The Breakfast Club

Constitutional Minute for 12 Sep 2023

If Not an Article V Convention, Then What?

I've demonstrated that the delegates of 1787 did what they were authorized to do, and we should thank them for doing so, producing the longest serving Constitution in history, thus rendering the Foederal Constitution "adequate to the needs of the union." To suggest their convention was a "runaway" is to suggest the Constitution it produced was somehow fraudulent. If so, why are we still operating under it all these years later? The drafters of the Constitution produced not a perfect union (is a perfect union even possible with fallen man?), but certainly a more perfect one. And despite the damage inflicted on this document, we remain the freest country on earth, a fact validated by the millions who come here, both legally and illegally, each year.

But current trends are not encouraging: It is an inescapable fact that the power of the federal government over our individual lives continues to grow each year, the cost of maintaining that government continues to rise, elections continue to be plagued by fraud, and, if the Left ever uses those elections to once again control all three branches of the federal government, America will become an unpleasant place to live and raise a family. I hope, if nothing else, that we can agree on that.

But what if well-meaning but misinformed conservatives continue to fight a provision in our Constitution which was placed there for exactly the situation we now face, and they are successful in preventing its use. What alternatives do we have, and will any of them or even all of them together repair the damage to our constitutional order? This essay will explore those alternatives.

First, it should be noted that organizations opposing Article V spend most of their time and column space attacking the mere idea of an article V convention rather than suggesting viable alternatives. It should also be noted that the few alternatives offered have been repeatedly suggested for the last 50-60 years, yet no substantive change has occurred with regards to the relative balance of power and federal overreach. There was a glimmer of hope when Donald Trump was elected in 2016, but we all saw the ferocity with which the Deep State fought the man and resisted his agenda, distracting him with endless investigations and impeachments. Any truly conservative President in the future will face similar pushback.

Addressing the "Con-Con" issue.

Before I begin to analyze alternatives, I feel it incumbent to address the use of the pejorative term "Con-Con" by opponents of Article V. Short for "Constitutional Convention," the term is deliberately (but inaccurately) used to 1) reinforce the unsupported claim that an Article V convention is a Constitutional Convention in disguise:

> "A Con-Con … would open the entire Constitution for change, even total erasure – which is what occurred in 1787"[1]

and 2) they also use the term unethically to suggest that the Article V movement is some sort of "con-game."

When debating this issue, I can immediately tell whether my opponent is interested in a serious discussion or simply wants to fear-monger. If the later, they will refer to the event as a "con-con." The opponents' purposeful avoidance of the correct terminology: "Article V Convention" (acknowledging the true source of authority for the event), "Convention of the States" (which it clearly is), or "a Convention for proposing Amendments" (which is what Article V itself calls the event), reveals just how much these groups rely on fear to make their case.

You will only find me using one of these three *authentic* phrases to describe the event.

1. "Elect Better Representatives to Congress."

Who could argue with such a suggestion? Of course, we need better, more constitutionally literate representatives in Congress, and God knows conservatives have been trying to identify and elect such people since before the days of Ronald Reagan (blessed be his name. Where has it gotten us?

Part of the problem with this alternative lies with the term "better representative." Right and Left have polar-opposite understandings of this term, and, I submit, so do RINOS and true conservatives. The public school system is not structured to produce graduates who understand our constitutional system and the changes which have occurred in that system over the last 200+ years. In fact, recent evidence would suggest the public school system is better equipped at producing graduates who hate their country and want to see it collapse, than love it and want to see it survive.

So how are these "better representatives" to be produced? How do we educate them? How do we identify them? How do we convince them to run for office? And how do we get them elected in sufficient numbers to make a difference? Remember, there are 435 members in the House of Representatives, with 218 required for a majority; 100 Senators, with 60 required to break a filibuster. Virginia might reasonably produce handful of these so-called

[1] https://insidejbs.wordpress.com/2015/03/23/falsehoods-mark-the-campaign-for-a-constitutional-convention/

"constitutionalist" representatives (from our 11 House Districts and 2 Senate seats), which states will produce the rest?

