An Inspection of
the Reality of a Convention of States

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Introduction

The concern Conservatives have for the disregard of the founding morals and values of the United States and the consequential destruction of the Nation's founding document, the Constitution, and the republican form of government is based on real and tangible activities of both elected and appointed officials of the Federal Government, whether due to deliberate, irresponsible, or negligent behavior. Liberty faces a real and present danger because of a Federal Government that is obese in spending, size, and imposing regulations. There should be no pause in assigning the responsibility for this to not just elected and appointed federal officials but also to State and Local Governments and, yes, to ourselves, We the People.

But, having said this, it must also be realized that the proposition of a Convention of States, as described by Mr. Levin and others, is based on a hasty interpretation and justification that no less endangers the Republic of the United States and its Constitution. The purpose herein this White Paper is to set forth why the proposition is not correct and to beg Conservatives to faithfully adhere to the Constitution as they argue others should.

State Sovereignty

On July 4, 1776 the 13 North American Colonies of England declared themselves to each be Sovereign States with all powers and status equal to those of England and other nations of the time. They formed an alliance under which they facilitated their independence from England.

To formalize their mutual alliance the 13 States drafted an agreement that was called the Articles of Confederation, AoC. The drafting began in the same year as the Declaration of Independence and was submitted to all 13 States for ratification in 1777. In 1781 ratification was completed by all 13 States. [For a more definitive timeline, click HERE. For a transcript of the Articles of Confederation, click HERE.]

Article II of the AoC reads: "Each state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled." The restrictions on the States and authority delegated to the states operating

under the Articles of Confederation may be found in Article VI. That delegated pertained to

- sending any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance, or treaty, with any King prince or state,
- entering into any treaty, confederation, or alliance whatever between them, without the consent of the united states,
- laying any imposts or duties, which may interfere with any stipulations in treaties, entered into by the united States,
- keeping vessels of war in time of peace, and
- engaging in any war without the consent of the united States.

The States reserved

- the sovereignty of their own laws,
- the coinage of money (whose value was set by the congress of the Articles of Confederation congress),
- the laying of imposts and duties,

Also,
- People were citizens of their respective States. There was no confederation citizenship of the individual person.
- Common defense was provided by land forces of the individual States and collectively under the Articles of Confederation forces were funded by the States by way of common treasury. The same was for case of naval forces.
- Disputes, such as those of land, were settled with the Articles of Confederation congress as the mediator and not by a law supreme to those of the respective States.

There is more such in the AoC, but it only adds to demonstrate that the Confederation under the AoC acted in accordance with State laws and positions. This is the exact opposite to that under the United States Constitution.

The Inference of Historic State Conventions on the Meaning of a Convention to Amend the Constitution

Professor Robert Natelson asserts, such as HERE, HERE, and HERE, that the word “convention” in Article V means a “Convention of States” because of examples of meetings (conventions) between States during the “founding” era. [The word ‘founding‘ is placed in quotes because of the inference in the context Professor Natelson’s argument and the reliance on that argument by others, such as Indiana State Senator David Long, click HERE , and Mr. Levin, click HERE.]

There is no disagreement that meetings took place between States during the “founding” era, which here we classify as from 1776 through 1789 when ratification of the Constitution was final. During that time period the several

States were sovereign, except for the few restraints imposed by the AoC. States were not otherwise answerable to a superior government. There was no superior set of laws. States had only their respective laws to adhere to. But when the ratification of the Constitution of the United States was complete circumstances changed.

Unlike before and during the time of the AoC the U. S. Constitution established a Federal Government whose authority supersedes that of the several States in ways described by Articles I and VI. Two branches of government were added, Articles II and III. The sum effects being that restraints were imposed on the several States in matters pertaining to the Federal Level, most of which is voiced in Article I, Section 10. To put matters in modern day colloquial language – it is above the pay grade of the States to act unilaterally in Federal matters because of the very compact into which they entered for the formation of a federal system.

