Who Needs a New Constitutional Convention?

You have probably griped under your breath, "There ought to be a law to stop these people," when confronted by a particularly noxious act by a government agent. Because this is such a pervasive sentiment, liberty-minded persons are raising an increasing clamor to make some adjustments to the U.S. Constitution to more effectively rein in an ever-growing public sector that intrudes further into our lives, our families, and our pockets.

Credible constitutional scholars are going so far as to push for a more drastic solution than the addition of a mere amendment to the Constitution, as we have done 27 times so far: They are pushing for a constitutional convention, which is the alternative method set forth in its Article V for making changes to the Constitution. This means of amending the Constitution, however, opens up the entire document to potentially radical change. This danger exists not only because a constitutional convention cannot be limited in its scope, but also because it could be influenced and populated not just by those with whom we may agree, but by the political elites who favor a substantial expansion of the powers of government, and a limitation on the rights of citizens.

We must be very careful before we take such a precarious step. Though the Constitution admittedly is imperfect, it still made possible the greatest experiment in liberty the world has witnessed. Some advocates suggest that a constitutional convention could be restricted to proposing a single omnibus amendment to make several changes to the document, and then disband. However, the power to restrict a convention is not in the text of the Constitution, and if we start a convention, it could be hijacked by establishment insiders. Those who want to make changes in accord with the Founders' intent to limit and separate government powers may instead inadvertently end up with a totally new and foreign system of government. If a single amendment is the goal, we can much more safely use the procedure already set out in Article V to propose such an amendment: to have Congress call for a new amendment.

But, some may ask, given the increasing assaults on liberty by government, wouldn't it be worth the risk of amending the Constitution to stop the adventures by government into areas in which it doesn't belong? The short answer is, "No."

The real problem is not the Constitution itself; the real problem is that the Constitution is being systematically ignored, violated, and misinterpreted. The solution, therefore, must focus on getting back to the Constitution, not "fixing" it. However, when our own allies make such reasonable-sounding proposals to convene a constitutional convention, we should surely give them a thorough analysis. After considering the matter from every angle, the man or woman who values freedom must still say "no" to a constitutional convention. It will not fix what ails us.

The Key – Powers Versus Rights

The key to the analysis of why we should not amend the Constitution with a convention is understanding the difference between government powers and citizens' rights, and how the Constitution currently treats them — something not taught with any clarity in schools, even in law schools.

The U.S. Constitution enumerates the limited powers of the federal government, and makes them few and specific. It also specifically protects *some* rights in a "Bill of Rights" included in the first 10 amendments of the Constitution, but the protected rights are not limited merely to those that are listed.

What "powers" does the federal government have under the U.S. Constitution? To professor types, government power is defined as a monopoly of force and control in a particular geographic area. As a practical matter, government powers are things such as running courts of justice, coining money, defending the country, and taxing the citizens. When the original states adopted the Constitution, they delegated a small quantity of their own authority and power — and that of their inhabitants — to a national government. All states admitted to the union in later years tacitly agreed to that same delegation of specified powers as well.

Rights, on the other hand, are entitlements to existence and action that are God-given, such as the rights to life, liberty, property ownership, free speech, and worship, by virtue of our being His natural creatures on Earth. They are always true for all persons at all times, and are not granted by government — as the United Nations would assert — but by God. They cannot be selectively granted to one person and not another. Thus, there can be no "right" to housing, food, medical care, or a job, as modern politicians falsely assert, because these require a transfer of goods and they aren't personal liberties. Historically, governments have always suppressed and limited rights, but properly understood, rights should stand against all government interference. Tyranny, by definition, is the elimination of one's natural rights by government.

Here is how the Constitution itself makes the point: The Ninth Amendment addresses the issue of rights by stating, "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." In other words, all rights are inherently owned by the people and protected from government interference, whether they are listed in the Constitution or not. Any right you can think of is protected by the Constitution (though not necessarily protected by those elected to discharge the duties in the government that was created by the Constitution), unless otherwise specifically ceded to a temporary usurpation by government, such as entry into one's house when the government agent has a search warrant signed by a judge.

