John C. Yoo, *Our Declaratory Ninth Amendment*, 42 Emory L.J. 967 (1993)

Significant Cases

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)
Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820)
Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1871)
Griswold v. Connecticut, 381 U.S. 479 (1965)
Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992)
Lawrence v. Texas, 539 U.S. 558 (2003)

Reserved Powers of the 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.

(Amendment X)

The Tenth Amendment expresses the principle that undergirds the entire plan of the original Constitution: the national government possesses only those powers delegated to it. The Framers of the Tenth Amendment had two purposes in mind when they drafted it. The first was a necessary rule of construction. The second was to reaffirm the nature of the federal system.

Because the Constitution created a government of limited and enumerated powers, the Framers initially believed that a bill of rights was not only unnecessary, but also potentially dangerous. State constitutions recognized a general legislative power in the state governments; hence, limits in the form of state bills of rights were necessary to guard individual rights against the excess of governmental power. The Constitution, however, conferred only the limited powers that were listed or enumerated in the federal Constitution. Because the *federal* government could not reach objects not granted to it, the Federalists originally argued, there was no need for a *federal* bill of rights. Further, the Federalists insisted that, under the normal rules of statutory construction, by forbidding the government from acting in certain areas, a bill of rights necessarily implied that the government could act in all other areas not forbidden to it. That would change the federal government from one of limited powers to one, like the states, of general legislative powers.

The Federalists relented and passed the Bill of Rights in the First Congress only after making certain that no such implication could arise from the prohibitions of the Bill of Rights. Hence, the Tenth Amendment—a rule of construction that warns against interpreting the other amendments in the Bill of Rights to imply powers in the national government that were not granted by the original document.

That interpretative rule was vital because some of the provisions of the Bill of Rights purport to limit federal powers that are not actually granted by the original Constitution and thus might give rise to a (faulty) inference that the Bill of Rights implied the existence of such powers. The First Amendment, for instance, states that "Congress shall make no law... abridging the freedom of speech, or of the press." Did that mean that the original Constitution had therefore granted Congress power to abridge those freedoms? The Federalists did not think so, which is why they initially opposed inclusion of a bill of rights. As Alexander Hamilton observed of the unamended constitutional text in *The Federalist* No. 84: "Here, in strictness, the people surrender nothing; and as they retain everything they have no need for particular reservations.... Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?" Numerous other important figures made similar statements during the ratification debates. Obviously, the nation chose to include the Bill of Rights, but only with the Tenth Amendment as a bulwark against implying any alteration in the original scheme of enumerated powers. If Congress was not originally delegated power to regulate speech or the press, no such power is granted or implied by adoption of the Bill of Rights.

Despite the Framers' concerns and the clear text of the Tenth Amendment, the Supreme

Court indulged precisely this form of reasoning. In the *Legal Tender Cases* in 1871, declining to locate the power to issue paper money in any enumerated power, the Court wrote:

> And, that important powers were understood by the people who adopted the Constitution to have been created by it, powers not enumerated, and not included incidentally in any one of those enumerated, is shown by the amendments.... They tend plainly to show that, in the judgment of those who adopted the Constitution, there were powers created by it, neither expressly specified nor deducible from any one specified power, or ancillary to it alone, but which grew out of the aggregate of powers conferred upon the government, or out of the sovereignty instituted. Most of these amendments are denials of power which had not been expressly granted, and which cannot be said to have been necessary and proper for carrying into execution any other powers. Such, for example, is the prohibition of any laws respecting the establishment of religion, prohibiting the free exercise thereof, or abridging the freedom of speech or of the press.

This is the precisely the kind of reasoning that the Tenth Amendment was designed to prohibit.

