

Inquiring Minds Topic – 15 June 2018

Albert Myers, Moderator, for Barbara Bill

States' Rights

The first ratified agreement for a central government among the original 13 states was The Articles of Confederation in which the states retained most rights and power, and the central government was very weak. This proved unsatisfactory, and a convention was held in which our present Constitution was developed. Upon ratifying the Constitution, states ceded power to the federal government, though the Tenth Amendment to the Bill of Rights states:

Amendment X: 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**.

For discussion:

- Where is the point at which the federal government intrudes on states' rights?
- Educational curricula and standards?
- Immigration law – is it legal for cities or states to become sanctuaries?
- Marijuana regulation? - if federal governs, is an Amendment needed?
- Definition of marriage?
- Gun control?
- Why do you think the Tenth Amendment is important?

Two articles are provided to stimulate discussion:

Constitutional Myth: The 10th Amendment Protects 'States' Rights'

theatlantic.com/national/archive/2011/07/constitutional-myth-7-the-10th-amendment-protects-states-rights/241671/

Not long before he was sworn in as a new member of the Senate, Tea Party favorite Mike Lee gave a [speech](#) in Draper, Utah, about the horrors of federal legislation in the Progressive Era.

Congress decided it wanted to prohibit [child labor], so it passed a law--no more child labor. The Supreme Court heard a challenge to that and the Supreme Court decided a case in 1918 called [Hammer v. Dagenhart](#). In that case, the Supreme Court acknowledged something very interesting -- that, as reprehensible as child labor is, and as much as it ought to be abandoned -- that's something that has to be done by state legislators, not by Members of Congress. [...]

This may sound harsh, but it was designed to be that way. It was designed to be a little bit harsh. Not because we like harshness for the sake of harshness, but because we like a clean division of power, so that everybody understands whose job it is to regulate what.

Now, we got rid of child labor, notwithstanding this case. So the entire world did not implode as a result of that ruling.

Lee did not mention a couple of things. The first is that the law did not say "no more child labor." What the [Keating-Owen Child Labor Act of 1916](#) said was in fact very respectful of the Constitution's grant to the Congress of the power to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes." It forbade businesses to "ship or deliver for shipment in interstate or foreign commerce, any article or commodity" produced with child labor. And the Keating-Owen Act was not the product of a spoiled Congress whimsically banning child labor; it was the culmination of decades of sustained, informed national demand by the people -- sovereigns in our system -- that American commerce be cleansed of this barbaric relic of the past.

Second, the only reason "we got rid of child labor, notwithstanding this case," was that the Supreme Court in 1938 -- after two needless decades of what Justice Holmes correctly called "ruined lives" -- [overruled](#) *Hammer v. Dagenhart* and held that the federal government *can* forbid child labor as part of its power over commerce. Had it not done so, it's pretty clear that children in (you fill in the state) would be suffocating in mines today.

The third thing Lee did not mention is that nothing in the Constitution anywhere says that regulation of shipment of child-produced goods in interstate commerce "has to be done by state legislators, not by Members of Congress." In fact, he cannot point to anything in the text of the Constitution that was "designed to be a little bit harsh."

The harshness is in his head.

Lee is a "Tenther," part of a new [extremist movement](#) that seeks to brand all major federal legislation -- not only labor regulation, but environmental laws, gun control laws, and Social Security and Medicare -- as violations of the "rights" of states as *supposedly* spelled out in the Tenth Amendment. Senator Jim DeMint last year [phrased](#) it this way: "the Tenth Amendment says powers not explicitly given to the federal government in the Constitution go to the states or to the people."

Is he right? Let's look at the text, which reads, [in its entirety](#):

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.

Notice that DeMint, like a lot of "Tentherers," managed to sneak a word in that the Framers didn't write.

The word is "explicitly." Nothing in the Tenth Amendment says that powers -- such as power to regulate child labor as part of commerce, for example -- must be *explicitly* or *expressly* given to the federal government. Compare the language of the Articles of Confederation:

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.

When the First Congress adapted this repealed provision as an amendment to the new Constitution, a few important words didn't make the cut. The Articles were familiar to every member of the First Congress. It seems hard to believe that they meant to copy the language but accidentally left some of it out.

What does the omission of the word "expressly" suggest?

Since the Amendment was adopted, constitutional thinkers have concluded that the *express* powers delegated to the federal government by the Constitution necessarily carry with them the "implied" powers needed to carry them out.

If "implied power" sounds like tricky lawyer talk, ask yourself the following question: Is the American flag unconstitutional? The Constitution doesn't make any reference to a national flag. By the "express" argument, states and only states would retain what we might call "the flag power." The U.S. Army would have to march under a congeries of the fifty state flags, depending on the origin of each unit. That would be cumbersome, confusing, and dangerous -- and more to the point, stupid. Congress can "raise and support armies." A country that has an explicit power to raise an army has the implied power to designate a flag. Nobody seriously reads a Constitution any other way.

