakota v. Dole*, 483 U.S. 203 (1987).
[15] *Hodel v. Virginia Surface Mining & Reclamation Assn*, 452 U.S. 264 (1984).
[16] *Id*. at 291.
[17] *New York v. U.S.*, 504 U.S. 144 (1992).
[18] *Id*. at 175.

waste themselves or taking title to it "commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."[19]

Aside from the present case initiated by California, only one other case has raised a Tenth Amendment challenge to the Section 102 waiver provision.[20] In *County of El Paso v. Chertoff*, the DHS Secretary under President George W. Bush, Michael Chertoff, exercised his Section 102 authority to waive thirty-seven federal laws to facilitate construction of barriers and roads along 470 miles of the United States-Mexico border in Texas, New Mexico, Arizona, and California.[21] Like Secretary Duke's waiver, Chertoff's also purported to waive "all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of" the federal laws listed, and did so "with respect to the construction of roads and fixed and mobile barriers" and their upkeep.[22] The County of El Paso, Texas, sued, arguing that Chertoff's waivers of Texas state and local laws violated the Tenth Amendment. The district court rejected the County's argument, finding that the commandeering allegations were without support. [23] The court distinguished *New York*, explaining that unlike the low-level nuclear waste legislation, the REAL ID waiver did not require the County to enact laws and implement a federal program.[24] The court also collapsed conflict preemption into its Tenth Amendment analysis, finding that the waiver "merely preempts Plaintiffs from enforcing state and local laws that would impede Congress' ability to expeditiously construct the border fence."[25]

Under current Supreme Court doctrine, then, the grounds for a viable Tenth Amendment suit are laid when Congress has "commandeered" state government or state resources. The only court to confront a Tenth Amendment challenge to Section 102 of the REAL ID Act had little difficulty dismissing the claim. California's legal arguments were more sophisticated, and its record better developed, than the *County of El Paso* court makes El Paso County's out to be. Yet the state fared no better in its uphill battle. The foundation of Tenth Amendment law thus laid, I turn to California's arguments.

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[19] *Id.* at 176.
[20] *Cty. of El Paso v. Chertoff*, No. EP-08-CA-196-FM, 2008 WL 4372693 (W.D. Tex. Aug. 29, 2008).
[21] Interestingly, I found no records indicating that California sued over these 2008 waivers of its state and local laws.
[22] *Cty. of El Paso*, supra note 20 at *8.
[23] *Id*. at *9.
[24] *Id*.
[25] *Id*. at *9.

IV. CALIFORNIA'S TENTH AMENDMENT CLAIM

California alleged that Section 102 impermissibly invades California's sovereignty both on its face and as applied in the San Diego and Calexico waivers. I address the facial and as-applied challenges in turn.

a. The Facial Challenge

Section 102 vests the DHS Secretary with the power to waive "all legal requirements" in order to expeditiously build the border wall. California asserted that if this phrase is interpreted to allow the Secretary to waive the application of state and local laws,

> it would include the power to waive state laws that are intended to ensure work-place safety, anti-harassment and discrimination laws, state wage and hour laws, anti-corruption laws, laws relating to public safety, or any other state law, including criminal enforcement provisions of state law.[26]

Thus, California argued that if Section 102 is employed to waive state laws, it infringes upon the state's sovereign right "to create and enforce a legal code, both civil and criminal."[27]

There is disagreement among legal scholars as to whether the "all legal requirements" language in Section 102 was intended to encompass state law requirements.[28] The *County of El Paso* court found the phrase unambiguous, holding that Congress did intend the waiver authority to reach state laws.[29] Assuming this is the case, California has a plausible argument that Section 102 commandeers state legislatures in violation of the Tenth Amendment. As described above, the Section 102 waiver in effect "writes into any statutes that might impede completion [of the border wall]…a waiver provision" for its construction.[30] Put another way, the waiver provision "grant[s] the executive branch the discretion to determine when certain laws should not apply."[31] Under the *New York* test, one can see how "writing into" state statutes and deciding when state and local laws should apply could constitute commandeering. Like the *New York* statute, the REAL ID waiver provision forces states to accept a federal regulatory scheme – the construction

