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Convention of the States: Wrong on History, Nullification

Sometimes it seems that many of the "scholars" tying their names and reputations to the Convention of the States (COS) movement seem to make misstatements that call into question their credibility.

For example, the following bit of "history" is recounted on the COS FAQ page:

> This claim that Congress gets to choose the delegates also goes against common sense. Just because one party "calls" a convention, doesn't it mean it gets to choose the delegates for the other parties. Think about it. Virginia called the Philadelphia Convention of 1787. Did it get to choose the delegates for Massachusetts? Of course not. Massachusetts did. Each state chooses its own delegates; it doesn't matter who calls the convention. This is Agency law 101 and basic common sense.

Let's look closely at the details of this paragraph.

First, who called the Philadelphia Convention of 1787? Virginia, as the COS claims? No! The Constitutional Convention of 1787 was called by the Continental Congress on February 21, 1787.

Not only did Virginia not call the Philadelphia Convention, but the report from the Continental Congress calling for states to send delegates to it highlights the role played by New York, not the Old Dominion.

So, on their website, rather than ignore a bit of history that doesn't fit their purposes, the COS misrepresents the historical record, perhaps hoping people would not take the time to research the subject for themselves.

Such a revision may seem minor, but if an Article V convention was such a good idea, one as safe and supported by history as the COS scholars say, why would they need to fiddle with the historical record at all?

Furthermore, does it seem wise or safe to trust the care of something as potentially powerful as a constitutional convention to a group whose leadership can't get right such basic facts of American history, particularly the history of the Constitution Convention itself?

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.

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