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DISADVANTAGES OF A FEDERAL CONSTITUTIONAL CONVENTION

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"CONVENTIONS are serious things and ought not to be repeated." These words of Charles Cotesworth Pinckney of North Carolina spoken in the closing debate of the Philadelphia Convention, September 15, 1787, are pertinent today to the suggestion sometimes bruited that in the exigency created by the latest revolutionary decisions of the Supreme Court[1] article V of the Constitution should be invoked to the end that Congress acting for the first time thereunder ". . . call a Convention for proposing Amendments, which . . . shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof . . . ." The imminence of action under this clause arises from the fact that thirty-two state legislatures have now applied for a new federal constitutional convention.[2] In 1963 the legislatures of eighteen states submitted to Congress thirty-eight applications calling for such a convention; this is almost four times as many applications as were submitted to Congress in the first century of the Constitution. Twelve of these dealt with apportionment of state legislatures.

Article V says that on application of two-thirds of the states Congress "shall" call the convention for proposing amendments. The imperative color of this word cannot be disregarded. It leaves no discretion in Congress as to the convening of an article V assembly, although it may be consistent with some control by Congress over the modalities.[3] A deliberate refusal on the part of Congress to call a convention, once the requisite number of state applications were in hand, may be expected, by enlarged analogy to what has been done in the recent civil rights cases and what is being proposed in the electoral apportionment cases, to bring into play the powers of the Supreme Court to direct the setting up of the national convention. Such a crisis is one to be avoided.

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1. Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).

2. Statement of Senator Ervin in introducing S. 2307. 113 CONG. REC. S. 11757 (daily ed. Aug. 17, 1967).

3. S. 2307, 90th Cong., 1st Sess., is an attempt to deal with the procedure of a federal constitutional convention in various respects. Some of its provisions have been pointedly criticized by Mr. Theodore C. Sorensen in testimony before the Senate Judiciary Subcomm. on Separation of Powers, Oct. 30, 1967.

The novelty and drama of this conjuncture have suggested to some that a national constitutional convention might be a good thing. It might, some have intimated, serve as a useful school in the democratic process, educate the voters on a continental scale, and give the people new opportunity to revise their organic law. Nothing in my view could be more wrong. Nothing could show more misapprehension of the nature of political organisms or the foundation of the vast structure which constitutes the American system today. A general and unlimited federal constitutional convention would at least be a futility and might be a disaster.

I. Edmund Randolph's Motion for a Second Convention in 1787

Pinckney's words were spoken in opposition to the motion of Edmund Randolph at the close of the deliberations in Philadelphia. The document prepared by the delegates not only was a mass of compromises but contained provisions or omissions unsatisfactory to many. Hence the motion was that the Constitution as drafted be submitted to conventions of the several states, and that after action by them it be re-submitted to a second convention for amendment or revision. In opposition to this proposal Pinckney urged the confusion and contrariety of views that would arise from this procedure. Elbridge Gerry, Randolph, and George Mason supported the motion, it was defeated, and they refused to sign the Constitution. Jefferson, not a delegate, considered the lack of a Bill of Rights to be a capital defect of the draft, but told Madison that he would not oppose adoption because he did not want to run the risk of a second convention. Benjamin Franklin urged the delegates to suspend their honest doubts in the hope that difficulties would work themselves out in practice.

The considerations which in 1787 militated against a second constitutional convention are vastly stronger today.

II. Character of General Constitutional Convention

The body which would be called into being by the action of Congress under article V would have revolutionary potentialities. As recently pointed out by the Supreme Court, once the procedure is set in motion, "there is no restraint on the kind of amendment that may be offered."[4] While Congress in initiating the procedure

4. Whitehill v. Elkins, 389 U.S. 54, 57 (1967).

under article V will presumably fix a time and place and specify the composition of the convention, and while it may seek to limit the kind of amendment the convention shall propose, it would seem obvious that limitations of subject matter can be of no avail. Once convened, the body of delegates to propose amendments in accordance with article V could, if they wished, raise the most fundamental questions by proposing a complete reorganization of the government. They could take the revolutionary step which the States-General of France took in 1789 in reconstituting themselves as the National Assembly. As the Supreme Court of Pennsylvania pointed out:

> A convention to amend the Constitution, without there is [*sic*] an express limitation as to the extent of their power, passed upon by the people in determining the question of amendment, has inherently, by the very nature of the case under the great principle peculiarly American, and quasi revolutionary in its character heretofore mentioned, absolute power, so far as may be necessary to carry out the purpose for which they were called into existence, by the popular will. Unless prohibited or restricted in the manner specified by the people, the convention has a right, untrammelled by mere legislative limitations, to propose to the people for their consideration and adoption any plan they may see fit.[5]

What we should be confronted with in a general constitutional convention would be, presumably, nothing like the twenty-five specific amendments which have from time to time in 170 years been adopted by separate consideration. The effort of a general convention would presumably be the herculean one of a revised and improved constitutional structure for the entire country. The changes would be embodied in the subtle, ambivalent, and refractory material which is the only instrument of the legal draftsman; that is, in words. Under present circumstances the task is hopeless.