While providing a rule of construction for the relationship between the Bill of Rights and the scheme of enumerated powers, the Tenth Amendment also affirms the Constitution's basic scheme of defining the relationship between the national and state governments. The Founders were wary of centralized government. At the same time, the failure of the Articles of Confederation revealed the necessity of vesting some authority independent of the states in a national government. The Constitution therefore created a novel system of mixed sovereignty. Each government possessed direct authority over citizens: the states generally over their citizens, and the federal government under its assigned powers. In addition, the states qua states were made a constituency within the national government's structure. The state legislatures chose Senators, determined how presidential electors should be chosen, and defined who would be eligible to vote for Members of the House of Representatives. As noted in *The Federalist* No. 39, the new government was "in strictness, neither a national nor a federal Constitution, but a composition of both." Critical to this mixed system was the scheme of enumerated federal powers, which allows the federal government to operate only within defined spheres of jurisdiction where it is acknowledged to be supreme.

As James Madison wrote in *The Federalist* No. 45:

> The powers delegated by the proposed Constitution to the Federal Government are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace negotiation, and foreign commerce;... The powers reserved to the several states will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people, and the internal order, improvement, and prosperity of the state.

Chief Justice John Marshall wrote in *Marbury v. Madison* (1803), "the powers of the [national] legislature are defined, and limited; and that those limits may not be mistaken or forgotten, the constitution is written." Alexander Hamilton, urging ratification in New York, recognized in *The Federalist* No. 33 that a congressional act beyond its enumerated powers is "merely [an] act of usurpation" which "deserves to be treated as such." The Tenth Amendment memorialized this constitutional solution of carefully enumerated, and thus limited, federal powers.

The Tenth Amendment had limited judicial application in the nation's first half century. No decision turned upon it, and in *McCulloch v. Maryland* (1819), Chief Justice Marshall

declined an invitation to use it as a vehicle for narrowly construing federal powers. In the middle of the nineteenth century, the Tenth Amendment was connected to the later rejected states' rights doctrine of "dual federalism," which maintained that the national and state governments were "separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres." *Tarble's Case* (1872). In contrast, the Framers' conception of the government was not one of "distinct sovereignties," but rather of a mixed sovereignty in which states were an integral and vital part. Beginning with the New Deal Court, the Supreme Court has countenanced an expansion of federal powers far beyond the expectations of those who framed and ratified the Constitution. The extent to which those developments are consistent with the Constitution depends on the construction of the various enumerated powers. Because the Tenth Amendment is a textual reaffirmation of the scheme of enumerated powers, the modern expansion of the federal government's role in national life has shaped, and perhaps altered, the role of the Tenth Amendment in modern jurisprudence.

Modern Supreme Court decisions recognize few limits to the scope of Congress's enumerated powers. Under current law, Congress may regulate, among other things, manufacturing, agriculture, labor relations, and many other purely intrastate activities and transactions. Indeed, in one case the Supreme Court upheld the power of Congress to regulate a single farmer's production of wheat intended for consumption at his own table. *Wickard v. Filburn* (1942). That expansion has generated federal–state conflicts that were not contemplated by the Founding generation, such as federal regulation of state-government employment relations, federal use of state officials to enforce federal regulatory regimes, direct federal commands to state agencies or legislatures, and extensive control of state policy through conditions on federal spending for states. These conflicts call for interpretation of the relevant grants of federal power, most significantly the Commerce Clause, the Spending Clause, and the Necessary and Proper Clause (*see* Article I, Section 8). If the Constitution grants such power to Congress, the Tenth Amendment's terms are satisfied; if it does not, the Tenth Amendment is violated. That is the meaning of the oft-repeated statement of Chief Justice Harlan F. Stone in *United States v. Darby* (1941) that the Tenth Amendment is "but a truism that all is retained which has not been surrendered."

In *National League of Cities v. Usery* (1976), however, the Supreme Court indicated that the Tenth Amendment carries some substantive protection of the states. In that case, the Court invoked the Tenth Amendment to prevent application of the Fair Labor Standards Act to state employees. Justice William H. Rehnquist's opinion barred the federal government from transgressing upon the "functions essential to [a state's] separate and independent existence," activities taken as state qua state, which he regarded as protected by the Tenth Amendment's reservation of powers to the states. *National League of Cities* overruled *Maryland v. Wirtz* (1968), an earlier case in which Justice William O. Douglas, joined by Justice Potter Stewart, had dissented because "what is done here is nonetheless such a serious invasion of state sovereignty protected by the Tenth Amendment that it is in my view not consistent with our constitutional federalism."

