

PODCAST RSS A A

SHARE: EMAIL PRINT 2 19 Like 38

POSTED ON AUGUST 11, 2011 BY STEVEN HAYWARD

CON-CON-CON JOB?

So over the transom comes a notice about the [Conference on the Constitutional Convention](#) (or “Con-Con-Con” for short) up at Harvard Law School next month, which is bringing together figures from left and right to mull over an Article V constitutional convention. As the participant in a couple of successful “post-partisan” right-left efforts at compromise over some knotty-pine policy issues such as [energy](#) and [climate change](#), as well as the “[Modernizing Liberalism](#)” effort I wrote about here back in June, far be it from me to pour cold water on such an effort. This isn’t going to sport the Kumbaya mushiness of “No Labels,” for one thing. It’s going to feature prominent lefties such as Larry Tribe and Laurence Lessig, and right-thinking folk such as Instapundit’s [Glenn Reynolds](#) (Glenn will give one of the keynotes, in fact), and Cato’s very sound [John Samples](#), along with some Tea Party activists.

It is one thing to reach policy compromises even over deeply divisive policy issues such as the debt ceiling. Constitutional compromise is another matter, and it is easy to predict that the Con-Con-Con effort will make little progress for an elusively simple reason: the basic condition that made the compromises of the 1787 convention possible do not exist today. The Framers of 1787, and, significantly, their critics who became the Anti-Federalists, shared a general agreement about first principles (with one important exception which I’ll come to in due course), which made institutional compromise possible. The Framers were all believers in the creed of individual natural rights as expressed in the prologue to the Declaration of Independence, and moreover believed that limiting government required anti-majoritarian institutions such as the Senate, separation of powers, the Electoral College, and federalism, among other things. The modern left believes in none of these things, and every agenda of constitutional reform from the left calls for abolishing or weakening all of them. (See, for just one example, [Larry Sabato’s really bad book on the subject](#), and Sabato is far from being a hard leftist.) The left would like to abolish the Senate and the Electoral College, just for starters. Deep-dish thinkers like Cass Sunstein have argued for making the judiciary *more* powerful, precisely because it is more immune to popular political accountability.

For the Framers in 1787, most of their arguments were over how to limit government power and secure individual liberty most effectively, which meant they were arguing over small differences. You might almost say that the Philadelphia convention was a group of rightists arguing with themselves. Today’s left, starting at least as far back as Woodrow Wilson, who dismissed the natural rights philosophy of the Declaration of Independence and attacked the principle of the separation of powers, wants to remove as many limitations on government power as possible. As such the Con-Con-Con exercise has little hope of reaching a principled compromise over constitutional reform, and even if a suite of reforms might get the necessary ratification of three-fourths of the states, it is likely the reforms would make our political divisions worse.

The one case of where the Framers had to compromise because they had a serious difference of first principles is

instructive—slavery. Even though there was probably majority sentiment for abolishing slavery in 1787, tolerating slavery in the South was unfortunately necessary if there was to be a union and a constitution at all. And, of course, it required a civil war to resolve this problem ultimately—not an encouraging precedent for constitutional “compromise” today.

The way the modern left has willfully misconstrued the convention’s compromises over slavery is revealing and significant, as it shows the left is unable or unwilling to distinguish the first principles of the Constitution from its compromises. The left likes to criticize the Founders for their toleration of slavery, for example, by claiming the three-fifths clause means that black Americans were only “three-fifths of a person.” In fact the intent and action of this clause was to *diminish* the political power of slave states, which wanted slaves counted as whole persons for the purpose of apportioning House membership. I always have fun pointing this out to students, and asking if they’d feel better about the Founders if they had allowed *more* political power to slave states in 1787 by counting them as whole persons. It usually elicits dumbfounded looks, silence, and subject-changing to Jefferson and Sally Hemings or something.

Moreover, the entire treatment of slavery in the convention and in the text of the Constitution is significant. Note that the term “slave” is never used; instead, the drafters employed euphemisms, such as “persons held to service” or “other persons.” Even the fugitive slave clause does not use the term. Here’s an interesting point that only emerges from Madison’s notes on their deliberations. The original proposed language for the fugitive slave clause was “No person legally held to service in one state. . .” Madison himself objected to the term “legally;” he told the convention that he “thought it wrong to admit in the Constitution the idea that there could be property in men,” and that the word “legally” seemed to favor “the idea that slavery was legal in a moral view.” So the term was struck.

It is for these and other reasons that Frederick Douglass was able to make out that the Constitution was an anti-slavery document at the level of principle, yet somehow modern liberals can’t make this out at all because they have rejected the principles and logic of the Founding (following, I might add, the same ground of reasoning as Calhoun and other pro-slavery southerners of the mid-19th century, a fact that seems not to embarrass modern liberals, but this is a subject to dilate more fully another day).

Finally, one last observation. The Con-Con-Con organizers downplay the risk of a “runaway” constitutional convention on the grounds that nothing radical would ever get the approval of three-fourths of the states. This makes some sense, until you recall that the Philadelphia convention of 1787 was a “runaway” convention. How so? It was called for the purpose of revising the Articles of Confederation, and required the unanimous consent of all 13 states for revisions to be adopted. Yet what the convention produced was a wholly new Constitution that would go into effect if only *nine* states ratified it. So much for following the law as it was spelled out explicitly in the Articles. I often pose this problem to students, asking whether the convention acted illegally or unconstitutionally, or what possible justification they could claim for their acts.

