



Episode 663: Is the Constitution an Enemy of Liberty?

Guest: Sheldon Richman

WOODS: All right, I got a lot of requests, a *lot* of requests to have you on to talk about this book.

RICHMAN: Oh, good.

WOODS: So I just thought, yeah, I'll get to it one of these days. But then it just kept coming, so I thought, all right, today's the day; we'll do it; we'll do it. All right, so the book is called *America's Counter-Revolution: The Constitution Revisited*. Now, that is a provocative title. I'm sure that's why you chose that title. Let me ask you right away the question you'd be most likely to get from constitutionalists, who would say you're throwing out the baby with the bathwater. If only we would interpret the Constitution the way it was originally intended — they'll agree with you, yeah, everything's gone off the rails and a lot of terrible things are being done by the government, but if only we could just get back to the original meaning of the Constitution, everything would be all right. I would be inclined to think that you would be able to respond to that on all different levels.

RICHMAN: That's right. The first thing I'd like to say to that is that it begs the question — it assumes there's "an original meaning." Now, even within the originalist camp, there are differences of opinion. Some people will say it's the intention and meaning of the framers or of the ratifiers. Grady Barnett and others who claim to be a libertarian talk about the original meaning to sort of the society at large, what did the text just mean to everyday people. It's not really clear what original meaning means.

And we also have to keep in mind that the Constitution was a political document. It was the product of a compromise, and so there's a lot of vagueness and legal language. Constitutional language is inherently underdeterminate, and by that I don't mean that language isn't anything. That would be ridiculous. Here we are having a conversation. But language, especially legal language and constitutional language, is going to be underdeterminate; in other words, there's going to be a lot of wiggle room.

The framers knew that. Hamilton and Madison understood that they were not writing anything that was crystal clear. They knew, and they even concede some of this in *The Federalist Papers*, that the boundaries between the states and the national government and the boundaries between the three branches of government at the

federal level, those boundaries would be determined through political battles over the years. They were not under any illusion that they had written this crystal clear document that everybody from now till eternity would understand and have no trouble observing. So I think it's a red herring, really, to say if we only got back to it.

Besides, you know, Spooner, as Lysander Spooner famously pointed out – at least famously among libertarians – that even the Constitution authorized the government that we have or it was powerless to prevent it. The Constitution was never suspended in any formal way. Everybody always argued that they were acting constitutionally, even when they were doing things that libertarians and so-called constitutionalists despised. So what happens? When you play the Constitution game, you've got to be prepared to lose.

All constitutions are living constitutions. I disagree that you can have something other than a living constitution, meaning, people will always be interpreting it. We can't program a robot or a computer to give us flawless answers to every constitutional dispute that arises. It's always going to be people, and people have interests, and even if they're honest, they're going to have different interpretations, and there's no way to get away from that.

WOODS: Sheldon, you mentioned Lysander Spooner, and of course he wrote about different aspects of the Constitution, but he also wrote about the overall idea of constitutions and this particular constitution, and his view was that the Constitution wasn't binding, because it didn't have the consent of everybody involved. But that's not the line of argument you're taking in this book. It may be one you've taken in the past, but in this book, you're looking at the history of the Constitution. This is a history book here. And you're arguing – you can see it right in the title – this is America's counter-revolution. So in what sense would the Constitution, that is held out as a beacon of liberty to the whole world, how can that be thought of as a counter-revolution?

RICHMAN: Well, you have to put it in its historical context, and unfortunately that seems to get dropped out. You would think, listening to lots of people, that the U.S. or the Americans won the Revolution, drove the British out, and then immediately sat down, wrote the Constitution, and then things just went from there. There's sort of a lost eight years between the – well, actually, before the war ended, because actually this begins before the war ends – and 1787 or 1789 when the Constitution is ratified and goes into effect: namely, the period of the Articles of Confederation. That gets really short shrift, even among libertarians. Like, well, there were problems and then we jumped to the Constitution.

WOODS: Right.

RICHMAN: I mean, you see this even with some hardcore libertarians. They may be minarchists, but they're very hardcore libertarians. And so I don't see this as an anarchist issue, by the way. You can be a limited government-advocate and totally embrace my book, so even though the final chapter is about anarchism, called "The

Constitution of Anarchy," you don't have to be an anarchist to see what I'm saying here or to agree with it.

