The Institute for Principled Policy

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Constitutional Conventions, Crises, and Coups:

The Institute for Principled Policy's position on the calling of a new Constitutional Convention

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There is currently a movement in the United States that is gaining a disturbing momentum. The leaders of the movement are agitating state governments to petition Congress to call a new constitutional convention. While groups on the left have been demanding a new convention for the purpose of re-writing the existing Constitution for decades the current calls are coming from groups that most would place in the "conservative" category. The liberal groups are calling straightforwardly for a convention with plenipotentiary constitution making authority while the conservative elements are calling for a convention limited by charter for the purpose of amending the existing Constitution. While the latter sounds reasonable it is the opinion of the Institute For Principled Policy, not on our own authority but based on extensive research on the legal, historical, and procedural precedents set by conventions of the United States, colonial America, and Great Britain, that the chartering of a so-called controlled or "shackled" constitutional convention will have the same result as the calling of a convention with plenipotentiary authority. That predicted result in either case is a new constitution. Based on further research into existing constitutional models, parts which are already being implemented, we believe that the government created by any new constitution will be divorced from both the bedrock philosophical moorings laid out in the Declaration of Independence and from the shackles imposed by the current constitution. In this light the Hegelian Dialectical nature of the debate over a new constitutional convention is exposed.

In this series we will present the case and documentation that are the foundation our positions.

The Policy Institute takes the position that a new Constitutional Convention poses a grave hazard to the original intent for the design and function of the federal government of the United States. It is therefore a grave danger to the United States, its individual states and its citizens.

We agree with proponents of a convention that the system as it is currently executed (but not the document governing the system) is badly broken and in dire need of repair. We strongly disagree however that the way to fix the system is by imperiling the existence of the system upon opening it to the radical innovators awaiting such an opportunity. Even the proponents of a new convention acknowledge that it is, at best, a gamble.

<u>False "either/or" dichotomy</u>

Retired law professor Robert G. Natelson, Senior Fellow at the Goldwater Institute and author of position papers that are being used as the "go to" arguments employed to refute objections to a new convention, wrote the following

> "Of course, abuses of the Article V amendment processes are possible. But the possibility must be viewed against the clear and present danger to individual rights and freedom of doing nothing."[1]

The Institute for Principled Policy contends that there is far more than just a "possibility" of an abuse of the process. And it is the clear sentiment of his paper's larger quote that the US is in a crisis and the crisis is rapidly worsening. We would agree with this sentiment.

However we must contend that the solution to the system dysfunction will not be quick and certainly will not be the result of a risky gamble in a rigged game with everybody at the table "all in" but will come from dedicated citizens working to restore respect for and obedience to the highest law of the land- the Constitution.

Crisis is inevitable in government, and part of the purpose of government is to deal with crises while maintaining order and justice. No major change in government can be made without the presence of a crisis (or crises) which the current structure is allegedly unable to handle. There is simply no reason to believe that elected officials who openly ignore the both the letter and the spirit of the current Constitution would be any more likely to obey new amendments or a new constitution that might be proposed and ratified by a new convention than is currently the practice.

Which crisis is critical enough?

There has not been enough evidence provided, or likely will be, to convincingly argue that the current Constitution leaves no method of solving whatever supposedly insurmountable crisis is being proffered as the rationale for the call for convention. There are several candidates for this position- a balanced budget, personhood of the unborn, state negation of federal law, forcing Congress to obey the same laws passed for individuals, etc. etc. In every case there has been shown NO compelling evidence that the current Constitution is not adequate to control these crises, all of which are legitimate concerns.

Sadly, the first Constitutional Convention was the result more of a purposefully manipulated crisis (Shays' Rebellion) than the nation's real difficulty, which could have been solved by agreement of the 13 states, regarding interstate trade issues.[2] The solution to our current crises is the election of representatives who will obey, uphold, defend, and protect the Constitution, not bend, re-shape, dismember or ignore it according to the will of personal and special interest.

