

The “Con-Con” Con

The Dangerous Proposal for States to Apply for an Article V Constitutional Convention by William J. Olson & Herbert W. Titus

Introduction

In recent years various interest groups both on the political right and left have called for the States to exercise their power under Article V of the Constitution to convene a Constitutional Convention to amend — or indeed even replace — the U.S. Constitution. Various groups have proposed a Balanced Budget Amendment, a “Repeal” Amendment (giving the States the power to veto federal legislation), a Marriage Amendment (defining marriage as union of one man and one woman), a Human Life Amendment, a Term Limits Amendment, along with efforts to legalize marijuana, repeal the 16th Amendment, etc. Proponents of such a Convention have ranged from George Soros on the left to various Tea Party groups on the right.

Contrary to the claims of some proponents, the prospect of an Article V Convention of the States (“COS”) is not a new idea which has been “hidden away” by the Founders in the Constitution for such a time as this, only to be “discovered” by modern self-identified constitutional scholars. Noble as some of these amendments might be, those supporting an Article V Constitutional Convention are willfully oblivious to the can of worms that inevitably would be opened by giving today’s instant-gratification society the opportunity to scrap the careful and deliberate system bequeathed to us by the framers of the Constitution.

Article V of the U.S. Constitution provides:

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....

This paper addresses two False Premises, and two False Assurances made by proponents of an Article V Constitutional Convention.

FALSE PREMISES:

1. The problem of big government is found in the text of the U.S. Constitution, which can be corrected by changing the words of the document.
2. The only remedy to the problem of an out-of-control federal government is changing the Constitutional text.

FALSE ASSURANCES:

1. There is no danger of a Runaway Convention.
2. A small minority of the State Legislatures can stop bad proposals from being ratified.

INTRODUCTION

The very notion of opening up our U.S. Constitution for re-examination and revision should send shivers down the backs of all liberty-loving people. The circumstances that led to the writing of our constitution during the summer of 1787 and its ratification in 1789 were unique in the annals of history.

The men who gathered in Philadelphia had recently risked their lives, liberty, and property in declaring their independence from England. By their heroism, they demonstrated both a love of liberty and a disdain of centralized government, a combination which is rare today. Their education contained a healthy dose of applied Biblical truth, coupled with a historical understanding through serious study of classical and other experiments in self-government, exhibiting a covenant faith in the rule of law.

At the time of the writing of the Declaration of Independence and ratification of our Constitution, it was generally understood that our rights came from our Creator God, and that the self-evident purpose of civil government was to secure God-given individual rights, not subject to change by majority vote or by the enlightened few. Today, few understand, much less apply, such fixed natural law principles.

Then, the nation's institutions, including education, the press, the church, and the family were largely governed by Christians applying biblical principles. Today, we live in a post-Christian society, where even God's definition of marriage is subject to revision, and where even the binary biology of male and female sex is sacrificed on the pro-choice altar of gender self-identity.

As God's sexual order is breaking down, there is evidence all around us that the original American God-ordained political order is on the brink of an abyss of no return.

The fashioning of our Constitution was a singular circumstance that led to a covenant document that should properly be viewed as a gift to the American people from a gracious and loving God. Anyone who believes, in times such as these, that improvements can be made in the United States Constitution, without grave risk to the rights given to us by our Creator, is embracing folly.

We are being told, however, that the cultural, legal, and political breakdown can only be averted by the State initiative taking bold action to turn the tide. Upon closer look, it appears that the extreme measure of a "Convention of the States" is based upon **two false premises**, as well as **two false assurances** about a State-initiated and controlled convention to propose changes in the United States Constitution.

FALSE PREMISES

False Premise 1. The problem of big government is found in the text of the U.S. Constitution, which can be corrected by changing the words of the document.

For over three decades, we have litigated and filed briefs across the country in over 200 important constitutional cases. Our work has ranged broadly across the text of the U.S. Constitution, particularly including its federalist and separation of power provisions, as well as the First, Second, Fourth, and Fourteenth Amendments. We regularly contest the conventional methods of judicial interpretation employed to undermine the constitutional text by judges who want to impose their will and values upon the American people. But the threat to America's freedom does not emanate just with the judiciary. The President and Congress, both bound by oath to defend the Constitution are equally guilty, ignoring the written limitations to their enumerated powers. Indeed, every threat to freedom that we can think of has come from legislators, executives, and judges who abuse their power and misuse and misapply the Constitution, rather than from those who follow its text.