Conservatives don't when it's a power they want the government to have. And James Madison didn't either. Madison was the sponsor of the proposed Bill of Rights in Congress. When Representative Thomas Tucker of South Carolina moved to insert the word "expressly" into what became the Tenth Amendment, Madison (in an eyewitness account reprinted in [The Complete Bill of Rights](#), edited by Neil Cogan)"[o]bjected to this amendment, because it was impossible to confine a government to the exercise of express powers, there must necessarily be admitted powers by implication, unless the constitution descended to recount every minutiae. He [Madison] remembered the word 'expressly' had been moved in the convention of Virginia, by the opponents to the ratification, and after full and fair discussion was given up by them, and the system allowed to retain its present form." Tucker's amendment was voted down.

Chief Justice John Marshall, who had been a delegate to the Virginia Ratifying Convention in 1788 (making him, though you'd never know this from reading far-right "constitutionalist" writing, a Founder), read the Tenth Amendment the same way. In [McCulloch v. Maryland](#), Marshall rejected the argument that because Congress has no *express* power to create a bank, it is forbidden to do so. He noted the absence of "expressly" in the Tenth Amendment: "The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word in the Articles of Confederation, and probably omitted it to avoid those embarrassments."

"Constitutionalists" who try to smuggle the word back into the Constitution aren't being faithful to the document; they are rewriting it. (They also try to smuggle the ideas of state "rights" and state "sovereignty" back in. In fact, many proud "constitutionalists" these days seem to me to bear primary allegiance to the [Articles of Confederation](#), not this new-fangled Madison thing.)

The best way to read the Tenth Amendment we actually have is that its words mean what they say, and not what they don't say. The Constitution grants Congress all the implied powers "necessary and proper" to using its enumerated powers.

By and large, there is no "clean division" between states and federal government in the Constitution we have. Of course the Constitution guarantees a role for the states. Some powers are given exclusively to the federal government, and cannot be shared, such as the power to conduct war and negotiate peace, regulate currency and emit bills of credit, or set the discipline of the armed forces and state militias. Some powers are given to the states, and can't be taken by the federal government, including the power to designate state capitals, adopt state constitutions, draw the political boundaries of cities and towns, choose the officers of their state militias. Many powers are explicitly *denied* to the states -- for example, they can't even negotiate agreements *among themselves* without Congress's permission. Some are expressly *denied* to the federal government -- the power to set criminal venue in states where the crimes did not occur, for example.

The rest -- the powers that aren't given explicitly and exclusively to one government or the other -- belong to *the people*. The people are the holders of "rights"; they are the holders of "sovereignty." And, being sovereign, the people can insist that powers be *shared* by the states and the federal government, relying on the political process, and on their own supremacy as expressed in presidential and

congressional election, to police the boundaries.

The Constitution we have offers no pretext for reactionary judges, like the *Hammer v. Dagenhart* Court, to step in and say that the federal government *may not* use its textual power over commerce to stop the exploitation of children in factories, mills, and mines (or, for that matter, to regulate the interstate market in health insurance). If members of Congress want to be "a little bit harsh" and protect exploiters of children, they have to say so, and take the heat from their real bosses--the people.

Tenth Amendment Movement Aims to Give Power Back to the States

 foxnews.com/politics/2009/05/26/tenth-amendment-movement-aims-power-states.html

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, Tenth Amendment

Fed up with Washington's involvement in everything from land use to [gun control](#) to education spending, states across the country are fighting back against what they say is the federal government's growing intrusion on their rights.

At least 35 states have introduced legislation this year asserting their power under the Tenth Amendment to regulate all matters not specifically delegated to the federal government by the Constitution.

"This has been boiling for years, and it's finally come to a head," said Utah State Rep. Carl Wimmer.

"With TARP and [No Child Left Behind](#), these things that continue to give the federal government more authority, our rights as states and individuals are being turned on their head."

The power struggle between the states and Washington has cropped up periodically ever since the country was founded. But now some states are sending a simple, forceful message:

The government has gone too far. Enough is enough.

Montana Gov. [Brian Schweitzer](#) recently signed into law a bill authorizing the state's gun manufacturers to produce "Made in Montana" firearms, without seeking licensing from the federal [Bureau of Alcohol, Tobacco, Firearms and Explosives](#). Similar laws are being considered in Utah, Alaska, Texas and Tennessee.

The Montana law is expected to end up in the courts, where states' rights activists hope judges will uphold their constitutional right to regulate firearms.

That would reverse a longstanding trend, said Martin Flaherty, a professor of constitutional law at Fordham Law School.