During the Articles of Confederation – which I'm not claiming is a perfect libertarian era, by the way, but I am doing some comparison here – you had a quasi-central government. And I call it a quasi-government, because it lacks some very important, I think, defining powers that governments have, and one in particular; namely, the power to tax. But people will kind of remember this from their schooldays, if the Articles even gets covered anymore; I don't know. But the central government had no power to tax. The U.S. – and it was called the United States – was literally a confederation, a legal friendship of sovereign states. That's how it was seen. And if the central government needed money, it had to requisition it from the states. Now, as we know, we know human nature, sometimes the check wasn't really in the mail when the national government asked for money from the states.

It also had no power to regulate trade. These are two extremely important powers that it lacked, which is why I want to call it a quasi-government. Now, it did rely on taxation, but the taxing power was in the states, so it was a government but not a full government.

Lots of people back then thought, even among the Anti-Federalist people who didn't like the Constitution, thought that maybe the national government should have some limited power to tax, so there were discussions going on in that regard. But this is why it's a counter-revolution. The move toward a central government was a move away from decentralization, and I think that constitutes a counter-revolution, given what the American Revolution was, which was overthrowing an empire off the shores here so that the states could manage themselves.

WOODS: You know, it's funny; this whole Articles of Confederation thing, I was just looking on Facebook, the Articles of Confederation has 1,500 likes. There's a page for the Articles of Confederation, 1,500 likes. I mean, you and I probably know 1,500 people. That's it. Whereas the U.S. Constitution – now, there are several different Facebook – there's The U.S. Constitution, U.S. Constitution. But if you put them all together, it's probably about a million. And to me, okay, you could argue that the Articles of Confederation had its inconveniences, if you want to make that argument. But to me it's not so overwhelmingly obvious that the Constitution is to be preferred that the likes should be in that proportion. That is the result of nothing other than propaganda, right?

RICHMAN: Well, I think so, because, look, I don't really remember my history lessons in junior high school and high school, or even freshman college. I don't remember. I assume we covered the Articles of Confederation. I'm just assuming. It's an act of faith.

WOODS: Right, but to dismiss it, right? Just to dismiss it.

RICHMAN: Well, I'm sure we covered – it must have been covered. It's got to be covered. These days, who knows? But back in my day – look, I was going to elementary school in the '50s, so I assume they were still covering it. But I'm sure it got very short shrift, and they said, oh yes, everybody agreed there were problems. I'm sure we never heard the word Anti-Federalist. I'm pretty sure of that. So yes, there were problems. They realized there were something worse than inconveniences, and therefore they met in Philadelphia and these demigods – and this is the key to it – these demigods – not demagogues, by the way, demigods – in other words, half-gods.

WOODS: Right.

RICHMAN: These godly men, totally wise and totally informed of what the public interest is, sat down in Philadelphia and wrote this wonderful document. That's the story I'm pretty sure we learned.

WOODS: Yeah. Oh yeah, absolutely. And basically you're not even presented with the idea that there might have been a decent argument for not doing this. That would be unthinkable, of course, because this is our destiny. I mean, it's all caught up in this quasi-religious encasing. It's very odd.

RICHMAN: Yes.

WOODS: Let's talk about some specifics here. First of all, you've got – because I think this is really – you say "The All-Embracing Power to Tax." That's Chapter 13, appropriately enough. Talk about that, because that key thing here, regardless of the General Welfare Clause, the Commerce Clause, all this other stuff, that power to tax is so essential, not only because taxation is control, but also because you combine that with General Welfare, and it means that even if something's not included in the Constitution, the government has the power to tax, and so it can therefore take that power and use it for Obamacare, use it for all kinds of things that aren't in there.

RICHMAN: Yeah. In fact, the Supreme Court has ruled – I forget what year this was, but it's not new – that the Congress can even accomplish through taxation what it explicitly is not allowed to accomplish through regulation.

WOODS: That's what I was trying to say, yeah.