In other words, freedom can be well defended in the courts based on nothing more than what the Founders have already given us as the text of the First, Second, Fourth Amendments, etc. Even the Commerce Clause and the Necessary and Proper Clause, properly understood and applied, protect liberties, rather than threaten them. Indeed many of the proposals being made by some of the lawyers and politicians supporting a COS — allegedly to remedy the perceived problems of our time — actually would undermine existing liberties for generations to come.

The problem today with a runaway federal government is not to be found in the text of the U.S. Constitution. The problem is not the words of the Constitution, but the hearts of those government officials who view themselves as our rulers, not our servants. They often act however they desire, regardless of the language of the Constitution. If they are willing to defy the “authorial intent” of the constitutional text drafted by the Framers, would they have greater regard for words of the Constitution as amended by the COS proponents? Of course not. And if the problem is not to be found in the words of the Constitution, will the solution come from tweaking those words?

To the contrary, our constitution is being undermined by a godless evolutionary jurisprudence that has prevailed in this country for nearly 100 years. First introduced at the Harvard Law School and championed by Oliver Wendell Holmes, a Darwinian evolutionary world view has displaced the Blackstonian Christian legal foundation upon which the American common law originally rested. Today, the very notion of a rule of law binding on judges, legislatures, and presidents is dismissed as out-dated, erased by the latest social science studies conducted by the professorate. No longer is the Constitution viewed as based on a fixed and paramount law unchangeable by the ordinary actions of judges, legislators, and executive

officials. Rather, every constitutional norm is subject to some arbitrary level of scrutiny — strict, intermediate, or otherwise — and weighed against perceived overriding government interests. That view of Constitutional law is anti-law to the core, and no change of the constitutional text without a rejection and repudiation of “evolutionary law” will restore the nation to its original footing.

False Premise 2. The only remedy to the problem of an out-of-control federal government is changing the Constitutional text.

Many of the proponents of a COS profess despair and hopelessness about the future of our nation under the current Constitution. We do not share that fatalistic view.

Not even a decade ago, the Second Amendment was a dead letter, until rescued by Justice Antonin Scalia in the Heller v. District of Columbia (2008) decision. Thereafter, the Second Amendment was applied to protect against state infringement by Justice Samuel Alito in McDonald v. Chicago (2010). The scope of that protection continues to work its way through various courts, and we have been involved in many of those cases. Many activist judges have and continue to resist the mandates of Heller and McDonald, and there is no reason to assume that they would give any more heed to anything a COS would do. This is just one of the reasons that groups like Gun Owners of America, and the National Association for Gun Rights also oppose the dangerous COS proposal. It is much too early to despair about the Second Amendment.

Until four years ago, the Fourth Amendment had been slowly emasculated over the course of several decades by the notion that the Amendment only protects a “reasonable expectation of privacy.” However, in U.S. v. Antoine Jones (2012), the case involving placement of a GPS device on a Jeep, the U.S. Supreme Court returned the Fourth Amendment to its historic property basis — protection of “persons, houses, papers, and effects.” This decision was followed a year later by Florida v. Jardines (2013), where the police used a drug dog to sniff the outside of a home. Now, the Supreme Court has ruled that the basic protection of the Fourth Amendment is “property” based and that it can only be enhanced, rather than diminished, by “privacy” considerations. Other applications of this new doctrine are now working their way through the courts, including a Tenth Circuit opinion written by Judge Neil Gorsuch, recently nominated by President Trump to serve on the U.S. Supreme Court. Again, it is much too early to despair about the Fourth Amendment, for it too is being revitalized.

These are just two areas of constitutional jurisprudence that mirrors the work of the late Justice Scalia’s signal contribution to bring the Constitution back to its original textual meaning. And Justice Scalia does not stand alone. Justice Clarence Thomas has written numerous concurring and dissenting opinions in an attempt to persuade his colleagues to return to the traditional role of the judiciary to “say what the law is,” as it is written in the original document, not as it is interpreted by the latest court precedent. Justice Neil Gorsuch has

exceeded all expectations in his faithfulness to textualism. While Justice Roberts has often disappointed, and Justice Kavanaugh is still untested, Justices Scalia and Thomas have had a profound impact on their fellow justices, including liberal Justice Elena Kagan who has openly admitted that: “We are all textualists now.”

