



Written by [Joe Wolverton, II, J.D.](#) on June 6, 2016

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If He'd Had His Words

There was, perhaps, no greater generation than that of the latter half of 18th-century America: Jefferson, Madison, Washington, Adams, et al. There is a long and distinguished roster of heavy hitters who make up the varsity team of Founding Fathers.

There are outstanding members of that generation, however, whose names have been forgotten and who have not only been relegated to the junior varsity squad, but have been kicked off the team altogether.

Thomas Burke is one of these forgotten Founders. Burke was the author of one of the most influential, controversial, and misunderstood paragraphs of our country's first constitution, the Articles of Confederation.

Before opening that can of worms, let's start with a brief biography of this man whose name has been all but erased.



Self-taught and Successful

Born in Ireland, Burke immigrated to America in 1760 after a dispute with his Anglo-Irish parents. Burke settled in Virginia and began practicing medicine; it is assumed that he chose this career because of an uncle who was a successful doctor in Dublin, Ireland.

Though he was just past his 20th birthday, Burke was blessed with the advantages of a top-notch formal education, a sustaining self-confidence, and a commitment to personal virtue that would serve him well in his new homeland.

After several years of working as a family doctor, Thomas Burke realized that if he wanted to get wealthy, he would need to change vocations. Accordingly, he left his medical practice and entered the study of law, soon hanging out a shingle and beginning a practice of his own.

As a lawyer, Burke — still known as Doctor Burke — moved to Norfolk, Virginia, and started making his money representing merchants in debt collection proceedings.

Regarding how one could so quickly switch from the practice of medicine to the practice of law, it seems from the extant records that Burke was completely self-taught. He had no formal legal training, and for that matter, he had no formal medical training, either. He was a man of his age: self-taught, self-confident, and self-sufficient.

It was during this time in his life that Burke began rubbing shoulders with the Virginia elite, including many of those varsity squad superstars mentioned above. Among those with whom Thomas Burke began a relationship was Thomas Jefferson, who became one of Burke's many illustrious correspondents.

As his star ascended and his wealth accumulated, Burke found himself in the middle of political disputes



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raging through Norfolk. Burke's temperament was genial, and he found himself counting the company of many good friends, but his self-confidence and ambition occasionally caused him to be recalcitrant and impulsive, traits that left him with no shortage of enemies, as well.

Remarkably, however, it was neither Burke's legal work nor his circle of powerful acquaintances that brought him fame. It was his patriotic poetry.

In 1766, a year after the repeal of the infamous Stamp Act, Burke wrote a poem entitled "Triumph America," to be read at a celebration of the end of this tyrannical legislation. The poem was so moving it was said to have been printed in many newspapers. Sadly, none of the printed versions have survived. The poem, perhaps an early draft, was sent by Thomas Burke in a letter to his uncle.

In all, Burke wrote at least 23 more poems, most of which are of a patriotic tone. There are a few romantic verses among the *oeuvre*, and it is about this time in his life when Thomas Burke married Mary Wilson Freeman.

Within two years of his marriage, Thomas Burke and his wife moved to North Carolina, reportedly to be close to the legal action in Orange County and to take advantage of the state's climate, which was "remarkably moderate and healthy."

As American relations with Great Britain drew every day closer to combat, Thomas Burke threw himself into the patriot cause, not only with his poetry, but with his talent for reason, his love of liberty, and his skill in oratory.

One biographer writes that about this time (1772) Burke was letting people know that "he cherished liberty and detested tyranny." Some historians have suggested that as a native Irishman Burke had an innate loathing of all things British. While that cannot be known for certain, it is indisputable that Burke immersed himself in his law practice and slowly staked his position as a rising politician and a man clearly committed to the cause of American independence.

In 1775, Burke was elected by the citizens of Orange County to be their representative at North Carolina's second provincial convention. He was subsequently reelected to all these meetings. Burke's education and easy speaking ability quickly qualified him to take a leadership position at these conventions, conventions charged with crafting the state's new constitution.

So impressed were his convention colleagues with Burke's ability and erudition that they elected him to be chairman of the committee that would frame the constitution of North Carolina. Burke employed his knowledge of history, building the nascent government on the ancient theory of balanced government, including a bicameral legislature and an executive, each branch with the power to check the others and keep the others within their enumerated spheres of authority.