Every lawyer knows the treacherous, chameleon-like nature of the verbiage out of which a new constitution would have to be constructed. It has long been pointed out that "[t]he same words may have different meanings in different parts of the same act and of course words may be used in a statute in a different sense from that in which they are used in the constitution."[6] Or, as Justice Holmes remarked in *Towne v. Eisner*: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought . . . ."[7]

5. Woods's Appeal, 75 Pa. 59, 67 (1874).
6. Lamar v. United States, 240 U.S. 60, 65 (1916). *See also* Towne v. Eisner, 245 U.S. 418, 425 (1918).
7. *Id.*

What are the living thoughts which a new organic instrument would be expected to take into account? Their number is great, their complexity enormous. Federal-state relationships, the rights of minorities, the problem of poverty, the new demands of urban society, the allocation of the war power as between Congress and the Executive, apportionment of votes in relation to representation in state and federal governments, the church-state relationship—these are only a few of the tensions and difficulties that now call for resolution and in respect of which the phraseology of a new constitution would have to be chosen and measured. With jealousy and cunning the strong forces active on various sides of these and other great issues will in a constitutional convention strive to bend the draftsmanship to their purpose.

Even if the correct solution of any of these problems could be sketched out in the tumult and pressures of a national convention, exactitude in formulating it cannot be expected. Delusive exactness, as has been well said, is a source of fallacy throughout the law;[8] and in any new draft of a constitution resort will have to be had, as before, to generalities. The new words and phrases chosen for the new organic instrument could not come to rest in any final meaning until generations of judicial interpretation had explored and refined their application to particular states of fact. What has happened in the last century and a half in the fluctuating interpretation of the old phrases—the general welfare clause, due process, equal protection of the laws, the commerce clause—would have to be repeated in the next century and a half in respect of the new product of a federal constitutional convention. The ultimate results could not possibly be foreseen by the draftsmen of 1968.

Rather one must anticipate that at the end of a long exegesis in the courts historians would feel the need to revise the result from a re-study of the verbal habits of the twentieth century, just as Professor Crosskey has attempted, in analyzing the existing Constitution, ". . . to provide the reader . . . with a specialized dictionary of the eighteenth-century word-usages, and political and legal ideas, which are needed for a true understanding of the Constitution . . . ."[9] Of the great generalities in which constitutions must be expressed, the proposition is especially true which the late Charles Curtis formulated for legal draftsmanship generally:

8. Truax v. Corrigan, 257 U.S. 312, 342 (1921) (Holmes, J., dissenting).

9. W. CROSSKEY, 1 POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 5 (1953).

> Words in legal documents . . . are simply delegations to others of authority to apply them to particular things or occasions . . . . They mean, therefore, not what their author intended them to mean, or even what meaning he intended, or expected, reasonably or not, others to give them. They mean, in the first instance, what the person to whom they are addressed makes them mean.[10]

So eight Supreme Court Justices now hold that the fourth amendment, adopted in 1791 to protect the right of the people "to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures," is violated by electronic surveillance of conversations in a public telephone booth.[11]

III. Grave Handicaps of Present-Day Constitutional Convention

The Philadelphia Convention of 1787 possessed unique advantages. It came together in the atmosphere of crisis created by Shays' Rebellion and other events which brought home to the delegates the peril of the Union. It was favored by the attendance of outstanding men possessed of a common intellectual background through the literature of the eighteenth century Enlightenment. "Really," Jefferson wrote to John Adams, "it is an assembly of demigods." Washington, Franklin, Hamilton, and Madison are best known to us; but the group included seven former state governors, twenty-eight former members of Congress, and eight signers of the Declaration of Independence. Filled with the gravity of their task, the delegates took measures to insure that their deliberations should be conducted with the secrecy essential to collective reflection and foresight. Only the outcome in the form of the finished document was submitted to the public scrutiny.