And even though Justice Scalia has been absent from the Court for a time, it appears that he is having an even greater impact in death, than in life. With his sudden passing, the Internet literally burst with tweets and blog posts extolling his legacy to a level of public awareness such that, immediately after Scalia died, the GOP leadership in the Senate refused to consider President Obama’s nominee to replace him — holding the “Scalia” seat vacant to let the people to decide. And the people voted for Donald Trump who promised that, if elected, he would nominate a candidate for the Supreme Court who would best reflect Justice Scalia’s originalist views, including his hostility to the judiciary finding new so-called “fundamental rights” never mentioned in the Constitution’s text, while ignoring the rights clearly protected by the text. Thus far, Justice Gorsuch has fulfilled that promise, and Justice Kavanaugh may improve with time. Moreover, the next vacancy is likely to come from the liberal wing of the court — giving President Trump the ability to reshape the Court for a decade or more.

Although there is the prospect of restoring constitutionalists on the courts should President Trump hold the White House for two terms, there is little evidence that there is any meaningful change in the practicing bar — liberal, progressive, or conservative — to press the courts to adhere to the Constitution as it is written. Instead, lawyers continue to immerse themselves in judicial precedent, seemingly unaware of the opportunity to urge the courts to overrule prior decisions no matter how lawless. This inertia to honor atextual precedents — or even newly forged pseudo-constitutional rights — infects not only litigants, but State Governors and legislative bodies reflexly to obey court orders as if an order has the same effect as a law — binding on the nation as a whole, and not just the parties to the case. Forsaking their duty as lesser civil magistrates, courts have allowed the federal courts to usurp the role of States in our constitutional federal system by undermining their own independence and sovereignty.

Article V Convention proponents believe that it currently matters little who is elected to office, requiring structural change. We disagree. That very notion is inconsistent with our experience, as well as rejecting the Scriptural truth that “When the righteous are in authority, the people rejoice; but when the wicked beareth rule, the people mourn.” Proverbs 29:2.

The Declaration of Independence provides an important caution: “Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed.” Indeed, prudence dictates that the States do not put at risk the best protection available for our liberties — at least, while evils are sufferable. And many of the current evils

of our federal government — bad as they are — pale in comparison to the tyrannical monarchial rule that our forebears cast off 240 years ago.

FALSE ASSURANCES

False Assurance 1. There is no danger of a Runaway Convention.

COS proponents assert that there is little, if any, risk of a “runaway” convention. Rather, the proponents assure that the Convention will be a limited one, controlled by the participating States which will, in turn, be led by delegates who are committed to: (i) downsizing the federal government; and (ii) restricting the government to the exercise of enumerated powers, with revitalized states, as envisioned by the original Tenth Amendment. We do not share this naive belief.

America’s own history belies such faith. The proponents of a COS assert there would be fixed rules which would strictly limit what the Convention may do. However, the Constitutional Convention in Philadelphia in 1789 was called only to amend the Articles of Confederation of March 1, 1781, which specified that established a “perpetual Union” (Article I) which could only be amended by an “alteration agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State” (Article XIII). Most of those who supported a meeting of the States in Philadelphia to consider amendments to the Articles of Confederation believed that the Convention had no authority to do more than that. Indeed, the Articles of Confederation expressly stated that it was based on a “perpetual” union and the Articles could only be amended by unanimous agreement of the state legislatures — language not in our current Constitution.

Although many in the Hamiltonian mold believed that the nation needed to replace the Articles of Confederation in order to establish a strong central government, the new American nation fought a war for independence under those supposedly deficient Articles, beating the most powerful military on the face of the earth. Ignoring those limitations, the Constitutional Convention in Philadelphia wrote an entirely new Constitution which was presented to the people for ratification, circumventing the state legislatures. Therefore, to the extent that there is an American precedent delimiting the authority of a Constitutional Convention, it supports the position that such a Convention may do what it will — including changing the method of ratification of the Constitution. Given this historical precedent, there is no reason to believe that a COS could not suffer a similar fate.

Moreover, if disputes were to arise about the rules of the convention — who would resolve those disputes? Is it likely that the U.S. Supreme Court would resolve them? Article III, Section 2, which grants the Court’s power, applies to cases or controversies arising under the Constitution, the laws of the United States, between States, etc — none of which would seem to apply to a COS. However, the proponents of COS seem to believe that the Supreme Court will stand against the tide of change and enforce the rules the way that those proponents

want them interpreted. This optimistic view of the Supreme Court is at considerable odds with their view that the Supreme Court is totally corrupted, requiring substantial tightening of the constitutional language. If a majority of the Supreme Court believes in strong centralized national government, should it be relied upon to allow its power to slip away when any remedial provisions could be derailed with just one more politicized decision?