After the 2022 mid-term elections, the House Freedom Caucus boasted 52 members.[2] I don't know the criteria that must be met for membership in the Caucus, but I will assume the majority of their members are true constitutional conservatives. Given this, we still fall a bit short of passing constitutional reform legislation. When House Freedom Caucus members recently talked of a government shutdown to force fiscal reforms, Senate Republicans clutched their pearls.[3]

And of course, without also controlling the Presidency, the chance of enacting legislation designed to rollback federal overreach becomes problematic.

And then we come to the $64,000 question: will Congress, even with a substantial number of constitutional conservative members, ever pass, with a 2/3 majority of each chamber, a Term Limits Amendment, a Balanced Budget Amendment, or any amendment which would in some way reduce the near-plenary power Congress currently enjoys primarily thanks to the Supreme Court's interpretation of the General Welfare and Commerce clauses? It is simply not going to happen.

Yes, we need better representatives in Congress; no, having them even in abundance will not fix our myriad problems.

2. "Let Congress Alone Propose Amendments."

This is the chief alternative promoted by the John Birch Society. They are careful to point out they do not oppose amending the Constitution, and in fact support certain amendments, but only if Congress proposes them.

They seem to overlook the fact that Congress sits, every day they are in session, as a sort of "Article V Convention" (with Congressmen in place of the states). Any day of the week, Congress could pass and send to the states a constitutional amendment. But Congress has not done so in 50+ years. Why? Hundreds of amendment ideas have been introduced in Congress,[4] scores of them each year; they are all promptly sent to the respective Judiciary Committee to die a quick and painless death. This paradigm will not change by adding a few more members to the Freedom Caucus. I would encourage JBS to not hold their breath while waiting on Congress.

[2] https://axiomalpha.com/list-of-house-freedom-caucus-members-in-2023/

[3] https://www.axios.com/2023/09/07/government-shutdown-freedom-caucus-senate-house-gop

[4] https://en.wikipedia.org/wiki/List_of_proposed_amendments_to_the_Constitution_of_the_United_States

3. "Use the Tenth Amendment (Nullification)."

I respect the work of the Tenth Amendment Center,[5] I really do, they play an important role in raising awareness of the importance of this Amendment, an amendment often overlooked by people reading through the Bill of Rights who tire easily (that was a joke).

The Center would like the federal government to start adhering to the principles of limited and enumerated rights (see Tenth Amendment) and stop doing things not specifically enumerated in the Constitution. So would I. Unfortunately, the Supreme Court does not agree, and they do get a vote. Here's an example: On TAC's website we read: "When the federal government regulates economic activity that doesn't directly relate to trade across foreign borders or state lines, it usurps power and violates the Constitution." Yes, that would have been (and in fact was) James Madison's view in 1798. Unfortunately, in *Wickard v Filburn*, the Court said the activity in question (growing corn in *Wickard's* case) need only have some traceable effect on interstate commerce, it need not be commerce itself, to be regulatable. TAC doesn't mention *Wickard v Filburn*, probably because they don't want to hurt the feelings of their website visitors who would be dejected to learn that the Court long ago (1942 to be exact) destroyed the original understanding of the Commerce Clause. In *Helvering v Davis* the Court said Congress can spend money on anything *they deem* to support the general welfare of the United States. In 1792, James Madison warned of the damage that would result from just such an interpretation. It took 142 years for the Court to come up with such an interpretation, but, oddly, government spending really started to take off in 1937 and continues to rise.

TAC wants states to pushback over "violations" of the original limits the Constitution placed on federal power and somehow ignore the Court decisions which gave the government the authority to do so.

TAC promotes nullification and interposition, two very important principles that do have their time and place. So does JBS. The latest copy of their New American magazine applauds the efforts of a Board of Supervisors in Illinois to "nullify" a new Illinois law that make illegal certain firearms and magazines. That's great for the residents of that county, what about the remaining citizens of Illinois?

