



# Legislative Study Group

Texas House of Representatives

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May 29, 2009

## Policy Primer for Members: House Concurrent Resolution 50

**Recommendation: Unfavorable**

**HCR 50 (Creighton | Hughes | Berman | Gattis | Guillen)**

Members,

Attached is a brief memorandum on HCR 50 with background history on the 10th Amendments and federal mandates. The LSG recommends "Unfavorable" on this concurrent resolution. While there are favorable amendments that will be offered to the resolution, on its merits, the resolution remains unfavorable.

### Key Points:

HCR 50 is a resolution designed to assert the "states' rights" to ignore any federal laws or policies considered outside the bounds of the 10th Amendment. This resolution declares that the 10th amendment defines the "total scope of federal power" and goes on to direct the federal government to repeal any compulsory legislation directing compliance by the states. From the resolution, emphasis added:

***"federal legislation that directs states to comply under threat of civil or criminal penalties or sanctions OR that requires states to pass legislation or lose federal funding **be prohibited or repealed.**"***

(lines19-23, pg 2)

### **Examples of federal legislation that directs states to comply:**

- **Civil Rights Act of 1964**
- **G.I. bill**
- **Voting Rights Act**
- **Violence Against Women Act**
- **Americans With Disabilities Act**
- **Age Discrimination in Employment Act**
- **Civil Rights Act of 1968**
- **Title IX Education Amendments of 1972**
- **Equal Employment Opportunity Act**
- **Individuals With Disabilities Education Act**
- **Pregnancy Discrimination Act**
- **Voting Accessibility For the Elderly and Handicap Act**
- **Civil Rights Act of 1991**
- **Family and Medical Leave Act**
- **COBRA (Consolidated Omnibus Budget and Reconciliation Act)**
- **Safe Drinking Water Act**
- **Clean Air Act**
- **Child Support Enforcement**
- **NAFTA**

May 28, 2009

## Policy Primer for Members: House Concurrent Resolution 50

**Recommendation: Unfavorable**

### **HCR 50 (Creighton | Hughes | Berman | Gattis | Guillen)**

Currently there is a concerted movement on the part of conservative groups across the nation demanding that state legislatures pass resolutions designed to assert the states' preference to ignore any federal laws or policies they find outside the bounds of the 10th Amendment.

In Texas, this measure is HCR 50 which declares that the 10th amendment defines the "total scope of federal power." It directs the federal government to repeal any compulsory legislation directing compliance by the states.

Some proponents claim this resolution simply calls for the protection of the states from the fiscal tyranny of the federal government and seeks the protection of the state treasury. In reality, following the proposal would have serious social policy implications, reaching far beyond the expectations of some proponents. There needs to be a realization that the federal government is not the only government which can be tyrannical. The people need protection from the states as well, and yes, the federal government does use sanctions and civil penalties to protect the people from the state. Historically, the tyranny of the state has been equal to if not greater than that of the federal government, as I will highlight in this discussion.

To many proponents and detractors alike, this measure may be considered ineffective or innocuous because it is only a resolution. However, it is dangerously symbolic of a more sinister movement spreading across the nation. This movement is made of individuals, who because they do not approve of our democratically elected President, advocate secession or even more radical actions. However, they choose to forget that even the leaders of the federal government were elected by the people of Texas and the United States.

It is important to remember that, while the 10th Amendment is an important tenet of states' rights in a federalist society, it is but one amendment to the United States Constitution. While it has its place, it should not be elevated above the other equally important amendments to the Constitution. The effectiveness and longevity of the Constitution is a result of the fact that it is a document whose interpretation has evolved over time.

As originally interpreted by the Supreme Court, the Bill of Rights did not apply to the states; it applied only to federal law. The states had their own constitutions and their own bills of rights which represented the general rule of law. The states used the 10th amendment to justify any number of repressive immoral policies including slavery, the ability to seize abolitionist literature from the mail, secede from the union, and to send slave-catchers into non-slave state territory to enforce the Fugitive Slave Law of 1850.

After the Civil War, the Supreme Court did not completely change the way it viewed the 10th amendment. In the first wave of cases, the federal government was still considered to be an overarching power whose job was not to alter the status quo of the states. For example, in the case of **Hammer v. Dagenhart (1918)**<sup>1</sup> the court held that although there should be limitations on the right to employ children in mines and factories in the interest of their own and the public's welfare, such regulation was reserved for the states under the 10th amendment. During this time, the States were, as the HCR 50 seeks, also considered immune from federal taxation and exempt from bankruptcy legislation and all other economic controls.

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<sup>1</sup> 247 U.S. 251

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This parochial view of economic control evolved as a result of the Great Depression when the power of Congress to regulate the economy through the use of its commerce power, which had always existed in the Constitution, was fully recognized by the Court. Since then, aside from a few notable exceptions, the Court has upheld the application of federal economic controls as well as the fundamental rights guaranteed by the Constitution.

