

The Breakfast Club

Constitutional Minute for 29 Aug 2023

The “Runaway Convention” Myth

I had this essay all ready to go, and then California messed it up.

I was ready to address the myth that an Article V Convention cannot be controlled and will “runaway, like the 1787 convention did,” when, out of the blue, California announced their intention to apply to Congress for an Article V convention to:

Affirm that federal, state, and local governments may adopt public safety regulations limiting aspects of firearms acquisition, possession, public carry, and use by individuals, and that such regulations are consistent with the Second Amendment to the United States Constitution and the understanding that throughout American history private individuals have possessed firearms for home defense, hunting, and recreational purposes;

or:

Impose, as a matter of national policy, the following firearms regulations and prohibitions: (1) universal background checks as a prerequisite to purchase or acquisition of a firearm, (2) a prohibition on sales, loans, or other transfers of firearms to those under 21 years of age, subject to limited exceptions, (3) a minimum waiting period after the purchase or acquisition of a firearm before that firearm may be delivered to the buyer or acquirer, and (4) a prohibition on the private possession of assault weapons and other weapons of war;

The initiative took the form of a proposed resolution¹ to be introduced soon in the California Assembly. It was expected to pass.

Now, up front, I want to make it clear I do not support California’s *purpose* for having an Article V Convention; gun control needs to be retracted, not expanded, but the state’s action reveals the growing dissatisfaction with a divided government among even the Leftist states; neither party is getting what they want these days (which hurts progressives more than it hurts conservatives, think about it). The gun control measures California wants will never pass in Congress and the state knows this. They rightfully see an Article V convention as their only hope, through amendment. But they have taken great pains to word their application so that if the threshold of 34 state applications is reached, the convention will produce this and only this sort of amendment. The language in California’s resolution is precise and forceful:

¹ https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=202320240SJR7

Resolved, That this application is for a limited constitutional convention and does not grant Congress the authority to call a constitutional convention for any purpose other than those set forth herein and that **this application shall be void** if ever used at any stage to consider any constitutional amendments on subjects other than those specified herein;

This language is even more assertive of a limited convention than the model legislation of the Convention of States Project, whose simulated convention I was recently privileged to attend.

But even this restrictive language did not deter the fear porn which immediately sprang forth, not from the John Birch Society, the normal source, but *Left-wing* Common Cause, whose “Director of Constitutional Conventions and Protecting Dissent Programs” (what a title), Viki Harrison, shouted:² *“The entire Constitution could be rewritten...Doing a convention puts every civil right we have in this country at risk.”* Really? Of course, the interviewer didn’t press Ms. Harrison to explain how she came to that conclusion, apparently only Conservatives are required to prove their claims.

But Harrison’s qualms about amending the Constitution proves a point I’ve been making for a long time: over the last 100 years, the Left has created a constitution which works very well for them. It no longer limits Congress and the Executive Branch in any meaningful way and as long as they can maintain control of the Congress and count on a liberal majority on the Supreme Court, they can do pretty much whatever they want.

Opps, there went the Supreme Court as the “Legislature of Last Resort.”

And control of the Congress? That’s no longer a sure thing.

Many on the Left have been calling for a new Constitution for more than ten years,³ which makes Ms. Harrison’s concerns doubly confusing. If you want to rewrite the Constitution, why not just have an Article V convention, it will apparently allow a rewrite of “THE ENTIRE CONSTITUTION!” as Harrison claims.

What a confusing mess. Faced with new warnings of a “runaway convention,” California postponed a vote on their resolution until 29 August to allow an investigation into the warnings.

Given that, let me proceed with the essay I originally intended to write, and then I’ll put recent events in perspective. Warning: pour yourself a cool one, this is longer than my standard Constitutional Minute.

The most oft-encountered argument against an Article V convention insists that the “Grand Convention” of 1787 was a “runaway convention.” Opponents of Article V claim that because the 1787 Convention was only authorized by the Confederation Congress to “revise” the Articles of Confederation and instead replaced them, any future Article V convention will simply follow 1787’s example and replace our 200+ year-old Constitution with an entirely new document,

² <https://justthenews.com/nation/states/center-square/gavin-newsoms-national-constitutional-amendment-limit-gun-access-put>

³ <https://www.theatlantic.com/politics/archive/2013/11/the-us-needs-a-new-constitution-heres-how-to-write-it/281090/>

perhaps the “Constitution of the New States of America” proposed in 1964,⁴ or something even more progressive. To make matters worse, the claim continues: the delegates will find a way to make the new Constitution either self-ratifying or they will include within it such a low ratification requirement as to make ratification attainable by the existing Democrat-controlled states.

