CLEVELAND STATE LAW REVIEW ET CETERA
VOLUME 64 JANUARY 26, 2016 PAGES 1-13

HOW THE TENTH AMENDMENT SAVED THE CONSTITUTION, CONTRADICTS THE MODERN VIEW OF BROAD FEDERAL POWER, AND IMPOSES STRICT LIMITATIONS

STEVEN T. VOIGT

This paper challenges the position that the Tenth Amendment merely states an abstract concept and has no place in constitutional interpretation. The history of the Tenth Amendment portrays a much greater significance for this amendment. Not only did the Tenth Amendment likely save the Constitution and preserve the union, but it imposed very real restraints on federal power. The implication for modern courts is that the Tenth Amendment cannot be ignored. Far from just stating a truism, it sets forth a constitutional rule of interpretation that must be applied whenever the scope of any federal power is examined.[1]

I. Introduction

On the Fourth of July in 1788, as delegates met in Philadelphia and debated the terms of a federal constitution, a group of Pennsylvanians gathered in the town of Carlisle to celebrate the anniversary of America's independence. After a speech delivered by a pastor marking the occasion, members of the crowd raised their tankards to thirteen toasts, one for each of the former American colonies. Following each toast, muskets fired into the air, accentuating the significance of the proclamations. After twelve toasts had been made, cups were raised for the final toast: May "America remain forever free from tyranny, anarchy, and consolidation."[2] Musket fire raked into the sky.

---

[1] Steve Voigt is a Senior Assistant Attorney General for a State Attorney General's Office, where he serves as lead counsel on complex and often high profile constitutional litigation. Prior to joining the Attorney General's office, Mr. Voigt was Of Counsel with a leading global law firm. Before private practice, Mr. Voigt served a one-year term as a Judicial Clerk for the Superior Court of Pennsylvania. Mr. Voigt has authored a number of published law review and journal articles about constitutional law and other legal topics.

The views expressed in this paper are exclusively those of the author and do not necessarily represent the views of the author's current employer or any former employer or the forum where this is published.

[2] *Carlisle Gazette* (July 9, 1788), *reprinted in* THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS, 1788-1790, VOL. I., 242-43 (Merrill Jensen & Robert A. Becker eds.,1976).

In 1788, whether the States should ratify the Constitution was debated in conventions of the States, in big city newspapers and small town chronicles,[3] in churches and meeting halls, and among neighbors in the town square.[4] In this momentous debate, many harbored serious concerns with the newly proposed Constitution and feared that it would lead to federal *consolidation* and an eventual diminution of the authority of the States. But many also feared what would happen without ratification. While some called for a new constitutional convention to develop a new constitution that would provide better protection to the States, others feared that *anarchy* would be the consequence of rejecting the Constitution and waiting for a new constitutional convention.

This debate over ratification of the Constitution culminated with the Tenth Amendment. This may seem curious to some readers, because the Tenth Amendment was ratified *after* ratification of the Constitution. For sure, some today do treat the Tenth Amendment as a second-act to the ratification of the Constitution—an afterthought stuck into the Bill of Rights that does not really mean much or have much of an effect on the rest of the Constitution and federal power.[5] But in truth, the Tenth Amendment was critical to ratification. Many opposed to the Constitution only reluctantly decided to support it because the States and the people demanded that amendments would be considered soon after ratification. Without support of these individuals who trusted that later amendments would answer their objections, almost certainly there would have been a different outcome in several of the ratifying conventions, considering some States ratified the Constitution by only slim margins. Even with ratification, had amendments not been quickly sent to the States, the Constitution likely would not have long survived.[6]

---

[3] PAUL S. CLARKSON & R. SAMUEL JETT, LUTHER MARTIN OF MARYLAND 136 (1970) ("The delegates dispersed from Philadelphia, and one of the most far-ranging, widespread, and important debates in the history of government began. The newspapers published thousands of articles and letters, whose authors ranged from the illustrious to the obscure and anonymous.").

