

# The Breakfast Club

## Constitutional Minute for 5 Sep 2023

### Controlling an Article V Convention

In my last essay, I explained why 1787 was not a “runaway convention.” The fifty-five delegates at Philadelphia “render[ed] the Feederal Constitution adequate to the [needs] of the Union.” The Articles of Confederation had not met those needs, the union was on the verge of disintegration. If 230+ years under the same Constitution is not evidence that the new document provided a “more perfect union,” I don’t know what other evidence will convince. There are increasing calls by the Loony Left for a new Constitution, but those calls have a single purpose in mind: to turn the United States of America into the United Socialist States of America. The principles “baked into” our constitution are sound, but “tinkering” with the limitations on power and jurisdictions, primarily by past Supreme Courts, have robbed the document of its inherent restraining influence on government, the government it created. This must stop, and then be reversed.

How do you ensure that an Article V Convention held in 2024 or 2025 does what we expect of it; how do you ensure it produces only those sorts of amendment ideas conservatives want and expect (and greatly need)?

#### **Control in the application.**

The first control is found in the application itself. A properly worded application will help keep the convention limited to the purpose(s) listed in the application. Thirty-four properly worded applications would be even better. The application morally commits the state to sending commissioners who are themselves properly limited in their authority. For a state to publicly request a convention for purposes A, B and C and then credential its commissioners for purposes D, E and F would be unacceptable to the other states. The staff at the convention charged with examining and verifying credentials would be on firm ground in rejecting such credentials and turning the commissioners away. Here’s<sup>1</sup> the model application being proposed by Convention of States Project, as endorsed by the American Legislative Exchange Council (ALEC). Here’s<sup>2</sup> House Joint Resolution 516, introduced in the 2021 session of the Virginia Assembly, which, if it had not died in committee, would have had Virginia apply for a limited convention.

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<sup>1</sup> <https://alec.org/model-policy/article-v-convention-of-the-states/>

<sup>2</sup> <https://lis.virginia.gov/cgi-bin/legp604.exe?211+ful+HJ516+pdf>

In 1987, a report<sup>3</sup> requested by the Attorney General of the United States concluded: "...that there are inevitable uncertainties associated with any as-yet-untried process. However, it is suggested that the adoption of convention-procedures legislation by the Congress would minimize greatly any remaining uncertainties associated with the convention method of amendment." We will discuss these "convention procedures" in a moment.

### **Control in the delegates' credentials.**

As we saw in the last essay, the credentials of the 1787 commissioners, for the most part, were very expansively worded, which was by design. Only a couple borrowed Congress' wording to revise the Articles, but even those also added wording to "render the Foederal Constitution adequate to the [needs] of the Union." Madison and Hamilton knew what they wanted to accomplish at the "Grand Convention," Both Madison<sup>4</sup> and Hamilton<sup>5</sup> had separately analyzed the defects in the Articles of Convention and surmised that nothing short of a new plan of government would correct those deficiencies. Madison drafted and had his delegation chair, Edmond Randolph, introduce the Virginia Plan, which the other delegates immediately realized was a new plan of government. But as the Virginia Plan was discussed, the other delegates began to see that the new plan, with some modifications, would "render the Feederal Constitution adequate to the [needs] of the Union."

In the 2019 session of the Virginia Assembly, SJR268<sup>6</sup> was introduced which would limit the authority of Virginia's commissioners should Congress call an Article V Convention. Pay special attention to Section 7. "Violation of Oath by a Commissioner." Would you be willing to subject yourself to a Class 6 Felony conviction (separate legislation) for willfully violating the limits of your commission?

### **Control in the Convention Procedure and Rules.**

Another safeguard once the convention is underway, is the near certainty that the proceedings will be televised. The entire country will be watching the *first-ever* Article V Convention, for a while at least. If the proceedings drag on for months or even weeks, short-attention-span Americans will return to their daily lives. But constitutional scholars will continue watching daily with great interest, as will the state legislatures which sent delegations. How likely is that a commissioner interested in exceeding their authority will risk recall and/or a civil penalty to do so?

