

Federal Law, State Law and State Policy



Today's Discussion

10th Amendment of the U.S. Constitution

State Powers vs. Federal Powers

Dual Court System and Legal Precedent

The dispute between U.S. Circuit Courts regarding the 8 USC 1373 and 1644 and the 10th Amendment

Which Circuit court governs Vermont? And why?

Why do we need to understand this when considering the revisions for Vermont's FIP policy?

What is the purpose of policy as it relates to state and federal laws?

10th Amendment

Amendment X

- “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.”
- From this text, the Supreme Court has derived an “**anticommandeering principle**,” which prohibits the federal government from compelling the States to enact or administer a federal regulatory program. See [*Printz v. United States*, 521 U.S. 898, 935, 117 S.Ct. 2365, 138 L.Ed.2d 914 \(1997\)](#) (“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.”).” (emphasis added.)

Exclusive and Concurrent Powers

Exclusive federal powers	Concurrent powers	Exclusive state powers
Coining money	Taxation	Conducting elections
Regulating interstate and foreign commerce	Lawmaking and enforcement	Establishing local governments
Regulating the mail	Chartering banks and corporations	Providing for public safety, health, welfare
Declaring war	Taking land for public use (eminent domain)	Maintaining militia
Raising armies	Establishing courts	Ratifying Constitutional amendments
Conducting foreign affairs	Borrowing money	Regulating intrastate commerce
Establishing inferior courts		
Establishing rules of naturalization		

The Supremacy Clause

[Article VI](#), Paragraph 2 of the U.S. Constitution is commonly referred to as the Supremacy Clause.

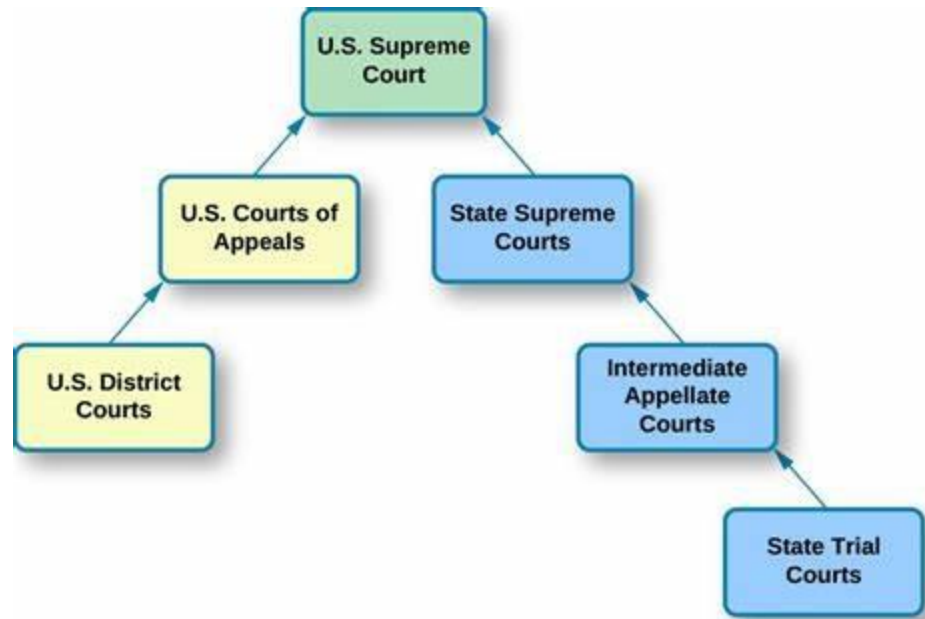
It establishes that the federal constitution, and federal law generally, take precedence over state laws, and even state constitutions. It prohibits states from interfering with the federal government's exercise of its constitutional powers, and from assuming any functions that are exclusively entrusted to the federal government. It does not, however, allow the federal government to review or veto state laws before they take effect

8 U.S.C § 1373 and 8 U.S.C. § 1644

- 8 U.S.C. § 1373(a)
- “Notwithstanding any other provision of Federal, [State](#), or local law, a Federal, [State](#), or local government entity or official **may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and [Naturalization](#) Service information regarding the citizenship or immigration status**, lawful or unlawful, of any individual.” (effective: September, 1996)
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- 8 U.S.C § 1644
- “Notwithstanding any other provision of Federal, State, or local law, **no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status**, lawful or unlawful, of an alien in the United States.” (effective: August 22, 1996)

(emphasis added)