This essay will examine that argument -- and dispel the myth.

This argument rests on several faulty premises: 1) that the Confederation Congress called/authorized the 1787 convention, 2) that Congress’ “revision” restriction was binding on the 55 delegates which attended the convention in 1787, 3) that there is, in fact, no method to limit or otherwise effectively control the actions of delegates to any new convention and 4) that a constitution could be proposed which would somehow bypass the ratification scheme in the current Articles Five (amendments) and Seven (the constitution itself).

First, let’s briefly review the reasons why an Article V convention is currently being proposed (Update: at least by Conservatives).

I hope no one disputes the contention that the national government⁵ has vastly exceeded the sort of government the framers of the Constitution envisioned. The government which went into operation on March 4, 1789, was intended to concern itself with the “big” issues of foreign relations/treaties, national defense, and commerce between the states, with foreign countries and with Indian tribes. Revenue for this government’s operations was intended to come primarily from “Taxes, Duties, Imposts and Excises” focused primarily on trade. States were expected to have day-to-day impact on the lives of their citizens, In Federalist 45, James Madison said it this way:

"The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State. The operations of the federal government will be most extensive and important in times of war and danger; those of the State governments, in times of peace and security.

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⁴ https://www.bibliotecapleyades.net/sociopolitica/master_file/newstatesconstitution.htm

⁵ I will refrain from calling it the “federal” government, which is the standard nomenclature, because the term “federal” encompasses the states; the “federal government” then includes the government located primarily in the District of Columbia and its surrounds, as well as the 50 state governments.

Madison's 1788 description bears little resemblance to today's national government. Today, it is farcical to insist that the national government is in some way constrained to its enumerated and thus limited powers. In 2010, then Congressman Peter Stark of California unguardedly admitted that "Yes, the federal government can do most anything in this country." Anything indeed. The situation has not improved in the last thirteen years.

Most of the blame for this change can be placed on the Supreme Court which gave Congress an unlimited spending power in 1937 by proclaiming that the term "general welfare," which Article 1, Section 8 gives Congress the power to spend money in support of, meant anything Congress wanted it to mean. "*The discretion belongs to Congress.*"⁶ The power to delegate its normally un-delegable legislative power to Executive branch agencies was blessed in the 1968 case of *Mistretta v U.S.* In fact, the charge one frequently hears that "Congress ignores the Constitution's limits on its power." This sounds authentic, but when you peak behind the curtain you find that there are few limits on that power left in the original Constitution. Congress "religiously" follows the interpretation of the Constitution as declared by the Supreme Court; a copy of the 3000+ page *U.S. Constitution, Analysis and Interpretation* is given to every new Congressman or woman. It outlines every important decision of the Court. It is, in a very real sense, the "operational" Constitution.

If there are no longer any "chains of the Constitution"⁷ which Thomas Jefferson would have us bind Congress down with, and the expansion of governmental power and jurisdiction is primarily due to errant interpretations of the Constitution, it would seem that many of the original "chains" could be reforged by returning the language of the Constitution to its founding era understanding. Particularly, terms like "general welfare" and "commerce" absolutely must be clarified or else we wait patiently for a case to reach the Supreme Court which allows them to reverse their earlier, power-expanding decisions. Other corrections, such as term limits, a balanced budget requirement, a requirement to return federally managed state lands to state ownership, etc., are unlikely to ever be proposed by Congress, which hasn't proposed an amendment to the states in over 50 years.

Who Called the Convention of 1787?

In September 1786, delegates from five states met in Annapolis, Maryland to discuss trade difficulties. They met at the initiative of Virginia. All the states had been invited but some delegations had not yet arrived on the appointed day and baring any notice that they had been delayed, the delegations present decided to proceed without them. It soon became apparent that without the remaining delegations no progress could be made on the planned topic, but James Madison and Alexander Hamilton decided it was time to take on a bigger topic.

⁶ *Helvering v Davis* (1937).

⁷ Thomas Jefferson, fair copy of the drafts of the Kentucky Resolutions of 1798.