Government powers, by contrast, are addressed in the 10th Amendment. That amendment structures the matter in the negative, stating: "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." In other words, if a power isn't specifically stated in the document, the government may not exercise it. "The powers delegated by the … Constitution to the federal government are," in James Madison's words,

"few and defined." Madison, who is considered "the Father of the Constitution" because he was its main author, said that Congress, for example, may do only specific things that are set forth in a list found in Section 8 of Article I of the Constitution. If Madison were incorrect and it were true that politicians could use a phrase in the Constitution — such as that saying that the government was responsible for the public's "general welfare" — to expand its role into whatever areas that it deems as falling under the "general welfare," the government would be all-powerful. Madison mocked the idea that the Constitution gave the Congress such leeway: "If Congress can do whatever in their *discretion* can be *done by money*, and promote the *general welfare*, the Government is no longer a limited one possessing enumerated powers, but an indefinite one subject to particular exceptions."

How does this discussion of rights and powers relate to a constitutional convention? A close inspection of the government's powers in the Constitution shows that we don't need to amend the Constitution, but rather to enforce what is already there, in order to restore limited government. For example, what if the federal government decides to interfere with your property rights through the federal Environmental Protection Agency (EPA), and it declares that a puddle on one end of your property means that you have a protected "wetland," and that you may not use the land for some purpose for which you had planned?

A constitutional scholar may argue that the Constitution does not *explicitly* protect private property from government interference and that it would be wise to add a provision spelling out that government has no such authority, via an amendment proposed by a constitutional convention. The rationale for adding explicit language in the Constitution to protect property owners is that a large number of onerous government actions would be stopped dead in their tracks. Perhaps. That assumes that a bureaucrat would abide by such a restriction, even though he is not willing to abide by existing restrictions that already prohibit the federal government from encroaching on your lands. It also assumes that a convention would produce a change such as this — which, it should be emphasized, does not even further limit federal power, but simply elaborates on the existing limitations. On the other hand, the convention could turn the Constitution on its head, despite the good intentions of many of those now calling for it.

If we analyze the matter under the Constitution itself, in terms of powers and rights, you are protected two ways in the preceding scenario. First, there is no "power" in the Constitution to interfere with your property. Congress has no jurisdiction to even pass a law creating an agency like the EPA, nor to authorize it to enter upon your land or make any determinations about it. Second, the "right" to be free from illegal searches and seizures, as explicitly stated in the Fourth Amendment, as well as your natural right to control and enjoy your own property without government interference, precludes the EPA from involving itself with your property rights in any way.

Thus, the failure is not in the Constitution, but in the legislative and executive branches of the federal government that will not respect its clear and existing provisions. Since government does not honor the existing limits in the Constitution, we should not expect it to honor new added limits. The habit of adding laws upon laws to those that already exist has been the pattern of statist lawmakers in the last several decades. It has done immeasurable harm to the law itself, by complicating it beyond all measure or understanding.

For example, when the problem of domestic violence came more to the fore in the 1970s, the government did not simply begin to enforce existing laws against assault. Rather, it began to pass a huge number of new laws, such as the Violence Against Women Act (VAWA), and restraining order laws, that were layered on top of the current legal structure. Assault has not decreased, but the number of

laws has increased immeasurably, requiring vast new expenditures, vast new bureaucracies, and vast new government power. Perhaps that was the point in the first place.

The Big Fix

The overall strategy of using a constitutional convention to fix what ails our government is flawed not only because our politicians could simply ignore any revisions just as they now ignore the existing Constitution, but the proposed amendments themselves would not substantially improve the situation of our country even if the politicians did obey them.

Ironically, those who have clamored for a constitutional convention rarely focus on the fundamental issues with the document, and often only attempt to redress secondary issues such as term limits (page 22) and a balanced budget. One such advocate, Bill Fruth, has put together a slate of 10 proposed amendments, most of which would be either meaningless if enacted, or are badly misguided. For example, regarding a balanced-budget amendment, Congress is already limited in what it may spend since it may only spend money for purposes enumerated in the Constitution. A balanced-budget amendment would do nothing to either limit spending or prevent "off-budget" spending, and it could be ignored, as is the case with the existing Constitution.

Also, the proposed amendments do not have an explicit provision to protect property from government intrusion, despite the fact that government at all levels has become much more aggressive in interfering with private property. The one aspect of property protection contained in our Constitution, the Fifth Amendment provision that taking property must be for a public use (called "eminent domain") has been all but eviscerated by the U.S. Supreme Court by a series of cases culminating in its recent decision in *Kelo v. City of New London* in 2005.