Dual Court System and Legal Precedent



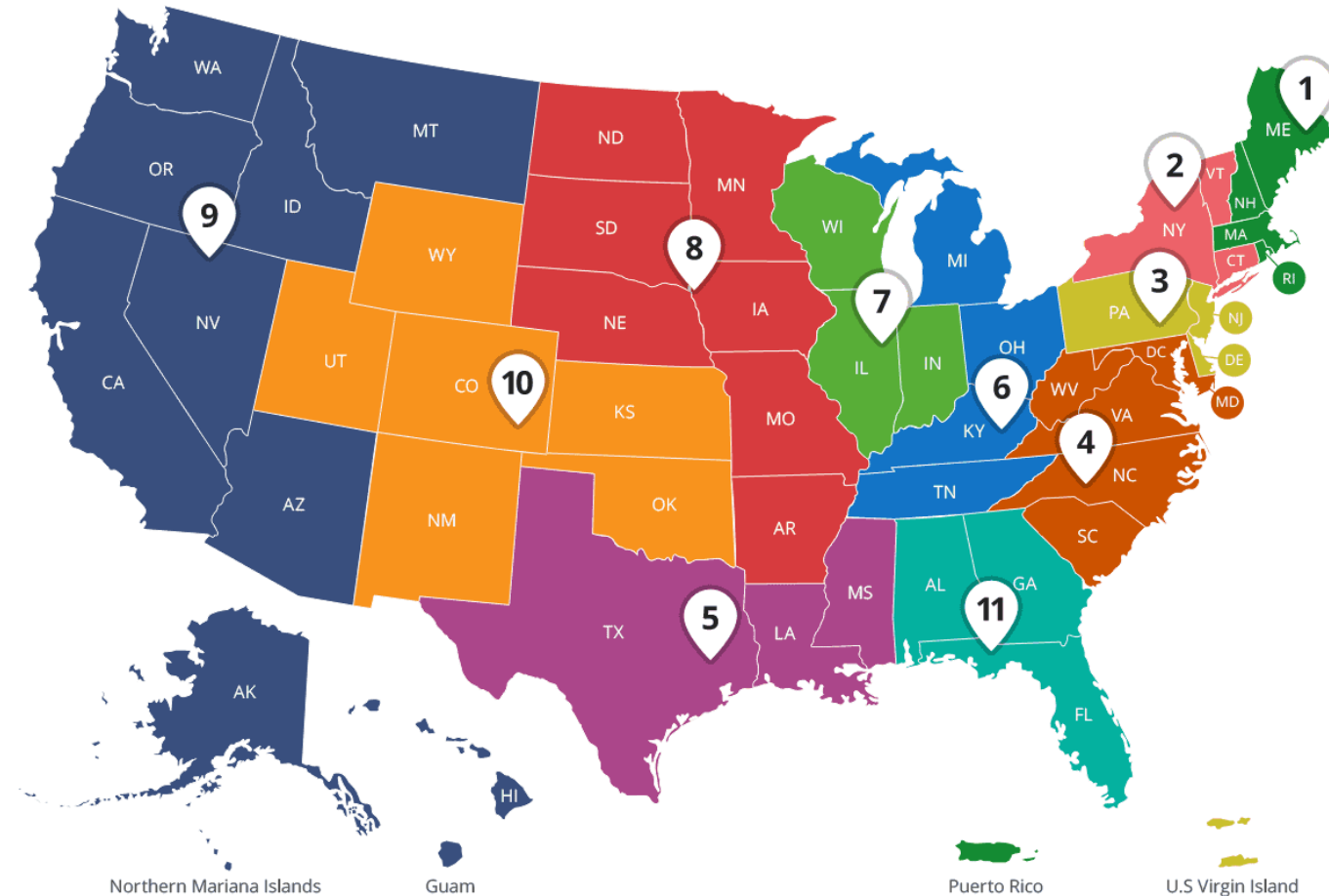
Precedent refers to a **court decision that is considered as authority for deciding subsequent cases involving identical or similar facts, or similar legal issues.**

Precedent is incorporated into the doctrine of stare decisis and requires courts to apply the law in the same manner to cases with the same facts.

Stare decisis – “let the decision stand” or “to stand by things decided”

In Vermont, legal precedent is set by the Vermont Supreme Court and the U.S. Supreme Court. If a state issue, we would next look to neighboring states for precedent. If a federal issue, we would look to the Second Circuit of the U.S. Court of Appeals, and then to other Circuits if 2nd Cir. did not address the issue.

The Circuits of the US Court of Appeals & Decisions Regarding the 10th Amendment and 8 U.S.C 1373 and 1644



The Federal Statutes and the 10th Amendment

- Does 8 USC 1373 and/or 1644 violate the 10th amendment thereby making the federal statutes unconstitutional?
 - 3rd Cir, 7th Cir and 9th Cir state with varying arguments in differing fact patterns that the federal statutes are in violation of the anti-commandeering principle within the 10th amendment. All three Circuits use the *Murphy* decision as the basis for this claim.
 - 2nd Cir states that the statutes are not unconstitutional and that their sister circuits are using the *Murphy* case incorrectly.
 - “But the conclusion that § 1373, on its face, violates the Tenth Amendment does not follow. A commandeering challenge to a federal statute depends on there being pertinent authority “reserved to the States.” In *Murphy*, there was no question that, but for the challenged federal law, the States’ police power allowed them to decide whether to permit sports gambling within their borders. That conclusion is not so obvious in the immigration context where it is the federal government that holds “broad,” *Arizona v. United States*, 567 U.S. at 394, 132 S.Ct. 2492, and “preeminent” power, *Toll v. Moreno*, 458 U.S. at 10, 102 S.Ct. 2977. Title 8 of the United States Code, commonly known as the Immigration and Nationality Act (“INA”), see 8 U.S.C. § 1101 *et seq.*, is Congress’s “extensive and complex” codification of that power, *Arizona v. United States*, 567 U.S. at 395, 132 S.Ct. 2492.” *State v. Dept. of Justice*, 951 F.3d 84, 113 (2nd Cir 2020). Thus, at the same time that the Supreme Court has acknowledged States’ “understandable frustrations with the problems caused by illegal immigration,” it has made clear that a “State may not pursue policies that undermine federal law.” *Id.* at 91 (quoting *Arizona* at 416.)

