



Tenth Amendment

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THE TENTH AMENDMENT TO THE CONSTITUTION STATES

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.

Articles of Confederation the first constitution of the thirteen original United States; in effect 1781-1789

Jurisdiction the territory or area within which authority may be exercised

sovereignty supreme and independent power

federalism a system of political organization; a union is formed of separate states or groups that are ruled by a central authority on some matters but are otherwise permitted to independently govern themselves

Throughout American history, judges, politicians, and commentators have debated and disagreed about the meaning of the Tenth Amendment. The first constitution, the Articles of Confederation, recognized only a loose "league of friendship" among the thirteen newly independent former colonies. The individual states retained "every Power, Jurisdiction, and right" not "expressly delegated" to the national government, which was granted few powers. The delegates to the Constitutional Convention in 1787 realized that the problems facing the nation demanded coordinated national action. State sovereignty would have to be curbed. The Constitution they drafted does just that. It shifts power away from the state legislatures and into a redesigned national (or federal) government. The national government is given extensive powers, particularly over commercial and financial matters, and is authorized to do everything "necessary and proper" to exercise these powers.

The Tenth Amendment was added to the Constitution in order to lessen the fears of those who were suspicious of so much power being given to a centralized government situated in a far-off capital city. The amendment makes the obvious, yet politically necessary, claim that the national government's powers are limited. What is not obvious is just how limited these powers are, and where one turns to understand these limits. Behind the answers to these questions lies the broader dispute about the proper relationship between national and state power—what, in the United States, is called federalism.

Federal and State Powers

On the one side of this conflict are those who insist that the Tenth Amendment states a simple fact or truism: that the national government has only the powers that it has been granted. Anything else that might be termed a governing power belongs or is "reserved" to the state governments. Reserved powers are therefore more like residual or leftover powers. This perspective is similar to the one taken by Alexander Hamilton and James Madison, both of whom initially opposed adding a bill of rights to the Constitution. In the *Federalist Papers*, No.84, Hamilton insisted that a bill of rights was unnecessary since it would create "various exceptions to powers which are not granted." In other words, why tell the national government, which derives all of its power from the Constitution, that it cannot do something that it was never empowered to do?



Dual federalism doctrine that holds that both the state and the federal government are supreme and autonomous within their respective areas

The Tenth Amendment raises the question of the nature of the federal union. What has been called the centralist position, and used to be called the nationalist position, favors national action. Among this position's supporters have been Chief Justice John Marshall, Abraham Lincoln, Theodore Roosevelt, Franklin Roosevelt, and most of the Supreme Court through American history. They view the Constitution as a supreme law to be established by the people. They reject the idea of the Constitution as an interstate compact. As Justice Harlan Fiske Stone stated, "The Tenth Amendment states but truism is (self-evident truth) that all is retained which has not been surrendered." On the other hand, decentralists, or states' rights, as they used to be known, favor action at the state and local levels. Its advocates contend that the Constitution is a treaty among sovereign states that created the central government and gave it carefully limited authority. As Justice Clarence Thomas wrote in dissent, "The ultimate source of the Constitution's authority is the consent of the people of each individual. State, not the consent of the undifferentiated similar people of the nation as a whole." At the end of the twentieth century, the Court remains closely divided on this and the overlapping issue of federalism.

Jefferson's point of view. The alternative argument, put forward by Thomas Jefferson and others, was that a bill of rights, even if stating the obvious, would educate citizens. It might serve to instruct both the government and the governed about the rights and powers that belong to each. This latter understanding informs the interpretation of those who find in the Tenth Amendment a reaffirmation of the "federal" relationship between the national and state governments. The Tenth Amendment reminds these individuals about a doctrine that is sometimes referred to as dual federalism. It implies that Congress, even when carrying out a granted power, must not invade a subject area or activity that is reserved to the states.

Interpreting the amendment. The position a person takes in this debate will determine how one approaches interpreting the Tenth Amendment. Suppose one decides that the Tenth Amendment simply confines Congress to its delegated powers. One's focus will then be on the specific enumeration of powers in Article I, Section 8 of the original document along with the enforcement authority conferred on Congress by the final sections of the Fourteenth and Fifteenth Amendments. In contrast, if one adopts the view that the Tenth Amendment carves out a realm of independent state sovereignty, then a concentration on Congress's powers is only helpful to the degree that it contributes to an understanding of the traditional relationship between the state and national governments.

