What is a Constitutional Convention?

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WHAT IS A STATE CONSTITUTIONAL CONVENTION?
‘CONSTITUTIONAL ASSEMBLY’ AS PROPOSED DEFINITION

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ABSTRACT.
‘State constitutional assembly’ is defined along with three subsidiary definitions; difficulties are addressed and solutions proposed; a survey of the 994 assemblies (1775 to 2010) is supplied, and the proposed definition defended; issues for further development are noted.

KEY WORDS. constitutional convention; state constitutional assembly.

A. INTRODUCTION. The literature has failed to define ‘constitutional convention.’ Webster’s online dictionary directs us to samples of constitutional conventions such as the Philadelphia convention of 1787.

A working definition is proposed, with attention to ‘states,’ that is, political units of the United States:

A meeting of persons with credentials (defined below) who consider changes in organic text or form of government (defined below) which proceedings satisfy minimum norms of behavior (defined below).

The reader will note, for future reference, that this definition is not limited to constitution conventions in the United States, state or federal.

Passing references in the literature do not target the necessity of the three subsidiary definitions: credentials as input, text and structure as output and norms of behavior in the ordered discourse through which the conventioneers produce their results and/or consider proposals.

In the best survey to date, 233 state constitutional conventions have been identified in the interval 1775 and 1986. See Dinan, The American State Constitutional Tradition, 2006.

The difference between that figure and the 994 constitutional assemblies argued for herein, is a measure of the greater range of the definition presented in this article. In short, and as explained below, any effort engaged by credentialed individuals in ordered discourse which considers any organic change (whether adopted or not and whether that change is nominally ‘state’ or ‘federal’) justifies inclusion of the effort as a constitutional assembly.

B. TABLE COMMENTS. The next three sections discuss the table annexed hereto in detail. See http://works.bepress.com/peter_aschenbrenner/

C. TYPES OF CONVENTIONS. The codes found in the third column, “Type,” denote the type of each convention. Below is an explanation of these type codes in the order of appearance.

   Or = Organizational Convention. These conventions are those which, in each state of the first thirteen states, supplied charters to each colony that lacked royal pedigree.

   Su = Supplemental Convention. This type of convention modified or created a new constitution for a state that already possessed a constitution.

   Ra = Ratification. These are the 14 conventions that considered whether or not to ratify the federal constitution.

   Ad = Admission. Admission conventions created a constitution as a step toward statehood.

   Br = Bill of Rights. These conventions considered whether or not to ratify the Bill of Rights.

   11-20, 22-27 = Amendment. These conventions considered whether or not to ratify the amendment indicated by the number. (See “Tw” below for the 21st Amendment.)
Tn = Titles of Nobility Amendment. These conventions considered whether or not to ratify the Titles of Nobility Amendment. Although there were erroneous reports that this amendment was ratified, the received wisdom, now itself doubted, has maintained that TONA has never been fully ratified and adopted.

SI = Corwin Amendment. These conventions considered whether or not to ratify the Corwin Amendment which would have made slavery legal; more precisely, which would have protected state regulation of the institution of chattel slavery from federal interference.

Re = Readmission. These conventions occurred in the eleven states that seceded from the Union during the Civil War. These conventions created a new constitution to present to Congress in order to be readmitted into the Union. Note that the conventions in which these eleven states adopted so-called secession ordinances are not listed here.

Tw = Twenty-First Amendment. These conventions considered whether or not to ratify the Twenty-First Amendment. This amendment is unique in that it repealed another amendment: the Eighteenth Amendment.

D. CONVENTION FORMAT. Constitutional conventions have taken different forms. Below is an explanation of the codes found in the fourth column, “Format,” of the table.

SLS = State Legislative Session considering Congressionally proposed Article V amendment.

SCC = State Constitutional Convention as Traditionally Convened Independent Body.

SLC = State Legislature convenes itself as State Constitutional Convention.

CSC = Committee working during State Convention.

CSL = Committee during State Legislative session.

SCG = State constitutional convention.

RCC = Republic or precursor constitutional convention.

E. CONVENTION PRODUCT. Column five, “Product,” of the table consists of a state abbreviation and a product code. There are three possible products of a state constitutional convention: a new or modified constitution (C), a ratification of a federal constitution (R), or a ratification of an amendment to the federal constitution (Am). Although these products were the goal of the convention, conventions were not always successful: not all conventions decided to ratify and not all admission or readmission conventions produced a constitution that was accepted by congress.

F. WHY STATE LEGISLATIVE SESSIONS ARE ASSEMBLIES. One of the features of the analysis offered herein is that sessions of a state legislature which consider proposals to the federal constitution, proposed by Congress, that is, are treated as constitutional assemblies.

We have two excuses for this, a weak and a strong excuse.

The weak excuse: if you have a state body that modifies the federal constitution, then the oath taken by state officials to abide by the federal constitution now embraces obedience to federal constitutional text which the legislators have participated in changing.

