



Written by [Joe Wolverton, II, J.D.](#) on July 24, 2014

States Retain Authority to Secure Borders Against Illegals

Governor Rick Perry of Texas has taken the defense of Texas into his own hands, deploying up to 1,000 National Guard troops to his state's border with Mexico. Accusing the federal government of offering nothing but "lip service" on securing the southern border, Perry declared, "I will not stand idly by while our citizens are under assault and little children from Central America are detained in squalor. We are too good of a country."



Regardless of whether Perry's actions serve to stem the tide of illegal immigrants flooding across the border, the effort of a state government to take control of its own safety is constitutionally sound and should be praised by all constitutionalists.

As James Madison wrote in *Federalist*, No. 45, "The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." Surely, the securing of borders falls within this description of state authority.

In fact, historically, the federal government was not considered the primary purveyor of immigration policy.

Before the states sent delegates to a convention in Philadelphia in 1787 to amend the Articles of Confederation (the result of which was the Constitution), they were already defending their sovereign borders by setting rules governing the means by which one could lawfully enter the state. That is to say, they were policing the immigration of aliens, an act undeniably within their right as a sovereign government.

Not once during that summer of 1787 did any one of the delegates sent by the 13 states suggest granting to the new national government the authority to set immigration policy for the entire nation.

That is significant. Not even the most strident advocate of a powerful national government ever proposed granting the power in question to the central authority.

The assumption that states would exercise authority over their own borders persisted throughout the ratification process, as well.

During the ratifying convention held in Virginia in 1788, a question was raised regarding the scope of the surrender of sovereignty that would be required of states whose representatives were rightfully jealous of maintaining the rights of their home states. Would the proposed charter protect the rights of states to continue governing themselves? George Mason, a delegate to the Constitutional Convention in 1787 who refused to sign the Constitution saying that he would rather "chop off his right hand than put it to the Constitution," responded:

But I wish a clause in the Constitution, with respect to all powers which are not granted, that they are retained by the states. Otherwise, the power of providing for the general welfare may be



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perverted to its destruction. Many gentlemen, whom I respect, take different sides of this question. We wish this Amendment to be introduced to remove our apprehensions. There was a clause in the Confederation reserving to the states respectively every power, jurisdiction, and right, not expressly delegated to the United States.

A pair of amendments similar to those recommended by Mason was eventually appended to the Constitution, known as the Ninth and Tenth Amendments.

Read together, these amendments forbid the federal government from exercising any power other than those enumerated in the Constitution, and they protect the sovereignty of the states against alienation by the government of the United States.

The application of the principle of federalism, including the retention by states of their authority to govern within their boundaries, is particularly relevant to the establishment of a national immigration standard.

Thomas Jefferson spoke on this precise issue and the effect such congressional acts should have:

Alien friends are under the jurisdiction and protection of the laws of the state wherein they are; that no power over them has been delegated to the United States, nor prohibited to the individual states, distinct from their power over citizens; and it being true, as a general principle, and one of the amendments to the Constitution having also declared, that 'the powers not delegated to the United States by the Constitution, nor prohibited to the states, are reserved, to the states, respectively, or to the people,' the act of the Congress of the United States, passed the 22d day of June, 1798, entitled 'An Act concerning Aliens,' which assumes power over alien friends not delegated by the Constitution, is not law, but is altogether void and of no force.

Constitutionally speaking, the 10th Amendment makes it very clear that in the absence of explicit, enumerated authority to legislate, power to govern in that area remains with the states and the people.

While there are legitimate questions as to the constitutional limits on federal authority over immigration (specifically with regard to whether the influx of illegals across the southern border constitutes an invasion), there is no question that states retain the power to secure their borders and to repel any attempt to cross them, particularly in violation of applicable law.

Governors of other border states are encouraged to follow Rick Perry's example and exercise this sovereign authority to protect their citizens now rather than wait on the federal government to act.

Photo of U.S.-Mexico border near El Paso, Texas

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