Nor do the proposed amendments unmake the creation of what could be called the extra-constitutional fourth branch of government — the "administrative branch." Congress has unconstitutionally authorized and generously funded a new administrative branch of government, to join the legislative, executive, and judicial branches, which exercises powers of all of the other branches. These well-known "alphabet soup" agencies, like the EPA, the FCC, the FDA, and many others, employ swarms of powerful and unaccountable officers who make thousands of pages of regulations. The new breed of agency makes it own laws (legislative), implements its own laws (executive), and enforces its own laws (judicial). They have their own tribunals, which take on the appearance of courts, to enforce them. Actual courts, appointed under Article III of the U.S. Constitution, rarely disturb the tribunals' illegitimate rulings, deferring to the alleged expertise of the agency.

There are similar federally controlled agencies at the state level. The federal government has created and funds an octopus of state agencies that intrude into family life — from child protective services, to local schools, to healthcare entities. The federal agents extended their police powers through the states in the form of bribery to the states to implement federal programs: They tax the states' citizens and then promise to give some of the money back to the states if the states create the new agencies and follow their edicts.

Finally, proponents of a constitutional convention do not advocate the elimination of the Federal Reserve system, which is a private banking entity that creates money out of thin air and substitutes for the enumerated power of Congress to coin money in Article I, Section 8. The Fed's manipulation of national interest rates, the amount and value of dollars, and financial regulations is largely what led to the housing bubble (and its collapse) and today's desperate financial straits — and will lead to further economic calamities in the future, at the expense of the middle class and poor.

In the past, Congress has ignored balanced-budget requirements. In 1979, a law was passed requiring the budget be balanced by 1981 (P.L. 95-435), and it was completely disregarded. As another example, some proposed amendments call for eliminating the income tax — a welcome development — *but not eliminating the spending that it funds*. Thus, government spending would continue unabated as the Fed would merely increase the supply of money and credit, and the government would pay its bills through borrowing from foreign countries and through a hidden tax called inflation or through creating a new tax, such as some form of new national sales tax.

However, even if such concerns were considered, it does not change the fact that virtually every overreach of the federal government can be checked by applying the chains of the existing Constitution! So why chance a convention?

Why Not a Constitutional Convention?

The primary danger with calling a constitutional convention is that it could become a "runaway" convention that exceeds its mandate, possibly creating a new form of government altogether.

Article V of the U.S. Constitution sets forth two means to propose amendments to the document: either by the proposal of a two-thirds majority of both houses of Congress, or by a constitutional convention called by two-thirds of the states. Once an amendment or amendments are proposed, they must be ratified by three-fourths of the states, with Congress choosing whether ratification will be by the state legislatures, or by special state ratifying conventions. All amendments to date have been proposed by Congress, rather than by a constitutional convention.

Some of the proponents of a convention, including former Speaker of the House Newt Gingrich, opine that a convention could be convened to deal with only a single issue, such as term limits, or a balanced budget, two perennial favorites. That is a misreading of Article V, which does not impose such a limit. Once a convention is in place, it can propose any number of amendments, subject only to ratification by the states. And all changes will be on the table, as happened with the original constitutional convention when delegates decided not to add amendments to the Articles of Confederation, but to write a whole new Constitution. More on that later.

A single-amendment proposal that has gained traction in the Tea Party and libertarian movements is from Randy Barnett, professor of constitutional law at Georgetown University Law School, which he calls the "Federalism Amendment." It is a multi-part amendment, like the current Amendment XIV, that intends to restore the proper balance between the state and federal governments and to eliminate the income tax, worthy goals indeed.

But what if a constitutional convention started going the way of the big-government mavens and became a so-called "runaway" convention and the big-government acolytes introduced a multi-part amendment of their own that undid the few protections provided by the Constitution that are still enforced? This could even be done in the name of "democracy"; consider how the checks and balances the Founding Fathers carefully crafted into the Constitution are now besmirched as "gridlock." What happens then? The "Article V convention now" crowd suggests that this would not happen because there are built-in safeguards, but that is naïve in the extreme.

They first point to a safety net in the form of necessary ratification of any proposed amendment by three-quarters of the states, as is required by Article V. But this safety barrier is flimsy at best. There was such a safeguard built into the Articles of Confederation as well: Any changes to the Articles had to be "afterwards confirmed by the legislatures of every state." The Philadelphia Convention, of course,

changed the ratification process so that the assent of only three-quarters of the states was needed.

This theory also fails to account for the possibility the state legislatures may not have the opportunity to kill a bad amendment by refusing to ratify it. Powerful federal interests could influence Congress to require that ratification be done through special state ratification conventions, which they could control through coercion or the power of the purse. Let us not forget how President Obama gained the votes of many wavering Senators and Representatives for his recent federal healthcare bill by openly and brazenly promising gargantuan financial goodies to those Members' states and congressional districts.

