

# The Constitution Within

BY SHELDON RICHMAN



I've argued previously that a free society depends ultimately on people having a proper sense of just conduct. This means more than the words they recite or put on parchment. Most crucial is how they *act* and expect others, such as those in the government, to act. For this reason it is futile to put undue emphasis on written constitutions as the key to liberty. The real constitution is within—each of us. If the freedom philosophy is not inscribed in the actions of people, no constitution will help.

I am reminded of the weak protection afforded liberty through mere words by Richard Labunski's recent book, *James Madison and the Struggle for the Bill of Rights* (Oxford University Press). Labunski provides a well-written, gripping account of how James Madison kept his promise to have the first U.S. Congress amend the new Constitution in order to add a bill of rights. The Virginia ratifying convention, along with several other state conventions, was unhappy that the Constitution lacked a bill of rights. Madison and other champions of the new charter thought a declaration of rights was unnecessary and even dangerous; a government of limited, enumerated powers, they said, would already be restrained from violating rights.

But the Anti-federalists, who opposed a strong central government, and even some supporters of the Constitution, disagreed. Desperate to have his state of Virginia ratify the Constitution, Madison, a convention delegate, promised to propose the amendments recommended by the convention once the new government was set up.

But Madison had to get into Congress to keep his promise. That wouldn't be easy. As Labunski reports, Madison's bid to be one of the senators from Virginia (state legislatures elected senators in those days) was opposed by a leading Anti-federalist, Patrick Henry. Madison finished third in a field of three behind Richard Henry Lee and William Grayson, Anti-federalists both.

Madison's only chance now was to win a seat in the House of Representatives. But that election wouldn't be easy either. Madison's opponent was his friend James Monroe, who, Labunski writes, "had serious reservations about the proposed Constitution. He primarily objected to the authority of the federal government to directly tax citizens. . . . He vowed to support a bill of rights if elected." Madison's vigorous campaign against Monroe paid off with 57 percent of the vote.

Labunski portrays Madison as "initially . . . lukewarm" or even opposed to the idea of a bill of rights. At best he thought it unnecessary and believed (in Labunski's words) "the new government should have a chance to operate for a while before changes were made." Madison "doubted whether amendments—which he described as 'parchment barriers'—would really restrain the government if it was determined to abridge the liberties of citizens, but he saw little harm in offering a declaration of rights," Labunski writes.

One reason for this was Madison's fear of the alternative: a second constitutional convention, which Anti-federalists favored. Amendments, then, were the lesser evil.

When the first Congress under the Constitution convened, Madison kept his word and introduced several amendments. Labunski believes that by then Madison had become a sincere champion of a bill of rights. Others are not so sure. (It should be noted that the Anti-federalists' sincerity has also been questioned; specifically, did they campaign for a bill of rights to obscure their more fundamental objections to the nationalist Constitution? Maybe: after the amendments were adopted, some Anti-federalists denied their importance.) Nevertheless, Madison overcame the obstacles and shepherded through the House a series of amendments. These were then modified in the Senate. (The one amendment

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Madison apparently really wanted—a prohibition on *state* violation of freedom of speech, press, and religion and the right to a jury trial—was removed by the senators, agents of the state legislatures.) Eventually the ten amendments we know as the Bill of Rights were ratified by the states.

The reason for this roundabout and admittedly incomplete story is that Madison made a revealing statement during the debate on what would become the Tenth Amendment to the Constitution. As introduced and as eventually approved, it read, “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.”

Thomas Tudor Tucker of South Carolina rose to add one word to this amendment: *expressly*. It thus would read: “The powers not *expressly* 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.”

This version would have considerably narrowed the scope of the national government—and Madison objected: “[I]t was impossible to confine a government to the exercise of express powers; there must necessarily be admitted *powers by implication*, unless the constitution descended to recount every minutiae” (emphasis added).

As Labunski notes, the change would have been dramatic: “The Tucker amendment would have greatly diminished congressional authority under the ‘necessary and proper’ clause, which had granted Congress substantial discretion to carry out responsibilities assigned by the Constitution.”

At least, it would have created tension within the document. The “necessary and proper” clause was a source of great concern to Anti-federalists. The Anti-federalist known as “Brutus” wrote, “No terms can be more indefinite than these, and it is obvious, that the

legislature alone must be the judge of what laws are proper and necessary for the purpose.”

Tucker’s amendment failed twice, first in the committee of the whole and then in the full House, by a vote of 32–17.


### Few and Defined?

Madison’s position on the proposed change to the state-powers amendment raises interesting questions. In light of his plea that “there must necessarily be admitted powers by implication,” what are we to make of his famous line in Federalist 45 that “The powers delegated by the proposed Constitution to the Federal Government, are few and defined”? When strict constructionists appeal to original meaning or intent, which meaning or intent have they in mind? And which counts more: what was said during deliberations over the text or what was said in newspaper articles designed to win public support for the Constitution? Is Madison a reliable ally to be cited with confidence?

Moreover, when the Constitution says Congress has the power “To make all laws which shall be necessary

and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof,” where is the bright line that limits the scope of the national government?

Most important, how is something as malleable as the interpretation of legal text to protect our freedom from those who would read its phrases broadly? Such people, after all, are most likely to be attracted to government.

As Madison himself warned, “parchment barriers” inspire little confidence. For the sake of freedom there is no substitute for getting right *the constitution within*. And for that, there is no substitute for self-education and an articulate passion for liberty. 

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