

The Breakfast Club
Constitutional Minute for 6 December 2022
Reserved Powers

I recently answered a question on [Quora.com](https://www.quora.com) which read: "In the 10th Amendment, what does "to the people" mean?" The requestor was, of course, referring to these words:

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.

Here's how I answered the question (note: I get a half-dozen requests on Quora each day. I don't take them all, but even when I do I tend to write short, succinct answers):

*"The People are Sovereign...(A)t the Revolution, the sovereignty devolved on the People and they are truly the sovereigns of the country...the Citizens of America are equal as fellow Citizens and as joint Tenants in the sovereignty." (Chief Justice John Jay, writing in *Chisholm v. Georgia*, 1793)*

Basically, the 10th Amendment implies that all political power not given up, through constitutions, to either the state or federal governments, remains (theoretically at least) in the hands of the ultimate sovereigns: the people.

Unfortunately, the 10th Amendment is largely a "dead letter" today, the Supreme Court long ago having given Congress plenary power not found in the Constitution. Today, Congress can spend money on anything its little heart desires, whether that object is found in the Constitution or not (see *U.S. v. Butler*, 1936 and *Helvering v Davis*, 1937). Congress can borrow money without limit, and tax us without limit. They can delegate their legislative power to the Executive Branch whenever they want (see *Mistretta v. U.S.*, 1989). Today, nearly all political power lies with the federal or state governments, not with the people. The people retain, for the time being, simply the power to elect their representatives and change those representatives when the previous choice reveals itself to have been wrong.

"It is only when the people become ignorant and corrupt, when they degenerate into a populace, that they are incapable of exercising their sovereignty. Usurpation is then an easy attainment, and an usurper soon found. The people themselves become the willing instruments of their own debasement and ruin. Let us, then, look to the great cause, and endeavor to preserve it in full force. Let us by all wise and constitutional measures promote intelligence among the people as the best means of preserving our liberties." (James Madison, First Inaugural Address, 1809)

There is a lot more to the 10th Amendment than my short answer covers. For instance, while I claimed the 10th as a “dead letter,” implying it was devoid of meaning, the Supreme Court’s official stance, expressed in [United States v. Darby Lumber Co.](#), was that *“The amendment states but a truism that all is retained which has not been surrendered”* In other words, the court agreed with the basic premise that the Constitution is one of limited powers, which is essentially what the 10th says, and thus the 10th adds nothing new to our understanding of the Constitution. *“Its purpose was ... to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.”*

There had been a similar statement in the Articles of Confederation (Article II), which read: *“Each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.”* Note that mention of “the people” was added in the 10th Amendment.

So, to summarize: All political power originates in the sovereignty of the people. They give up some sovereign to the national government through the U.S. Constitution and some to their state government through the state constitution; the rest they retain or reserve to themselves. If “we the people” would only remember that.

The Supreme Court has often ruled that certain powers are reserved to the states simply because they are not found in the U.S. Constitution; but what I find lacking in the Court’s logic is an acknowledgement that the state don’t have *every* power not given in the U.S. Constitution, they have *only* those powers given them in their respective *state* constitutions. The court seems to conveniently forget “the people.” (Of course, “the people” know none of this is going on because “the people” don’t usually read SCOTUS rulings -- except a few Breakfast Clubbers).

The Court occasionally rules that the national government simply lacks the power it is trying to implement, not necessarily that it is a reserved power of the states. An example: the [Gun-Free School Zones Act of 1990](#) mandated a "gun-free zone" on and around public school campuses across the country. In [United States v. Lopez](#) (1995), the federal government claimed the gun-prohibiting power was to be found in the Constitution’s Commerce Clause. Without specifically mentioning the Tenth Amendment, the Supreme Court ruled that there was no clause in the Constitution authorizing such a power. And so, the GFSZA was struck down, replaced two years later by a new law that did the same thing, claiming a different origin for the power.

If “the people” could ever figure out how to speak with one voice, I think they could be more powerful than even Joe Biden’s “we’ve got nukes” federal government. Granted, that’s a big “if,” but I can dream, can’t I?

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