[4] Notably, some argued that the representatives had authority only to amend the existing Articles of Confederation and that there was no authority for the new Constitution. *See, e.g., Letters of Cato, Letter II*, *reprinted in* THE ANTI-FEDERALISTS, SELECTED WRITINGS AND SPEECHES 7 (Bruce Frohen ed., 1999) ("This Convention have exceeded the authority given to them, and have transmitted to Congress a new political fabric.").

[5] *See* AKHIL REED AMAR, THE BILL OF RIGHTS 9 (1998) ("As it stands instead, the fact that the most evident structural provision (our Tenth Amendment, their Twelfth) sits at the end of the Decalogue may mislead us into viewing it as an afterthought . . . .").

[6] *See* ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS, 1776-1791 163 (1962) ("Conversations in countinghouses and on courtyard squares proved that this issue [a bill of rights], above all others, was *vital to the public*.").

With the addition of the Tenth Amendment to the Constitution much more was added than just "a truism," as the Supreme Court stated in *United States v. Darby*, 361 S.Ct. 451, 462 (1941). Yes, the Tenth Amendment phrased the important maxim of all that is not given is retained. But by incorporating this principle into the actual text of the Constitution, the framers and the States intended for much more than a recitation of a philosophical doctrine. This amendment was intended to direct interpretation of federal power and to constrain federal power. With the Tenth Amendment, the framers and the States made clear that only so much as was necessary to carry out the enumerated functions of the government had been given to the federal government.

The Tenth Amendment sets forth a *required* strict interpretation of federal power that *necessarily* must be applied every time the federal reach is in question. In each instance where the breadth of power is at issue, this rule decisively mandates that the narrower path of construction always be taken. In other words, whenever a federal statute, action, or law is compared against enumerated powers, the Tenth Amendment requires that no contortion of the Constitution take place. If the statute, action, or law is not clearly within an enumerated power or strictly necessary to bring about that enumerated power, then the statute is beyond the Constitution. The same applies to the scope of enumerated powers. Those are to be narrowly construed, consistent with their original intent.

II. The States called for an amendment to protect their sovereignty

On September 28, 1787, Congress agreed to send the Constitution to the States for ratification. Along with votes for ratification, Massachusetts, New Hampshire, Virginia, New York, Rhode Island, and South Carolina sent their approvals with corresponding proposals for constitutional amendments.[7] Wording similar to the Tenth Amendment figured prominently among these recommendations.[8] The subject of reserved rights arose in other conventions. North Carolina declined to ratify the Constitution at its first convention, fearing that the Constitution was too vague concerning the scope of the federal government's powers.[9] Pennsylvania ratified the Constitution on December 12, 1787 without proposals for amendments, but dissenters from Pennsylvania's ratifying convention separately submitted a list of recommended amendments, including one reserving States'

---

[7] ELLIOT'S DEBATES VOL. I at 334, 326 (1836); ELLIOT'S DEBATES VOL. II at 177, 414; ELLIOT'S DEBATES VOL. III at 659; CREATING THE BILL OF RIGHTS, THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 15 (Helen E. Veit, Kenneth R. Bowling, & Charlene Bangs Bickford eds., 1991) (*hereinafter* Creating the Bill of Rights).

[8] "The conclusion that states rights—regardless of individual rights—was the primary concern" of anti-federalists "seems inescapable." ALPHEUS THOMAS MASON, STATES RIGHTS DEBATE, ANTIFEDERALISM AND THE CONSTITUTION, SECOND EDITION 98 (1972).

[9] *See* NORTH CAROLINA HISTORY PROJECT: FAYETTEVILLE CONVENTION OF 1789, available at www.northcarolinahistory.org/encyclopedia/274/entry.

rights.[10] After ratification, Maryland immediately appointed a committee that was tasked with considering potential amendments.[11] The committee recommended thirteen amendments, the first of which was:

> "1. That Congress shall exercise no power but what is expressly delegated by this Constitution."[12]

III. The call by early leaders for an amendment protecting the States

In the first inaugural address of the United States, President George Washington called for a discussion about the possibility of amendments to the Constitution, based on "the nature of objections which have been urged against the System."[13] Among those who carried the torch and demanded amendments constraining federal power were prominent names among the founding fathers.