Reading into Article V: First salvo

The most prevalent argument among groups calling for a new constitutional convention is based on the language of Article V:

> 'The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress…'

There are two clauses in this language that proponents of a new convention consider to be great bulwarks of their position. The first "…on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments…" is believed to give the states and the states alone the power to force Congress to call a "shackled" or "limited" convention, bounded by "strongly worded" state legislature-written resolutions authorizing the convention and appointing delegates to it for the purpose of amending (and only amending) the current Constitution.

There are several serious breaches in this seemingly formidable defensive wall that render it vulnerable if not completely useless. The first breach is in the legal and historical precedent set by the first Constitutional Convention. Despite a very strongly worded resolution written by Congress asking the states to authorize a convention in Philadelphia limited to the "sole and express purpose of revising the Articles of Confederation" and VERY strongly worded resolutions authorizing delegates to attend and requiring them in nearly every case to discuss amendments to the Articles of Confederation ONLY, the first convention was a runaway. Despite the "strong shackling," the first act of the Philadelphia convention was to vote to act in secret and the very first day was spent in deciding to discard the Articles of Confederation and write a new constitution. Many objected that this completely violated the clear letter if not intent of their written charters but in the end 39 of the 55 framers signed the new document.

So, did a “shackled” convention supposedly restrained by “strongly worded” resolutions have any effect in preserving the Articles? Not for a majority of participants. Professor Natelson makes a long and complex argument regarding the meanings of words contained in the resolutions to try and make a case that the states really knew that they were going to be entirely re-writing the Articles of Confederation. Sadly, he resorts to equivocation in the meanings of key words and phrases in order to bolster his case. Despite his claims, at least sixteen of the convention members from several states appear not to have been privy to this knowledge prior to attendance, and several states seem to have been left out of this general knowledge as well. In the end his argument is refuted by an examination of his claims in light of the very same historical documents the author himself cites.

Missing the point

Another serious breach is found in a flaw in the language of Article V. Note that while the states are empowered to force Congress to call a convention for amendment purpose there is NO language requiring them to leave delegate appointments to the states. Therefore Congress has a free hand to appoint delegates themselves or set a list of strict requirements (“constitutional scholars,” “legal scholars,” law school professors, political scientists, etc.) upon the selection process. But there is absolutely NO reason to believe the states will be in charge of appointing delegates to or setting the agenda of any new convention. The language that needs to be there is simply missing. The Institute for Principled Policy has been making this point for over 2 years now, since the Ohio legislature held hearings on a federal Constitutional Convention call resolution in December, 2008. Only recently has it been tacitly admitted by groups like ALEC (American Legislative Exchange Council) that we were correct in the form of their ‘Madison Amendment’, an amendment that is supposed to fix this flaw in Article V.

> ARTICLE ___. The Congress, on Application of the Legislatures of two thirds of the several States, which all contain an identical Amendment, shall call a Convention solely to decide whether to propose that specific Amendment to the States, which, if proposed shall be valid to all intents and purposes as part of the Constitution when ratified pursuant to Article V.

Please look closely and see if you can spot the flaw in this “fix” based upon our earlier discussion. This amendment does NOTHING to fix the problem of enforcing state participation and control of a new convention. ALEC completely missed the point.

Prof. Natelson does fine historical work on this issue by carefully building a convincing case that the original intent of the framers was that the states would be in control of any convention called to revise the Constitution. In this assessment we heartily agree and believe that Natelson has built a rock-solid case. But Prof. Natelson then demands that original intent be the guiding light of Congress in authorizing a new convention.

This is tilting at windmills in the form of federal hegemony. Having spent 150 years wiping out any vestiges of state sovereignty, to expect the Congress which has worked so hard alongside the other federal departments to destroy as completely as possible state sovereignty to suddenly surrender on the mere demand of the emasculated states that those states be placed in control of a convention which will in all probability strip the central government of the power accumulated over decades of Constitutional infidelity is a breathtaking display of self-delusion.