The U.S. Constitution in Article 1, Section 5, Clause 1 says: "Each House may determine the Rules of its Proceedings..." And of course, each House has indeed set up separate and distinct rules of procedure. The Senate famously includes the (in)famous filibuster in its rules, the House does not. Without these rules, Congress would be bedlam; nothing would be accomplished as members

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<sup>3</sup> <https://www.ojp.gov/pdffiles1/Digitization/115134NCJRS.pdf>

<sup>4</sup> <https://teachingamericanhistory.org/document/vices-of-the-political-system/>

<sup>5</sup> <https://founders.archives.gov/documents/Hamilton/01-03-02-0272>

<sup>6</sup> <https://lis.virginia.gov/cgi-bin/legp604.exe?191+ful+SJ268+pdf>

took out their aggression on one another, shouted across the political aisle at each other and, generally, behaved like children. Fortunately, each house established rules and enforces them, with Parliamentarians and a Sergeant at Arms if necessary. Article V opponents would have us believe a convention would amount to a free for all, there would be no order, and no expectation of what might result. I should point out that the recent simulated convention operated with both a parliamentarian and a Sergeant at Arms.

Setting rules of procedure will be the convention's first order of business after electing presiding officials. Fortunately, the Rules Committee will not need to start from scratch. Rules for such a Convention have already been drafted and now used twice in conducting simulated conventions. In this essay<sup>7</sup> published in the Tennessee Law Review, Robert Natelson provides us the complete historical background on convention rules.

It is sometimes objected that nothing requires the convention to adopt the traditional "one state-one vote" rule, that the convention could allocate votes to delegations based on the state's congressional representation. This would allow large Left-leaning states like California (55 Congressmen), New York (29 Congressmen) and Illinois (20 Congressmen) to dominate both debate (every commissioner is entitled to speak on a subject) and votes. Remember that for a convention to get underway 34 states would have applied to Congress for a convention for limiting, not expanding the powers of Congress. Would the delegations of those 34 states allow such a vote-counting rule to be enacted for the convention? In this short paper,<sup>8</sup> Rob Natelson focuses on this question alone.

The greater likelihood is not that the convention will propose unacceptable amendments, but that it will produce nothing at all, no amendments that a majority of commissioners could agree on. In that case, the convention will still have been valuable in "breaking the ice" and demonstrating that such a convention will stick to its charter and follow its own rules.

### **The final safeguard: Ratification**

Opponents of an Article V Convention insist that, somehow, the convention will either propose "self-ratifying" amendments, or even a "self-enacting" new constitution. This charge is delusional. The Convention is being conducted under the authority of Article V of the Constitution. That is its only authority.

The Preamble of the U.S. Constitution makes it clear that "We the People" are the ultimate authority behind the Constitution, not "We the State Legislatures."<sup>9</sup> It is a near certainty that if an Article V convention is called, the state legislatures will directly appoint their commissioners, not subject that appointment to a choice of the citizens. But even if they

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<sup>7</sup> [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1904649](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1904649)

<sup>8</sup> <https://conventionofstates.com/files/two-reasons-each-state-will-get-one-vote-regardless-of-population-size>

<sup>9</sup> This greeting was considered in 1787, but it was not known which states would ratify the Constitution, so Gouverneur Morris went with "We the People" instead, and we should all be thankful he did.

did, the commissioners would operate under the authority of the state legislature, not the citizens.

The suggestion that such a convention would operate under the authority of the Declaration of Independence (i.e., have the authority to “dissolve the political bands which have connected them with another” and to “provide new Guards for their future security”) is simply ludicrous and grasping at straws. In 1776, there was only natural law and the English unwritten Constitution. Today, we have Article V.

Finally, Article V clearly requires that any amendments proposed by either Congress, or a Convention be ratified by three-quarters of the states (38) before they become part of the Constitution. There is no way around this; this is required.

I believe this combination of controls and limitations will ensure an Article V Convention produces exactly what is expected of it, and no more. We do not live in a risk-free world; such does not exist. Anytime we strap ourselves into a vehicle we accept risk, without giving it a second thought. Prudent men and women analyze the risk inherent in any operation and ensure risk is eliminated or mitigated to the extent possible. An Article V Convention is no exception.

The alternatives to an Article V Convention will be the subject of my next essay. Stay tuned.

If you desire further clarification of the points made in this essay, contact Gary Porter at [constitutionlead@gmail.com](mailto:constitutionlead@gmail.com).