For Burke, the most critical consideration was the locus of sovereignty. Burke believed that original sovereignty resided with the people and that the surest way to secure liberty was for the people to elect representatives who would act in the best interest of the people, using their reason and wisdom as guides in their lawmaking efforts.

Having set the state of North Carolina on the firm footing of republicanism and popular sovereignty, Thomas Burke soon saw his sphere of influence widen, being elected in December 1776 to represent his adopted home state at the Continental Congress in Philadelphia.

Burke took his seat in Congress in February 1777, and he immediately began making a name for



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himself, speaking vehemently against the accumulation by Congress of any powers or authority not expressly given to it by the people and governments of the several states.

From his first day, Thomas Burke asserted himself into all important debates that touched and concerned the authority of Congress to impose mandates on the states. He was, as historian Jack Rakove writes, “one delegate who was prepared to articulate a theory of confederation founded on a belief in the primacy of state sovereignty.”

Burke’s insistence on the sovereignty of states made him few friends in the Second Continental Congress. However, his commanding presence and disarming oratory convinced his colleagues to support his resolution “affirming that the states were sovereign and that the confederation could only exercise those powers that were expressly delegated to it.”

On February 25, 1777, Thomas Burke’s tenacious adherence to the principle of state sovereignty brought him into conflict with a man of much greater renown and whose knowledge of the law was believed to be second to none: James Wilson.

Wilson and Burke were two men described as having “radically different views of the nature of the union.” Their once-famous debate centered on a proposal that would have granted the Continental Congress power to compel states to hire agents to patrol ferries in order to apprehend suspected deserters from the Continental Army, a common concern for General Washington’s armed force.

Burke insisted that Congress did not have the authority to force states to foot the bill for programs of the general government. Today, this principle is known as anti-commandeering, and although it has been reaffirmed in recent years by the Supreme Court, the federal government has yet to understand this concept despite the passage of 239 years.

After Wilson claimed that Congress could act without the explicit authority from the states, Burke argued that the state legislatures were the only governments to which the people had given their consent (as manifested by the constitutions of the several states), and therefore citizens could only be compelled to carry out acts authorized by their respective state legislatures.

The sine qua non of a valid government is the consent of the governed, and only by adherence to this principle could liberty be maintained. Furthermore, Burke explained, the states had constitutions granting enumerated powers to the state governments and protecting the rights of the people. No such enumeration or protections existed with respect to Congress and the people of America. The Union, he concluded, was no more than a convention permitted by states. It was, in other words, little more than an ad hoc committee of states tasked with deliberating those few matters dealing with the common cause of defeating the British. Beyond that limited scope, the Continental Congress had no legitimate authority to act. All powers not specifically granted to Congress by the state legislatures was retained by them, Burke declared.

Burke insisted that this important principle be stated explicitly in the Articles of Confederation that were then being hammered out by the Continental Congress, and he offered an amendment to Article II to accomplish this. His amendment became known as the Burke Amendment.

In a letter to the governor of North Carolina, Burke explained his impetus for offering the amended version of Article II:

[The original draft of Article II] expressed only a reservation of the power of regulating internal police,



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and consequently resigned every other power. *It appeared to me that this was not what the states expected, and, I thought, it left it in the power of the future Congress or General Council to explain away every right belonging to the states, and to make their own power as unlimited as they please.* I proposed, therefore, an amendment, which held up the principle, that all sovereign power was in the states separately, and that particular acts of it, which should be expressly enumerated would be exercised in conjunction, and not otherwise; but that in all things else each state would exercise all the rights and powers of sovereignty, uncontrolled. [Emphasis added.]

During the deliberations on his amendment, Burke issued a warning that reads like a prophecy. Burke declared that if his resolution did not pass, the general government would give “Congress a power to prostrate all the laws and constitutions of the states because they might create a power within each that must act entirely independent of them, and might ... render ineffectual all the barriers provided in the states for the security of the rights of the citizens.”

Burke’s proposal passed easily — 11 states to one, with one delegation divided — albeit with predictable opposition from James Wilson and Richard Henry Lee. With the adoption of this article, the Continental Congress was prohibited from exercising any power not explicitly granted to it by the states. Article II, as amended by Thomas Burke and passed by Congress, states: “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.”

