

The Breakfast Club

Constitutional Minute for 1 Aug 2023

The Tenth Amendment

A wave of sadness falls over me every time I encounter the Tenth Amendment in reading or conversation. The Tenth was intended to be the final bulwark against the expansion of government; instead it has largely become a nullity, the federal government, including the Supreme Court, long ago having abandoned any pretense of a government of limited and enumerated powers.

The amendment was a good idea, it expressed the thinking of the framers as they contemplated what they had created; The insistence that this was a government of limited and enumerated powers resounded throughout the ratification debates as Federalists tried to allay Anti-Federalist's fears of a too-powerful central government.

At the Virginia Ratification convention, James Madison sternly insisted that "[T]he powers of the federal government are enumerated; it can only operate in certain cases; it has legislative powers on defined and limited objects, beyond which it cannot extend its jurisdiction." He repeated essentially the same words in Federalist #14 and on the floor of Congress four years later. Madison's last official act as President in 1817, the day before he passed the reins of power to his neighbor James Monroe, was to veto an "Internal Improvements" bill that had been passed by Congress a few days before, stating:

"I am not unaware of the great importance of roads and canals and the improved navigation of water courses, and that a power in the National Legislature to provide for them might be exercised with signal advantage to the general prosperity. But seeing that such a power is not expressly given by the Constitution, and believing that it can not be deduced from any part of it without an inadmissible latitude of construction and a reliance on insufficient precedents; believing also that the permanent success of the Constitution depends on a definite partition of powers between the General and the State Governments, and that no adequate landmarks would be left by the constructive extension of the powers of Congress as proposed in the bill, I have no option but to withhold my signature from it..."¹

Today of course, Congress shows no reluctance to spend billions of our tax dollars on "internal improvements" and Presidents are usually eager to sign such bills. Not a hint remains today that this spending is beyond the scope of limited and enumerated powers.

James Iredell proposed this amendment in the North Carolina ratifying convention:

"Each state in the Union shall respectively retain every power, jurisdiction, and right, which is not by this Constitution delegated to the Congress of the United States, or to the departments of the general government; nor shall the said Congress, nor any department of the said government, exercise any act of authority over any individual in any of the said states, but such as can be justified under some power particularly given in this Constitution; but the said Constitution shall be considered at all times a solemn instrument, defining the extent of their authority, and the limits of which they cannot rightfully in any instance exceed."²

Iredell's proposal is certainly more specific, but I doubt it would have been any more effective in constraining the enlargement of the federal government. The measure didn't pass in the ratifying convention and was thus not forwarded to Congress as a proposed amendment.

In Federalist #78, Alexander Hamilton stated:

"[A] limited Constitution ... can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing ... To deny this would be to affirm ... that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid ..."

Instead of being the guardians of limited government the "courts of justice" became the enablers of a massive bureaucracy, the cost and profligacy of which now threaten to bankrupt this nation. SCOTUS opinions in 1936 and 1937³ gave Congress the authority to spend money on anything *they* decided would promote the "general welfare." An opinion in 1942⁴ gave the federal government authority to regulate any aspect of business no matter how remote its connection to "interstate commerce." A 1989 decision⁵ confirmed Congress' unrestrained ability to delegate its law-making power to the Executive Branch. Unless we correct these faulty decisions of the Court we will never return to limited government.

In closing, I turn your attention to "[The Tenth Amendment Center](#)"⁶ (TAC), an organization fighting the good fight to keeping alive the principle of their namesake. In books and essays, TAC encourages leaders in the states to implement the principle of nullification in pushing back against continuous unconstitutional federal overreach. Their co-directors, Michael Boldin and Michael Maharrey, wrote one of the two books I recommend below and TAC promotes others on nullification in their bookstore.⁷ I strongly suggest you subscribe to their once-a-week mailings.

For further reading:

[Tenth Amendment: Power From the People: Foundational Principles of the Revolution, From Sovereignty to Resistance](#), by Michael Boldin and Michael Maharrey, 2022.

[The Tenth Amendment and State Sovereignty: Constitutional History and Contemporary Issues](#), by Mark R. Killenbeck and Willaim E. Leuchtenburg, 2001.

Next week: Reflections on this Bill of Rights series; the final essay.

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¹ <https://millercenter.org/the-presidency/presidential-speeches/march-3-1817-veto-message-internal-improvements-bill>.

² <https://press-pubs.uchicago.edu/founders/documents/amendXs5.html>.

³ *United States v. Butler*, 297 U.S. 1 (1936), and *Helvering v. Davis*, 301 U.S. 619 (1937).

⁴ *Wickard v. Filburn*, 317 U.S. 111 (1942).

⁵ *Mistretta v. United States*, 488 U.S. 361 (1989).

⁶ <https://tenthamendmentcenter.com/>.

⁷ *Nullification: How to Resist Federal Tyranny in the 21st Century*, by Thomas E. Woods, 2010.