Is the 10th Amendment really "under fire"?

While campaigning for the presidency in 1996, former Senate Majority Leader Bob Dole carried a copy of the 10th Amendment in his coat pocket, vowing if elected to "dust off the 10th Amendment and restore it to its rightful place" as a check on federal power.[1]

Dole never got the chance to do so as president, but a new generation of lawyers and politicians is now attempting to dust off the amendment, which provides that "[t]he 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."[2] Those who support a strict reading of the 10th Amendment—referred to by some as "Tenthers"—argue that its text prohibits any federal action that is not expressly provided for by Article I, Section 8, of the Constitution.[3]

This movement to reaffirm the 10th Amendment manifested itself in the Ohio General Assembly in September, when the Ohio Senate passed Concurrent Resolution 13 (S.C.R. 13), legislation that seeks to reaffirm the amendment as a restraint on federal power.[4] S.C.R. 13 also states that currently "[m]any federal laws directly contravene the Tenth Amendment" and that "The Tenth Amendment defines the total scope of federal power as being that *specifically* granted to the federal government by the Constitution of the United States" (emphasis added).[5]

Similarly, the People's Constitutional Coalition of Ohio, an Ohio citizens group, has been collecting signatures for a ballot initiative—a "Sovereignty Amendment"—that would inscribe comparable language in Ohio's constitution. Judge Eugene Lucci of the Lake County Court of Common Pleas recently published an article in which he claimed that "the 10th Amendment is under fire" by the federal government. Judge Lucci's article calls on citizens to reaffirm the amendment "to restore the balance of liberty in this nation."[6]

The Tenther movement is motivated at least in part by the Obama administration's agenda, which includes curbing greenhouse gas emissions, expanding access to healthcare and further regulating financial markets.

But while the Tenther movement may be a political reaction to the new Democratic agenda, the movement, as represented by Ohio's S.C.R. 13, reflects both misinformed constitutional law and misguided public policy.

First, the amendment contains no adverbs such as "expressly" or "specifically," as S.C.R. 13 and the Tenthers imply.[7] The U.S. Supreme Court has never held that the amendment represents such a restriction on federal power. To the contrary, the Court has consistently upheld laws enacted pursuant to Congress's Commerce Power, even when such laws only indirectly affect commerce. Even under the Court's narrowest reading of Congress's Commerce Power—*U.S. v. Lopez*—Congress may regulate activities that only "affect" interstate commerce.[8]

But to fully understand how radical the Tenther views are, it is worthwhile to consider the practical implications of their philosophy. Following the argument advanced by S.C.R. 13 to its logical conclusion would require the invalidation of hundreds of landmark laws.

As environmental advocates, we fight to defend laws that protect human health

by Will Reisinger, Trent A. Dougherty and Scott Winograd



and the natural world. The Clean Water Act, the Clean Air Act and the Safe Drinking Water Act are but a few laws that would be unconstitutional exercises of federal power under Tenther philosophy. With the enactment of each law, Congress has exercised powers not *expressly* delegated to it by Article I, Section 8, of the Constitution. Nowhere in Article I, Section 8, for example, is Congress specifically authorized to regulate the discharge of mercury into streams or prohibit the storage of hazardous wastes near our drinking water supplies.

But federal environmental laws would represent just a handful of the myriad federal laws that could not withstand constitutional scrutiny. Medicare, Social Security and other social programs that millions depend on would not survive. In addition, the Civil Rights Act and the Voting Rights Act, both outlawing racial discrimination, would likely be unconstitutional. To the Tenthers, the Fair Labor Standards Act, which prohibits child labor, which was rampant in the 19th century—would represent impermissible federal activism. Dwight Eisenhower's interstate highway system and the federal funding used to support it would also be at risk after a full reaffirmation of the 10th Amendment.

Finally, following Tenther reasoning, even our beloved National Park system, the defining legacy of Theodore Roosevelt, could be endangered. (Much of the National Park lands have been acquired through the use of eminent domain—a power that, although alluded to, is not specifically granted to Congress in the Constitution.)

Quite simply, if the power of the federal government were limited to the extent desired by the drafters of S.C.R. 13, the United States would become unrecognizable to most of its citizens.

Perhaps in their next legislative effort, the senators who drafted S.C.R. 13 will seek to abolish some of these popular government programs. If not, the movement in the Ohio General Assembly to reaffirm the Tenth Amendment can only be called a useless political stunt. ■

Will Reisinger is staff attorney for the Ohio Environmental Law Center. Trent A. Dougherty is director of legal affairs for the Ohio Environmental Council and director of the Ohio Environmental Law Center. Scott Winograd is a third-year law student at Ohio Northern University and intern with the Ohio Environmental Law Center.

Endnotes

1. Peter A. Lauricella, "The Real 'Contract With America': The Original Intent of The Tenth Amendment and The Commerce Clause," 60 Alb. L. Rev. 1377 (1997).
2. U.S. Const. Amend. X.
3. Article I, Section 8, outlines the basis of Congress's power, including the power to regulate interstate commerce, coin money and provide for an army and navy.
4. See 2009 Ohio Senate Concurrent Resolution No. 13, Ohio 128th General Assembly-2009-2010 Session, 2009 OH S.C.R. 13 (NS).
5. S.C.R. 13 is sponsored by Senators Timothy J. Grendell (R-Chesterfield) and Keith Faber (R-Celina).
6. Judge Lucci also calls on "all Americans to diligently and jealously [sic] guard the U.S. Constitution" and to protest what he terms an erosion of state sovereignty." *Solo, Small Firms, and General Practice News*, Vol. 19, summer 2009, Ohio State Bar Association.
7. Although the original Articles of Confederation contained the word, the drafters of our Constitution chose to exclude the word "expressly" to avoid straight-jacketing the new federal government. See Kurt T. Lash, "The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty and 'Expressly' Delegated Power." 83 *Notre Dame Law Review* 1890 (2008).
8. *United States v. Lopez*, 514 U.S. 549 (1995).