Both men had complained frequently about the widely acknowledged deficiencies in the Articles of Confederation. As early as August 1783, Hamilton had drafted a resolution⁸ to address the many deficiencies which had become apparent in the Articles. After listing twelve distinct deficiencies that should be addressed in such a convention, Hamilton's resolution concludes:

"Therefore, Resolved that it be earnestly *recommended* to the several states to appoint a convention to meet at (blank) on the day of (blank)." (Emphasis added)

Notice the wording of the resolution; Congress would *recommend to the several states to appoint a convention*. Why didn't Congress simply direct the states to attend such a convention? Why? Because Congress had no such authority! Article 2 of the Articles reads:

"Each state retains its *sovereignty, freedom, and independence*, and every power, jurisdiction, and right, which is not by this Confederation *expressly* delegated to the United States, in Congress assembled." (Emphasis added)

The states retained all powers not *expressly* delegated to the Congress. Nowhere in the Articles is Congress provided the authority, implied or expressed, to call conventions, for any purpose. They could recommend the states convene, but the recommendation contained no authority or power to convene the states, dictate the scope of the convention, or command the state's attendance. None whatsoever.

The states meanwhile retained all the sovereign powers they previously exercised as free and independent states, absent any powers *expressly* delegated to Congress. One of those retained sovereign powers was the authority to call for a meeting of the states. A state could obviously not command the attendance of other sovereign states, but any state could call for such a meeting.

Before we go on, we should consider what information is part of a convention "call." The Annapolis Convention's call for a "Grand Convention" included three items of information: who was being addressed in the call (i.e., who was asked to respond to the call), the purpose of the call, the date and location where the invitees should assemble. Also note what was not included in the call: the choice of commissioners, including the number of commissioners to represent the state, was left up to the states. No convention rules were included in the call, it was understood that the convention would devise its own rules of order.

Who Really Called the Convention of 1787?

At the Annapolis Convention of September 1786, James Madison and Alexander Hamilton realized it was now or never to fix the Confederation before it broke apart into 2-3 separate

⁸ <https://founders.archives.gov/documents/Hamilton/01-03-02-0272>

confederacies.⁹ They took a vote among the five delegations present and issued a resolution¹⁰ to the states to convene in Philadelphia on what was May 14th of the following year to “to Remedy Defects of the Federal Government.”

Several important features of this resolution included:

- 1) It was addressed to the five state legislatures of the governments the commissioners sitting at Annapolis represented, not to Congress. Those states included: Virginia, Delaware, Pennsylvania, New Jersey, and New York.
- 2) It set a place and date for what became the Grand Convention.
- 3) It set the purpose of the convention, which was to:
 - a. take into consideration the situation of the United States
 - b. devise such further provisions as shall appear to them necessary to render the constitution of the Federal Government adequate to the exigencies of the Union.
 - c. report such an Act for that purpose to the United States in Congress assembled.

Note that the word “constitution” in item b. was not capitalized. This usage of the word referred not to the Articles of Confederation directly but rather to how the current “Federal Government” was *constituted*, i.e., structured.

Out of respect to the Congress and the states not represented, the commissioners agreed “to transmit copies of the[ir] Report to the United States in Congress assembled, and to the executives of the other States.” By February of the next year when Congress got around to endorsing the idea, seven states, Virginia, New Jersey, Pennsylvania, North Carolina, New Hampshire, Delaware, and Georgia had already appointed their commissioners.

Several other items to note: the purpose set out for the convention was not to simply revise the Articles of Confederation, it was to “render the constitution of the Federal Government adequate to the exigencies of the Union.” “Render” is an intransitive verb meaning “to make or cause to be,”¹¹ as in to render a painting. “Exigencies” is not in common use today; it simply means “urgent need or want,” so translated into modern parlance, the sentence reads “make the structure of the Federal Government so that it meets the urgent needs of the Union.”

In summary, the five states present at Annapolis called the Grand Convention, not Congress, and those states set the purpose of the convention to modify the way the Federal Government was then designed to meet the needs of the Union.

⁹ In Federalist #2 we read: “It has until lately been a received and uncontradicted opinion that the prosperity of the people of America depended on their continuing firmly united, and the wishes, prayers, and efforts of our best and wisest citizens have been constantly directed to that object. But politicians now appear, who insist that this opinion is erroneous, and that instead of looking for safety and happiness in union, we ought to seek it in a division of the States into distinct confederacies or sovereignties.”