By contrast with the situation in 1787, delegates to a national constitutional convention of the present day would be subjected to impossible conflicts and pressures destructive of any possibility of calm deliberation. The three millions of the Atlantic fringe of settlements living principally by agriculture have now spread across a continent wholly unknown to the draftsmen of 1787 and have multiplied to a mass of 200 millions, diverse in racial origin. The simple agricultural habits of colonial times, upon whose virtues

10. C. Curtis, *A Better Theory of Legal Interpretation* in Jurisprudence in Action 132, 156 (1953).

11. Katz v. United States, 389 U.S. 347, 373 (1967) (Black, J., protesting against making the Court "a continuously functioning constitutional convention").

Jefferson relied for honest rule by the majority,[12] have given place to a prodigious complex of industry, commerce, and finance, within a statutory framework undreamed of in the eighteenth century. Even more important, the functions of government in relation to the economic activity of the country have completely altered. Whereas in the eighteenth century contacts between the government and business or agriculture were trifling, so that in the view of Jefferson and his school the only good government was a weak one, today political forces flowing from Washington or the state capitals interpenetrate, where they do not actually condition, the economic behavior of every citizen. The welfare state has come into being. Government is in business, and the business of government is very largely to divert the product of labor and industry to the maintenance or amelioration of various sections of the population, in the ratio more or less of their voting power. Hence at the present day the stakes of constitution-making are inconceivably great and differ *toto coelo* from what the delegates of 1787 had to deal with.

In these completely transformed perspectives, we must realize the handicaps to which a modern constitutional convention would be subjected. In the first place, its membership would be chiefly composed of political partisans, aligned in accordance with the economic forces, the racial or religious affiliations, and the ideologies which in more or less degree the great historic parties serve. These are the "factions" whose advent Washington dreaded. They are natural and inevitable in a democratic society, and their impact upon the processes of a national convention, however grave and momentous the issues, cannot be escaped.

In the New York State Convention of 1967, for example, the effort was originally made to select delegates for their personal eminence and character, regardless of party affiliation. This failed; delegates were chosen by the electoral process, and the convention was organized on party lines with the Democratic speaker of the State Assembly as chairman. The Democratic majority yielded to the effort of the Catholic Diocese of New York to eliminate from the existing constitution the stringent prohibition against state aid to denominational schools, in the hope of obtaining tax money for Catholic education. The new constitution with this among other revisions was on the insistence of the convention chairman submitted to the voters as an entirety, rather than in sections which would

12. Letter from Thomas Jefferson to James Madison, Dec. 20, 1787; *see* S. PADOVER, THE COMPLETE JEFFERSON 123 (1943).

have isolated the parochial school amendment for separate vote. In consequence, the entire new draft was rejected by the electorate. A federal constitutional convention will necessarily abound in divisive issues of this kind.

Moreover, the proceedings of convention delegates will be conducted in the intense glare of publicity. Every word will be transcribed. Imputations of motive, analyses, and predictions will fill the newspaper columns and flood the airways. Television will obtrude itself on the proceedings, in the name of the so-called "right of the people to know." A multitude of issues clamoring for attention will leave no time for reflection or long-range thought. With respect to the New York State Convention of 1967, for example, the Association of the Bar of the City of New York found affairs were so conducted as to preclude meaningful consideration by the convention of informed comment on such matters as the judiciary article. The schedules followed by the convention allowed only forty-eight hours for public scrutiny of that important item. In the case of a national convention, the sacred ritual of the quadrennial nominating procedure will assert itself; and the deliberations of the constitution-makers will probably have to be carried on in the atmosphere of chaos and carnival which has been developed for the nomination of presidents.

Finally, the terminology of the resultant document will have two characteristics that can be surely predicted. For one thing, it will be marked by the grandiloquence which characterizes (as shown by the *Congressional Record*) our political pronouncements. In addition, and with a view to the long-range effect upon the powerful interests, economic and other, to be affected by a new constitution, the draft produced will be loaded with the best semantic devices that the research psychologists of Madison Avenue can create.[13]

In short, a national constitutional convention in our day must of necessity be the very opposite in character and conduct of the conclave which among the groves and classic facades of Philadelphia worked out the structure of the new commonwealth which was to represent the *Novus Ordo Saeclorum.*

13. Thus the Temporary National Economic Committee, whose hearings in 1939-1940 were conducted with a view to framing legislation in the banking and financial field, devised for use in examining witnesses a phraseology, divided between "good words" and "bad words," which would color the testimony in the manner desired by examining counsel. This phraseology was created in advance of the hearings by an expert in public psychology. *See* Krock, *The Prompters and Stage Managers of TNEC Hearings*, N.Y. Times, June 7, 1939, at 22, col. 5.