Currently, the state sovereignty and original intent that Natelson’s argument depends on for functionality are dead letters at the federal level. Until the states decide to exercise their 10th amendment powers and work to repeal the 17th amendment, the letter will remain dead.

Who's in control?

Now there is a third issue that Prof. Natelson attempts to address but his efforts strain the limits of credulity. That is the issue of whether or not a convention, once authorized, can be controlled at all, let alone by one or the other authorizing body. He makes the point that many of the 16 men who refused to sign the Constitution at Philadelphia were complying with what they understood to be their *fiduciary* responsibility to their state legislatures.

But clearly 39 others viewed their fiduciary responsibilities quite differently. Dr. Natelson defines fiduciary responsibility as follows and we find it a satisfactory definition

> A "fiduciary" is a person acting on behalf of, or for the benefit of, another, such as an agent, guardian, trustee, or corporate officer.[3]

We have looked at 350 years of history with regard to conventions to see if we can come to an understanding of the relationship between legislatures and conventions and how one may interact with the other. There simply is not room in this introductory work to address the complexities of this relationship. We can report in shorthand what we have learned so far.

First, the Constitutional Convention delegates set several precedents for American law by ignoring their charters. But why did they believe this was acceptable? The answer we get from our historical and procedural studies is that both legislatures and conventions of a given entity are at least, legally speaking, equals. In both the English and American republican structures of government a legislature is a body representing the governed that makes law within a framework of a higher, limiting authority. A convention that has been chartered to make a constitution for an entity is also a body representing the governed that frames the higher law that legislatures must submit to and obey. In that light a convention is a higher body of representatives of the governed than is the legislature, even though the legislature may have originally sanctioned the convention call.

So, can a convention called by a legislature be controlled by it? Former Chief Justice of the US Supreme Court Warren Burger answered that question in a letter to Phyllis Schlafly on June 22, 1988

> "I have also repeatedly given my opinion that there is no effective way to limit or muzzle the actions of a Constitutional Convention. The convention could make its own rules and set its own agenda. Congress might try to limit the convention to one amendment or to one issue, but there is no way to assure that the convention would obey."[4]

The bottom line in these two points is that any convention that is called by a "body politic" is the highest law making body in that body. John Randolph Tucker states rather succinctly:

> "This principle, the supremacy of the Body-politic as constitution-maker and the subordination of the government as the delegated agent of the Body-politic, with no powers but those derived from the Body-politic by virtue of the constitution, is therefore the foundation of American Constitutional Law."[5]

Control of conventions, in the form of rules of procedure and the agenda, is in the hands of the delegates to it, not in the hands of any legislative body that calls it. The delegates' fiduciary responsibility is to the body-politic ('*We the people'* from the constitutional preamble); not to legislative representatives. Therefore the question of delegate selection becomes of paramount importance. What *people* are the delegates responsible to? Clearly what Tucker means are the people of the political divisions in which they live:

> "And let it be noted here that the Body-politic is not the Government, nor the persons admitted to participate in the functions of Government — but it is the whole body of persons politically associated. The organic force of the Body-politic, that social power which controls persons and things, for peace, order and the common weal, is what we call Government. The expression of that force is Law."[6]

Strong special interests will obviously strenuously demand that they be represented at any convention which means that the will of the body-politic as a whole will be diluted by the will of special interests claiming to represent the "good of the whole." With no language in Article V requiring the states to choose delegates, leaving delegate selection to Congress by default, any new convention will likely be populated by blocs of delegates with agendas and fiduciary responsibility to their particular interest groups. This is a formula for disastrous re-writing of the Constitution.

Reading into Article V: Second salvo

Returning to Article V, proponents resort to their "iron-clad" defense of their position: that of the Article V ratification clause requiring the legislatures or conventions of three-fourths of the states to ratify any amendment submitted to Congress. It is claimed that this is an absolute defense against wholesale changes in the current Constitution. But is it?