RICHMAN: And the Supreme Court said it doesn't matter whether raising revenue was secondary in the minds of the congressmen who passed this bill. They can still do it. That's incredible. Well, this "all-embracing power to tax" is not even my phrase. It's from the Supreme Court. 1913 or '14, the case that took up the Wilson income tax. The case is known as Brushaber. It actually even goes back earlier to the Pollock case –

See, this is something that's not widely understood, even by libertarian law professors, because I've heard them speak about this and they get it wrong. In 1894 – this is way past the era that my book is about, but I do discuss it in the chapter you're referring to – Congress passes an income tax, and it goes to the Supreme Court. Now, people

generally believe – libertarians generally believe and I think most people generally believe that in 1895, the Supreme Court struck down that law, because they said an income tax is unconstitutional. Then, as the story goes, in the Progressive Era when Wilson comes in – well, actually it begins under Taft – a constitutional amendment gets rolling to permit an income tax, and the idea is that it had to be done, because the Supreme Court in the previous century had said income taxation is unconstitutional.

That is wrong, at least in its essence. There are some minor details that are right about that, but here's what really happened. In 1895, the Supreme Court looked at that income tax that was passed a year before, and the challenge was not to the whole bill, but to the bill that laid a tax on the income from property, real and personal property. In other words, let's say rent – other income from property – and interest from bonds, stocks and bonds. I believe a holder of stock in a bank challenged this and said this is unconstitutional, because to tax the income from property is equivalent to taxing the property itself – I'm not saying I buy this argument, but this was the argument that was made. So taxing the income from property is equivalent to taxing the property. Taxing property is a direct tax. The Constitution says you have to lay a direct tax on the basis of the census; in other words, a portion of the population to the states. This bill didn't do that; therefore, that's invalid.

The Supreme Court bought that argument, but then it went on to say we're going to knock down the whole law, including the tax on wages and salaries, because Congress' intent was not to put all the burden on wage earners, and if we strike out the property income part of it, all the burden will be on wage earners. That wasn't Congress' intent; therefore the whole bill falls. However, they said there was no question that Congress has the constitutional power to tax wages and salaries.

So they passed the Sixteenth Amendment, which, the key phrase of that is from whichever source derived. If you read that amendment, it says Congress can tax income "from whatever source derived," and what those few words meant is this: that the Supreme Court in the future, in judging the constitutionality or anything about an income tax, can't look at the source of the income. That's "from whatever source derived." And that addressed the 1895 Pollock case. So the income tax on wages and salaries was never ruled as unconstitutional. In fact, in those cases the Supreme Court said that the – and it uses, like, six or seven synonyms for this – the power to tax under the Constitution is all embracing, plenary, comprehensive. You think of every synonym you can to capture that idea, that's in those cases. And so the Anti-Federalists were vindicated, because they were saying in the day, in 1787, what are you talking about, this is an unlimited power to tax here, that this document gives to Congress. And the Supreme Court later on said, yeah, that's true.

WOODS: I've got a juicy question for you, but first let's pause to thank our sponsor.

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All right, here's a question that my friends Kevin Gutzman and Brion McClanahan, who are constitutionalists, might come back with. They would say it's true that the Constitution has – well, there were people who wanted to establish a nationalist government and who wanted the federal government to have plenary power to do anything it wanted. And there were people who wanted to have only enumerate powers. Now, what matters is not that some people – I mean, I hate the expression "at the end of the day," but in other words –

RICHMAN: Yeah, me too.

WOODS: Yeah. *Ultimately* what matters is not what the intentions of the worst people in the world were; what matters is – and in a way, it doesn't even matter the document itself. What matters are the terms on which the document was sold to the public, and at the ratifying conventions, over and over again even the Federalists themselves clarified that the General Welfare Clause was not an open-ended grant of power. It wasn't a grant of power of any kind. The federal government would have only powers expressly delegated to it. The phrase "expressly delegated" was used in at least a half-dozen ratifying conventions. So even if, in other words, we could go back and look at bad aspects of the Constitution, what you look at with any legal document is the intentions – is what people agreed to, basically, and people agreed to a limited government. That's what was sold to them at the ratifying conventions. So if Sheldon Richman finds that the Constitution has a lot of terrible features, don't we set that against, but at the ratifying conventions, the real document was sold to them as a limited government document. Even though the nationalists wanted it to be something other than it was, that's what it wound up being, because that's how it was sold at the ratifying conventions?

RICHMAN: Well, but how do we know that the people in the ratifying conventions weren't just seeing the nationalists winking their eyes as they said that stuff? In other words, once you get in that game, I don't see how it's any guidance. But I can – and you'll forgive the expression – trump that. I can trump your argument with the following argument. Trump has now ruined the language now, right? You can't say –

WOODS: (laughing) Right.