IV. Irrelevance of Constitution-Making to Present Governmental Problems

In reality the concept of a new-minted organic law to reorganize and redirect the fabric of the national government is a fallacious one. The idea no doubt derives from the Philadelphia Convention and the somewhat false view of that classic episode conveyed by Gladstone's description of the American Constitution as "the most wonderful work ever struck off at a given time by the brain and purpose of man." Justified in some degree, this is also misleading. The Constitution of 1787 was by no means a new creation. It had been preceded by many political instruments on this side of the Atlantic. It codified American governmental experience as well as the principles which the draftsmen derived from the Magna Carta, the British constitution as represented by Blackstone, Montesquieu, and the Greek confederacies described in Plutarch or Aristotle. Behind the Constitution lay the Articles of Confederation (1777), and behind that the defense arrangements of the United Colonies of New England (1643), the Albany Conference of Four Colonies to Concert Measures against the Indians (1684), William Penn's aborted plan of union (1697), and the plan of union proposed by Benjamin Franklin in 1754 to commissioners of seven colonies for dealing with the French danger. Experience had also been gathered from the Stamp Act Congress which met in New York in 1765, as well as the First and Second Continental Congresses.[14]

Not only are the words of the Constitution a codification of experience, but on them as a result of long usage and judicial interpretation has been evolved a living governmental structure. This encloses political processes of great subtlety and delicacy, independent of, even though originating from, the instrument of 1787. As Justice Holmes said in *Missouri v. Holland*,

> [W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation.[15]

The Constitution we now have is much more than the few hundred words of the Philadelphia draftsmen. It is the entire fabric

14. *See* C. Burdick, The Law of the American Constitution 3-22 (1922).
15. 252 U.S. 416, 433 (1920).

of usage, understanding, political behavior, and statutory implementation, erected on that base and compounded with the glosses of many judicial decisions. Evolution has brought changes which habit has confirmed. One instance is the transformation of the electoral college. Thus the American political structure is a complex living organism, no longer a mere document. To interrupt its functioning by an attempted general revision of the original framework would be an experiment presumptuous in nature and fraught with peril. To such an attempt might fitly be applied the words used by Edmund Burke with regard to the British constitution:

> An ignorant man, who is not fool enough to meddle with his clock, is however sufficiently confident to think he can safely take to pieces, and put together at his pleasure, a moral machine of another guise, importance, and complexity, composed of far other wheels, and springs, and balances, and counteracting and co-operating powers.[16]

As a nation we have reached that stage of maturity, we are so much a going concern, that our constitutional development must be allowed to proceed, as in the six generations just passed, by the accretions of use and practice. As with the British constitution, its essence resists definition. Jefferson records a dinner conversation in 1791 at which John Adams and Alexander Hamilton differed as to what the British constitution really was. Said Adams: "Purge that constitution of its corruption, and give to its popular branch equality of representation, and it would be the most perfect constitution ever devised by the wit of man." Hamilton said: "Purge it of its corruption, and give to its popular branch equality of representation, and it would become an *impracticable* government: as it stands at present, with all its supposed defects, it is the most perfect government which ever existed."[17] Blackstone, after describing the three branches of King, Lords, and Commons, thought the British constitution was so admirably tempered and compounded that nothing could endanger or hurt it but the destruction of this equilibrium. He thought that, if the independence of any one of the three was ever lost, "there would soon be an end of our constitution," and the people would be "reduced to a state of anarchy."[18] Walter Bagehot in writing *The English Constitution* knew better. Development since his time has gone even further in concentrating

16. E. BURKE, *Appeal From the New to the Old Whigs* in 3 WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 111 (H. Bohn ed. 1855).

17. PADOVER, *supra* note 12, at 1211.

18. 1 BLACKSTONE, COMMENTARIES Introduction § 2.

all power in the House of Commons, so as to create a political system more flexible and more responsive to the popular will than any other, and as stable as our own.

This course of steady constitutional evolution is the only one practicable for a society of the size and complexity of the United States. For individual amendments, separately weighed and considered as codified solutions of separate problems, there is always room. It is the daring innovation of a great assize to rewrite the classic document of 1787 which seems to me the height of presumption and the source of disaster.