This type of backroom coercion occurred with the Philadelphia Convention of 1787, which called for the proposed Constitution to be ratified by special ratification conventions. And this has already been done once since 1787. When Congress submitted the 21st Amendment to the states for ratification to repeal the 18th Amendment (regarding prohibition of liquor), it specified that the amendment be ratified by state conventions as opposed to state legislatures, because Congress knew that many state Representatives were under the control of the temperance lobby, or afraid of it.

Whether proposed amendments were ratified by either state legislature votes or a special convention, the feds have the edge either to nullify our amendments or to pass theirs. It's not that current government officials are any more corrupt than in days past, only that they have so much more power right now. In earlier days, "they had vastly less to be corrupt with," as noted by libertarian political theorist Robert Higgs. The establishment has amply proven that it will spend whatever is necessary to accomplish its goal, and the elected politicians have certainly hung out the "for sale" signs.

Professor Kevin Gutzman of Western Connecticut State University, and author of *The Politically Incorrect Guide to the Constitution*, is another scholar who suggests that a state-called constitutional convention could not become a "runaway," because it would be called by states that are seeking to limit government power, not to expand it. Additionally, Professor Gutzman believes that the current mess couldn't get any worse, citing the scoffing of Rep. Nancy Pelosi (D-Calif.) when asked if ObamaCare was constitutional. He believes that the only possible direction for the proposals from such a convention would be to decrease the reach of the federal government. Nice sentiment, but that entirely ignores the history of the last decades, and the nationalized healthcare debacle of the last year.

Though well-intentioned people may be the ones calling for a constitutional convention, the fact that their calls received "up" votes in their states doesn't mean that the same well-intentioned people would determine the composition of the state delegations to such a constitutional convention. Would the aforementioned professors be certain of a place in some state's delegation, or would they be excluded by establishment insiders and, like children, relegated to pressing their noses to look into the candy store window, while the enemies of freedom do their worst?

The answer to that query is rather obvious. If a constitutional convention is called, the overwhelming majority of the delegates from many, if not most, states would likely be big-government supporters. This should be abundantly apparent when one considers the core of the constitutional problem: The same people who elect members of Congress also elect the state legislators. These same people would also elect the delegates to an Article V constitutional convention. To the extent that these people have so little understanding about the need for a limited government under the Constitution as to elect a majority to Congress who refuse to stand by their oaths to uphold the Constitution, they would also tend to elect like-minded delegates to a constitutional convention.

In contrast, an electorate sufficiently informed to make it safe to call a constitutional convention would

also be capable of electing a majority of constitutionalists to Congress who could in turn be trusted to propose needed amendments to the Constitution.

Ironically, even the delegates to the original constitutional convention in 1787 exceeded the bounds of their prescribed task, which was to merely revise the Articles of Confederation. If even those patriots could not stay their ambition, could today's delegates?

Keep the Barn Door Closed

Whenever a consensus develops for amending the Constitution, we can make all needed amendments by the traditional method of a proposal by Congress and ratification by the state legislatures. No convention is needed.

Since the Founders provided for two means of amending the Constitution, one can infer that they were placed there for different purposes and eventualities. The traditional method of proposing one amendment at a time suggests that this option would be used more commonly, for incremental changes that may be needed to adapt to new circumstances that the Founders did not anticipate. The constitutional convention, by contrast, is really a drastic remedy to start all over again, to re-boot the machine. It is reasonable to assume that this method was placed in the Constitution in the eventuality that everything had become so bad that nothing but a new group of founders could get things back on track.

The John Birch Society has wisely resisted the siren song of well-meaning patriots who periodically call for a constitutional convention under Article V. Too much can go wrong, and that wrong could be permanently memorialized in a new, UN-style constitution, where rights could be delegated by government, not by inalienable fiat of the creator. Since we have the historical method of amendment available, without the risk of throwing open the barn door and letting predators in to prey upon the livestock, we should circumspectly choose that method to make the needed changes.

The old Baltimore curmudgeon, H.L. Mencken, summed it up in his cynically frumpy manner when he said, "Political revolutions do not often accomplish anything of genuine value; their one undoubted effect is simply to throw out one gang of thieves and put in another." While the possibility of the advance of liberty is enticing, the possibility of putting our Constitution in the hands of a much worse gang of thieves looms large, and the future of the entire Republic cannot be risked on that one turn of a card.