While this event has been largely forgotten by Americans, even constitutionalists, the effect of Burke’s article on the history of American government and the Constitution that created it cannot be overstated. Although most accounts of the history of the 10th Amendment to the Constitution of 1787 focus on the struggle between the anti-Federalists and the Federalists, the philosophy’s parentage is more properly identified as Burke’s Article II and his rock-ribbed defense of the wide authority of state governments and the narrowly tailored authority (“few and defined” in the words of James Madison) of the federal government.

Unfortunately, however, while the spirit of Burke’s proposal may have informed the 10th Amendment, its letter did not. Noticeably missing from the latter is that very critical word: “expressly.”

Those who advocated ratification of the Constitution of 1787 presented Article II of the Articles of Confederation as evidence of the impotence of the government under the Articles and the need for a more energetic central authority. Writing as “Publius,” James Madison explains why the language of Burke’s proposal did not make it into the Constitution crafted in Philadelphia:

Had the convention taken the first method of adopting the second article of Confederation, it is evident that the new Congress would be continually exposed, as their predecessors have been, to the alternative of construing the term “*expressly*” with so much rigor, as to disarm the government of all real authority whatever, or with so much latitude as to destroy altogether the force of the restriction.

Earlier, in the collection of letters known to history as *The Federalist Papers*, Alexander Hamilton expressed the same sentiment regarding the recommended relationship between the federal and state governments. If the convention at Philadelphia in 1787 had followed Burke’s lead, Congress would have been “reduced to the dilemma either of supposing that deficiency, preposterous as it may seem, or of contravening or explaining away a provision, which has been of late a repeated theme of the eulogies of those who oppose the new Constitution.”



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Though the requisite number of states ratified the new Constitution, the fight for recognizing state authority as superior to that of the general government was not over.

During the deliberations in the first Congress convened under the authority of the Constitution of 1787, many representatives argued in favor of an amendment that mirrored the exact wording of Article II of the Articles of Confederation. One of the leaders of this movement was Thomas Tucker, representative from, not surprisingly, South Carolina.

The journals of the First Congress contain the following exchange between Tucker and his colleague from Virginia, James Madison:

Mr. Tucker proposed to amend the proposition [the proposal that would become the 10th Amendment] by prefixing to it “all powers being derived from the people.” He thought this a better place to make this assertion than the introductory clause of the Constitution, where a similar sentiment was proposed by the committee. He extended his motion also, to add the word “expressly,” so as to read “the powers not expressly delegated by this Constitution.”

Mr. Madison objected to this amendment, because it 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. He remembered the word “expressly” had been moved in the convention of Virginia, by the opponents of ratification, and, after full and fair discussion, was given up by them, and the system allowed to retain its present form.

Mr. Tucker did not view the “expressly” in the same light with the gentleman who opposed him; he thought every power to be expressly given that could be clearly comprehended within any accurate definition of the general power.

Mr. Tucker’s motion, being negatived, Mr. Carroll proposed to add to the end of the proposition, “or to the people;” this was agreed to.

Later, Elbridge Gerry tried a second time to insert Thomas Burke’s language — specifically the word “expressly” — into the text of the 10th Amendment, which reads, “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.” This attempt was also defeated: 17 representatives in favor of Gerry’s proposal, 32 opposed, including James Madison.

While it may not have seemed so at the time, Madison’s ability to defeat the attempt to amend the language of what would become the 10th Amendment to include the word “expressly” made it easier for the federal government to consider itself superior to the state governments, just as Thomas Burke predicted.

According to the anti-Federalist writer “Centinel,” the failure of Congress to include the word “expressly” in the 10th Amendment has “reduced the several states to shadows” and created a federal government possessed of power beyond anything ever imagined by those of the founding generation.

The purposeful omission of the word “expressly” from the 10th Amendment amounted to nothing less than the statutory seizure of the reins of sovereignty by a federal government that was already driving toward the dissolution of states’ rights.

Thomas Burke was an immigrant, an autodidact, an American, a statesman, a talented lawgiver, and a man whose inestimable defense of liberty, popular sovereignty, and states’ rights has been sadly erased



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from the history of American government and whose wise restriction on federal power was sadly erased from the 10th Amendment.



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