During the 1960's, the 10th Amendment was a major issue because Southern states attempted to use it as a barrier to enforcement of the 14th Amendment. The 14th Amendment gave citizenship to and protected the civil liberties of recently freed slaves. It did this by prohibiting states from denying or abridging the privileges or immunities of citizens of the United States; depriving any person of his life, liberty, or property without due process of law, or denying to any person within their jurisdiction the equal protection of the laws.

The current efforts by states to push for 10th Amendment resolutions asserting state sovereignty, stir up rhetoric of Jim Crow era segregation. The painful reality is that Southern states used a focus on the 10th Amendment to justify state sanctioned slavery and segregation. The discriminatory Jim Crow laws and other voting suppression efforts caused many minority citizens to be deprived of their constitutionally guaranteed rights, including the precious right to vote. These laws stayed in effect for years despite the efforts of many to repeal them. The Civil Rights Act, Voting Rights Act, and the 24th Amendment were eventually passed in 1964-65 to close this era of discrimination and bring equality to all Americans. This included equal access to the polls for all Americans regardless of race, religion, gender, color, or creed. Mississippi and Texas along with 11 other states originally rejected the ratification of the 24th amendment, and did not ratify it until this legislative session some 45 years later. The argument used to fight the passage of these groundbreaking pieces of legislation was that they would infringe upon the state's sovereign rights, an argument overturned by the passage of these acts on the federal level and by state-wide elections across the nation ratifying the 24th amendment.

The simple fact is that if the courts had favored states' rights arguments and not forced states to comply with court orders and federal statutes, this country would be a very different place. In **Oregon v. Mitchell (1970)**<sup>2</sup> Oregon challenged the constitutionality of the amendments to the federal Voting Rights Act, claiming that the Act usurped powers reserved to the states to control their own elections. However, the Supreme Court upheld the Voting Rights Act provision making literacy tests unconstitutional. Statistics showed voter registration and voter participation were consistently greater in states without literacy tests.

In **South Carolina v. Katzenbach, Attorney General (1966)**<sup>3</sup> South Carolina argued along with five other states that the Voting Rights Act of 1965 exceeded the powers of Congress. The Supreme Court found that when a state exercises power wholly within the domain of state interest, it is insulated from federal judicial review, but such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.

Not long ago our state had political primaries that were open only to whites. Texas Justice Reed stated that, "Texas is free to conduct her elections and limit her electorate as she may deem wise..." The Supreme Court in **Smith v. Allwright (1944 Harris County)**<sup>4</sup> held that because the primary election was related to the general election, the right to vote, regardless of race, was secured by the United States Constitution.

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<sup>2</sup> 400 U.S. 112

<sup>3</sup> 383 U.S. 301

<sup>4</sup> 321 U.S. 649

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Under the guise of states' rights, Alabama Governor George Wallace attempted to block two black students from enrolling at the University of Alabama. Through the Supreme Court decision in **Brown v. Board of Education**<sup>5</sup> and intervention by the National Guard the school was forcibly integrated. The Florida Legislature also argued that Brown usurped state constitutional powers, and passed a resolution to declare the Court's decision in 1954 as null and void.

When Barry Goldwater ran for president, he emphasized the need for states' rights, as a cornerstone of his campaign. He opposed the Civil Rights Act of 1964 based on his view that the act was an intrusion of the federal government into state affairs. Provisions in this legislation prohibit discrimination on the basis of sex as well as race in hiring, promoting, and firing.

All of these examples of states' rights highlight the fact that HCR 50 has far reaching negative repercussions, seeking to turn back the clock on the social progress of our nation. Most references to states' rights in the common political vernacular are actually veiled references to segregation. It is true that the 10th amendment resolution currently proposed demands that the federal government cease and desist mandates, including grants and other federal money sent to states that include any required provisions. However, most federal legislation has some requirement that must be met in order to receive funds. When the federal government appropriates taxpayer funds to the states the taxpayers should have a means to ensure that the dollars are spent for the purpose their democratically elected leaders originally determined. A few examples include conditioning federal highway funds on having a drinking age of 21 as well as the reduction of the blood alcohol level to .08 or requiring the state to pay for the rape exams for rape victims to be eligible for Violence Against Women Act (VAWA) funds. HCR 50 calls for a repeal of federal legislation that protects the people and prevents their tax dollars from being used in Texas to address critical needs in transportation, education, health care, law enforcement, veterans' programs and many other vital services beneficial to our state.

The Supreme court in **Martin v. Hunter's Lessee (1816)**<sup>6</sup> wisely stated that *judges of equal learning and integrity, in different States, might differently interpret a statute, or a treaty of the United States, or even the Constitution itself. If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws the treaties, and the constitution of the United States would be different in different states, and might perhaps never have precisely the same construction, obligation, or efficacy, in any two States.*

HCR 50 is intended to send a message of upholding states' rights to Washington D.C., but the ramifications of such a message from Texas and other states are far beyond the intentions of this resolution and would have a deep and devastating impact if actually followed. The State of Texas should focus on more pressing matters and not seek to reopen the wounds of the past with such an irresponsible resolution.

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<sup>5</sup> 347 U.S. 483

<sup>6</sup> 14 U.S. 304