Written by **Joe Wolverton, II, J.D.** on January 29, 2016

# Conventions Create Bigger Government

*"For it had come about that the tyranny obliterated the Constitution of Solon by disuse."*

— Aristotle, Athenian Constitution, Book XXII

These United States of America are at a critical crossroads in our history. We must now decide whether we will walk the path of formerly free societies and allow tyrants to rob us of what is left of our liberty, or whether we'll stand up to the statists and restore our Constitution and reclaim the fundamental rights it was written to protect.

Among those who profess to be friends of the Constitution, two main solutions to the problem facing us have been proposed, solutions that are diametrically opposed: On one side you have an unlikely coalition of progressives, socialists, cultural Marxists, and conservatives who recommend calling for a "convention of the states" using Article V as the vehicle for forcing our Constitution to fit their idea of good government, whether it be through a "balanced budget amendment" or the outlawing of private firearm ownership.

On the other side, there are constitutionalists who prefer the surgical solution of nullification. Simply stated, nullification is the exercise by the states of the authority they retain under the Constitution (as specifically set forth in the 10th Amendment).

Following this strategy, states would follow the advice of two of the most prominent of our Founding Fathers — Thomas Jefferson and James Madison.

In the Kentucky Resolution of 1799, Thomas Jefferson called nullification the "rightful remedy" for any and all unconstitutional acts of the federal government.

The federal government may exercise only those powers that were delegated to it. This is made clear by the 10th Amendment: "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." Nullification recognizes each state's reserved power to nullify, or invalidate, any federal measure that a state deems unconstitutional.

Nullification is founded on the fact that the sovereign states formed the union, and as creators of the contract, they retain ultimate authority to enforce the constitutional limits of the power of the federal government.

There are several benefits for applying this understanding via nullification: It is a far safer approach for remedying problems caused by violating the Constitution than a constitutional convention; it is based on upholding the Constitution and the founding principles of the Republic; and it can be implemented by individual states, without having to first get two-thirds of the states on board.

The constitutional convention (Article V) approach is based on changing the Constitution. It is risky because the changes could end up being as radical as altering the fundamental structure of our government — and could even entail an entirely new Constitution. It is not as risky as seceding from the union and starting anew, but it is risky nonetheless.

On the other hand, nullification is based not on altering the Constitution but on enforcing it. States that nullify congressional acts or presidential decrees that violate the Constitution would not only be stopping the federal juggernaut at their state borders, they would also be signaling that the Constitution is so vitally important that it must be enforced.

Despite the promises made by its advocates, the risks associated with the Article V convention approach are not theoretical. In fact, there have been at least two episodes in America's relatively short history where Americans in desperate need of salvation from tyranny have called conventions: the Continental Congress and the Constitutional Convention of 1787.

Taking the last first, The New American has published extensive evidence that, despite the fact that the product of the Constitutional Convention of 1787 was the greatest expression of self-government ever drafted, the meeting that made it unquestionably exceeded its mandate.

In 1787, the document known as the Articles of Confederation was the constitution of the United States. Its Article XIII mandated regarding any changes to the Articles: "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 existing Constitution (the Articles of Confederation) 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.

As admitted above, we were lucky (blessed) to have achieved the results of the runaway convention of 1787. The question remains, however, in the 21st century, would we be so lucky again? Not likely. As The New American has reported in several previous articles 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.

Two questions will reveal the fundamental errors with this statement and will explain why the promoters of the Article V convention option 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.

The second example of a monumental meeting accumulating powers beyond those anticipated by the states is the Continental Congress.

After fighting for eight years to restore their local governments and the rest of their God-given liberties, the colonies recognized a need to cooperate in their common opposition to the "long train of abuses" committed by the crown and Parliament of Great Britain.

In order to hammer out the metes and bounds of their responses to the royal deprivation of fundamental rights being committed by the king's army and agents in Massachusetts, a congress of delegates from the 13 colonies was called.

This congress possessed neither constitutional authority, nor any explicit grant of power from the several colonies to act on their behalf. It was meant to serve as a place where the wise and virtuous representatives of the colonies could craft a consensus resolution to send to London laying out the demands of the people of America.

There is, however, in the history of what came to be known as the First Continental Congress a cautionary tale for those of us in contemporary America who find ourselves victims of a tyrannical central government robbing us of a roster of fundamental rights.

The lessons learned by an analysis of the proceedings of that First Continental Congress have not been explored or reported, but the urgency of applying the lessons learned through such a study cannot be overstated.

The moment during the First Continental Congress when Massachusetts asked for that body's ratification of its plan to react to British General Thomas Gage's imposition of martial law on Boston is less important than the fact that the Bay State submitted the question to Congress in the first place.

Massachusetts considered, apparently, Congress to possess authority to rule on the legality of its actions. That is monumental.

Did the Continental Congress have any such enumerated power? Did that body ever claim to have such authority? Were the delegates, in their commissions, ever granted that authority by the colonial authorities that sent them? The answer to all these questions is no.

Regardless, the Congress usurped control over local committees of resistance, endowing itself with the exclusive power to drive the American agenda. This was a completely extra-constitutional exercise of non-delegated authority.

But once such power was exercised and accepted, a precedent was set and was faithfully followed — a

fearful prospect for the possible outcome of an Article V convention.