Those who are supporting a COS badly misunderstand or misrepresent the risks involved. They believe that the process they are unleashing can be controlled and managed. Some of the individual proponents arrogantly believe they will personally play a dominant role in such a convention, and that they can control the process. They appear to believe that the same establishment powers which support and profit from big government in Washington, D.C. will just sit back and watch while their power is eroded by underfunded and largely unorganized forces supporting liberty. The “assurances” that these proponents have provided to state legislators about how such a process would unfold, if it is ever allowed to begin, are reckless in the extreme.

Proponents distinguish between a so-called Article V Convention of the States and a Constitutional Convention. They bristle when their proposal is described as a call for an Constitutional Convention (“Con-Con”), denying their COS ever could turn into a Constitutional Convention. As written, however, Article V does not contemplate such an independent role. First, it requires that the State legislatures make “application” to Congress for permission to “call a convention for proposing amendments.” Thus, the State legislatures cannot act unilaterally, even if two-thirds of the State legislatures are in agreement not only to call a convention, but to the exact same proposed amendments. Second, while Article V states that Congress “shall,” upon application of two-thirds of the State legislatures, “call a convention for proposing amendments,” there is nothing in Article V limiting Congress to specify the subject matter, or even the text thereof.

Indeed, in principle, there is no fixed legal or political rule that would bind any COS, either express or implied. Any call for a COS would be conducted under the charter of the nation, the Declaration of Independence which recognizes the inherent authority of the people to constitute and reconstitute their government. Whatever limits on the power of the people would be found in the laws of nature and of nature’s God, not in any resolution or other limiting instrument devised by men — including the Constitution.

False Assurance 2. A small minority of the State legislatures can stop bad proposals from being ratified.

The Constitution’s Article V provides two methods for the ratification of amendments — one by three-fourths of the State legislatures, and the other by three-fourths of conventions called in the 50 states. The Constitution provides that the initial choice is Congress’s — not the COS. Thus, COS can give no assurance that one State legislature short of three-fourths can block any undesired amendment that might be forthcoming from a COS. If Congress should

choose the State convention ratification process, then no State legislature would be in position to block any unwanted amendment.

Regardless of which ratification process is selected, COS's promise that undesired amendments will be blocked is chimerical. There is no evidence that the convention process would be free from the bargaining and compromise that takes place in any legislative or convention body. It would not be unthinkable, for example, that there would be very strong support for changing the First Amendment to provide for complete government control of funding of election campaigns, and the repeal of the Citizens United v. FEC decision — a cause strongly desired by many liberals. Moreover, in recent years, polling indicates that a decreasing number of Americans still believe in the principles of the First Amendment. Agreeing to this amendment could then be used as a bargaining chip to obtain balanced budget amendment, strongly desired by conservatives. And, as was true of the ratification of the Bill of Rights, there is no legal or political barrier to separate out certain amendments from other amendments for ratification, and therefore, upping the risk that more than one bad amendment will secure the necessary three-fourths vote. In short, the ratification process poses risks of its own — risks that COS proponents downplay in their futile effort to provide a modicum of assurance that not one amendment opposed by the COS conservative leadership could ever be ratified.

Despite their claim of vast political expertise, some of the proponents of a Con-Con have exhibited terrible political judgment in the past, such as supporting the Religious Freedom Restoration Act (“RFRA”), which federal judges have interpreted to empower them to override the jurisdictional bar of the First Amendment religion clauses whenever the federal government asserts a compelling governmental interest. Many Con-Con proponents are big supporters of Judicial Supremacy — the notion that a Supreme Court decision constitutes “the law of the land.” And many of the lawyers who have signed onto the Con-Con believe prefer “judicial balancing” invented by leftist Justices such as “strict scrutiny” over putting the focus on the Constitution’s “text, history, and tradition” that Justice Scalia repeatedly urged.

The Framers of the Constitution were careful, deliberate, and deeply spiritual men who put their own interests and desires second to the needs of the new nation. They attempted (however successfully) to put aside petty differences and passions of the day to create a lasting form of government that would limit and combat power, rather than enable it. Can anyone say the same about our current crop of politicians, lawyers, and academics who would be entrusted by those supporting an Article V Convention with the power to alter our form of government?

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