Thomas Jefferson referred to the absence of a declaration of rights in the Constitution as a "principal defect" and remarked that "both people & Conventions in almost every state have concurred in demanding it."[14] Jefferson wrote that "[t]he declaration of rights will be the text whereby" the States "will try all the acts of the federal government" and that an amendment was needed to "guard us against" federal "abuses of power within the field submitted to them."[15]

Samuel Adams, concerned with the potential for federal over-reach under the Constitution, warned that without "great care . . . to prevent it, the Constitution in the Administration of it would gradually, but swiftly and imperceptibly run into a consolidated Government pervading and legislating through all the States, not for federal purposes only as it professes, but in all cases whatsoever: such a Government would soon totally annihilate the Sovereignty of the several States."[16] He believed that a constitutional amendment was necessary to create "a

---

[10] THE DEBATE ON THE CONSTITUTION, FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION, PART ONE, 526-52 (The Library of America 1993) (*hereinafter* The Debate on the Constitution).

[11] ELLIOT'S DEBATES VOL. II at 549.

[12] *Id*. at 550.

[13] George Washington, Inaugural Address of 1789 (April 30, 1789) (transcript available at http://www.archives.gov/exhibits/american_originals/inaugtxt.html).

[14] *Thomas Jefferson's letter to William Carmichael, United States' charge d'affaires in Spain, 1782-1794* (Aug. 12, 1788), *reprinted in* THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS, 1788-1790, VOL. IV at 50 (Gordon DenBoer, Lucy Trumbull Brown, Alfred Lindsay Skerpan, & Charles D. Hagermann eds., 1989).

[15] *Thomas Jefferson's letter to James Madison* (Mar. 15, 1789), *reprinted in* THOMAS JEFFERSON: WRITINGS at 944 (The Library of America 1984).

[16] *Samuel Adams' letter to Richard Henry Lee* (Aug. 24, 1789), *reprinted in* THE WRITINGS OF SAMUEL ADAMS, VOL. IV: 1778-1802, at 334 (Harry Alonzo Cushing ed., 1908) (emphasis in original).

line drawn as clearly as may be, between the federal Powers vested in Congress and the Distinct Sovereignty of the several States upon which the private & personal Rights of the Citizens depend. Without such Distinction there will be Danger of the Constitution issuing imperceptibly and gradually into a consolidated Government over all the States . . . ."[17]

In the Virginia ratifying convention, Patrick Henry unleashed a blistering oratory against the proposed Constitution, warning that the States would become "consolidated" and obsolete.[18] "Where are your checks?" he asked the convention.[19] He repeatedly called for amendments. "Mr. Chairman," he said, "the necessity of a bill of rights appears to me to be greater in this government than ever it was in any government before."[20] Again he asserted: "The necessity of amendments is universally admitted. It is a word which is re-echoed from every part of the continent. A majority of those who hear me, think amendments are necessary. Policy tells us they are necessary. Reason, self-preservation, and every idea of propriety, powerfully urge us to secure the dearest rights of human nature . . . ."[21]

George Mason was particularly concerned that the necessary and proper clause could extend the powers of Congress to nearly unlimited ends.[22] During the 1787 constitutional convention, he warned that using the necessary and proper clause "the Congress may grant monopolies in trade and commerce, constitute new crimes, inflict unusual and severe punishments, and extend their powers as far as they shall think proper; so that the State legislatures have no security for the powers now presumed to remain to them, or the people for their rights."[23] Mason argued that the principle of *all that is not given is retained* is an insufficient safeguard against federal over-reach.[24] He argued "that there ought to be some

---

[17] *Samuel Adams' letter to Elbridge Gerry* (Aug. 24, 1789), *reprinted in* THE WRITINGS OF SAMUEL ADAMS, VOL. IV: 1778-1802, at 116 (Harry Alonzo Cushing ed., 1908).

[18] ELLIOT'S DEBATES VOL. III at 395.

[19] *Id*.

[20] *Id*. at 445.

[21] THE DEBATE ON THE CONSTITUTION, FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION, PART TWO, 675 (The Library of America 1993) (*hereinafter* The Debate on the Constitution).