According to many of its advocates, the delegates elected (or appointed) to an Article V convention would have no power beyond recommending amendments to the Constitution; the implicit power, however, would be immense and could bring into being a completely new Constitution, one unrecognizable to the one we cherish.

The actions taken and the effects of the actions taken by the First and Second Continental Congresses testify to this fact.

Consider, for example, this statement made by historian Jack Rakove regarding the First Continental Congress:

> Local committees that had originally been instrumental in calling the Congress were now to be transformed, in a sense, into nothing more than the administrative agencies existing solely to implement the policies and programs of the Continental Congress.

This very scenario could repeat itself should an Article V convention be called.

Americans should take warning.

As Rakove writes, "By extension, Congress too would be able to argue that its authority flowed from the express will of the people."

In his book *The Beginnings of National Politics*, Rakove claims that the rapid pace of popular (and political) accession to the acts of Congress was astonishing. People treated the decrees of Congress as legally binding orders rather than suggestions that they were at liberty to accept or reject.

Rakove presents evidence, additionally, that even judges far from the center of congressional debates began bending their judicial decisions to adhere to the will of the First Continental Congress

Based upon this reaction, Americans must appreciate the immense and practically uncontrollable power an Article V convention could assume.

There is in the history of the First Continental Congress evidence — written historical evidence — of the runaway power such extra-constitutional conventions could gain and just how quickly that power could be gained and begin to govern.

Furthermore, with a couple of scattered exceptions, colonial assemblies ratified the acts and decrees of the First Continental Congress. This apparent accession of authority served to substantially strengthen the power of the Congress.

To one wary of the purpose and politics of potential representatives at an Article V convention, this behavior by the colonies points out a historically manifested reaction that state legislatures could (would) have to any amendments "suggested" (the word used by Article V convention supporters) by the Article V convention.

As Thomas Johnson, Jr. wrote to James Duane (both members of the Continental Congress), "I am afraid … disapprobation of any article might be of infinite mischief to our cause."

One needn't have too agile an imagination to picture a similar reaction repeated by state legislators and "conservative leaders" to the proposals that come out of an Article V convention, particularly after feeling the peer pressure of other states that have already agreed to the "suggested" changes to the Constitution.

By the time the Second Continental Congress met, representative Samuel Ward wrote, "Being free from all restraints we may deliberate with freedom, resolve wisely, and execute with firmness whatever the necessities our country may require."

Rakove points out that the mandates and instructions given by colonial assemblies to their congressional delegates were sufficiently vague so as to justify Samuel Ward's expression of authority.

That similar slippery wording in the resolutions calling for an Article V convention or in the commissions given to the representatives who would attend is not at all a far-fetched fear, particularly in light of the list of genuinely socialist and cultural Marxist organizations that are pushing for the Article V convention.

These self-interested and designing delegates would "interpret" their mandates broadly, broadly enough to destroy the Constitution and the concept of federalism as we know it.

Historians of the Revolutionary era point out that the colonial assemblies were weak and practically paralyzed, and this impotency only served to embolden the Continental Congress in spite of a dearth of official or enumerated authority.

Today, likewise, no constitutionalist would deny that state legislatures are anything other than paralyzed and weak. They meekly accept the acts of Congress as if handed down on stone tablets from Mount Sinai. These state assemblies act as if they are nothing more than subordinate agents of the federal government.

This weakness would be used as the lever that Article V proponents would use to move the convention in the direction they desire, regardless of the will and mind of the American people.

Next, consider this description of the deliberations, made by Rakove:

> Confident in their authority, the delegates felt no compunctions about preserving the privacy of their deliberations. An injunction to secrecy that Congress adopted on May 11 [1775] was observed so scrupulously in their correspondence that only the modern discovery of key documents has made it possible to reconstruct the critical debates that took place.

This could easily become a feature of the Article V convention, as well. Speeches would be made about the "will of the people" and "those who want to derail this last, desperate attempt to restore order to the republic" and how that noble endeavor would be threatened without absolute secrecy. By the time it was over, the damage would be done and the "will of the people" would have been sacrificed to the moneyed interests who supported the convention and paid for most of the delegates.

Furthermore, just as provincial congresses were, as Rakove writes, "nominally superior" to the Continental Congress "in the sense that they formally elected and instructed their delegations, in practice and in function," he adds, "they served as the subordinate administrative agencies of Congress itself."

This sort of de facto subordination would occur if we ever witness an Article V convention. Although the states would technically (constitutionally) be superior, the convention would assume the superior position, and the states would serve only as executives of the convention's resolutions.

Finally, as the foregoing rehearsal of the history of conventions and congresses demonstrates, the power that such a body could possess is immeasurable at the outset. Regardless of the narrowly tailored intent of those who might agree with them in theory, our own history reveals that in practice these extra-constitutional bodies exercise immense power, power that many of their supporters never wanted

them to wield — but exactly the sort of revolutionary, radical, irreversible power the forces behind them knew they could wield.

Regardless of promises to the contrary, there will be those who would hijack a new convention, and the cause it was called for — a balanced federal budget amendment, for example — and any noble underlying principle would be ruined by the billionaires who would be able to purchase the power to rewrite the Constitution and propel us headlong toward a plutocracy that would bring poverty for the masses.

While the push to hold a second constitutional convention is progressing in many states, there is yet time for concerned Americans with a better grasp of history than the scholars promoting the event to speak up and prevent this convention from happening.

Our knowledge of history should teach us not 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 powers assumed by similar bodies.