Written by **Joe Wolverton, II, J.D.** on May 28, 2014

Con-Con Group Pens Another Historically Inaccurate Call for Convention

Once again, the proponents of an Article V "convention of states" (a term that never appears in the applicable constitutional article) are misrepresenting history, the Constitution, and the position of The John Birch Society.

In an op-ed originally published in the (Provo, Utah) *Daily Herald* and subsequently reprinted by the Convention of States (COS) organization, Allen Boettcher, the COS director for Utah, declares that it is "time to trust the Constitution."

Curiously, however, Boettcher goes on to explain why we should do exactly the opposite by "proposing amendments to correct specific problems" in the Constitution.

First, it is the position of The John Birch Society that the solution to the problem of the federal government's consolidation of power and accumulation of crushing debt does not lie in the changing of the Constitution, but in the consistent application of its enumerated powers and the 10th Amendment. Boettcher apparently believes that although Congress, the president, and the courts routinely disregard all limits on their power included in the current Constitution, somehow new amendments would transform them into obedient adherents to additional restraints.

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In his letter, Boettcher even (I imagine unwittingly) admits this very fact, writing, "The Federal Government would never voluntarily relinquish its own power." Will that same criticism not still hold true if we were to add even more amendments intended to place constitutional limits on that power? Won't the federal government continue tearing right through the "parchment barriers" on its way to totalitarianism?

Of course it will, Mr. Boetttcher.

Next, Boettcher claims:

> Those who refer to an Article V Convention as a "Constitutional Convention" (including The John Birch Society, Eagle Forum and, apparently, Ms. Openshaw) demonstrate a fundamental misunderstanding of the difference between the 1787 Constitutional Convention, called by the states pursuant to their residual sovereignty for the purpose of crafting a workable federal government, and an Article V Convention, called under the authority of our existing Constitution.

Wrong again, sir.

It's curious that the COS people go to such lengths to deny that they are calling for a constitutional convention, yet they have no problem calling what happened in Philadelphia in 1787 a constitutional convention and it was called for *exactly* the same reason as the COS: to propose amendments to the existing Constitution.

This is the last paragraph from the report of the Continental Congress calling for the convention of the states held in Philadelphia begun in May 1787:

> Resolved that in the opinion of Congress it is expedient that on the second Monday in May next a Convention of delegates who shall have been appointed by the several states be held at Philadelphia for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the states render the federal constitution adequate to the exigencies of Government & the preservation of the Union.

Change a few words, modernize the language a little bit, and this is precisely the same call being made by the COS organization, yet they consistently deny that they are calling for a constitutional convention. They cannot have it both ways.

In 1787, the document known as the Articles of Confederation was the capital "C" Constitution of the United States. Article XIII of that Constitution mandated that regarding the making of changes to it: "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."

When the constitutional convention met in Philadelphia in May 1787, that legally binding and constitutional provision was ignored. From the moment Edmund Randolph stood and proposed what was known as the "Virginia Plan," the Constitutional Convention of 1787 became a "runaway convention."

There's no debating that fact. There was a provision of the Constitution prohibiting any changes to the Articles without unanimity. That provision was not only disregarded, but was replaced, eventually, by Article VII of the Constitution created at the convention.

Article VII of our current Constitution reads: "The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same."

That's quite a bit different. With the approval of that new provision, the unanimity rule and the Constitution were replaced.

Despite constant reassurances by the pro-Article V convention group, there is nothing that could prevent a "convention of the states" from going down that same road.

Were we lucky (blessed) by the results of the runaway convention of 1787? Yes, undoubtedly. Would we be so lucky again? Not likely. As I've indicated in a previous article on the subject, there are scores of socialist organizations slavering at the thought of getting their hands on the Constitution and making it over into something we wouldn't recognize. These groups have adopted Article V as the means to that end: an Article V convention of the states.

There is nothing in Article V limiting the power of a convention called under its authority. Think of the ramifications of a convention called to change the Constitution — a convention without legal limits on its power.

Of course, the COS organizers claim that the convention they support would not create a new constitution.

That's not the point. The point is that the COS could create a new constitution, just as the constitutional convention in Philadelphia did in 1787.

On that point, was the convention of 1787 called to consider a new constitution? No, it was called "to devise such further provisions as shall appear to them necessary to render the constitution of the Federal Government adequate to the exigencies of the Union."

In other words, the convention was meant to be a limited convention, empowered for the very limited purpose of considering amendments to the Articles of Confederation that would help the country get out of the financial mess it was in in 1787.

Does that not sound precisely like the language used in COS literature? Yes. On its Frequently Asked Questions (FAQ) page, the COS states: "The federal government is spending this country into the ground.… It's time American citizens took a stand and made a legitimate effort to curb the power … of the federal government."

Lastly, a final and very important point about Article XIII of the Articles of Confederation.

In its FAQ, the COS claims: "It [the Convention of the States] cannot throw out the Constitution because its authority is derived from the Constitution."

Two questions will reveal the fundamental errors with this statement and will explain why the COS promoters try to avoid at all costs mention of the Articles of Confederation, specifically Article XIII.