Contradictory Supreme Court Opinions

The often contradictory opinions voiced by Supreme Court justices when they apply the Tenth Amendment are best understood as variations on these two general themes. One of the Court's earliest statements on the Tenth Amendment came in the case of *McCulloch v. Maryland* (1819). In this case, the Court rejected Maryland's argument that the Tenth Amendment recognized a set of reserved state powers which deserved constitutional protection over those congressional activities which the Constitution did not specifically mention. Instead, the Court concluded that the Tenth Amendment forbids only those activities which could not plausibly be seen as "necessary and proper" to carrying out the enumerated powers of Congress.

Collector v. Day. The Supreme Court in 1871 signaled that it was moving to the alternative position. In *Collector v. Day*, it ruled that a national income tax, while a legitimate exercise of Congress's authority, could not be applied to the salaries of state officials. This embracing of the doctrine of dual federalism reached its climax in *Hammer v. Dagenhart* (1918). In that case, the justices overturned a law which forbids the transportation in interstate commerce of goods produced by child labor. The Court concluded that such regulations fell under state, not federal, regulatory power.

The New Deal. These decisions resulted in weakening the power of the national government. Eventually, they led to a showdown between the Court and President Franklin Roosevelt over the constitutionality of his New Deal programs. By 1937, Roosevelt had won the battle with the



The Liverpool pitcher commemorating Thomas Jefferson's presidential inauguration (1801). The jug features a quotation from his inaugural address: "We are all Republicans . . . all Federalists."

Court, and *Hammer v. Dagenhart* was formally overturned in 1941. The Supreme Court then returned to its earlier position, claiming that the Tenth Amendment could not be used to block an otherwise legitimate federal law or regulation. --

The Supreme Court Reverses Itself

This understanding of the Tenth Amendment remained fairly stable until 1976 when the Supreme Court handed down its divided decision in *National League of Cities v. Usery*. The case provoked a spirited debate among constitutional commentators, because in refusing to allow the application of wage and hour standards of the Fair Labor Standards Act to state employees, the Court appeared to herald the return of dual federalism. Indeed, then Justice (and now Chief Justice) William Rehnquist clearly stated that "there are limits upon the power of Congress to override state sovereignty even when exercising its otherwise plenary powers to tax or to regulate commerce."

But within ten years, the Supreme Court retreated from this position. In *Garcia v. San Antonio Metropolitan Transit Authority* (1985), the Court announced that it was overturning *National League of Cities*. Justice Blackmun, writing for a majority of the justices, argued that the limitations on the authority of Congress over the states were not to be found in a set of reserved powers or "traditional government functions" but rather in the political processes.

The Issue That Will Not Go Away

But *Garcia* did not signal an end to the debate over how to interpret the Tenth Amendment. In his dissent in that case, Justice Rehnquist suggested that the Court would return to this controversial issue. And it has. In 1995, in *U.S. v. Lopez*, the Court declared for the first time in more than half a century that Congress had acted outside of its power under the commerce clause. Although this case did not involve a direct application of the Tenth Amendment, cases restricting state sovereignty under the Tenth Amendment (including *Garcia*) have usually relied upon a broad reading of the commerce clause. The Court adopted the position in *Lopez* that the Gun-Free School Zones Act of 1990 was not a regulation of commerce and was therefore beyond the scope of Congress's power. The Court also at least implied that limitations on congressional power might be found within the traditional powers (such as regulating the possession of handguns) exercised by states.

The Brady Bill. By 1997, this position became more clear. In *Prinz v. U.S.*, the Court announced that the Brady Handgun Violence Protection Act (the Brady Bill) was unconstitutional insofar as it required state law enforcement officials to conduct background checks on gun purchasers. Justice Antonin Scalia's majority opinion insisted that the text of the Constitution did not speak directly to the issue involved in this case, but Justices Sandra Day O'Connor and Clarence Thomas, who wrote separate concurring opinions, disagreed. They concluded that this was



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simply a case where the Tenth Amendment prevented the federal government from ordering state officials to administer a federal regulatory program.

Conclusion. The *Lopez* and *Prinz* cases make Justice Rehnquist's prediction of a reevaluation of the Tenth Amendment possible. But regardless of the direction that the Supreme Court takes, history suggests that no reading that it gives of the Tenth Amendment will settle the continuing argument over its meaning. Nor will it end the debate over the range of federalism.