CONSTRUCTS OF A CONSTITUTIONAL CONVENTION
(Abridged)

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"And the men who hold high places must be the ones to
start to mould a new reality closer to the heart."
- Geddy Lee [2]

Part One - Answer to Question C.

Like mariners tossed for 250 years in thick weather on an unknown sea who have come upon the earliest glance of the sun, let us take our latitudes and ascertain how far the elements have driven us from our true course.[3] We are, in fact, like Odysseus, who in a moment of pure reason ordered himself tied to the mast of his ship and his crew to plug their ears lest they succumb to the deadly song of the sirens.[4] We placed the authority to decide, outside our control, in the hands of our government and they dutifully rowed us onward, their only guide: the Constitution. Although our government never heard the sirens, they also never heard us imploring them to steer clear of the storm brewing on the horizon.

The anti-federalist prophecies of expansive national government have materialized. We should hasten to dispatch our representatives to the cause of a second constitutional convention. The ratifiers prescribed the appropriate remedy in Article V of the Constitution. [5]. The representatives should be instructed by the original intent of the first ratifiers and given the solemn charge of proposing amendments that will make the practice of the government better satisfy that intent.[6]

I. The Parameters of the Convention

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[2] Rush. Closer to the Heart. 1977.
[3] Daniel Webster, Second Reply to Hayne, U.S. Senate, Jan. 26, 1830.
[4] If I Implore You and Order You to Set Me Free p. 561
[5] US Const. Article V, 1776.
[6] As expressed in the Federalist and Anti-Federalist papers.

The instant problem is how to set out the mandate of the convention. The founders' blanket criterion of "evaluating the constitution on its ability to endure" offers little guidance. Ours will specifically need a scope of authority similar to the 1787 convention.[7] The first convention's mandate was only to amend the Articles of Confederation. The present convention should be bound to the Article V rules of calling 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."[8]

When the founding fathers cast aside their mandate to amend the Articles of Confederation[9] and set out to design a national government that acted on individuals as opposed to states, they set the first American precedent for invoking prerogative. Because only 11 of the 13 states ratified a document that exceeded the mandate of the convention, there is an alternative argument that the 11 states, which entered into the new union thereby seceded from the Articles of Confederation, leaving Rhode Island and North Carolina as the only two states left.

The statesman's right to use prerogative is natural and inalienable. The paradox of "using the text of a document to authorize changes to that same document" lends supremacy over the convention to the best delegate. He would know every rule of the convention and thus he would also know that he wasn't bound by the rules of the convention. Once the new drafters are convened, the answer to the meta-question of who has the power to decide becomes self-evident: they do.

The prevailing point is that the original drafters invoked prerogative, of which, John Locke was also an early proponent. He defined prerogative as the authority of a ruler or government to violate the law for the benefit of the whole, later to be confirmed by the whole.[10] When their work product was ultimately confirmed (ratified) by 11 of the 13 states, the founders' action was sanctified. If prerogative is invoked again, a criterion for evaluating the success or failure this constitution will be whether it can be confirmed by the whole.

II. Substantive Decisions

History teaches us that the disparate opinions of the disparate states will appear amongst the delegates. The states-righters and nationalists, republicans and democrats and urban and rural ought to clash and ultimately compromise on middle-ground as

[7] From Charles Warren, The Making of the Constitution (1928) p. 16 re: The Supremacy Clause and the Negative.
[8] US Const. Art. V
[9] Records of the Federal Convention, The Progress of the Supremacy Clause, James Madison Wednesday May 30. (RB Supp. 463)
[10] From Blecker: Policing the Boundaries on Locke's 2nd Treatise (RB Supp. 197)

Madison predicted would happen early on in 1787.[11] In other words, this convention is likely to produce a similar work product to that of the first convention: something within the 40-yard lines. As the ancient Greek philosopher Thales proclaimed: unity is found among diversity.[12]

Like the original framers, our convention must look to the ancient Greeks such as Plato[13], Solon and Thales for the cogs of a constitutional apparatus. Solon said that he gave his people not the best constitution he could design, but the best that they would accept.[14] His idea of a constitution was one of laws driven by demonstrable truth and proof.[15] Thales' theme was unity through diversity, which became the motto of the US Constitutional structure: 'E Pluribus Unum' or 'out of many, one'.[16] Plato identified the seven constitutions and warned that in the rule by one, a monarchy may devolve into a tyranny; in the rule by few an aristocracy may devolve into an oligarchy and in the rule by the many, a democracy may devolve into a mob-archy.[17] When the founders looked to Plato, they decided that the best option was a blend.