The Articles of Confederation had a requirement contained in Article XIII that required unanimous consent for amendments to the Articles

> '…nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.'[7]

How did the founders get around this seemingly ironclad law especially since only 12 of the states actually participated in the Philadelphia convention (Rhode Island chose not to send delegates)? The same question could be asked about the Article V requirement of three-fourths of the states. Could it be circumvented as the Articles were?

The answer is that, yes, indeed it could be circumvented in the same way the first Constitutional Convention avoided the rule- by calling for ratification by state conventions. Why state conventions? Please refer back to the previous discussion on conventions and the body politic. The state legislatures were parties to a binding "perpetual" contract and bound by law to obey the superior authority of the Articles. BUT, a state ratifying convention had the delegated authority, as a representative of the people of the state, to withdraw from that contract with the other states and even to create a new contract.

That is exactly what the state ratifying conventions did. They agreed to conditionally secede from the old union under the Articles and form a new one under the Constitution. The condition was that at least 8 other states also agree to secede and join them. And what would happen to the states refusing to participate? They would be left in possession of the old and essentially useless union.

If this seems unlikely, consider the fact that when George Washington took his first oath of office there were only 11 states in the union. North Carolina and Rhode Island did not come into the new union until late 1789 and spring 1790 respectively. Consider further that the framers were simply following an earlier precedent set by the Continental Congress in declaring independence from the British Crown, the exact equivalent of seceding from that union, and then writing the Articles of Confederation as a national constitution of a new and perpetual union between their individual states. How was this possible? It was possible because the Continental Congress was elected as a convention of delegates appointed by state conventions.[8, 9, 10] What does this fact do to ALEC's 'Madison Amendment' that was designed to ensure state legislative control over convention activities? If a convention is really a higher body than a

legislature, which it is, then the 'Madison Amendment' is rendered a meaningless jumble of high-sounding but impotent verbiage.

New States, no states

Now that we know that it is possible to bypass the current ratification procedure we need to think about how it might happen. There is a model for a new US Constitution that was written in the 1960's by a group of progressives with funding from the Ford Foundation. The group was called the Center for the Study of Democratic Institutions and was directed by a former underling of Franklin Roosevelt named Rexford Tugwell, who was chosen because he had been heavily involved in an earlier progressive effort to write a world constitution. Since this new constitution was supposed to make the U.S. capable of moving directly into a world governing body and Tugwell knew the model already, what better choice?

His model constitution is called the Newstates Constitution and few today grasp that important concepts of this model are already in place and at work in the United States. If Newstates became the model of choice by a runaway convention (a conceivable scenario should Congress control delegate selection) its ratification procedure consists not of ratifying conventions but a direct plebiscite called and completely controlled by the sitting president who is in virtual total control of the entire process.

Under the Newstates Constitution there are actually no longer any states but mere federal regions in which officials are appointed or elected at the national level. No states means no state ratification. Therefore the new constitutional model bypasses the old one's ratification procedure in 2 different ways.[11]

As you can see, the Institute for Principled Policy has serious issues with the calling of a new constitutional convention. There are a number of serious difficulties that must be addressed and must be addressed with legal, historical and procedural scholarship, an effort that the arguments of proponents of a new convention have yet to accomplish.

Notes

[1] Natelson, Robert G., Goldwater Institute Policy Report No. 241- *Amending the Constitution by Convention: A Complete View of the Founders' Plan*, Sept. 16, 2010, p. 2

[2] DeWeese, Tom, Charles Michaelis, *Dangers of a New Constitutional Convention*, Camp American, Louisville KY, June 2009; June 2010, 4-disc video series available at http://www.campamerican.com/?page_id=27&category=13

[3] Natelson, Robert G., Goldwater Institute Policy Report No. 241- *Amending the Constitution by Convention: A Complete View of the Founders' Plan*, Sept. 16, 2010, p. 4

[4] Burger, Warren, Letter to Phyllis Schlafly, June 22, 1988, available at http://www.eagleforum.org/topics/concon/pdf/WarrenBurger-letter.pdf