Madison discussed this very problem in Federalist #43:

Two questions of a very delicate nature present themselves on this occasion: 1. On what principle the Confederation, which stands in the solemn form of a compact among the States, can be superseded without the unanimous consent of the parties to it? 2. What relation is to subsist between the nine or more States ratifying the Constitution, and the remaining few who do not become parties to it?

The first question is answered at once by recurring to the absolute necessity of the case; to the great principle of self-preservation; to the transcendent law of nature and of nature's God, which declares that the safety and happiness of society are the objects at which all political institutions aim, and to which all such institutions must be sacrificed.

In other words, Madison is here making a very delicate reference to the right of revolution as it is expressed in the Declaration of Independence—in fact this is the only place in the *Federalist Papers* where there is a distinct echo of the Declaration. I note that whenever Tea Partiers or their sympathizers like Michele Bachmann invoke the Declaration's right of revolution today, they are called "dangerous extremists." I'll happily stand with "extremists" like Jefferson and Madison any time.

About the second question Madison's long answer is less convincing, and rests ultimately on the hope, subsequently borne out, that it will be a moot point if every state ratified the Constitution, as in fact happened. Madison finally repairs behind the formula "The time has been when it was incumbent on us all to veil the ideas which this paragraph exhibits." In other words, let's avert our gaze and hope for the best. That worked then; I don't think we can do it now, because, as bears repeating, the modern left does not agree with the principles of 1787. As such, I don't want to try even agreeing with them about the lunch menu.

More from Power Line

- ▷ [IN SEARCH OF MR. GENERIC](#)
- ▷ [DO RIGHT MAN – TONIGHT!](#)
- ▷ [DOES EXCESSIVE WELFARE SPENDING CAUSE RIOTS?](#)
- ▷ [WHEN WILL THEY PEPPER OBAMA?](#)
- ▷ [DEATH THROES OF THE WELFARE STATE](#)



Add a comment...

 Post to Facebook

Posting as Boyd Atchison (Not you?)

Comment**Doug Santo**

I suppose it's a good idea for academic types to get together and discuss issues that affect society. But I just clicked on the link to the conference and in the first paragraph I read this:

"From the Right and the Left, citizens are increasingly coming to recognize that our Republic does not work as our Framers intended".

I was not aware of this phenomenon. I read a lot of media and I was not aware of any movement to convene a constitutional convention from the right or left. I do not think a significant number of citizens are coming to the conclusion that our Republic does not work as the founders intended. I for one, flatly reject that notion. I think the conclusion citizens draw from the recent debt negotiations is that our politicians are not working for the benefit of the country, more for the benefit of themselves and their...[See More](#)

3 · Like · Reply · [Subscribe](#) · August 11 at 1:09pm

**Mark Thomson** · Park College

Doug, you're RIGHT ON there. We need patriots not politicians in all areas of congress.

Have you noticed most have LAW degrees. (= no common sense)

[Like](#) · [Reply](#) · Friday at 1:18pm

**Don Curran**

As the article points out, the original Constitutional convention was in fact operating on a "very tight set of parameters," i.e., to only revise the Articles of Confederation. I would love to see a con-con to propose a balanced budget amendment, but this would definitely let the genie out of the bottle and we'd have to be prepared for most anything at that point.

[Like](#) · [Reply](#) · Yesterday at 8:28am

**Kent G. Budge**

"From the Right and the Left, citizens are increasingly coming to recognize that our Republic does not work as our Framers intended".

It's perfectly true.

The difference between Right and Left is that the Right considers this a bug and the Left considers it a feature.

3 · Like · Reply · [Subscribe](#) · Friday at 11:47am

**Rick Caird** · Top Commenter

I would love a Constitutional Convention if I had any faith it would end up building on the current Constitution, but I am more afraid it would take away.

I would like the tenth amendment enforced and Commerce Clause limited to actual interstate commerce. But, there are many who would like to restrict free speech (think AGW proponents) and others who would like to eliminate the second amendment. There are lot of people, mostly on the left, who think the whole Constitution is unduly restrictive. They would have a field day.

3 · Like · Reply · [Subscribe](#) · August 11 at 12:24pm

qualtrough1713 (signed in using Hotmail)

"The tenth amendment enforced and Commerce Clause limited to actual interstate commerce"

That points up the real problem. There isn't that much wrong with the Constitution we have, but rather the judiciary's faulty enforcement of it. Some have proposed repealing direct election of senators, but I think a smarter approach would be to take the job of appointing judges away from the president and into the hands of a randomly-selected governor. Even better, de-politicize the supreme court by filling the bench with judges selected randomly from the lower courts, serving on staggered terms, like the Federal Reserve board. When the SCOTUS term is up they revert to the lifetime appointment they had before.

That doesn't solve out-of-control spending. Repealing the 16th amendment will help. Maybe a declining ceiling on income tax rates over 20 years to phase it out. To get the states to ratify, specify that X percent of income tax revenue (X eventually rises to 100%) goes directly to the states, unencumbered.

[Like](#) · [Reply](#) · Friday at 2:17pm

**Joe Sloan** · Owner at Sloan Vazquez, LLC

On a more mundane, but equally important level, this crisis of communication is played out on a weekly basis in city council and school board meetings across the country. Locally elected representatives of all stripes are often incapable of articulating a political philosophy, and "compromise" on the school bond issue or cable contract is often reached after visits from lobbyists for the underwriter or communications conglomerate. It ain't Harvard, but it's the school where most Congressional representatives get their education.

Once upon a time, I held the notion of "government service" as a noble aspiration. That was before I spent 25 years closely observing city politics and watching many of those self-serving, egotistical Neanderthals make their way to Washington, only to carry on making decisions, without regard to principle, and voting for something that they think will help to secure their