Article I, Section 10, Clause 3 of the Constitution requires the consent of Congress for a State to enter into compacts with another State. The significance of this Clause is important to understand because it is in addition to Article I, Section 10, Clause 1 which is similar to that of Article VI, paragraph 2 of the AoC.

Samuel Johnson defined 'compact' in his A Dictionary of the English Language as

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CO'MPACT. «. / [faSum, Latin.] A  contrad ; an accord ; an agreement ; a
mutual and fettled appointment between  two or more, to do or to forbear
Ibmc-  thing. It had anciently the accent on  the laft fyllable.
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It seems reasonably evident if several States, in this case at least 34, joined in an agreement to hold a Convention of States then such an agreement, a 'compact', would require the consent of Congress. So, unless Congress agreed and, according to Article V, called a convention in the form of a Convention of States then a convention of such designation for the purpose of amending the Convention would not take place.

In his Commentaries on the Constitution of the United States (1833), Book 3, Chapter 35, Paragraph 1397, Joseph L. Story, SCOTUS Justice 1811 – 1845, provided an interpretation of Clause 3. He said "agreements, and compacts is nowhere explained; and has never as yet been subjected to any exact judicial, or other examination." He did cite an example pertaining to matters of mutual convenience between States but also noted the relevance of the Clause into matters that cause "any infringement of the rights of the national (sic) government", including those of "mischief."

So it is clear that it is not correct to assert that a convention to amend the Constitution is to be interpreted as a Convention of States. It could be, if Congress were to make it so. But to simply declare it is so without the approval

of Congress it to overlook the content of the Constitution as it was written and still is.

Mr. Madison's Interpretation of the Meaning of the word 'Convention'

James Madison and his mentor, Thomas Jefferson, embodied the corporate knowledge of the founding of our nation and the understanding of the era. Mr. Jefferson, although he supported a strong and independent federal government, was a champion of States rights and believed States had the sovereignty to check the Federal Government. Mr. Madison was a protégé of Jefferson. He understood and was acquainted with the role and activities of States as anyone at the time, and he shared much of Jefferson's positions. But neither voiced in their writings an interpretation of the word 'convention' as meaning a Convention of States.

Indeed, if an inspection is made of Mr. Madison's notes during the Philadelphia Convention it is clear that twice he expressed concern for the meaning of the word 'convention' as it was used in Article V. Moreover, he clearly recorded that he thought a convention to amend the Constitution was not necessary and at one point in the Philadelphia Convention replaced the version under discussion that included the word 'convention' with his own which did not, only to have the word reinserted by Gouverneur Morris and Gerry.

So it seems reasonable to take the position that if Mr. Madison questioned what form would be a 'convention' and there was no definition provided by any other participant then the appearance of the word 'convention' simply meant that Congress was to provide for the construct of a convention to amend the Constitution.

Several meetings of States during the 19th century have been cited by Professor Natelson in "A Compendium for Lawyers and Legislative Drafters", link not found. But as the author notes, these conventions met outside of Article V thus, as cited above by Justice Story, "agreements, and compacts is nowhere explained; and has never as yet been subjected to any exact judicial, or other examination." That is, the occurrences of those meetings do not support the claim that an Article V Convention can be a Convention of States simply at the will of the several States.

Mr. Madison's Concern for a Second Convention to Amend the Constitution

Frequently a reply by James Madison to a letter from Col. George Lee Turbeville regarding the call for a second convention to consider revisions of the just-written Constitution is cited as partial reasoning for why a Convention of States and for why there should be little concern for a run-away convention. [Mr. Madison wrote

several letters pertaining to the matter, including the Nov 2, 1788 letter to Col. George Lee Turbeville, a Nov 30, 1788 letter Henry Lee, a Dec 8, 1788 letter to Thomas Jefferson, and a Jan 2, 1789 letter to George Eve. (?). [There may be others.]