[22] ELLIOT'S DEBATES VOL. III at 441-42.

[23] M*ason's Objections Written on the Committee of Style Report* (Sept. 1787), *reprinted in* THE PAPERS OF GEORGE MASON, 1725-1792, VOL. III 1787-1792 at 992-93 (Robert A. Rutland, ed.,1970) (*hereinafter* Mason's Objections).

[24] ELLIOT'S DEBATES VOL. III at 444.

express declaration in the Constitution, asserting that rights not given to the general government were retained by the states."[25]

On June 8, 1789, as a Representative in the first Congress, James Madison proposed amendments to the Constitution.[26] He assembled his recommendations from the proposals and declarations made by the States during ratification. A reporter covering the first federal Congress quoted Madison as stating, "I find, from looking into the amendments proposed by the state conventions, that several are particularly anxious that it should be declared in the constitution, that the powers not therein delegated, should be reserved to the several states."[27] Madison remarked that despite ratification of the Constitution by eleven States, "still there is a great number of our constituents who are dissatisfied with it; among whom are many respectable for their talents and patriotism, and respectable for the jealousy they have for their liberty . . . ."[28]

In addition to the foregoing, numerous other early leaders called for an amendment similar to the Tenth Amendment. Melancton Smith[29] advocated that the "constitutional line between the authority" of the federal government and the States "should be so obvious, as to leave no room for jealous apprehensions or violent contests."[30] Smith feared "abolition of the state constitutions" and said this would be "fatal to the liberties of America."[31] He portended that "[t]hese liberties will not be violently wrested from the people; they will be undermined and gradually consumed."[32] Richard Henry Lee[33] argued for amendments that would "secure against the annihilation of the State Governments."[34] Samuel

---

[25] *Id*.

[26] THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS, 1788-1790, VOL. IV, 321 (Gordon DenBoer, Lucy Trumbull Brown, Alfred Lindsay Skerpan, & Charles D. Hagermann eds., 1989).

[27] Creating the Bill of Rights, *supra* note 7, at 85.

[28] 1 ANNALS OF CONG. 449 (1789) (Joseph Gales ed.,1834)

[29] Smith was a member of the Continental Congress and was elected to the New York ratifying convention. JON WAKELYN, BIRTH OF THE BILL OF RIGHTS, ENCYCLOPEDIA OF THE ANTIFEDERALISTS, VOLUME ONE: BIOGRAPHIES 183 (2004).

[30] *Melancton Smith's speeches in the New York ratifying convention, in* THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE 310 (Michael P. Zuckert & Derek A. Webb, eds, 2009).

[31] *Id*. at 315.

[32] *Id*.

[33] Lee served for a time as the President of the Continental Congress, and he was a delegate to the Virginia ratifying convention. WAKELYN, *supra* note 29, at 116.

[34] THE LETTERS OF RICHARD HENRY LEE, VOL. II 1779-1794, 507 (Sept. 28, 1789) (James Curtis Ballagh ed., 1914).

Spencer[35] remarked: "The gentlemen said all matters not given up by this form of government, were retained by the respective states. I know that ought to be so; it is the general doctrine, but it is necessary that it should be expressly declared in the Constitution, and not left to mere construction and opinion."[36] Elbridge Gerry[37] wrote, "Whether the present constitution will preserve the bal[]ance, or change to an aristocracy or monarchy, must depend on the alterations that should be made in the constitution & on the administration thereof: should there be no amendments I am of the opinion it will verge to a monarchy . . . ."[38]

Charles Jarvis[39] stated, "When we talk of our wanting a bill of rights to the new Constitution, the first article proposed must remove every doubt on this head—as by positively securing what is not expressly delegated, it leaves nothing to the uncertainty of conjecture, or to the refinements of implication."[40] Edmund Randolph[41] advocated for "drawing a line between the powers of Congress and individual States; and in defining the former."[42] Benjamin Williams[43] said that "In forming a constitution for a free country like this, the greatest care should be

---

[35] Spencer was a delegate to North Carolina's first ratifying convention and served as the President of North Carolina's second ratifying convention. WAKELYN, *supra* note 29, at 188.