¹⁰ <https://teachingamericanhistory.org/document/annapolis-convention-resolution/>

¹¹ Noah Webster, American Dictionary of the English Language, 1828.

Congress's endorsement resolution.

On February 21, 1787, Congress finally got around to passing the following resolution:

Resolved, That in the opinion of Congress, it is expedient, that on the second Monday in May next, a Convention of Delegates, who shall have been appointed by the several States, be held at Philadelphia, for the sole and express purpose of revising the Articles of Confederation, and reporting to Congress and the several Legislatures, such alterations and provisions therein, as shall, when agreed to in Congress, and confirmed by the States, render the federal Constitution adequate to the exigencies of Government, and the preservation of the Union.

Note that Congress thought it expedient (“proper under the circumstances”) that there be a convention for what amounts to a dual purpose: 1) revising the Articles of Confederation and 2) “render[ing] the federal Constitution adequate to the exigencies of Government, and the preservation of the Union,” language taken directly from the Annapolis Convention resolution.

As noted earlier, Congress had no authority to control such a convention, but the states did. The Annapolis resolution set the purpose for the convention, which Congress echoed as part of their endorsement, and the credentials each state provided their delegates did as well. It is time to look at those credentials.

Virginia (October 16, 1786) empowered its commissioners “to assemble in Convention at Philadelphia as above recommended and to join with them in devising and discussing all such Alterations and farther Provisions as may be necessary to render the Foederal Constitution adequate to the Exigencies of the Union and in reporting such an Act for that purpose to the United States in Congress.”

New Jersey (November 23, 1786) empowered its commissioners to “devis[e] such other Provisions as shall appear to be necessary to render the Constitution of the Federal Government adequate to the exigencies thereof.”

Pennsylvania’s (December 13, 1786) commissioners were empowered to “devis[e] such other Provisions as shall appear to be necessary to render the Constitution of the Federal Government adequate to the exigencies thereof.”

New Hampshire (January 17, 1787, empowered their commissioners “to join with [deputies from the other states] in devising & discussing such alterations & further provisions as to render the federal Constitution adequate to the Exigencies of the Union and in reporting such an Act to the United States in Congress”

Delaware (February 3, 1787) empowered their commissioners “to join with them in devising, deliberating on and discussing, such Alterations and further Provisions as may be necessary to render the Foederal Constitution adequate to the Exigencies of the union; and in reporting such Act or Acts for that purpose to the United States in

Congress Assembled... So always and Provided, that such Alterations or further Provisions, or any of them, do not extend to that part of the Fifth Article of the Confederation of the said States, ... which declares that “in determining Questions “in the United States in Congress Assembled each State shall “have one Vote.”

North Carolina (February 24, 1787) empowered their commissioners “to discuss and decide upon the most effectual means to remove the defects of our Foederal Union, and to procure the enlarged purposes, which it was intended to effect, and that they report such an Act to the General Assembly of this State.”

It should seem clear by now that before Congress published their endorsement of the convention, most states adopted the language contained in the Annapolis resolution and/or Virginia’s commissioner credentials, some with minor modifications. As we will shortly see, once Congress published their endorsement, some states adopted Congress’s language. With regard to those states, we must discuss the effect this had on the authority of their commissioners.

New York (on March 6, 178) was the first state to credential their commissioners: Robert Yates, John Lansing, and Alexander Hamilton, after Congress finally acted. The three were empowered “to meet such Delegates as may be appointed on the part of the other States respectively, on the second Monday in May next, at Philadelphia, for the sole and express purpose of revising the Articles of Confederation, and reporting to Congress, and to the several Legislatures, such alterations and provisions therein, as shall, when agreed to in Congress, and confirmed by the several States, render the federal Constitution adequate to the exigencies of Government, and the preservation of the Union.”

Massachusetts (April 9, 1787) copied verbatim the wording out of the Congressional resolution and then wrote that their commissioners were commissioned “for the purposes aforesaid.”

South Carolina (April 10, 1787), Connecticut (May 2, 1787), and Maryland (May 26, 1787) all followed the wording of the Annapolis Resolution with minor and insignificant wordsmithing.

So, what should have been the effect of including the “sole and express purpose of revising the Articles of Confederation” wording in New York’s and Massachusetts’ credentials.

