

# The Supremacy Clause & Tenth Amendment v. Mandates



By Paul Engel

November 15, 2021

- Does federal law always supersede state law?
- Is OSHA's vaccine mandate the supreme law of the land?
- What can the state and the people do to reinstate the rule of law?

By now, you've probably heard of Jen Psaki's response to a question about Texas standing up to Biden's threatened vaccine mandate. She stated that federal law trumps state law. I guess it's true that the best lie should contain a bit of truth, but today let's answer the question of whether federal law always trumps state law. Let's do so by looking at the original documents, so we can answer this question not only when it comes to vaccine mandates, but all of the acts coming out of Washington, D.C.

When Ms. Psaki talks about federal law trumping state law, she was referring to the Supremacy Clause, found in Article VI, Clause 2 of the Constitution of the United States:

*This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.*

[U.S. Constitution, Article VI, Clause 2](#)

To understand this clause, we need to break it down. The Supremacy Clause lists three things that are the supreme law of the land.

First, the Constitution of the United States is the supreme law of the land.

Second, the laws of the United States are supreme, but not all laws of the United States. Only the laws of the United States made pursuant to the Constitution are considered supreme. Meaning laws...

*Done in consequence or prosecution of any thing; hence, agreeable; conformable.*

### [Pursuant – Webster’s 1828 Dictionary](#)

Since only the laws of the United States made pursuant, or conformable, to the Constitution are given the high place of supreme law of the land, we’ve already shown that Ms. Psaki’s statement isn’t entirely correct. Before we get into that though, let’s look at the third thing that’s the supreme law of the land.

Third, treaties made under the authority of the United States are also considered supreme. Where does the United States get its authority? From the Constitution of course. Together, we see a hierarchy of supremacy. At the top is the Constitution of the United State, then below that document we have U.S. laws made pursuant to it and treaties made under the authority granted by it.

### **Vaccine Mandates**

With this in mind, let’s look at the question of Biden’s vaccine mandates and Texas’ response to it.

*No entity in Texas can compel receipt of a COVID-19 vaccine by any individual, including an employee or a consumer, who objects to such vaccination for any reason of*

*personal conscience, based on a religious belief, or for medical reasons, including prior recovery from COVID-19. I hereby suspend all relevant statutes to the extent necessary to enforce this prohibition.*

### [Texas Executive Order GA-40](#)

So here we have two competing orders, one from the government in Washington, D.C. telling private companies they must require vaccines, the other from the government of Texas saying they can't. So which one wins? Let's start with the federal question.

President Biden announced his intention to sign an executive order requiring employers with more than 100 employees mandate COVID-19 vaccinations as a condition of employment. While I have yet to find the actual executive order, the Occupational Safety and Health Association (OSHA), a division of the Department of Labor, has proposed regulations putting President Biden's intentions into "law". But is that the supreme law of the land? To answer that, we have to answer two questions, is this regulation law and was it made in pursuance of the Constitution?

Is It a Law?

*A rule, particularly an established or permanent rule, prescribed by the supreme power of a state to its subjects, for regulating their actions, particularly their social actions.*

### [Law – Webster's 1828 Dictionary](#)

So, is an OSHA regulation a rule prescribed by a supreme power of a state to its subjects? I would say yes. The government of the United States has delegated the power to establish rules for regulating actions, but is this rule being made pursuant to the Constitution?

Is It Pursuant to the Constitution?

Here is where Ms. Psaki's statement falls apart. First, Article I, Section 1, Clause 1 of the Constitution states:

*All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.*

### [U.S. Constitution, Article I, Section 1, Clause 1](#)

Legislative powers are defined as:

*Capable of enacting laws; as legislative power.*

### [Legislative – Webster's 1828 Dictionary](#)

If all legislative power, the power of enacting laws, is delegated to Congress, how can OSHA, which is a part of the executive branch, enact law? Sure, when Congress passed the legislation that created OSHA, they gave their creation regulatory power. However, the Constitution does not authorize Congress to delegate its legislative power, so that legislation was not made pursuant to the Constitution. Furthermore, while I haven't read the legislation, I've been told that creating vaccine mandates is not a power Congress supposedly gave to OSHA.

Being pursuant to the Constitution is not only simply about the question of Congress delegating its lawmaking power to the executive branch. Enter the Tenth Amendment:

*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.*

### [U.S. Constitution, Amendment X](#)

In order for a law to be made pursuant to the Constitution, it must enact a power delegated to the United States by the

Constitution. Look all you want, but you will not find the power to regulate private businesses, or their employees, delegated to the United States. Neither is the power to regulate the healthcare decisions for millions of Americans delegated to the United States. Since the Tenth Amendment states that powers not delegated to the United States are reserved to others, any legislation Congress may pass to enact those powers is not pursuant to the Constitution.

Laws Not Pursuant to the Constitution?

So where does that leave Biden's mandate?

*There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void.*

#### [Alexander Hamilton – Federalist Paper #78](#)

So if every act of a delegated authority contrary to its commission is void, what does that say about OSHA's regulation? For that matter, what does it say about the legislation that created OSHA, without that power being delegated to the United States?

*No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.*

#### [Alexander Hamilton – Federalist Paper #78](#)

So if the legislative act that created OSHA cannot be valid, meaning the agency itself is invalid, how can a regulation they promulgate be valid? To claim that anything OSHA does is valid means they are not only doing what they are unauthorized

to do, but what they are forbidden to do.

Mr. Hamilton pointed out that this idea that the federal government can do whatever it wants, even in contradiction to the Constitution that created it, is ridiculous. The very idea that the representatives of the people are superior to the people was as unthinkable to Mr. Hamilton as your deputy being superior to the sheriff or a servant being superior to their master. Yet that is the state of affairs today in America.

Now you may point out that the Federalist Papers are not law, rather they are commentaries in support of ratification of the Constitution as originally presented to the states. However, this idea that Congressional actions contrary to the Constitution are void was recognized by the Supreme Court:

*Certainly all those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the Legislature repugnant to the Constitution is void.*

### [Marbury v. Madison Opinion](#)

So if the act of the legislature that created OSHA is repugnant to the Constitution, which I have already shown makes it void, where does that leave the vaccine mandate and the Texas executive order?

### **Texas Executive Order**

At first, you may think this proves the Texas executive order wins this battle. Before you jump to that conclusion though, let's look at it again.

*No entity in Texas can compel receipt of a COVID-19 vaccine by any individual, including an employee or a consumer, who objects to such vaccination for any reason of personal conscience, based on a religious belief, or for*

*medical reasons, including prior recovery from COVID-19. I hereby suspend all relevant statutes to the extent necessary to enforce this prohibition.*

### **Texas Executive Order GA-40**

The problem with the Texas executive order is not that it's superseded by federal law, but that it violates the constitutions of both Texas and the United States. It is perfectly legal for Texas to tell Washington, D.C. that their mandate violates the agreement the states have, and therefore cannot be enforced within the state. However, neither the state nor federal governments have the authority to deprive private business owners control of those businesses. Both constitutions prohibit depriving these business owners of the property they have in their businesses, including control of those businesses.

### **Conclusion**

So Ms. Psaki was wrong; not all laws of the United States are superior to state laws. Of course. that doesn't mean that the Texas executive order doesn't have its problems as well. Either way, knowing what the Constitution actually says makes all the difference in the world. Perhaps if the administrations in both Austin and Washington, D.C. read and studied the Constitutions they took an oath to support, we would have fewer of these conflicts and illegal orders.

© 2021 NWV – All Rights Reserved

E-Mail Paul Engel: [paul@constitutionstudy.com](mailto:paul@constitutionstudy.com)

[**BIO:** Paul Engel founded The Constitution Study in 2014 to help everyday Americans read and study the Constitution. Author and speaker, Paul has spent more than 20 years studying and teaching about both the Bible and the U.S. Constitution. Freely admitting that he “learned more about our Constitution from School House Rock than in 12 years of public school” he

proves that anyone can be a constitutional scholar. You can find his books on Amazon and Apple Books. You can also find his books, classes and other products at the Constitution Study website (<https://constitutionstudy.com>).]