[36] ELLIOT'S DEBATES VOL. IV at 152.

[37] Gerry was a Massachusetts delegate to the constitutional convention. He later served in Congress. WAKELYN, *supra* note 29, at 73-74.

[38] Creating the Bill of Rights, *supra* note 7, at 85. In the House of Representatives, Gerry also advocated strengthening the Tenth Amendment by inserting the word "expressly" before the word "delegated." The Congressional Register (Aug. 21, 1789) *available at* http://consource.org/document/the-congressional-register-1789-8-21/. The measure was defeated because the necessary and proper clause contemplates only limited incidental powers to carry out enumerated powers. Indeed, Sherman characterized the necessary and proper clause as only "incidental." Creating the Bill of Rights, *supra* note 7, at 193. Madison explained that the necessary and proper powers were "powers by implication" within enumerated powers, needed "unless the constitution descended to recount every minutiae." *Id*. at 197.

[39] Jarvis was a delegate to the Massachusetts ratifying convention. ELLIOT'S DEBATES VOL. II at 178.

[40] The Debate on the Constitution*, supra* note 10, at 936.

[41] Randolph was the first Attorney General of Virginia, a member of the Continental Congress, and attended the constitutional convention. DAVID BARTON, ORIGINAL INTENT: THE COURTS, THE CONSTITUTION, & RELIGION 417 (2000).

[42] *Edmund Randolph letter to the Virginia House of Delegates* (Oct. 10, 1787), *reprinted in* THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE at 92 (Gary Lawson, Geoffrey P. Miller, Robert G. Natelson, & Guy I. Seidman eds., 2010).

[43] Williams had a lengthy public career on behalf of North Carolina, serving in the state legislature, as a member of Congress, as North Carolina's governor, and as a delegate to North Carolina's first ratifying convention. WAKELYN, *supra* note 29, at 229.

taken to define its powers, and guard against abuse of authority."[44] Thomas B. Wait[45] asserted, "I consider the several States to stand in a similar relation to the Nation, and its Constitution—as do individuals to a State and its Constitution—the former have certain rights, as well as the latter that ought to be secured to them—otherwise . . . the whole will be 'melted down' into one nation; and then, God have mercy on us—our liberties are lost . . . ."[46]

IV. The federalist assurance: All that is not given is retained

Many of the proponents of the Constitution sought to assure the States there was no need for a declaration of states' rights because all power that the people or the people through the States did not give to the federal government would be retained by the States or by the people. In the Federalist No. 32, Alexander Hamilton wrote, "[b]ut as the plan of the Convention aims only at partial Union or consolidation, the State Governments would clearly retain all the rights of sovereignty which they before had and which were not by that act *exclusively* delegated to the United States."[47] In the Federalist No. 45, Madison wrote, "The powers delegated by the proposed Constitution to the Federal Government, are few and defined."[48]

Likewise, Roger Sherman[49] penned: "The powers vested in the federal government are clearly defined, so that each state still retain its sovereignty in what concerns its own internal government, and a right to exercise every power of a sovereign state not particularly delegated to the government of the United States."[50] Noah Webster[51] wrote, "The constitution defines the powers of

---

[44] PETER SCHRAG AND VAN HALSEY, THE RATIFICATION OF THE CONSTITUTION AND THE BILL OF RIGHTS 229-30 (1964).

[45] Wait was the publisher of Maine's first newspaper. Creating the Bill of Rights, *supra* note 7, at 313.

[46] LINDA GRANT DE PAUW, THE ELEVENTH PILLAR, NEW YORK STATE AND THE FEDERAL CONSTITUTION 172 (1966).

[47] The Federalist No. 32 (Alexander Hamilton) (emphasis in original).

[48] The Federalist No. 45 (James Madison).

[49] Sherman signed the Declaration of Independence, was a delegate to the constitutional convention, and later served in Congress. Barton, *supra* note 41, at 421

[50] Roger Sherman*, A Citizen of New Haven*, *reprinted in* FRIENDS OF THE CONSTITUTION, WRITINGS OF THE "OTHER" FEDERALISTS, 1787-1788, at 267 (Colleen A. Sheehan & Gary L. McDowell eds., 1998).