The Court, in *National League of Cities*, embraced Justice William O. Douglas's earlier dissent, but nine years later, in *Garcia v. San Antonio Metropolitan Transit Authority* (1985), the Court overruled *National League of Cities*. The language and reasoning of *Garcia* led many observers to think that the federal judiciary would no longer entertain federalism challenges to congressional exercises of power and that the states' participation in the national political process would be their only protection against federal encroachments.

In recent years, that perception has changed somewhat, as the Supreme Court has revived the Tenth Amendment to enforce discrete limits on congressional attempts to extend enumerated powers to state operations. The Rehnquist Court, for example, has repeatedly curtailed Congress's ability to "commandeer" the machinery of state government. In *New York v.*

United States (1992), the Court prevented Congress from requiring a state legislature either to take care of a problem that Congress did not itself wish to deal with under its own enumerated powers (disposal of low-level radioactive wastes) or to take title to these hazardous waste materials and be responsible for their safe disposal. In *Gregory v. Ashcroft* (1991), the Court noted the serious Tenth Amendment implications that would be raised by a congressional attempt to regulate the employment of state judges. And in *Printz v. United States* (1997), the Court barred Congress from requiring state executive officials to implement a federal scheme of firearms regulation. Outside of this context of direct federal control of state operations, however, the Court has made little direct use of the Tenth Amendment.

Several other recent cases limit federal power without expressly relying upon the Tenth Amendment. *United States v. Lopez* (1995) and *United States v. Morrison* (2000) both struck down federal laws premised on an expansive application of the Commerce Clause—the regulation of guns in school zones (*Lopez*) and the creation of a federal civil remedy for gender-motivated violence (*Morrison*). To the extent that the Tenth Amendment is a codification of the principle of enumerated federal power, those decisions implicate the Tenth Amendment, as does every decision involving the scope of federal power.

The recent decisions employing the Tenth Amendment to limit congressional power have been enormously controversial, both among those who think those decisions go too far by applying nebulous, nontextual theories of federalism and among those who think that they do not go far enough by refusing to tackle head-on the modern expansion of enumerated federal powers. But the Court itself remains unsure as to precisely what role the Tenth Amendment plays in its constitutional analyses. Prohibiting the commandeering of state instrumentalities, for instance, may be a straightforward construction of the limits of congressional discretion under its enumerated powers; or it may be that such laws are not "necessary and proper for carrying into Execution" federal powers and are therefore beyond the powers delegated to Congress.

On the other hand, the Tenth Amendment may itself pose a substantive limit on assumedly granted powers. Even if modern developments permit (or require) expansion of congressional authority well beyond its eighteenth-century limits, such expansion cannot extinguish the "retained" role of the states as limited but independent sovereigns. The Tenth Amendment thus may function as a sort of "fail-safe" mechanism: Congress has broad power to regulate, and even to subject states to generally applicable federal laws, but the power ends when it reaches too far into the retained dominion of state autonomy.

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See Also

Article I, Section 8, Clause 1 (Spending Clause)
Article I, Section 8, Clause 3 (Commerce Among the States)
Article I, Section 8, Clause 18 (Necessary and Proper Clause)
Article VI, Clause 2 (Supremacy Clause)
Amendment IX (Rights Retained by the People)
Amendment XI (Suits Against a State)
Amendment XIV, Section 1 (State Action)

Suggestions for Further Research

Advisory Commission on Intergovernmental Relations: Intergovernmental Perspective, Vol. 17, No. 4 (Fall 1991)
Robert H. Bork, The Tempting of America: The Political Seduction of the Law (1990)
Alexis De Toqueville, Democracy in America (1832)

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Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)
McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)
Collector v. Day, 78 U.S. (11 Wall.) 113 (1871)
Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1871)
Tarble's Case, 80 U.S. (13 Wall.) 397 (1872)
United States v. Darby, 312 U.S. 100 (1941)
Wickard v. Filburn, 317 U.S. 111 (1942)
Maryland v. Wirtz, 392 U.S. 183 (1968)