If the Council adopts a policy that, in whole or in part, contradicts Federal law, what could happen?

I. If State Law/Policy conflicts with Federal Law

- When laws or policies conflict between State and Federal – the Federal government may sue the State.
 - May is not a Shall – we do not know whether the Federal government would sue Vermont if a Vermont State agency enacted a Statewide Policy that conflicts with federal law but they can, and if they did, they would more than likely win – see Supremacy Clause and 2nd Circuit discussed earlier.
 - The federal government could also sue a town or city directly.
 - The federal government can tie compliance to federal funds – not an issue for VCJC but may be an issue for local agencies
 - Likelihood of Federal interest in VCJC’s FIP Policy may vary wildly dependent on administration and what issues that administration wishes the federal agencies to focus on.
 - It is one thing to state that the VCJC may not be concerned about pushing up against the Federal government, it is another thing to state that the VCJC is mandating that all law enforcement agencies in the State risk tangling with the Federal government.

II. If the State Model Policy conflicts with 8 USC 1373 and/or 1644, by Vermont statute those sections of the policy are abolished:

- 20 V.S.A. 2366
- (f) Nothing in this section is intended to prohibit or impede any public agency from complying with the lawful requirements of [8 U.S.C. §§ 1373 and 1644](#). To the extent any State or local law enforcement policy or practice conflicts with the lawful requirements of [8 U.S.C. §§ 1373 and 1644](#), that policy or practice is, to the extent of the conflict, abolished.
- It is more likely that the VCJC, the State, would be sued by a local agency or other State agency within the state of Vermont than by the Federal government.

If the Council adopts a policy that, in whole or in part, contradicts Federal law, what could happen?

III. Difficulties with VCJC Professional Regulation cases

- If an unprofessional conduct case is based on a violation of the FIP policy, and the offending action is within one of the clauses of the policy that may violate federal law, depending on the facts and circumstances of the conduct.

IV. Potential loss of insurance for cities and towns toward defending civil suits

- Towns and cities may have insurance coverage issues if the policy has been found to violate federal or state law and/or town and cities may need to litigate whether the statewide policy violates state or federal law to maintain their coverage in the event of a denial.

Questions to consider when reviewing the proposed revision and the report supporting the proposed revision?

- For the first three recommendations, pgs. 5-6 FIP Report, sections II.d, V.b and V.c. and VI.a and VI.b of proposed revision, there is no issue with Federal law. The question for these sections are:
 - Does the Council support the amended language?
 - Does the Council find that the policy language provides clear guidelines to law enforcement officers?
- For proposal #4, language regarding federal policy, pgs. 6-7 FIP Report, potentially sections V.d.2, various sections of VI, and the Savings Clause of the proposed revision. The Winooski Model language, in and of itself, does not violate Federal law but does it give clear guidance to officers as to where State and Federal law meet? Does the removal of language that references federal statutes, as suggested by the AGO proposal, provide clarity or confusion?
- For proposal #5, provisions regarding the standard for permissible communication with federal immigration agencies, pgs 7-8, FIP report, section VI.7 of the proposed revision, does this language conflict with federal law? Does the Winooski model language address the safety concerns of border town agencies who use Federal agents as back up?

Questions from Council Members

Resources:

- Statutes

- [20 V.S.A. 2366](#)
- [8 U.S.C. 1377](#)
- [8 U.S.C 1644](#)

- Case Law

- [*Arizona v. United States*, 567 U.S. 387, 132 S.Ct. 2492, 183 L.Ed.2d 351 \(2012\)](#)
- [*Murphy vs. National College Athletic Ass'n.*, 584 U.S. 453, 138 S.Ct. 1461 \(2018\)](#)
- [*City of Chicago v. Sessions*, 888 F.3d 272 \(7th Cir 2018\)](#)
- [*City of Los Angeles vs. Barr*, 941 F.3d 931 \(9th Cir 2019\)](#)
- [*Steinle v. City and County of San Fran*, 919 F.3d 1154 \(9th Cir 2019\)](#)
- [*State v. Dept. of Justice*, 951 F.3d 84 \(2nd Cir 2020\)](#)
- [*Ocean County Bd of Commissioners v. Attorney General of State of NJ*, 8 F.4th 176 \(3rd Cir. 2021\)](#)