[51] Webster was a lawyer and a prominent intellectual and advocate of the time. HARLOW GILES UNGER, THE LIFE AND TIMES OF WEBSTER, AN AMERICAN PATRIOT iv-xiii (1998).

Congress; and every power not expressly delegated to that body, remains in the several state-legislatures."[52]

Charles Pickney[53] asserted that "no powers could be executed or assumed" by the federal government "but such as were expressly delegated."[54] Archibald Maclaine[55] stated, "It is as plain a thing as possibly can be, that Congress can have no power but what we expressly give them."[56] And James Wilson[57] argued that the "true line" separating federal and state power would not be difficult to ascertain because the federal powers are "enumerated" and "well defined."[58]

V. The insufficiency of the federalist assurance

Despite assurances by federalists that the Constitution would be strictly construed and very little power was to be taken from the States, many of the States and the majority of the people demanded a limitation on the federal government inscribed into the Constitution. The principle of *potestas stricte interpretatur* (a power is strictly interpreted) was simply not enough.[59] The people insisted upon articulation in writing that the States and the people retained what was not given, and so, the Tenth Amendment was ratified.

If there had been no Tenth Amendment, then there likely would have been calls for a new ratification convention. As John Page[60] remarked in 1789, "I venture to affirm, that unless you take early notice of this subject [constitutional

---

[52] NOAH WEBSTER, AN EXAMINATION INTO THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION 54 (1787).

[53] Pickney was a delegate to the constitutional convention and served four terms as South Carolina's Governor. MARTY D. MATTHEWS, FORGOTTEN FOUNDER, THE LIFE AND TIMES OF CHARLES PICKNEY xvi, 70 (2004).

[54] ELLIOT'S DEBATES VOL. IV at 253-63.

[55] Maclaine was a delegate to North Carolina's first ratifying convention. *Id*. at 250.

[56] *Id*. at 140-41.

[57] Wilson was a delegate to the constitutional convention and later a member of the Pennsylvania ratifying convention. COLLECTED WORKS OF JAMES WILSON, VOL. I, xix-xx (Kermit L. Hall & Mark David Hall eds., 2007).

[58] *Id*. at 238.

[59] *See Letters from a Federal Farmer, Essay XVI, reprinted in* THE ANTI-FEDERALISTS, SELECTED WRITINGS AND SPEECHES, 283 (Bruce Frohnen, ed., 1999) ("This reasoning is logical, but of very little importance in the common affairs of men; but the constitution does not appear to respect it in any view.").

[60] Page was a U.S. Representative and held various positions in Virginia state government. Creating the Bill of Rights, *supra* note 7, at 310.

amendments], you will not have power to deliberate. The people will clamor for a new convention; they will not trust the House any longer. Those, therefore, who dread the assembling of a convention, will do well to acquiesce in the present motion, and lay the foundation of a most important work."[61] Had that occurred, most assuredly something akin to the Tenth Amendment would have been prominent in the new draft of the Constitution, because the States and the people insisted on it. One way or another, it was going to be part of the Constitution.

Some feared that a united America would not survive if time was taken for a new convention. Gerry warned: "[M]y sense now is, that the salvation of America depends upon the establishment of this Government, whether amended or not."[62] Mason said that he "dreaded popular resistance to" the "operation" of the proposed Constitution.[63] Lee had no doubt that the un-amended Constitution would spur "tyranny" or "civil war."[64] Henry Knox[65] wrote that without adoption of the Constitution "speedily," "we shall be involved in all the horrors of anarchy and separate interests."[66] Page "[w]as positive the people would never support the government, unless their anxiety was removed; they in some instances, adopted it, in confidence of its being speedily amended."[67] Washington wrote, "My *decided* Opinion of the Matter is, that there is *no Alternative* between the *Adoption* of it and *Anarchy*."[68]

The Constitution acquired the support that it did from the States and the people only *because* the people and the States expected amendments controlling federal power to quickly follow ratification.[69] During the Virginia ratification convention, for example, while Randolph warned that "adoption" of the Constitution "is necessary to avoid the storm which is hanging over America, and that no greater curse can befall her than the dissolution of the political connection between the states," he also asked whether "it be not safer to adopt it, and rely on the probability of obtaining amendments, than, by a rejection, to hazard a breach

---

[61] 1 ANNALS OF CONG. 446 (1789) (Joseph Gales ed.,1834).