Article VI, Clauses 2 and 3 (in part) provide: This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . .

The strong argument: It’s been up to Congress whether to vest the power to consider
amendments in state legislatures or state conventions.

Article V provides in part:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, 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, as the one or the other Mode of Ratification may be proposed by the Congress.

Congress called for state conventions when it proposed repeal of the Eighteenth Amendment; it could do so again.

No one has given any reason why our constitutional history would be different if the twenty-six other amendments had been approved by the state conventions and the Twenty-First Amendment approved by the state legislatures.

If it is up to Congress to make state legislative consideration of amendments to the national charter the equivalent of state ad hoc conventions, then the legislative sessions count as the equal of constitutional conventions.

G. Definition for ‘Credentials.’

This is:

For each person attending a constitutional convention there must exist credentials in customary form which exhibit the substance of the person’s pedigree, that is, the right to attend, debate and vote in the assembly.

H. Definition for ‘Changes in Organic Text or Form.’ This can come about in two ways. First, the words officially designated as organic can be changed: substitution or deletion are two means. Second, the organic document may be supplemented with ‘thought controls.’ The Ninth and Eleventh Amendments provide rather obvious and regrettable instances; the regrets may be attributed to Carroll’s (modern) discovery that all lists of instructions are defective. Hence, a system’s assertion of additional (amendatory will suffice) rules by which readers of the system’s catalog of rules are advised to consider ‘this’ semantic outcome permissible and ‘that’ impermissible is logically defective.

Citation to the Cratylus will have to suffice for now; if semantic consensus – semantic cleansing, no less – cannot be achieved by agreement, it can hardly be achieved by command.

I. Definition of ‘Minimum Ordered Discourse.’ The reader should refer to Madison’s Meatgrinder here, that is, the operative phraseologies of Number 51, famous for its build up to ‘angels’ with its twinned invocations of ‘necessity.’ Thus, ‘internal controls on government [are] necessary’ and also are referred to, in the same passage, as “devices … necessary to control the abuses of government.”

How do these ‘necessary devices’ go about doing the business of the republic? They fulfill this ‘necessary’ function by setting one faction’s hope, wish, fear against another: “Ambition must be made to counteract ambition.”

Since the logic of venue supplies paradigms (molds, forms) by which rules of ordered discourse may be transitioned into existence, operate and be amended, it is rules-in-action to which our attention is turned. There are only three things one can do with rules-in-action or shouldness which are the same thing: Attack, defend and advocate. Hence, parliamentary procedure – and here any body of process will suffice – may be seen as an instance of venue logic’s output; that is, rules-in-action which generate assumptions.

The expression of assumptions is the function of parliamentary procedure, par excellence. A faction contests other factions on the floor of a convention, legislature, or other deliberative body; p₁ through pₙ are advocated, attacked and defended; assumptions a₁ through aₙ are struck off and recorded as speech acts. Eventually an outcome pₒ is adopted. (The outcome may be the rejection of all proposals.) To pₒ may be attached all of the assumptions made by the assembly or more conveniently the historical record that is the record of proceedings itself.

Madison himself noted that the existence of such a record defeats the Liar’s Paradox; he did
this in the negative, by asserting that were he to invoke what happened at the federal convention and providing access to assumptions made at the convention – to supply elaborations for the use of the Treaty Making Power, then in dispute – he would be an unreliable witness to what had happened.

But the vast majority of constitutional assemblies do not operate in secret; indeed, it is difficult to think of one tabled herein that has. Hence, any participant – or non-participant may avail herself of speech acts for the purpose of elaborating text, without finding herself charged with committing an ‘Epimenides’ and so accused, discovered herself in the dock with St. Paul, whose Epistle to Titus 1:12-13, rather blatantly bases his argument (All Cretans are liars) on the unreliable witness who is ‘himself a Cretan.’

It is sufficient for our purposes to leave this vast topic with the observation that Madison has, in No 51, asserted that there is a link between process and merit and that, thanks to the link which he describes, the blessings of civil peace will be showered upon the republic that obliges factions to feed their countervailing ambitions into the meatgrinder that is parliamentary process.

J. Citation to the Cratylus. The author promised a citation and here it is. Cratylus at Stephanus 433e: “Making the small great and the great small!” Socrates goes on, winking at his readers, while booing those in the assembly. “Those who say that whether you abide by present conventions or make a new and opposite one, it makes no difference if you are only agreed.”

K. Citation Format: Please cite as 2 Our Constitutional Logic 103.

L. Future Development. As blanks in the table indicate, considerable research needs to be done, at least to verify that information is not available.

M. Series. This appears in a series of articles based on Tables, sorted/mined from the Farrandian / USSC databases.

N. Server Location. This file is maintained on the I/D server.

O. Last Revised. This file was last revised on April 27, 2012; it is version 015.

P. File Format. The format of this file is MS Word 2010; the format of the associated table is also MS Word 2010.