Irrespective of whether the convention invokes prerogative or abides Article V, many of the 1787 premises still resonate. The same debate between states rights and a strong national government existed at the time of the original convention.[18] We are still searching for the appropriate degree of power to be vested in each coordinate branch of government; we still want our constitution to be an enduring charter of freedom, yet we still have states that contend their right to nullify or even secede from the compact; and we still fear tyranny above all else, just at the framers "wiffed it" in every breeze.[19]

Just as Heraclitus said that you can "not step twice into the same river; for other waters are ever flowing on to you"[20], it would be an outright falsehood to say that all of the necessary conditions, which lead to the outcome of the first constitutional convention remain in place today. Notwithstanding that logic, the keystone emotive understanding of the greatest evil as tyranny and the greatest good as liberty continues to emanate from the penumbras of our souls.[21] The founders knew that power's victim was liberty.[22] The drafters of any revised Constitution must bear in mind as necessities,

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[11] James Madison to George Washington April 16, 1787 (Antifederalist Papers p. 32)
[12] Constitutionalism in Ancient Greece, Blecker (RB Supp p. 25.)
[13] The Federalist Papers, no. 49, p. 310 James Madison
[14] Constitutionalism in Ancient Greece, Blecker (RB Supp p. 25.)
[15] Id.
[16] Constitutionalism in Ancient Greece, Blecker (RB Supp p. 17)
[17] Constitutionalism in Ancient Greece, Blecker (RB Supp p. 78)
[18] Id.
[19] Speech on Conciliation With the Colonies, Edmund Burke.
[20] Constitutionalism in Ancient Greece, Blecker (RB Supp p. 74.)
[21] Power and Liberty: A Theory of Politics, Chapter III, Ideological Origins of the American Revolution, Bernard Bailyn p. 82.
[22] Power and Liberty: A Theory of Politics, Chapter III, Ideological Origins of the American Revolution, Bernard Bailyn p. 82.

whether the amended constitution will absolutely restrict the government's use of power to the protection of liberty as the founders did. Power is aggressive and liberty is always "skulking about in corners" lamented John Adams.[23] The fountainhead principle of our convention shall be that the only appropriate use of power is the defence of liberty.

If the ancients provided the cogs of our republic, then John Locke who said "all political power is the right to make laws with the attached penalty of death", provided the motor. Locke drew a distinction between the laws of man and natural law, or laws derived from God. He invoked the question, "who shall be Judge?"[24] This question became the construct question of evaluating every constitutional issue. Is it to be decided by state or federal; executive, legislative or judiciary; congress or constitution or convention (prerogative)?

Locke said that at the core level, man would prefer to be in a state of pure nature, even with its anarchy, than he would to be in an absolute monarchy. The framers spent much of their time debating protections against just such a monarchy. James Madison said "The accumulation of powers in the same hands … may justly be pronounced the very definition of tyranny."[25]

A cardinal difference in degree between the 1787 convention and this one is that we are called to order by fear of tyranny and an overpowering national government. Ironically, the first convention was called for fears of anarchy under the Articles of Confederacy.[26] (This is not to refute that the delegates of the 1787 convention feared tyranny most, or that every revolutionary principle was the abhorrence of tyranny, only that the impetus for the convention was a fear of anarchy.) Thus, this convention will be spirited towards federal purity, as opposed to stronger nationalism. If there is a spectrum ranging from 0% states rights to 100% states rights, in order to be ratified, the amendments planned by the new convention should be plus or minus 10% of what the original framers gave us at the first convention if it is not to be too radical for ratification. As Solon and the founders knew, you cannot give the people a better constitution than that which they will accept.[27]

The new convention must also contemplate where this Constitution derives its own power – the people or the states. By virtue of that decision, it must then also consider upon whom it may act, the people of the nation, the state governments, or the body of people within each state. This was critical in debate on the ratification to the original constitution.[28] Special state constitutional conventions were to be called to

[23] Id. 83.
[24] From Blecker: Policing the Boundaries on Locke's 2nd Treatise (RB Supp. 205)
[25] Federalist 47 James Madison (Federalist Papers p. 298)
[26] Federalist 15 Alexander Hamilton (Federalist Papers p. 100)
[27] Constitutionalism in Ancient Greece, Robert Blecker p. 25
[28] Method of Ratification (Antifederalist Papers p. 126-127)

better reflect the will of the people within that state. Thus if the majority within that state were to fail to ratify at the special convention, that state would not have acceded to the union. If that state had the power to accede to the union, it then must as a corollary have the power to secede.[29]

The new constitution should interpret whether a state may nullify a law passed by the federal government or secede from the union and conversely whether the federal government may negative a state law as the framers did.[30] This is critical to defining the line between state and federal power. If a state has the power to secede from the union, it therefore - as a lesser power - has the ability to nullify federal law. This is propounded in debate by Hayne invoking James Madison's name and calling nullification the "extreme medicine of the state."[31] It should be addressed explicitly in the constitution. If it is possible, to secede or nullify, then there should be a special tribunal created to adjudicate disputes between states and the federal government to prevent another nullification crisis.

The drafters should also consider whether it is ever appropriate to have the federal government do a task that could be done better by a state. The Articles of Confederation read "Each state shall retain and enjoy as much of its present Laws, Rights and Customs, as it may think fit, and reserves to itself the sole and exclusive regulation and government of its internal police."[32] As William Patterson noted: despite the fact that the Articles of Confederation had tried pure state sovereignty,[33] state sovereignty was still more popular with the people in June of 1787 than a strong national government.[34] He went on to note that when concentration of power occurred in a national legislature in England, it was like a "poison" and were it not for the purity of the tribunals of justice, private rights would want for security.[35]

The gradual loss of states rights is not a trivial and ought to give us pause. States rights and individual liberty are inextricably linked. A greater degree of national government means certain states (viewed as regions of population) are more likely to feel their liberty constrained under excessive use of pre-emption while others are more likely to benefit. Moreover, the same outcome could be resolved on a state-by-state basis if left to their devises. A smaller federal government necessarily implies more regionalization, a net gain in the average liberty felt by a given individual and a greater number of individuals that perceive that gain in their liberty. In other words, what is good for the goose is not necessarily good for the gander and states rights beget greater freedom.

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[29] As argued by Webster characterizing Hayne on p. 729
[30] Debate on Veto of State Laws (Antifederalist Papers p. 82)
[31] Webster/Hayne Debate (RB Supp. 746)
[32] Articles of Confederation: First Draft (Dickinson Draft) Article III (RB Supp. P. 400)
[33] Debate of the New Jersey Plan, June 16, 1787 (The Anti-Federalist Papers, p. 69)
[34] Id. p. 65
[35] Id. P. 68

The new constitution must contemplate which powers it concentrates in which branches of government and whether it properly sets one power in opposition to another. This was considered by the framers and expounded by Gouvernor Morris in 1787.[36] It must ultimately decide whether the document will impose negative rights on the federal government by enjoining it from acting in all areas not explicitly delegated by the constitution or positive rights permitting it to act in almost any circumstance. The 10th Amendment to the US Constitution leads us to believe that our present constitution is a document of negative rights reserving the remainder to the states, while the necessary & proper clause, combined with the general welfare and supremacy clauses, lead us to believe the converse. This debate was at the forefront for the framers[37] and continues today.

In Federalist 10, Madison is concerned about ideological collections of power called faction but asserts that the geographical expanse of America will make it impossible for the majority to find itself.[38] Modern technology changes all this. Constitutional republics more frequently degrade into anarchy than tyranny, thus if the ideological faction is permitted from the majority, how will the new constitution handle it?

Through regionalization and reduction in the size of the federal government, the earliest federal powers would return to prominence. Those being primarily the military powers and the courts, as exhibited by the stated purpose of the Articles of Confederation as "for their (the States) common Defence, the Security of their Liberties, and their mutual and general Welfare."[39] This adaptation would refocus energy on national security, making us more powerful abroad.

We should employ the same criteria for analysis as the drafters if we are to amend our constitution. If we fail to employ these, we will feel the loss of liberty and will find ourselves on the slippery slope towards socialism and tyranny. We may suffer the loss of the American dream and even civil war as our union is torn asunder. Like Odysseus who ordered his sailors to strap him to the mast, if we are to unbind ourselves and re-mold our plan, we must be in a place of even higher reason to re-bind ourselves to a new constitution that will endure.

[36] Debate on State Equality in the Senate, Gourverneur Morris (Anti-Federalist Papers p. 107)
[37] Opposition to the Constitution, George Mason, September 7, 10, 15, (Anti-federalist Papers p. 175)
[38] Federalist 10, James Madison (Federalist Papers p. 72)
[39] Articles of Confederation: First Draft (Dickinson Draft) Article III (RB Supp. P. 400)