[5] Tucker, John Randolph, *The Constitution Of The United States- A Critical Discussion Of Its Genesis, Development, And Interpretation*, 1899, Callaghan & Co., Chicago, IL Vol. I, Chap. 1, §54

[6] Tucker, John Randolph, *The Constitution Of The United States- A Critical Discussion Of Its Genesis, Development, And Interpretation*, 1899, Callaghan & Co., Chicago, IL Vol. I, Chap. 1, §3

[7] Elliot, Jonathon Ed., *The Debates In The Several State Conventions On The Adoption Of The Federal Constitution*, J.B. Lippincott Co., Philadelphia PA, 1901, Kindle Version, locations 1645-1658

[8] Taylor, John, of Caroline, *New Views of the Constitution of the United States*, Regnery Publishing, Washington DC, 2000, p. 9

Taylor explains the individual sovereignties of the separate state legislative bodies as they appointed delegates to the Continental Congresses. First by colonial legislatures or specific districts within a colony then, after independence, by the state governments to whom the sovereignty of King and Parliament had passed. Taylor does not detail that each colony had to pass through a convention legislature phase until state governing law in the form of a constitution could be passed.

[9] Graham, John Remington, *A Constitutional History of Secession*, Pelican Publishing Co, Inc, Gretna LA, 70053, 2002, pp. 47-53, 90-96

Graham details the change of government from dependent colonial governments to sovereign independent state governments and demonstrates that each state had to pass through a period of either a convention legislature or electing a convention to build a new state constitution to bind the governments of the new entities. He builds the case that this was based on an understanding of the Common Law precedents set by the so-called "Convention Parliaments" of 1660 and 1688 in Britain. Though the argument is complex, it boils down to the idea that sovereignty only resided in the body of the King and Parliament in Britain as long as the governed, from whom the power to govern flows, consented. He cites the fact that James II was *deemed* to have abdicated by the Convention Parliament of 1688 because he had refused to rule and abandoned his realm. Without a king, Parliament was left to operate as a convention under the British Constitution until a new occupant for the throne could be agreed to by the delegated authorities of the convention. The convention asked William III to assume the throne along with his wife Queen Mary, James II's sister. He agreed under the condition that he would only rule as a constitutionally limited monarch and if certain rights were codified into the permanent law of Britain which the convention agreed to, thus creating the current form of the British constitutional monarchy.

[10] Tucker, St. George, *Notes of Reference to Blackstone's Commentaries*, reformat of the 1803 edition, Lonang Institute, Livonia MI, 48154, Kindle Version, 2010, Appendix to Vol. I, Note C: Of the Constitution of Virginia, Positions 1543-2590

In discussing the origins of the creation of the state government of Virginia in 1776, Tucker presents an ironclad argument that a convention is the highest lawmaking body of any political entity and cannot be limited by the existing constitutional legislature, executive or judiciary. He cites Blackstone's Commentaries on the legal implications of Britain's Convention Parliament of 1688 and the Convention of the French Revolution as support for the argument that a convention can do something that a constitutionally limited legislature cannot- dissolve and replace the existing constitution of the political entity. He also explains in clear detail Virginia's transition from colonial government under the King to independent political entity with no constitutional authority for a government to a constitutionally governed state government. The citizens of the newly independent Virginia understood the necessity of creating a new constitutional authority before a new government could be formed. Therefore a convention of citizen-delegates had to form a new constitution to properly create the legal authority necessary to design the constitutional governmental structures and create the laws governing the election of representatives to fill the offices created by the constitution. The convention created the highest political law of the state, the state constitution, which bound the elected representatives by oath to obey the limits on their offices and their power imposed by it. The legislature was bound by the higher law. Therefore the convention is the higher body.

[11] Tugwell, Rexford G., *The Emerging Constitution*, Harper & Row, New York NY, First Edition, 1974, pp. 595-621