

# The Constitution or Liberty

BY SHELDON RICHMAN



*Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.*

We might think those words—or words to the same effect—are in the U.S. Constitution. But they are not. They are from Article II of the Articles of Confederation, America’s first constitution. They could have been placed in the U.S. Constitution but were deliberately left out in 1787.

After the Constitution was ratified, something *like* Article II was added to the Constitution as the Tenth Amendment. Unfortunately it is like Article II in the same sense that a whale is like a fish—superficially.

The Tenth Amendment says: “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 most significant difference is that Article II qualifies the word *delegated* with *expressly*. The Tenth Amendment does not. The difference was no oversight. This suggests that while the Articles of Confederation was a document of express, enumerated congressional powers, the Constitution, contrary to widespread belief, was not.

Professor Calvin H. Johnson of the University of Texas Law School published a paper in 2006 that sheds light on this subject. “The Dubious Enumerated Power Doctrine” presents formidable evidence that the framers had no intention of limiting the national government’s powers to the 16 items listed in Article I, Section 8, of the Constitution.

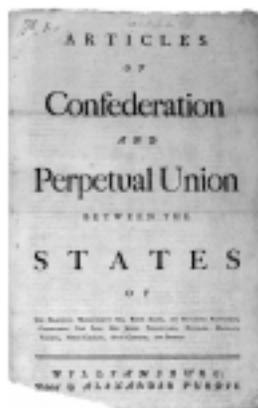
“In carrying over the Articles’ wording and structure, they removed old Article II’s limitation that Congress would have only powers ‘expressly delegated’ to

it,” Johnson writes. “When challenged about the removal, the Framers explained that the expressly delegated limitation had proved ‘destructive to the Union’. . . . Proponents of the Constitution defended the deletion of ‘expressly’ through to the passage of the Tenth Amendment. That history implies that not everything about federal power needs to be written down.”

The Constitutional Convention operated on the assumption that more, not fewer, powers were needed for the national government than were allowed under the Articles. Johnson quotes some of the framers to indicate this attitude. “The evils suffered and feared from weakness in Government have turned the attention more toward the means of strengthening the [government] than of narrowing [it],” Madison said to Thomas Jefferson.

When the convention began its work the delegates passed resolutions to guide the committees that were drafting particular sections of the document. Johnson writes that one such binding resolution specified that the new government would have every power enumerated in the Articles *and* an additional power (quoting the resolution): “to legislate in all Cases for the general Interests of the Union.”

This is contrary to the common view that Article I, Section 8, of the Constitution necessarily exhausts the national government’s powers. That view is undermined by several inconvenient facts. For example, the first clause of Article I, Section 8, states, “The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States. . . .” That’s a hefty grant of power that does not appear to be further restricted by any subsequent language. (Jefferson



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and Madison disagreed. See Federalist 41 by Madison, keeping in mind that the Federalist Papers were essentially ad copy for the Constitution and against the Anti-federalist opposition.) The 16 specific powers that follow don't appear to be limits on the taxation clause but rather coequal provisions.

But then why include a list of powers? Johnson writes: "Reading the Constitution as giving a general power to provide for the general welfare means that the enumerated powers of clauses 2 through 17 are illustrative of what Congress may do within an appropriately national sphere, but are not exhaustive."

In other words, Congress can't do whatever it wants. It can only act on behalf of the common defense and general welfare. Thus in the eyes of the framers, the government would be limited, but not nearly as limited as today's constitutionalists believe. The view among the framers was that Congress's jurisdiction covered all matters national in scope, leaving local matters to the states. But, as Johnson writes, "both Madison and Hamilton argued that the division between the federal and state governments was a legislative or political question that would be set in the future by competition between those governments for the loyalty of the people."

## Implied Powers

We know that the Constitution must have contained implied powers from the beginning. Article I, Section 9, expressly prohibits Congress from doing certain things, such as passing ex post facto laws and bills of attainder, granting titles of nobility, and interfering with the slave trade until 1808. Why would such prohibitions have been thought necessary if Congress could exercise only the enumerated powers? Another example: The Fifth Amendment limits the power of eminent domain, but the Constitution itself does not enumerate any power of eminent domain. It must be implied.

Johnson's argument would not be news to the Anti-federalists, that group of early Americans who feared the proposed Constitution would create an imperial national government with virtually unlimited

power. (It should be noted that southern Anti-federalists like Patrick Henry objected to an expanded national government in part because they feared the taxing power might be used to free their slaves. Thus was a good cause, decentralization of power, perhaps permanently stained by a link to the abomination of slavery. Samuel Johnson had it right, "How is it that we hear the loudest *yelps* for liberty among the drivers of negroes?") When advocates of the proposed Constitution advertised the document as containing express, enumerated powers, the Anti-federalists and fellow travelers such as Thomas Jefferson scoffed.

For example, James Wilson said: "The congressional authority is to be collected, not from tacit implication but from the positive grant expressed in the [Constitution]. . . . [E]verything which is not given [to the national government], is reserved [to the states]."

To which Jefferson replied: "To say, as Mr. Wilson does that . . . all is reserved in the case of the general government which is not given . . . might do for the Audience to whom it was addressed, but is surely *gratis dictum*, opposed by strong inferences from the body of the instrument, as well as from the omission of the clause of our present confederation [Article II], which declared that in express terms."

How the Constitution was intended to be interpreted and how it was in fact interpreted under the pressure of public opinion were initially two different things. As historian and economist Jeffrey Rogers Hummel explains, "To oversimplify only slightly, the Federalists got their Constitution, but the Anti-Federalists determined how it would be interpreted." For a while anyway.

Calvin Johnson is happy the Constitution has implied powers. No libertarian would be. But we must separate what the Constitution appears to say and how we evaluate it, and resist the temptation to let our political-moral views warp our reading. As Lysander Spooner in 1870 wrote, the Constitution "has either authorized such a government as we have had, or has been powerless to prevent it." Liberty's champions have to come to terms with that logic.