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[26] Complaint for Declaratory and Injunctive Relief, supra note 2 at ¶ 200.
[27] *Id*. at 29 (citing *Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982)).
[28] Compare Kitchen, supra note 3 at 562 ("[A]llowing the Secretary to waive any law granted the Secretary broad discretion to negate not only federal law, but state and local law as well.") with David J. Barron and Todd D. Rakoff, *In Defense of Big Waiver*, 113 Colum. L. Rev. 265, FN 268 (2013) ("We would not understand the authority to 'waive all legal requirements' to include 'waiving' state law requirements.").
[29] *County of El* Paso, supra note 20 at *10.
[30] David J. Barron and Todd D. Rakoff, *In Defense of Big Waiver*, 113 Colum. L. Rev. 265, 289 (2013).
[31] Kate R. Bowers, *Saying What the Law Isn't: Legislative Delegations of Waiver Authority in Environmental Laws*, 34 Harv. Envtl. L. Rev. 257 (2010).

of a border wall – into their own state legal systems, in this case through negating state laws. The discretion to waive is virtually unbridled, and lies exclusively with the DHS Secretary – a federal official – denying states input into when and to what extent a waiver is justified. Thus, under *New York*, California has a valid commandeering argument. In addition, to the extent that a Section 102 waiver could touch on areas of traditional state regulation not explicitly delegated to the federal government, the *Hodel* doctrine also lends support to California's theory. On its face, the waiver authority appears to reach state public safety laws, state wage and hour laws, and other such laws which Congress lacks the power to preempt.

At the same time, there are strong arguments for distinguishing *New York*. By waiving California state and local laws, the Secretary is not literally requiring the state and local governments to amend their laws through the state legislature and city councils. The waiver merely *has the effect* of amending them. Under a formalistic approach, therefore, the waiver probably does not amount to commandeering.

There is also an argument that Section 102 waivers operate not as amendments to state law, but as "preemptive" laws pursuant to the Supremacy Clause. States as sovereigns have the power to create their own laws, but the Congress can preempt them pursuant to one of its delegated powers. The Constitution expressly delegates to the federal government authority over national defense, foreign affairs, and immigration.[32] The Section 102 waiver is intended to promote construction of a border wall between the U.S. and Mexico; it is premised on the idea that expeditious construction is necessary for national security. Given this, the federal government has a forceful argument that Congress has the power to "preempt" via waiver any state laws that conflict with IIRIRA's border wall activities. However, as California argues, it is not clear that the exercise of Section 102 waiver authority is an act of preemption. Conflict preemption permits a conflicting or related federal statute to take precedence over a state statute. When the Secretary invokes the waiver, there is no true "preempting" federal statute. Rather, the Secretary is simply precluding the state from applying its laws to border wall construction activities.

Finally, even if the exercise of waiver authority is properly categorized as preemption, there are limits to what Congress may preempt. As noted above, *Hodel* stands for the proposition that Congress may displace states' exercise of their police powers *so long as* Congress is acting

[32] U.S. Const. art. I § 8.

pursuant to one of its delegated authorities.[33] Here, the Section 102 waiver provision contains no such limiting principle. To the contrary, it is virtually limitless, and does nothing to confine the federal government's waiver authority to its areas of delegated power. In sum, while undoubtedly an uphill battle, the outcome of California's facial challenge to Section 102 was not a foregone conclusion. The same cannot be said of its as-applied challenge, to which I turn next.

b. **The As-Applied Challenge**

In addition to challenging the constitutionality of Section 102 on its face, California also argued the statute is invalid as applied in the San Diego and Calexico waivers. This argument is more clearly disfavored under the *Hodel* and *New York* tests.