[62] *Id*. at 463.

[63] Mason's Objections, *supra* note 23, at 1114.

[64] *Richard Henry Lee's letter to George Mason* (Oct. 1, 1787) *reprinted in* THE LETTERS OF RICHARD HENRY LEE, VOL. II 1779-1794 at 438 (James Curtis Ballagh ed., 1914).

[65] Knox was the Secretary of War from 1785 to 1794. Creating the Bill of Rights, *supra* note 27, at 307.

[66] The Debate on the Constitution, *supra* note 21, at 57.

[67] Creating the Bill of Rights, *supra* note 7, at 85.

[68] The Debate on the Constitution, *supra* note 10, at 612 (emphasis in original).

[69] *See* HERBERT STORING, WHAT THE ANTI-FEDERALISTS WERE FOR, THE POLITICAL THOUGHT OF THE OPPONENTS OF THE CONSTITUTION 64 (1981) ("It is often said that the major legacy of the Anti-Federalists is the Bill of Rights.").

of the Union?"[70] Alexander White[71] likewise recommended that amendments "be considered with all convenient speed" "to tranquilize the public mind."[72] In his first inaugural address, Washington acknowledged the potential "expedien[ce]" of amendments.[73] During the first Congress, Gerry bluntly remarked: "The ratification of the constitution in several States would never have taken place, had they not been assured that the objections would have been duly attended to by Congress. And I believe many members of these conventions would never have voted for it, if they had not been persuaded that Congress would notice them with that candor and attention which their importance requires."[74]

That some anti-federalists deeply mistrusted the ratify-first-and-amend-later plan was all the more reason to move forward quickly with amendments. Monroe argued, "Adopt it now, unconditionally . . . and it will never be amended, not even when experience shall have proved its defects . . . Shall we not pursue the dictates of common sense, and the example of all free and wise nations, and insist on amendments with manly fortitude?"[75] In her 1788 treatise *Observations on the Constitution*, Mercy Otis Warren wrote, "The very suggestion, that we ought to trust to the precarious hope of amendments and redress, after we have voluntarily fixed the shackles on our own necks should have awakened to a double, degree of caution." Indeed, if the first Congress had not proposed amendments, the people may very well have rejected the Constitution that they, through the States, had only recently ratified.

Even many federalists agreed with the Tenth Amendment, partly as a means to hold together the union and partly because they trusted that the Constitution would be construed narrowly in any event.[76] In 1789, John Dawson[77] sent a letter to Madison urging him to recommend amendments before the first Congress

---

[70] ELLIOT'S DEBATES VOL. III at 471.

[71] White was a member of the Virginia ratifying convention and served in the Virginia state legislature. Creating the Bill of Rights, *supra* note 7, at 314.

[72] 1 ANNALS OF CONG. 445 (1789) (Joseph Gales ed.,1834); *see also* CAROL BERKIN, THE BILL OF RIGHTS (2015) (characterizing White as a federalist).

[73] George Washington, Inaugural Address of 1789 (April 30, 1789) (transcript *available at* http://www.archives.gov/exhibits/american_originals/inaugtxt.html).

[74] 1 ANNALS OF CONG. 464 (1789) (Joseph Gales ed.,1834).

[75] ELLIOT'S DEBATES VOL. III at 630.

[76] *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, 542 (1969) ("The desire for a bill of rights was too strong, however, for the Federalist arguments to overcome.").