Messrs. Yates and Lansing of New York left the Grand Convention on July 11, 1787, when it became apparent to them that to stay further would result in them exceeding their authority. By that date it had become apparent that an almost completely¹² new plan of

¹² It is incorrect to say that the Articles of Confederation were replaced in toto with the Constitution. There are five clauses from the Articles of Confederation which retained in the new plan of government, most nearly verbatim. These include the Extradition Clause, the Full Faith and Credit Clause, the Free Debate in Congress Clause, the Protection from Arrest Clause, and the Interstate Compact Clause.

government was being contemplated. Their fellow commissioner, Alexander Hamilton had departed eleven days earlier, on June 30th, after his “British Plan” had been coldly received, claiming “urgent business” back in New York. This left New York unrepresented at the Convention until its conclusion on September 17th. Hamilton returned to the convention on September 6th, and signed the Constitution on the seventeenth, but he did so as a private citizen since a minimum of two or more delegates were required for a quorum.

This leaves the Massachusetts delegation: Elbridge Gerry, Nathaniel Gorham, Rufus King and Caleb Strong open to criticism for exceeding their authority by remaining in Philadelphia throughout most of the convention.¹³

We should reflect on the conditions faced by the convention in 1787 which will not be present in a future convention. First, there was no means of instant or even speedy communication which would allow commissioners to provide an assessment of the situation to their state legislatures and request advice. Second, states in 1787 did not anticipate a new plan of government might be introduced in the convention and did word their commissions accordingly. Third, in addition to the wording to revise the Articles of Confederation, the Congressional resolution (and resolutions of New York and Massachusetts included the additional direction to “render the Foederal Constitution adequate to the Exigencies of the Union.”

We do not know what went through the minds of the Massachusetts commissioners or which set of instructions they felt more compelling (Elbridge Gerry was one of three men who refused to sign the Constitution). It is likely their legislatures would have advised them to leave the convention if it appeared poised to exceed the limitations of their initial petition to Congress.

Conclusion:

I believe we can lay the myth of the “Runaway Convention” to rest.

1. The delegates of the states attending the Annapolis Convention of September 1786 issued the call for the convention of 1787.
2. Their intent, clearly stated in the resolution sent to the other state legislatures, was a convention which would “render the Foederal Constitution adequate to the Exigencies of the Union.” No mention was made of a revision only of the Articles of Confederation.
3. The fifty-five commissioners who attended the Grand Convention did so under the authority of and under the direction of their state legislatures, not the Confederation Congress.
4. Congress eventually endorsed the call for the Convention and expressed a desire that it limit itself to a revision only of the Articles, but also that the convention “render

¹³ Caleb Strong left the convention on August 24, 1787, to attend to his ill wife.

the Foederal Constitution adequate to the Exigencies of Government and the preservation of the Union.”

5. The state delegations at the convention decided that “render[ing] the Foederal Constitution adequate to the Exigencies of the Union” could only be achieved with a new plan of government.
6. Five clauses from the Articles of Confederation were retained, the Constitution was not a complete replacement of the Articles.

What about California?

As I said earlier, the whole Article V question has become somewhat confused. California is never going to get 34 states to submit applications identical to theirs, and they know it. There are simply no 34 states who would support such gun controls (what’s an “assault weapon” or weapon of war? Are not semi-automatic pistols used in war?). The entire initiative is a kabuki dance.¹⁴

But there are some useful lessons here:

California’s application language is tight, tighter than that of COS Project. If Congress approves 34 resolutions for an Article V convention but some of them specify a different purpose for the convention, California’s application becomes void. California doesn’t want their application to be combined with those applying for restrictions on Congress for example. It may be too late for COS Project to adopt such language now that 19 states have adopted their original model legislation, but similar language could be passed in internal resolutions in those 19 states.

Another lesson here is the revelation that a great deal of ignorance and confusion about the Article V process exists equally on the Left as well as the Right. Ms. Harrison didn’t have to defend her claim; I’d like to see her arguments. You are all now better educated on this than she.

Which side is going to cross the finish line first: the side calling for a true Constitutional Convention to completely rewrite the document or the side calling for measured amendments that will “restrict the power and jurisdiction of the federal government?” Regardless, it is obvious we still have much work to do in teaching Americans the truth about their Constitution.

If you desire further clarification of the points made in this essay, contact Gary Porter at constitutionlead@gmail.com.

¹⁴ <https://en.wikipedia.org/wiki/Kabuki>