

Constitution Class Handout
Instructor: Douglas V. Gibbs
douglasvgibbs@reagan.com

www.politicalpistachio.com
www.douglasvgibbs.com
www.constitutionassociation.com

Lesson 16

Rights and State Sovereignty

A Protection of Rights Not Enumerated, 9th Amendment

The Bill of Rights was created to appease the **Anti-Federalists**, but many of the Framers envisioned possible dangers in its creation. In fact, Alexander Hamilton in **Federalist Paper #84** suggested that there existed the possibility of misinterpretations that may place the rights of the people in danger from an overpowering **federal government**. In Federalist #84 Hamilton suggested that government may create exceptions to powers not granted, and argue the power exists because it is not denied by the Bill of Rights. In other words, because the Constitution was designed to grant authorities, and those not listed are not granted, the **Bill of Rights** muddies the waters because those amendments tell the federal government what it can't do. Furthermore, many of the delegates in the Federal Convention of 1787 argued that the Bill of Rights is unnecessary, because prior to the creation of the Bill of Rights, the federal government was not given the authorities by the first seven articles over any of the issues listed in those first ten amendments in the first place.

Regardless, the Anti-Federalists demanded the inclusion of the Bill of Rights in the Constitution, or they would not ratify the document. Needing the support of the Anti-Federalists in order for the Constitution to be made law, the Founding Fathers that were at odds with the creation of the Bill of Rights compromised, and James Madison was given the task to write out the Bill of Rights based on proposals received from the several States.

Hundreds of proposed amendments were offered by the States. Only twelve were considered. Ten were ratified by the States during that time period. Answering concerns of the Founding Fathers that the federal government may interfere with rights not enumerated by the Bill of Rights, the 9th Amendment was included as one of those ten.

The Founders expected the people to protect their own rights through self-government. With freedom comes responsibility, therefore the people, when it came to their rights, should be governed by their conscience, not government. This concept tasked the people, with their individual judgment, to be civil, and to not encroach on one another's freedoms. If citizens were guilty of violating someone else's rights, the civil court system in each State would address the issue. Local courts were controlled by juries, and left all issues regarding rights at the local level.

The very notion of the federal government putting itself into a position of encroaching on the rights of the people was seen as tyrannical, and dangerous. After all, how could a centralized, far removed,

governmental power that is unfamiliar with local customs and laws properly administer private rights issues?

The problem presented by the Bill of Rights, however, is that by listing specific rights that the government shall not infringe upon, many of the founders believed that would open up the opportunity for the federal government to “interpret” the Constitution to mean that all other rights not listed are fair game. Therefore, the wording of the 9th Amendment was carefully fashioned to enable the reader to recognize its intent.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

In other words, the government cannot “deny or disparage” any rights, even the ones not listed in the Bill of Rights, because our rights are given to us by God. This does not give the federal government the authority to guarantee our rights, however. To allow a central government to force lower governments to abide by the rights enumerated in the Bill of Rights is to open the door for government to later dictate to the lower governments other actions they would have to take regarding rights. Since rights, as the Declaration of Independence reveals, are “self-evident,” as well as individual possessions, the authority to resolve disputes regarding rights remains at the local level.

Terms:

Anti-Federalists - Opposed to formation of a federal government, particularly by adoption of the Constitution of the United States.

Bill of Rights - The first ten amendments of the U.S. Constitution; a formal summary of those rights and liberties considered essential to a people or group of people.

Federal Government - System of government in which power is distributed between central authority and constituent territorial units.

Federalist Papers - Series of essays written by John Jay, James Madison, and Alexander Hamilton defending, and explaining the principles of, the Constitution in order to encourage the New York Ratifying Convention to decide to ratify the Constitution.

Questions for Discussion:

1. Why were the Anti-Federalists so worried about the creation of the federal government through the Constitution?
2. Who gives us our rights? Why is this significant?
3. What are the dangers of enabling the federal government to “interpret” the Constitution?

Resources:

Alexander Hamilton, Federalist Paper #84, Avalon Project, Yale

University: http://avalon.law.yale.edu/18th_century/fed84.asp

Joseph Andrews, *A Guide for Learning and Teaching The Declaration of*

Independence and The U.S. Constitution - Learning from the Original Texts Using Classical Learning Methods of the Founders; San Marcos: The Center for Teaching the Constitution (2010).

Philip B. Kurland and Ralph Lerner, *The Founder's Constitution – Volume Five - Amendments I-XII*; Indianapolis: Liberty Fund (1987).

State Sovereignty

“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.”

The 10th Amendment was designed to restrict federal powers from encroaching on State authorities. The article states that any powers not given to the federal government by the Constitution, and any powers not prohibited to the States, belongs to the States.

We must remember that originally all powers belonged to the States, a concept known as **Original Authority**. In order to create a central government, the States granted some of their powers to the federal government so that it may function in the manner necessary to protect, preserve, and promote the union. The States, in Article I, Section 10, are denied powers that would be in conflict with the federal powers granted. However, since the States originally maintained all powers, any authorities not granted to the federal government, nor denied to the States for the purpose of enabling the federal government to do its job, were retained by the States.