[77] Dawson was a member of Virginia's House of Delegates. Creating the Bill of Rights, *supra* note 7, at 304.

adjourned to "render it more secure, and more agreeable in the eyes of those who were oppos'd to its establishment."[78] In a letter Randolph penned to Madison, Randolph observed that the proposed bill of rights was "much approved by the strong federalists . . . being considered as an anodyne to the discontented."[79] Likewise, Henry wrote in a March 1789 letter, "Federal and anti seem now scarcely to exist; for our highest toned Feds say we must have the amendments."[80]

VI. The Tenth Amendment as a rule of interpretation and application

From time to time, the Supreme Court and lower federal courts grandly speak about the concept of federalism. In *Bond v. United States*, 131 S.Ct. 2355, 2364 (2011), for instance, the Supreme Court observed that the "allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States." The Court further said that federalism "ensure[s] that States function as political entities in their own right." *Id*.

But when it comes time to actually apply the principle of federalism and the Tenth Amendment, the courts almost always come up short. Typically, today's courts, at most, give a token nod to federalism, but then decide the case on other bases, without regard to federalism at all. It is not surprising then the Supreme Court has called the Tenth Amendment "but a truism." *See United States v. Darby,* 61 S.Ct. 451 462 (1941). In that same opinion, the Court remarkably disclaimed: "There is nothing in the history of its [the Tenth Amendment's] adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than 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." *Id*.

At this time, the inaccuracy of *Darby*'s view of the Tenth Amendment should be apparent: Without the Tenth Amendment, the Constitution as we know it today would almost certainly not have survived and the union may have dissolved along with it. The keystone importance of this one amendment cannot be understated. As Madison stated, "The objection to a bill of rights, from the powers delegated by the Constitution, being defined and limited, has weight, *while the Government confines itself to those specified limits* . . . ."[81] Jefferson observed: "I consider the foundation of the Constitution as laid on this ground: That 'all powers not delegated to the United States by the Constitution, nor prohibited by it to the

---

[78] *Id.* at 255-56.

[79] *Letter from Randolph to Madison* (June 30, 1789), *reprinted in* THE LIFE OF JOHN MARSHALL, II at 59 (Albert J. Beveridge, ed., 1916).

[80] Creating the Bill of Rights, *supra* note 7, at 226.

[81] *Id.* at 67.

States, are reserved to the States or to the people.' To take a single step beyond the boundaries thus specifically drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition."[82]

Often court decisions contain only empty platitudes regarding the Tenth Amendment. A prime example of empty platitudes was the Supreme Court opinion upholding the individual mandate of the Patient Protection and Affordable Care Act of 2010, *National Federation of Independent Business v. Sebelius*, 567 U.S. ___ (2012). There, the Chief Justice began with the familiar saying, "In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder." Then, before the Supreme Court upheld the individual mandate under Congress' power to "lay and collect taxes," he offered various observations about purportedly expansive federal power: That the necessary and proper clause "give[s] Congress great latitude." That "it is well established that Congress has broad authority under the [Commerce] Clause." That the commerce clause has an "expansive scope." That "Congress already enjoys vast power to regulate much of what we do." And that "the breadth of Congress's power to tax is greater than its power to regulate commerce . . .."

The omission in all of these statements is an appreciation for the Tenth Amendment and the effect it was intended to have on our understanding of federal power under the Constitution. Not surprisingly, when we set aside the mandate of the Tenth Amendment and start interpreting federal power in the directly opposite manner, the provisions of the Constitution begin to lose their meaning and have no rational boundaries.

The judicial approach of setting aside the Tenth Amendment as *substantively* irrelevant is contrary to the plain meaning of the amendment and even more egregious when we begin to understand the importance of federalism to the ratification of the Constitution. Far from irrelevant, the Tenth Amendment sets forth the mandate that should decisively resolve questions of federal power. When viewing federal constitutional powers, they should be construed according to their plain meaning and *narrowly*, to avoid artificial accumulation of judicially-created new meanings. Such should be the rule of construction in every instance. Restoring the Tenth Amendment to its proper, prominent place in our jurisprudence goes beyond fidelity to the commands of the Constitution and the founding fathers. This is a step that our nation must take if we are to begin to chart our course back to the crucial balance of federal and state power that is essential to our nation's survival.

---

[82] *Opinion on the Constitutionality of a National Bank* (1791), *reprinted in* THOMAS JEFFERSON: WRITINGS 416 (Merrill Peterson ed., 1984).