But inspection of and thought for those letters suggest that Mr. Madison was concerned that Anti-Federalist would use the occasion of a second convention to change much of the Constitution to suit their views of Federalism. His concern was that the Constitution and the Federal Government it formed would be undone. In other words, he was concerned for a run-away convention. That is no different than today's concern that a "run-away" convention to amend the Constitution would undo the very document itself, resulting in something and a form of government unlike that which came from the Philadelphia Convention. Such a concern in today's political environment is not unreal or exaggerated in spite of its dismissal expressed by those with their own agendas.

Federal Status and Danger to the Constitution

Nothing said here is to suggest there is ill intent by those who are calling for a Convention of States. But the very extent of how far and much the Federal Government has departed from that envisioned by those who drafted the Constitution speaks volumes to the care and thoughtfulness that should be given to a consideration of remedy.

The root of the problem is not the failure or the lack of content of the Constitution of the United States. The root of the problem is the very nature of man and the nature of the Beast that goes into office and entrenches itself. Mr. Madison's notes on the Philadelphia convention, the contents of the Federalist Papers, and the writings of Anti-Federalists warned us of this. The Constitution and the construct of the Federal Government, as created, was to avoid what we face today, an out-of-control federal government that is bloated in size, spending, taxation, and regulation.

But given present circumstances, in spite of the wisdom of the Framers, why would anyone believe that Amendments to the Constitution would remedy the problems? If today's politicians are as uncaring and ingenious as to be able to side-step and go-around the Constitution then why would we believe that any Amendments will remedy the problem? Stop and consider that in the past Congress has made agreements that are to provide long-term remedy of circumstance, to save money, to reduce deficits, or whatever, but within near-term following years have ignore those agreements. Stop and consider that Presidents have used unconstitutional means to do what they choose and Congress, and the People, idly sat by. Stop and consider that within the Judicial Branch decisions are made in abundant frequency that are legislative thus not constitutional, but no remedy is made.

There are three fundamental considerations that must be made regarding any Amendment:
1 – An Amendment is a ‘change’ to the Constitution, potentially in ways not anticipated or intended. Any amendment offered must be thoroughly examined and challenged for flaws. In scientific terms, a risk mitigation study must be made. (For example, a successful Balanced Budget Amendment must provide means for controlling borrowing, printing money, and taxation. Yet these three aspects were recognized by the Framers as being critical for the success of the Republic.)
2 – Morals and values can not be legislated. If they are not within the underpinning fabric of the People and those who represent the People then no amount of amending, of any kind, will remedy the issues in the Federal Government.
3 – Madison and others were concerned that a Bill of Rights would, because it provided an explicit delineation of rights, limit rights to those only. That is the concern that should be had for any amendment that intends to specifically remedy a problem and/or limit the Federal Government or any of its three Branches. Specificity can, and does, lead to a claim of a lack of guidance outside the particular matter.

Closing Thoughts

In all of the Amendment Debate we find ourselves visiting, revisiting, and arguing what is meant by the word ‘convention’ in Article V. Nothing is new about this. Madison initiated that debate with the writing of Article V. His question has never been answered. As written, Article V leaves the answer to interpretation and implementation by those with the larger voice. The larger voice is feared to be either Congress or a Majority. Neither is acceptable and certainly not intended by the very principles of this Compound Republic. Perhaps then, belated as it may be, the best starting point is an Amendment of Article V that provides clarity and voice that is that of a compound Republic and not that of a parochial, political, or otherwise voice that would endanger the Constitution.

But there is an even more root issue to be considered. All amendments offered from the States are intended to somehow restrain or tether the Federal Government. There is nothing offered or exercised that strengthens the States. Yet a Compound Republic demands the latter as well as the former. The issue is equally well that the States have allowed themselves to be in an inferior position. States accept money from the Federal Government espousing they want their fair share. But with the money carrot comes subservience to the Federal Government, and inferiority to its voice. There are Federal regulations and standards to be followed and with it a loss of State Voice. It must be understood that when the King hands out gifts he expects the receivers to toil the soil on his behalf.