"From 1937 to 1995 there is not one instance of the [Supreme Court](#) knocking back Congress," he said. "In the Constitution the interstate commerce clause gives Congress the right to regulate commerce between the states. That gives them a lot of power. There were questions of how far they can reach, but then comes the New Deal, and Roosevelt gets all these picks on the [Supreme] Court, and they come upon a theory whereupon congressional power is almost infinite."

That 1930s understanding of the Constitution is now the norm, with advocates for the federal government arguing that issues of a certain size and scope can be addressed only by an institution with the resources of the federal government.

As an example, federal authority is necessary in the economic crisis, said U.S. Rep. Dan Boren, whose home state of Oklahoma recently passed a sovereignty resolution.

"The economic situation in our nation over the past year has not been contained in any one community or state. The industries and institutions affected by the recent economic crisis touch multiple layers of our economy and are not confined to any one state or region," he said in a statement. "I feel there was Constitutional justification for Congress's recent efforts to stabilize our economy."

But for many state leaders, the degree to which Congress regulates issues within their boundaries, using the interstate commerce clause to regulate just about everything and anything, has become untenable.

Texas Gov. [Rick Perry](#) made headlines recently when he made a passing reference to the possibility of the Lone Star State seceding from the U.S., saying, "if Washington continues to thumb their nose at the American people, you know, who knows what might come out of that?"

States rights advocates offer countless examples of what they believe is Washington's overreach.

In Utah, 67 percent of the state's land is controlled by the federal government through wilderness preserves, limiting state leaders in their bid to fill government coffers through oil and natural gas drilling after Interior Secretary [Ken Salazar](#) cancelled 103,000 acres of leases this year.

In Idaho, ranchers are furious that federal [endangered species](#) law prevents them from shooting the wolves that prey on their cattle.

"The balance of power between the states and the federal government is way out of whack," said [Georgia](#) state Senator Chip Pearson. "The effect here is incalculable. Everything you do from the moment you wake up until you get to bed, there is some federal law or restriction."

Up until recently, the state sovereignty movement has remained almost entirely Republican, drawing supporters from the ranks that voted against [President Obama](#) and attended tea parties last month to protest federal tax hikes.

But the movement's rank and file are just as likely now to criticize Obama's predecessor, [George W. Bush](#), as they are the new president, pointing to what they believe were Bush's overreaching policies on education and [homeland security](#).

Many are becoming frequent visitors to a Web site, TenthAmendmentCenter.com, which was founded in early 2007 and has become a community bulletin board for states rights activists and politicians. Up to 20,000 viewers log on to the site every day.

The site's founder, Michael Boldin, a 36-year-old Web marketer in Los Angeles who says he has no political affiliation, says he decided to launch the site after watching the Maine State Legislature fight the Department of Homeland Security on the Real ID act, a controversial Bush-era law that will require states to issue federally regulated identification cards, complete with biometric data and stringent address checks.

"Maine resisted, and the government backed off, and soon all these other states were doing the same thing," Boldin said. "The bottom line is, if there's widespread support, people can resist the federal government at the state level."

The deadline for states to comply with Real ID has now been pushed back until 2011.

The Tenth Amendment movement is not without controversy. In Georgia, a columnist for The Atlanta Journal Constitution called a sovereignty resolution in the state Senate a threat "to secede from and even disband the United States."

The resolution, which was passed as part of a group of bills that were banded together, affirmed the state's powers under the Tenth Amendment, taking its inspiration and language from Thomas Jefferson's 1798 resolution opposing the Alien and Sedition Acts -- laws enacted by the federal government during wartime to quiet protest against the government.

The resolution asserts that any instance of the federal government taking action beyond its enumerated powers "shall constitute a nullification of the Constitution for the United States of America by the government of the United States of America."

"It's been taken out of context by some editors," said Pearson, who sponsored the bill. "It certainly never meant secession. The intent was to communicate that the actions of the federal government are an infringement on states' rights."

Robert Natelson, a law professor at the University of Montana who was involved in drawing up that state's sovereignty resolution over a decade ago, argues that states up until now have been unwilling to take action of any real consequence in checking federal power.

"Back then they passed the resolution, but they didn't turn down any federal dollars," he said.

"If the states are serious about returning the federal government to its historical origins, they're going to have to do more than pass resolutions. They're going to have to turn down money and litigate."

For further reflection:

<https://constitutioncenter.org/blog/10-reasons-why-americas-first-constitution-failed>

<https://legaldictionary.net/10th-amendment>

<http://law2.umkc.edu/faculty/projects/ftrials/conlaw/statesrights.html>

https://www.rutherford.org/constitutional_corner/amendment_x_rights_retained_by_the_states

To ponder:

