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Book Review: Constitutional Brinkmanship: Amending the Constitution by National Convention. by Russell L. Caplan.

Richard S. Kay

place to undertake a searching examination of the philosophical elements in the orthodox doctrine of naturalistic evolution. But then where *may* the intellectual case against naturalistic evolution be fairly considered? Nothing in the Constitution prevents universities from providing a forum for dissent, including theistic dissent from naturalistic evolution. The only problem is to overcome the prejudice which makes so many intellectuals identify naturalism with reason itself, and which causes them to accept uncritically Darwinist assurances that any dissenters must either be ignorant of the evidence or misunderstand "how science works."

CONSTITUTIONAL BRINKMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION.

By Russell L. Caplan.[1] New York: Oxford University Press. 1988. Pp. xxii, 240. $27.00, cloth.

Richard S. Kay[2]

Two or three years ago people began to notice that thirty-two state legislatures had filed petitions requesting Congress to call a national convention to propose an amendment to the Constitution requiring a balanced budget. This number was (and remains) two short of the two-thirds of the states that article V specifies as necessary to mandate such a convention. For many commentators a second national constitutional convention seemed uncomfortably imminent. The *Washington Post* called it "a terrible idea" that would "be a mess—and could threaten our structure of government and guaranteed liberties."[3] The *New York Times* said a convention would be "fraught with the danger of runaway revision."[4]

This reaction was nothing new. The convention method of proposing amendments has never been used. Each time we have come anywhere close, the same kind of alarm has warded it off.

In this book, Russell Caplan has provided the first modern scholarly volume on the national constitutional convention contemplated in article V. It is an extremely useful addition to the literature of constitutional change. Caplan approaches the subject in two parts. In the first he examines the history of the "constitutional convention," from its origins in seventeenth century England to the

1. Attorney, United States Department of Justice.
2. Professor of Law, University of Connecticut.
3. Wash. Post, May 9, 1988, at A14, col. 1.
4. N.Y. Times, Aug. 18, 1987, at A24, col. 1.

American conventions of the revolutionary and constitution-making eras, to the more or less regular attempts to secure a convention for a variety of purposes and the reactions to those attempts. In the second part he addresses a series of disputed legal questions concerning a convention, should it ever be called or meet. These include the content, form and timing of state applications, the regulatory or reviewing power of Congress or the courts, and the breadth of the powers permitted to the convention itself.

The interest these questions hold is related to the general fear such conventions have inspired in modern observers. In particular, critics have worried that a convention called to consider one type of amendment might decide to open up the whole Constitution for revision. It may become a "runaway convention." Such an event, it is argued, would be a profound threat to the individual rights protected in the Constitution, especially in the Bill of Rights and the fourteenth amendment. Caplan notes that the more serious recent attempts at an article V national convention have been aimed at limiting income taxes, stopping school desegregation and busing, reserving legislative apportionment decisions to the states, restricting abortion, and balancing the federal budget. The threat from a "runaway" convention, therefore, seems not so much to constitutional rights plainly embedded in the constitutional document, as to a series of judicial decisions whose connection to the text or history of the Constitution is, at best, profoundly controversial. Even the most recent drive for a convention to propose a balanced budget amendment received significantly more attention in the wake of the decision in *Bowsher v. Synar*[5] holding invalid the Gramm-Rudman budget scheme.

The uneasiness about a new constitutional convention, therefore, has on its face a certain anti-democratic aspect. A convention would not jeopardize the existing Constitution understood as some particularly important act of the "people." It would endanger a set of rules and doctrines created by judges in the distinctly anti-majoritarian process of constitutional litigation. Even the original Constitution, created by a narrow class of people now long dead, can hardly compete with a freshly elected convention in democratic legitimacy. The competition in that regard between a new convention and the "non-originalist" law of the Supreme Court is even more one-sided.

The potential impact of a convention on constitutional law depends, of course, on exactly what the delegates might be able to do. Caplan thinks that limits can be placed on the convention's

5. 478 U.S. 714 (1986).

agenda.[6] He argues that state applications may, and possibly must, specify specific subjects for amendments. Those subjects define the Convention's legitimate field of deliberation. Congress, on the other hand, is strictly limited in the degree to which it may interfere with the form or content of Convention proceedings. It may prescribe "housekeeping" matters such as the time and place of the meeting or the apportionment or qualifications of members. But it may not specify the necessary majorities for convention action or when the convention must adjourn.

Caplan contends, moreover, that these and many other allocations of authority are judicially enforceable. In the first instance Congress may enforce its idea of the convention's limits by refusing to submit its proposals to the states. But a state could challenge that refusal in court and "[i]f the reason offered by Congress for nonselection [of a means of ratification] was that the amendment was nonconforming, quite possibly the court would make the determination itself, and if it upheld the amendment, direct Congress to choose a mode and submit the measure for ratification." Likewise if the convention tried to bypass Congress's role in submitting the measure to the states "Congress would be able to obtain an injunction to prevent enforcement . . . ."

These rather definite declarations are supported with a wide array of material. Caplan reasons from the language of article V itself. He cites the actions and debates of the Philadelphia Convention of 1787 and the ratification debates. He relies, as well, on precedents from state constitutional conventions and state court judgments relating to those conventions. He refers to learned treatises and law review articles. That is, his conclusions are supported by the same kinds of materials we would expect to find in an appellate brief. This form of argument, the certainty with which he states his positions and his expectation that courts would have the last word, all seem to assume that the nature of a national constitutional convention turns on the application of rules and principles of law.

The correctness of that assumption, however, is one of the most interesting questions connected with constitutional conventions. The doubt that such a convention is amenable to legal restraint underlies the great wariness with which convention proposals are greeted. In his historical discussion Caplan shows

6. *Compare* Van Altyne, *Does Article V Restrict the States to Calling Unlimited Conventions Only—A Letter to a Colleague*, 1978 DUKE L.J. 1295 (subject matter of convention may be limited) *with* Dellinger, *The Recurring Question of the "Limited" Constitutional Convention*, 88 YALE L.J. 1623 (1979) (contra).

how often proposals for a convention have been opposed precisely because they were so likely to be unlimited by any law. The most illustrious example is of course the adoption of the Constitution of 1787-89. The Philadelphia Convention had no license in law for its existence. It exceeded the boundaries set for its work by the Continental Congress and in the states' commissions to their delegates. Congress had limited it to suggesting revisions and alterations to the Articles of Confederation. Instead it drafted a profoundly new charter. As Caplan explains, the proposed Constitution became law after a process of ratification that was plainly at odds with the Articles' own requirements for amendment.[7]

All this was justified at the time by the claim that the approval of the state ratifying conventions invested the Constitution with a political legitimacy that overcame any defect of law. The founding generation understood those state conventions to be capable of expressing the endorsement of the sovereign people in whose hands any constitution, any law was "clay in the hands of the potter."[8] The sanction of the people, wrote Madison in *The Federalist* No. 40, would "blot out antecedent errors and irregularities."[9]

Constitutions ordinarily cannot be the creatures of the law. They provide the basis for all other law but they themselves rest on no legal basis. Their authority is necessarily political. The constitutional convention is the most convincing institutionalization of that unincorporated and ill-defined, but critical, political authority. The people who call such conventions and the people who react to them, may well regard them as outside and above the law. In response to an argument that the 1821 New York constitutional convention was limited in the revisions it could effect, one delegate announced: "Sir, we are standing upon the foundations of society. The elements of government are scattered around us."[10]

The idea that the constitutional convention has powers superior to any form of positive law is apparent in assemblies bearing that name as far back as the seventeenth century. When the powers-that-were decided to terminate the protectorate of Richard

7. *See* Kay, *The Illegality of the Constitution*, 4 CONST. COMM. 57 (1987). For an argument that the Constitution was legally adopted see Amar, *Philadelphia Revisited*, 55 U. CHI. L. REV. 1043 (1988).

8. Wilson, *Lectures on Law*, in 1 THE WORKS OF JAMES WILSON 375 (J. Andrews ed. 1896).

9. THE FEDERALIST No. 40, at 253 (J. Madison) (C. Rossiter ed. 1961).

10. Caplan devotes a few pages in his preface to this persistent "convention-as-sovereign notion" and also notes that legal restrictions cannot as naturally be applied to conventions that propose whole new constitutions (like the Philadelphia Convention) than to those that merely propose amendments. On the whole, however, his arguments presume the existence of an applicable and binding law.

Cromwell and invite back Charles II in 1660, they wished, as much as circumstances allowed, to revert to procedures authorized under the law of England as it existed before the Civil War. A body was elected that was very like a Parliament but could not in law *be* a Parliament because it was not summoned by the king. While this group called itself a Parliament the legal defect caused it to be known popularly as a mere convention.[11] Similarly in 1688-89, after the invasion of William of Orange and the flight of James II, the assembly that offered the throne to William and Mary could not be a Parliament because it was convened by William who was not yet a king. It too became known as a convention.[12] In the same period irregular assemblies in many of the colonies were also called conventions. These conventions, in other words, were defined by the presence of legal flaws. But they did things that no legally assembled body could have done. A member of the Commons House of the 1688-89 Convention vainly reminded his colleague that "Parliaments that are Called by Kings, cannot make Kings, much less can a Convention not Called by a King . . . ."[13]

Remarkably, the very thing that made the convention-assemblies improper, their nonconformity with existing law, was what invested them with special authority. They appealed not to the law but to the source of the law's power. In 1688-89, although the Convention itself was deliberately ambiguous as to the legality of its actions, some pamphleteers, at least, suggested that the Convention, reflecting the sense of the people, was under no limitations. One suggested that it "seemeth to be something greater, and of greater power, than a Parliament."[14]

Likewise the fact that the eighteenth century American conventions were conceptually separate from any ordinary legislature came to be seen as their greatest virtue. Indeed Hamilton argued that it was the Articles of Confederation whose legitimacy was suspect because they proceeded from no source more fundamental than the legislatures. He wished to lay "the foundations of our national

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11. *See* Jameson, *The Early Political Uses of the Word Convention*, 3 AM. HIST. REV. 477, 481-82 (1898). Jameson also notes a number of earlier uses of the term "convention" in connection with "a parliament of defective or imperfect legality." *Id.* at 482-84.

12. *Id.* at 479; E. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 107 (1988).

13. *Quoted in* H. NENNER, BY COLOUR OF LAW 175 (1977).

14. *Caplan quoting* Jameson, *supra* note 11, at 479 n.3 which itself quotes *A Brief Collection of Some Memorandums: or, Things Humbly Offered to the Consideration of the Members of the Great Convention and of the Succeeding Parliament* (1689). *See also* R. ASHCRAFT, REVOLUTIONARY POLITICS AND JOHN LOCKE'S TWO TREATISES OF GOVERNMENT 566-68 (1986); E. MORGAN, *supra* note 12, at 107-10.

government deeper . . . ."[15] When the propriety of initiating a new Constitution by such an irregular procedure was raised in Philadelphia, Gouvernor Morris felt no embarrassment in replying that the argument "erroneously supposes we are proceeding on the basis of the Confederation. This convention is unknown to the Confederation."[16]

Such precedents, of course, might not be applicable to a national convention called under article V. Those other conventions were anomalies in the existing legal system. They had no law to justify their actions. An article V convention, on the other hand, might be very much the creature of existing law. It would owe its existence, and presumably its powers, to the Constitution of 1787.[17] It is much easier to see it as subject to rules inferred from article V. But this characterization is not inevitable. The creators of article V may have contemplated something like the Philadelphia Convention or the ratifying conventions which were not themselves provided for by law. Caplan notes that the advocates of the convention-proposal method wanted to provide a route of constitutional change that did not depend on initiation by the congress—one that bypassed the ordinary institutions of government. The drafters of the Confederate constitution thought it necessary in their article V to provide explicitly that a constitutional convention could only consider the amendments proposed by the petitioning states. Even if they contemplated a limited convention, the enactors had the experience of Philadelphia before them. They must have understood that it was impossible to be certain what a convention might do or how effective it might be.

H.L.A. Hart elaborated the idea of a rule of recognition that provides criteria for the validity of all law in a legal system. He emphasized that such a rule is, itself, a rule of law when viewed from inside the legal system. It is, however, when considered from a viewpoint external to the legal system, also the expression of a social and political fact.[18] No feature of American constitutional law more vividly illustrates the dual character of the basis of a legal system than the convention feature of article V. It may be an instance of the law expressly recognizing the non-legal facts on which

15. THE FEDERALIST NO. 22, at 152 (A. Hamilton) (C. Rossiter ed. 1961).

16. M. FARRAND, 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 92 (1911).

17. "The constitutional convention, then, I consider as an exotic domesticated in our political system, but in the process so transformed as to have become an essentially different institution from what it was as the Revolutionary Convention." J. JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS: THEIR HISTORY, POWERS AND MODES OF PROCEEDING 15 (1887).

18. H. HART, THE CONCEPT OF LAW 108 (1961).

all law depends (in this case the supposed approval of the people) and the possibility that those facts may change. The provision for a convention may be likened to a window looking out of the neat familiar legal system onto the untamed and unknowable political wilds.[19]

This basic ambiguity about the nature of the national convention of article V has, of course, never had to be resolved because such a convention has never met. Judicial treatment of state constitutional conventions has been conflicting. Sometimes challenges to the actions of such conventions have been treated no differently than cases involving the powers of a public utilities commission or any other agency created by and limited by law.[20] But other courts have treated these conventions as *sui generis* and, if not exactly free from all legal constraints, certainly not subject to ordinary law.[21] A review of the history of state conventions[22] compels the conclusion that those bodies are regarded as subject to law when they fail (for whatever reason) to get their projects adopted. They are treated as above the law when their extra-legal actions are accepted and take root. It is impossible to discover, as Caplan tries to do, by consideration of precedents and abstract principles, what a new federal convention may or may not do.[23] Only after the dust has settled will we know which side of the window the convention was on.[24] The old doggerel about treason is entirely apt:

> Treason doth never prosper, what's the reason?
> For if it prospers, none dare call it Treason.[25]

No matter how far they transgress existing rules, successful

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19. *See* J. JAMESON, *supra* note 17, at 11.

20. *See, e.g.*, State ex rel Kvaalen v. Graybill, 159 Mont. 190, 496 P.2d 1127 (1972). *See also* In Re the Constitutional Convention, 14 R.I. 649, 654 (1883).

21. *See, e.g.*, Kamper v. Hawkins, 3 Va. 20, 74 (1793) (opinion of Tucker, J.); Stander v. Kelley, 433 Pa. 406, 250 A.2d 474 (1969) *cert. denied sub nom.* Lindsay v. Kelley, 315 U.S. 827 (1969). The Pennsylvania Supreme Court held that a challenge to the actions of the 1968 constitutional convention was justiciable and it could decide whether amendments proposed by the convention and approved in a referendum were "violations of the existing Constitution." 433 Pa. 406 at 412, 250 A.2d 474 at 478-79. It further held that the procedures and restrictions that applied to the express constitutional method of amending did not apply to convention proposals. *Id.* at 416-21, 250 A.2d 474 at 479-81.

22. In addition to Caplan's book this history is reviewed in R. HOAR, CONSTITUTIONAL CONVENTIONS: THEIR NATURE, POWERS, AND LIMITATIONS (1917 reprinted 1987) and J. JAMESON, *supra* note 17.

23. *See* R. HOAR, *supra* note 22, at 46-48 (discussing the Massachusetts convention of 1853 and judicial reaction to it).

24. *See* Taylor v. Commonwealth, 101 Va. 829, 831 (1903); Miller v. Johnson, 92 Ky. 589 (1892).

25. Harrington, Epigrams IV.5. (1612) (*quoted in* THE OXFORD ENGLISH DICTIONARY Ti-Tz 304 (1933)).

constitutional conventions, like those of 1787-89, are unlikely to be perceived as outlaws. If they prosper, they will be founders.

A HISTORY OF THE AMERICAN CONSTITUTION. By Daniel A. Farber[1] & Suzanna Sherry.[2] St. Paul, Minn.: West Publishing. 1990. Pp. xxii, 458. $23.25 paper.

William M. Wiecek[3]

The flourishing condition of legal history in American law schools and history departments has produced a spate of valuable documentary collections for use in the classroom. These are of incalculable benefit to teachers of legal history. Farber and Sherry's *History of the American Constitution* joins this corpus of teaching books, and a welcome addition it is.

The earlier documentary compilations for classroom use in legal history, including those by Max Radin,[4] Mark DeWolfe Howe,[5] Joseph H. Smith,[6] and Spencer L. Kimball,[7] reflected assumptions about the teaching of legal history courses in law schools that seem outmoded today. They seldom distinguished between public and private law, and they included both English and American materials. They were Langdellian casebooks, doctrinal in emphasis, containing little that was not derived from published appellate opinions. They reached far back into English history to trace the origins of doctrines or precedents but made little effort to provide non-legal historical background or explanatory material that would embed legal documents in the larger social matrix. They were indifferent to modern American legal developments.

The preeminent modern documentary compilation, Smith and

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1. Henry J. Fletcher Professor of Law, University of Minnesota.

2. Professor of Law, University of Minnesota.

3. Congdon Professor of Public Law and Professor of History, Syracuse University.

4. M. RADIN, HANDBOOK OF ANGLO-AMERICAN LEGAL HISTORY (1936) (a student hornbook).

5. M. HOWE, READINGS IN AMERICAN LEGAL HISTORY (1949). Howe's collection, like its other pioneering contemporary, HART AND SACKS' LEGAL PROCESS, was never conventionally published; it was photocopied from typescript, printed on less-than-print-quality paper stock, and issued as a "temporary edition." Fortunate the law library that possesses a copy today! Howe's collection was distinguished by its sensitivity to historical context and its partial transcendence of the doctrinal.

6. J. SMITH, CASES AND MATERIALS ON THE DEVELOPMENT OF LEGAL INSTITUTIONS (1965).

7. S. KIMBALL, HISTORICAL INTRODUCTION TO THE LEGAL SYSTEM: CASES AND MATERIALS (1966).