Unfortunately, both nullification and interposition are what we call "extra-constitutional," i.e. the Constitution does not recognize these as legitimate actions a state or local government can take. When a state decides to "nullify" a federal law or mandate and not enforce it or take action itself to comply with the requirement, this creates a constitutional crisis that will likely have to be resolved in the court system. To win that case you must first establish that you have standing to appear before the court, i.e., you have or will suffer injury by the enforcement of the law, and, if successful in that step, then prove to the court

[5] https://tenthamendmentcenter.com/

that the law in question is unconstitutional. Nullification has its place, and it also has its limits. Nullification does not by itself remove the law. The law remains in effect until stricken by a federal court, usually the Supreme Court. Nullification won't reverse *Wickard v Filburn* or *Helvering v Davis*, or *Mistretta v. U.S.*, or any Supreme Court ruling which expanded the power of Congress. Only the Court can do that . . . or an amendment to the Constitution.

4. "Wait for the Supreme Court to Fix Things."

It took 50 years for the Court to reverse *Roe v Wade*. How much time does our constitutional republic have left? Can we wait another 50 years for a case to come along that allows the Court to reverse *Wickard*, or *Helvering*? And does the Court even think these were bad decisions in need of reversal? Most orignalists view these (and other cases)[6] as absolutely terrible decisions, but unless the Court thinks so, and I've never read anything which gives me that impression, they won't even grant a Writ of Certiorari to hear a case. And unless the court receives a request for Cert, they cannot take unilateral action to reverse anything, even if they wanted to. If we wait for the Court to correct the mistakes of previous Courts, we could (and likely will) wait forever.

5. "Change how federal judges act and give them the authority to not follow precedent."

I've included this alternative because a friend (a lawyer) attending the Williamsburg Breakfast Club suggested it after I spoke about Article V at that Club. Unfortunately, this suggestion works both ways. Give Leftist judges the leeway to ignore good precedent, and you invite chaos. Judges, like Justices, can't go around looking for bad law to fix; they must wait patiently, perhaps forever, for the right case to come before them. In addition, federal judges only have limited jurisdiction; their ruling only has effect (or should only have effect) in their jurisdiction. Finally, federal judges can't fix what the Supreme Court has broken. This is a bandaid fix, and not a good one at that.

That's pretty much the alternatives I've encountered; perhaps there are more. If so, please bring them to my attention. I'll close with this:

Ignorance and Fear are Powerful Forces.

Opponents of an Article V Convention count on the combined effects of two powerful forces: ignorance and fear.

Americans are woefully ignorant of their Constitution. our "wonderful" public education system ensures this. Even the few individuals who avail themselves of a course like the one Constitution Leadership Initiative (CLI) offers will have forgotten much of what they learned

[6] https://www.amazon.com/Dirty-Dozen-Radically-Expanded-Government/dp/1935308270/

a week later. Unless they undertake a consistent and structured study of the document, including keeping up with the changes resulting from Supreme Court decisions, their ignorance will persist. Most Americans simply don't have the time or inclination to do the deep and consistent study of the Constitution that is necessary to truly understand the document and the changes it has undergone since 1787. There are so many other activities vying for our attention, so many emails to answer, so many TV shows to watch. Poll after dismal poll convinces me that attempts to educate Americans is a fruitless cause, and for that reason I will likely be shutting down CLI within the next year.

Opponents of Article V count on this epidemic ignorance; it allows them to use their more powerful force without restraint: fear.

Fear is a powerful motivator. Unfounded fear is especially dangerous. Claims that "the most wonderful work ever struck off at a given time by the brain and purpose of man,"[7] is going to somehow be replaced in "a Convention for proposing amendments" brings some Americans literally to tears. "Our wonderful Constitution! Who would do such a terrible thing as to destroy this hallowed document behind the "closed doors" of a "con-con?"

People this afraid will fight to their dying breath to preserve a document that, ironically, no longer effectively exists.

They doom us; they doom us all to the slow but steady disintegration of the Founder's constitutional order.

"*In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution*," wrote Jefferson.[8]

If only the Constitution still had chains.

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

[7] Remarks of Sir William Gladstone

[8] Thomas Jefferson, Fair draft of the Kentucky Resolves, 1798.