California focused its as-applied argument on the "indefinite" and "unlimited" nature of the Section 102 waiver authority.[34] The state argued that the waiver authority is subject to the "barest of findings that a border crossing is an area of high illegal entry, with no standards or criteria for making this determination."[35] The state also alleged that the Calexico and San Diego waivers of state law with respect to the continued "upkeep of physical barriers, roads, supporting elements, drainage, erosion controls and safety features" are problematic intrusions into California's sovereignty. Because the waivers do not provide any definitions or time limits for these activities, California argued, "the scope of intrusion by Defendants into areas of historic state regulation and governance is potentially vast." Under current Tenth Amendment jurisprudence, these arguments fall flat.

The Secretary's waiver of state and local laws related to federal environmental preservation, historic preservation, and Native American religious freedom almost certainly does not violate the Tenth Amendment. California stated in its complaint that the laws actually implicated are all environmental in nature. Thus, while the waiver again has the effect of "amending" these laws, it is likely that Congress could preempt most if not all of them under its authority to regulate interstate commerce. As explained above, the *Hodel* Court found that this application of preemption does not violate the Constitution. California also argued that the indefinite nature of the scope creates uncertainty among state regulatory entities as to when and how their laws apply in the border region, and constitutes a "potentially vast" incursion into the

[33] *Id.* at 291.
[34] Complaint for Declaratory and Injunctive Relief, supra note 2 at ¶ 205.
[35] *Id*.

state's historic jurisdiction.[36] While perhaps sympathetic, this argument simply does not state a Tenth Amendment claim of direct, coercive commandeering required under *New York*. It is at best an indirect, passive co-opting of state power by the federal government.

Should such broad negations of state power by the federal government be permissible under the Tenth Amendment? This question brings me to the last section of my article, in which I argue that a new Tenth Amendment framework is necessary to address external waivers such as that in Section 102.

V. CURRENT TENTH AMENDMENT JURISPRUDENCE IS INADEQUATE TO ADDRESS BIG WAIVERS

A waiver is essentially the power to negate provisions of law. To date, the Court's Tenth Amendment jurisprudence has dealt only with positive law; the highly political and discretionary power to preclude the application of other laws has never before come before the Court in the context of a Tenth Amendment challenge. Because waivers – particularly external or "big" waivers – are a different animal, I argue that the current Tenth Amendment framework is insufficient to evaluate their constitutionality.

Unlike statutes, waivers don't go through bicameralism and presentment. They don't receive input from state representatives. To the extent they are issued by executive administrators, they are insulated from the local constituents most affected by the waivers. One scholar lambasted the Section 102 waiver for permitting prior statutory bargains to be "negated without the contentious deliberative process that might otherwise have caused greater consideration of the appropriate policy balance to be struck between expeditious construction of the border fence on the one hand, and the important environmental…interests protected by the waived statutes on the other hand."[37] Many of the issues surrounding waivers are undoubtedly creatures of administrative law, and may at first glance seem far afield from the Tenth Amendment. Nonetheless, they are related to the Tenth Amendment, as they go to the heart of the question of whether external waiver provisions – if they are to be interpreted as touching state as well as federal law – unlawfully intrude on states' sovereign rights of self-government.

A court could reasonably find that Section 102 violates the Tenth Amendment on its face based on the *New York* and *Hodel* framework. There are enough facts to argue that the

[36] *Id.* at ¶ 207.
[37] Kitchen, supra note 3 at 598-99.

Secretary's exercise of the waiver amounts to commandeering state legislatures. However, analyzing the Section 102 waiver under current Tenth Amendment jurisprudence – the commandeering test – is like trying to put a square peg through a round hole. A new standard would be better suited to answer these questions. Future courts faced with arguments like California's should endeavor to develop a new Tenth Amendment framework for waivers that weighs the desirability and usefulness of legislating through big waivers against the interests of state and local governments in enforcing their laws consistently and in knowing when their laws will be enforced.