First, was the authority of the constitutional convention of 1787 derived from the Constitution in effect when that convention was held in Philadelphia? Yes. The Continental Congress' report calling for the Philadelphia convention specifically references the "provision in the Articles of Confederation & perpetual Union for making alterations therein." Article XIII.

Second question: Did the convention in Philadelphia in 1787 "throw out the Constitution" in effect at that time and replace it with a new one, radically different from the one already in legal effect? Yes.

The differences between the Articles of Confederation and the Constitution of 1787 are significant. Not the least of which was the method established for adopting those changes and endowing them with the force of law. What once required a unanimous vote, now required the approval of only 3/4 of the states.

Finally, Boettcher insists that while "some federal laws can be 'nullified,'" this is "not a viable solution for the vast majority of federal law."

To correct this misunderstanding of federal law, I repeat what I have written in response to an earlier attack on nullification made by the COS:

> Next, despite its citation of principles of "Agency law 101," the COS movement's attitude toward nullification ignores basic tenets of the law of agency that would have been taught in that fictional class.
>
> The law of agency applies when one party gives another party legal authority to act on the first party's behalf. The first party is called the principal and the second party is called the agent. The principal may grant the agent as much or as little authority as suits his purpose. That is to say, by simply giving an agent certain powers, that agent is not authorized to act outside of that defined sphere of authority.
>
> Upon its ratification, the states, as principals, gave limited power to the central government to act as their agent in certain matters of common concern: defense, taxation, interstate commerce, etc.
>
> The authority of the agent — in this case the federal government — is derived from the agreement that created the principal/agent relationship. Whether the agent is lawfully acting on behalf of the

principal is a question of fact.

The agent may legally bind the principal only insofar as its actions lie within the contractual boundaries of its power.

Should the agent exceed the scope of its authority, not only is the principal not held accountable for those acts, but the breaching agent is legally liable to the principal (and any affected third parties who acted in reliance on the agent's authority) for that breach.

Under the law of agency, the principal may revoke the agent's authority at will. It would be unreasonable to oblige the principals to honor promises of an agent acting outside the boundaries of its authority as set out in the document that created the agency in the first place.

Imagine the chaos that would be created if principals were legally bound by the acts of an agent that "went rogue" and acted prejudicially to the interests of the principals from whom he derived any power in the first place. It is a fundamental tenet of the law of agency that the agent may lawfully act only for the benefit of the principal.

Inexplicably, this is the position taken by COS when they argue that the states may not nullify unconstitutional federal acts and refuse to be bound by an agent that repeatedly exceeds its authority. Not only does this agent (the federal government) habitually breach the agency contract, but it does so in a manner that irreparably harms the principal (the states).

Finally, let's use an analogy to put a finer point on the agency angle specifically and the need to alter the Constitution generally.

Imagine that a person agrees with a contractor to build a house. The two parties meet and sign off on a contract for the building of the house which includes a blueprint of the home. The contractor begins work, but after a while decides to start building wings on the house that weren't provided for in the contract and the blueprint and starts running up enormous debts to build these extra-contractual additions.

When the future homeowner visits the building site, what should his reaction be? Should he decide that he should go back to the contract and change parts of it, adding provisions reiterating the general contractor's restrictions and responsibilities?

Would a contractor with such obvious disregard for contractual limits on his power be likely to suddenly begin being bound by the new restrictions? Not likely.

This is exactly what the COS people are promising, though. They state that even though the federal government "is spending this country into the ground," the best way to stop this abuse of power is to add new restrictions to those already included in the original contract (the Constitution) that forbid this type of overreach.

Those of us opposing an Article V convention, however, believe that the best way to stop the federal government's constant disregard of constitutional limits on its power is for states (the principals) to enforce those limits.

We realize that the federal government will treat any new amendment restricting its authority the same way they treat those already in the contract.

Despite the millions being spent by the various factions of the Article V to ensure that a convention takes place, there is yet time for concerned Americans with a better grasp of history and constitutional

construction to speak up and prevent this from happening.

We cannot afford to entrust the future of our Constitution to a group of people who make blatantly incorrect statements about the power of an Article V convention and the history behind the adoption of our current Constitution.

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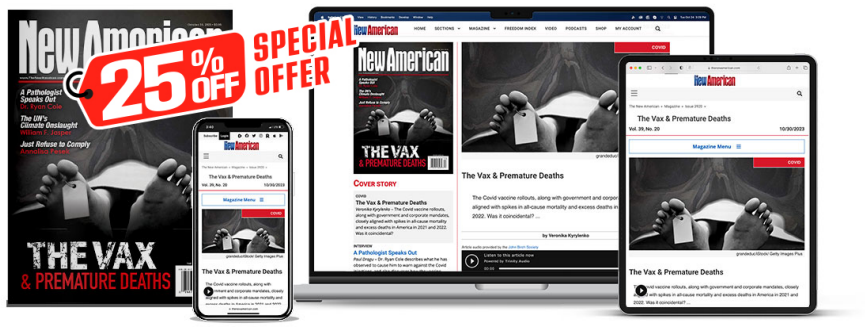

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