RICHMAN: – this trumps that anymore. I really regret that. I think we need to call him Drumpf, and that way we can restore the word trump.

WOODS: (laughing)

RICHMAN: But anyway, that's off the subject.

WOODS: We've lost too many words already in this movement, haven't we?

RICHMAN: Exactly. You know like "the end of the day," I don't like "going forward," when that's the only –

WOODS: I don't either. Maybe we need to do a whole show about grammatical and speech pet peeves or something.

RICHMAN: I'm not using "going forward" except when I'm driving and when there's time travel in to the past, then we can start saying "going forward."

WOODS: (laughing) There you go, right.

RICHMAN: But anyway, here's a story that's in the book. When it came time to write the amendments that would become the Bill of Rights, and this was being propelled by Madison, lots of people promised, okay, yeah, we'll have a Bill of Rights, because people said, "Where's the Bill of Rights? There's no Bill of Rights." But once it was ratified and the first Congress met, everybody who promised the Bill of Rights said, to hell with that, we're in now, we don't need a Bill of Rights. Madison felt a bit honor-bound. Probably Jefferson was pushing him, and he just felt honor-bound. So he comes up with 12 – he sifts through the 200 amendments or so that people at the conventions, the ratifying conventions were proposing. He throws out all the ones that would in any way change the structure that was laid out in the Constitution, which was really what mattered to the Anti-Federalists. The Bill of Rights, while they made some noise about it, that wasn't the thing that they cared about most. They wanted to change the structure. But he throws all those amendments out and sticks to the ones that would – you know, the kind of things that ended up in the Bill of Rights. He actually had 12; two never got ratified.

So what became number 10 is of course the famous one that seems to protect the states, right? It says, all powers – I don't have it exact here, but, all powers not delegated to the United States or not prohibited by the Constitution are reserved to the states and the people. So while that was being debated, a South Carolina representative by the name of Thomas Tudor Tucker – I love his name – stood up and said I have an amendment; I want to insert the word "expressly" before "delegated." So, "All powers not expressly delegated to the United States." Now, that had come out of the Articles of Confederation. Article II of the Articles of Confederation is a much, very fortified version of what became number 10. Or we could put it the other way: 10 is an extremely pale version of Article II of the Articles. People can look that up and see – or it's in my book.

Anyway, Madison objects. I object to adding the word "expressly." Why? Because, "All constitutions" – and this is a quote now – "must have power by implication, else the constitution would be an endless list of minutiae." You'll notice if you go through my book there's a chapter called "James Madison: Fathers of the Implied Powers Doctrine." Now, he might not have been the literal father. Someone else might have actually said that sooner, but he made quite a big deal of it, and he prevailed. They kept that word "expressly" out. So I think in a way that kind of tops the argument you're relaying, that they were promised they only had the powers expressly delegated.

And you know, when the Constitution was first unveiled, James Wilson, a very prominent Pennsylvania judge who was a prime nationalist and was quite a big

promoter of the Constitution, he gave a speech or wrote an article, I'm not sure which it was, where it talked about how it's plain as day, he says roughly, that the Congress can only exercise the powers that are enumerated and everything else is left to the states. And Jefferson looked at that – now, Jefferson was sort of, he was among the weakest of the Anti-Federalist types – and he was also in France a lot of the time. But he looked at it and said, I don't know what document James Wilson is reading, but I don't see that. And other people reacted the same way. Richard Henry Lee, another Anti-Federalist, said, what the heck is Wilson talking about when he says Congress or the national government could only exercise power that are specifically, expressly enumerated and nothing else. They looked at that and laughed. They said, we're looking at two different documents.

So it's not clear. It's not clear at all. And they knew it. The people at the time knew it. Like I say, Madison and Hamilton understood this was going to be fought forever. It was never going to be settled. It was a compromise. They had to compromise.

WOODS: Sheldon, just for the sake of showing the breadth of the book, say a word about the standing army, that issue. You have a chapter on that.

RICHMAN: For some reason, I don't know where libertarians get this, but they think that the government was prohibited from having a standing army under the Constitution, that people hated having a standing army. Well, people did hate the standing army, but there's nothing in the Constitution that bars a standing army.