The 10th Amendment was also designed to correct the problems that arose through the creation of the Bill of Rights. By the Bill of Rights being composed in such a manner that the first ten amendments tell the federal government what it cannot do, the worry was that the argument in support of unconstitutional activity by the federal government would entail the argument, “Where in the Constitution does it say the federal government can’t do that?” Such an argument by the central government may open up opportunities for the federal government to compromise **Americanism**, and fundamentally transform into a big government tyranny.

The Constitution was designed to grant authorities to the federal government so that it may function in the manner originally intended. The powers granted to the federal government are the only authorities the federal government has. If the powers are not enumerated, the federal government does not have those authorities. The 10th Amendment was written to remind us that even though the first eight amendments tell the federal government it “shall not infringe,” the rule of the Constitution is that all federal powers are enumerated in the Constitution, and if the power is not granted to the federal government, nor denied to the States, the authority remains with the States.

This article was written to support **State Sovereignty**. It is the Tenth Amendment to which one must first go when debating **States’ Rights**. The amendment clearly states that all federal powers are enumerated, and the remaining unlisted powers, if not prohibited, belongs to the States.

James Madison makes a clear argument in support of the concept of State Sovereignty in Federalist #45: *“. . . each of the principal branches of the federal government will owe its existence more or less to the favor of the State governments. . . 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 lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State. The operations of the federal government will be most extensive and important in times of war and danger; those of the State governments in times of peace and security. . .”*

The States serve in a manner similar to that of parents. The people, through their States are the parents of the federal government, but the petulant child is not only acting in ways never authorized, but the parents, through representation, and other means, have determined for themselves that they have no ability to rein in the out of control creation. The 10th Amendment reveals the reality that the States are sovereign, and that the federal government has only limited powers.

When breaking down the language of the Tenth Amendment, the previous articles of the Constitution become clear. It is in the Tenth Amendment that the principles of a limited government are most clearly articulated.

The concept that the Constitution was designed not to tell the federal government what it cannot do, but to tell it what it can do, is presented clearly in the first portion of this amendment. Powers not delegated to the federal government by the Constitution are not authorities granted, meaning that the federal government is limited to only the powers enumerated by the Constitution.

Some powers, despite the fact that **original authority** of all powers belongs to the States, are prohibited to the States. The authorities prohibited to the States are those that, if the States had those powers, may interfere with the federal government's task of protecting, preserving, and promoting the union. The list of powers prohibited to the States, any amendments doing the same notwithstanding, are located in Article I, Section 10.

The word **reserved** was chosen carefully for this amendment. "Reserved" is used rather than the word "granted," because the States are not granted any powers by any source. All of the powers already belonged to the States from the beginning. Any powers the States did not grant to the federal government, nor decide to prohibit to themselves through the Constitution, remain with the States. The presence of the word "reserved" reveals that fact. Reserved, in the context of this article, also means "To hold for their own use."

Terms:

Americanism - A philosophy of freedom that actively seeks less government and more personal responsibility.

Original Authority - Principal agent holding legal authority; initial power to make or enforce laws; the root authority in government.

Reserved - Kept for another or future use; retained.

State Sovereignty - The individual autonomy of the several states; strong local government was considered the key to freedom; a limited government is the essence of liberty.

States' Rights - The authorities of the States over local issues, and other issues, that are not directly related to the preservation of the union or are considered as federal issues.

Questions for Discussion:

1. Why was it important to ensure the federal government did not encroach on State authorities?
2. What did Madison mean when he wrote, "the federal government will owe its existence more or less to the favor of the State governments."
3. Why is it important that the enumerated powers limit the authorities of the federal government?

4. How does the fact that the States have original authority in regards to all powers bring into perspective the relationship between the States and the federal government?
5. Why was the word “reserved” used in the Tenth Amendment, rather than granted?

Resources:

About the Tenth Amendment, Tenth Amendment Center:

<http://tenthamendmentcenter.com/about/about-the-tenth-amendment/>

Definition of Enumerated, 1828 Webster’s Dictionary:

<http://1828.mshaffer.com/d/search/word,enumerate>

Definition of Reserved, 1828 Webster’s Dictionary:

<http://1828.mshaffer.com/d/search/word,reserved>

James Madison, The Federalist Papers #45, Avalon Project, Yale

University: http://avalon.law.yale.edu/18th_century/fed45.asp

Joseph Andrews, *A Guide for Learning and Teaching The Declaration of*

Independence and The U.S. Constitution - Learning from the Original Texts Using Classical Learning Methods of the Founders; San Marcos: The Center for Teaching the Constitution (2010).

Philip B. Kurland and Ralph Lerner, *The Founder’s Constitution –*

Volume Five - Amendments I-XII; Indianapolis: Liberty Fund (1987).

Thirty Enumerated Powers, Tenth Amendment Center:

<http://tenthamendmentcenter.com/historical-documents/united-states-constitution/thirty-enumerated-powers/>