VI. THE DISTRICT COURT'S ORDER

On February 27, 2018, the district court granted DHS summary judgment on California's Tenth Amendment claim.[38] The state had based its argument *City of Boerne v. Flores*[39], in which the U.S. Supreme Court held unconstitutional the Religious Freedom Reformation Act (RFRA) as applied to the states because it amounted to a "substantive change in constitutional protections" that was beyond Congress power to remedy and deter constitutional violations under Section 5 of the Fourteenth Amendment.[40] Moreover, the scope and reach of RFRA was "overly broad, as it applied to every agency and official in federal, state and local governments and to any federal and state law, and was temporally broad with no termination date."[41] California argued that 102's grant of authority is similarly overbroad and temporally unlimited, and thus prohibited under *City of Boerne*.[42]

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[38] *In re Border Infrastructure Envtl. Litig.*, __ F. Supp. 3d __ (2018), No. 17CV1215-GPC(WVG), 2018 WL 1071702 at *39-40 (S.D. Cal. Feb. 27, 2018).
[39] *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997).
[40] California had also argued that the waivers violate the Tenth Amendment "equal sovereignty" principle embodied in *Shelby Cnty., Alabama v. Holder*, 570 U.S. 529 (2013). In *Shelby Cnty.*, the U.S. Supreme Court struck down a Voting Rights Act coverage formula that applied to nine states where voter discrimination was rampant at the time of enactment. The Court explained that such a violation of the principle of equal sovereignty was permissible only where the statute was "significantly related to the problems it targets," and found that entrenched voter discrimination no longer existed in these states. *Id*. at 535. California argued that the DHS waivers similarly violated its equal sovereignty because only its laws have been waived, and the number of unauthorized entries through the California-Mexican border has decreased dramatically in recent years. The district court rejected this analogy, explaining that "[i]nevitably all states are not border states, and section 102 does not single out a particular state in imposing requirements on state powers in a discriminatory manner as the VRA in *Shelby*." *In re Border Infrastructure Envtl. Litig.*, __ F. Supp. 3d at *39.
[41] *In re Border Infrastructure Envtl. Litig.*, __ F. Supp. 3d at *39 (citing *City of Boerne,* 521 U.S. at 518).
[42] *Id.* at *39.

Rejecting this analogy, the district court found that *City of Boerne* was easily distinguishable because it involved a claim under the Fourteenth, not the Tenth, Amendment.[43] But more to the point, the court found no impermissibly broad language within Section 102: a waiver made pursuant to Section 102 is sufficiently "circumscribed to those the Secretary determines are 'necessary to ensure expeditious construction of the barriers and roads,'"[44] and the San Diego and Calexico waivers are sufficiently limited both physically and temporally "to the 'construction of roads and physical barriers…in the Project Area."[45] Finally, the court agreed with the district court in *County of El Paso* that Section 102 "does not abrogate the validity of state laws but 'merely suspend[s] the effects of the state and local laws."[46] If this is true, it seems clear that the waiver does not operate through preemption; there is no "temporary preemption" within the Court's jurisprudence. Rather, the Section 201 waiver has been interpreted as a discretionary tool in the federal government's toolbox which may preclude the application and enforcement of any and "all legal requirements" related to the border wall.

VII. CONCLUSION

Dismissed in the past as a "mere truism,"[47] the Tenth Amendment has some gained traction in recent years as a real constraint on federal power. While California's as-applied argument lacked traction, its facial challenge to the REAL ID law's seemingly limitless waiver power raised important policy issues that the court failed to address. Due to the unique issues that waivers, and particularly external waivers, raise, future courts would be well advised to create a new analytical framework entirely.

[43] *Id.*
[44] *Id.* (citing 8 U.S.C. §1103(c)).
[45] *Id.*
[46] *Id.* (citing *Cty. of El Paso*, 2008 WL 4372693, supra note 20).
[47] *U.S. v. Darby Lumber*, 312 U.S. 100, 124 (1941).