

## Is the Federal Minimum Wage Unconstitutional?

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[Michael J. Henry](#)

The popularity of the Tea Party during the 2010 Election represents a growing movement toward a stricter construction of the U.S. Constitution and a more limited federal government. Relying on this ideology, several candidates questioned the constitutionality of some of the most entrenched federal legislation, including the federal minimum wage. Senate candidates Joe Miller of Alaska and John Raese of West Virginia both argued that the federal minimum wage prescribed by the Fair Labor Standards Act of 1938 violates the Tenth Amendment and usurps rights granted exclusively to the States. Although both candidates ultimately lost in the general election, the popularity of the Tea Party may lead to new challenges not only to whether Congress should establish a federally-mandated minimum wage, but also whether Congress has the constitutional authority to do so.

### **The Tenth Amendment Argument**

The arguments raised by Messrs. Miller and Raese follow the limited government ideology that is a trademark of the Tea Party. In an ABC News interview, Miller stated that the federal government should not be involved in setting a minimum wage because it is "not within the scope of the powers given to the federal government." In another interview, Miller further explained his position, stating

"What I'd recommend that you do is go to the Constitution and look at the enumerated powers because what we have is something that we call the 10th amendment that says, look if it's not there if it's not enumerated, then it's delegated to the states...Everything that's not there is reserved to the states and the people."

Raese raised similar arguments, saying that the federal minimum wage represents "government micromanaging and intervention into the private sector."

The argument focuses on the Tenth 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." Although Article I, Section 8 of the Constitution grants Congress the power "to regulate commerce...among the several states", it does not contain a clause expressly authorizing Congress to prescribe a federal minimum wage. Thus, opponents argue that because the Constitution does not expressly give Congress the power to set a minimum wage, that power is reserved to the States.

### **The Supreme Court's Rejection of the Tenth Amendment Argument**

Nearly 70 years ago, the United States Supreme Court unanimously rejected this same Tenth Amendment argument and upheld the constitutionality of the federal minimum wage. In *United States v. Darby*, 312 U.S. 100 (1940), the Supreme Court found that, although the Constitution does not expressly give Congress authority to mandate a federal minimum wage, the Tenth Amendment does not deprive Congress of "authority to resort to all means for the exercise of a granted power which are appropriate and plainly

adapted to the permitted end.” *Id.* at 124. The Court found that based on Congress’s power to regulate interstate commerce, Congress could enact reasonable legislation in furtherance of its policy of excluding from interstate commerce any goods produced under substandard labor conditions. Thus, the Court held that the federal minimum wage is not unconstitutional.

### **The Future of the Federal Minimum Wage**

Although the 2010 Election revived some of the debate about the federal minimum wage, this legislation has survived constitutional challenges for over 70 years and it is unlikely that the Supreme Court will overrule *Darby* anytime soon. Furthermore, because the minimum wage is one of the more popular pieces of federal legislation among both Republicans and Democrats, it is also unlikely that Congress will repeal it. The vast majority of the States have enacted their own minimum wages which either equal or exceed the federal minimum wage.

The future of this argument will largely depend on whether the popularity of strict construction and limited federal government continues to grow during the 2012 Congressional and Presidential Elections. If more candidates supported by the Tea Party are elected in 2012 and, more importantly, if a Tea Party candidate wins the Presidency and appoints like-minded Supreme Court Justices, we could see a more lively debate on the issue in Congress and potentially a reversal of the *Darby* decision. However, for the time being, the federal minimum wage appears to be safe.