WOODS: Okay.

RICHMAN: It's certainly not prohibited, and there's every reason to think – well, it says Congress can raise an army. The only restriction is the budget has to be a two-year budget. It can't be longer than two years. And I have a chapter on the standing army, and you can see what Hamilton and Madison said, why it was needed. And here's the general argument they made, first in regard to the army, but then generally. They said, look, this new national government is going to face unlimited contingency, unlimited situations. We can't predict what the situations are going to be; therefore, the powers have to be equal to that; in other words, unlimited. They weren't arguing in the – even in The Federalist Papers they weren't arguing that it was a limited government. I know at times, yeah, Madison says "few and defined powers" at one point, but if you look at it in connection with other things, they're saying we have to give massive powers to this thing because we don't know what the future holds. Well, that's scary.

WOODS: All right, we're coming up toward the end, because I want people to check out what you've done. I don't want to give them the whole thing. We want to give them a flavor, right? So now I'm going to throw over to you – you've got 20 chapters in what is a book that people will be able to read quickly. I think they'll get a lot out of it. What do you feel like is something that really hits people between the eyes, that's just a shock, an argument they've not heard?

RICHMAN: Well, here's an impression I would like to leave with readers – and I did try to make this book very accessible. The chapters are not long.

WOODS: No.

RICHMAN: It's not laden with footnotes, although you can find – I name the books where I get my quotes and other things from, so I'm not totally leaving you in the woods – no pun intended there. What I'm trying to do is show, in a way, the continuity of American history from this moment, 1787, '89, that period where they switch from the Articles to the Constitution, all the way to the current time. In other words, one of the, I think, the major motives pushing the nationalists, the Federalists at the time, was today called national greatness. In other words, this will seem strange, but I think it's not crazy, that there's a continuity between the founders, the framers, the nationalists certainly among them, and neoconservatism.

Now, I know that's going to sound insane, but if you look at what they did – they wanted a standing army, they wanted the continental expansion, they wanted hemispheric expansion, they wanted Canada, they wanted Cuba. They were worried about Cuba long before the Russians and the communists. They were worried about the Russians in the Pacific Northwest. They were worried about the Indians and the Spanish. They had national security on their minds. I have a chapter in there called "Empire on Their Mind." They were empire builders from the start, and they were national greatness advocates. I'm convinced that if the state legislatures had been perfectly libertarian – in other words, if they hadn't engaged in debt relief, which they did, and I criticize that – if they hadn't done debt relief and other things libertarians would condemn, which Madison made a big deal of in moving for nationalization – even if none of that existed, the nationalists would have done what they did anyway.

There's every reason to think that, because what they wanted was a big league nation. They wanted to compete in the big leagues. They thought we were the rising empire and that we want to replace the dying old empire of the old world. And you couldn't do that with a collection, with a collection of states, with a mere confederation. And it moved a Jeffersonian in 1800, a guy by the name of Abraham Bishop, to say – and this is the epigram of the book – "A nation which makes greatness its polestar can never be free." That's someone speaking in 1800 about what the Federalists had done in the first 11 years or so under the Constitution. And that was the great motive. That was the motive: national greatness. They wanted to be in the big leagues and beat back the old empires. That should sober us up about the Constitution. They needed the Constitution to accomplish that. They couldn't have done that under the Articles.

WOODS: Well, this is a provocative book. It's a provocative conversation. It's called *America's Counter-Revolution: The Constitution Revisited*. Of course I'll link to it at TomWoods.com/663, which is our clearing house page for this episode, but if people weren't to visit that page, where can they find the book? Amazon?

RICHMAN: It's on Amazon; it's a Kindle book and in paperback. I have some material on the Constitution at my blog, Free Association, which is just SheldonRichman.com. So SheldonRichman.com will find you some material on that, but yes, Amazon is where you can find it.

WOODS: All right, so I'll also link to SheldonRichman.com. All right, well, good luck with it, Sheldon. It's a –

RICHMAN: Thank you.

WOODS: We've got to see if we can get the Articles from – not that we're cheering for the Articles either, but by comparison, obviously – we've got to get them up from 1,500 to somewhere (laughing). They've just been totally forgotten and dismissed. But anyway, great. I really enjoyed reading it, and I enjoy talking to you. Thanks again.

RICHMAN: Thank you very much.