

# Renewed Push for a Con-Con

Calls for a Constitutional Convention are exercises in misdirection. The Constitution doesn't need fixing; government officials who violate it need to be removed.

by Joe Wolverton II, J.D.

There is an alarming increase in the number and volume of otherwise credible conservative voices clamoring for the state governments to call a constitutional convention per the provisions set forth in Article V of the U.S. Constitution.

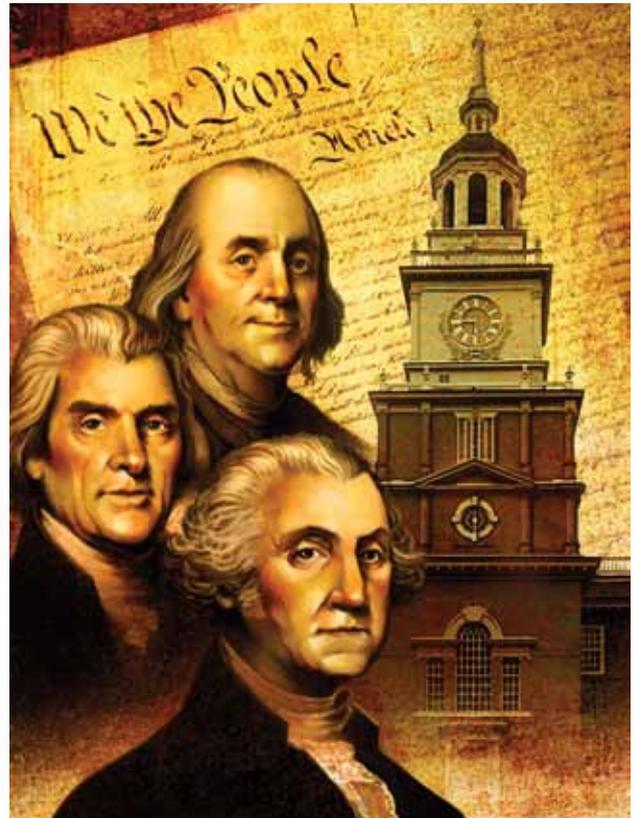
We begin this examination of the dangers posed by such a convention by laying out the constitutional authority relied upon by its advocates. Article V in relevant part:

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.

The Goldwater Institute recently published a three-part paper entitled “Amending the Constitution by Convention: A Complete View of the Founders’ Plan” by Robert G. Natelson. The paper is seemingly intended to function as a tract for use to convert other conservatives to the cause of the constitutional convention as a remedy to runaway big government. The Executive Summary of Part 1 by Nick Dranias asserts that under Article V, the states have “the power to apply to Congress to hold a convention for the purpose of proposing constitutional amendments. This power was meant to provide a fail-safe mechanism to control the federal government.”

## Fedgov Powers “Few and Defined”

There is a fundamental error in this statement: The Constitution does not grant to the states any powers. On the contrary, the Constitution is the delegation by the sovereign states to the central (federal) government of a few and definite powers. The nature of this relationship is best described in *The Federalist*, No. 45, by James Madison:



**Whom do you trust:** The Founders who gave us our incomparable Constitution, or our current spendthrift politicians who want to rewrite our governing compact?

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.

There is another flaw in Dranias’ Executive Summary regarding the power of Article V, and it effectively impedes the Goldwater Institute’s march toward a new constitutional convention. Simply put, the black letter of Article V does not allow for a convention with any purpose other than “proposing amendments,” which if ratified by the states (by either of the two methods provided) would become “part of [the] Constitution.” Why would a constitutionalist, sincere in his desire to restore the proper balance between



## CONSTITUTION CORNER

**We do not need a new constitutional convention. What we need is a return to the principles of federalism, limited government, enumerated powers, and popular sovereignty already a part of our existing Constitution.**

the state and national governments, advocate a convention to propose amendments to a Constitution that, according to both its authors and its plain language, already protects that delicate and unique balance of power between the states and the federal government? Is our Constitution as presently written silent or unclear on the subject of the rightful boundaries separating those two entities? In fact, it is not and therefore we do not need to incur the risk of upsetting that balance or erasing those boundaries by convening an Article V constitutional convention for that purpose.

### **Constitutional Remedy: Enforce the Constitution**

The truth is that a call for a new constitutional convention under such auspices is contrary to the very spirit of rigidly hewing to the text of the Constitution (including the related concept of limited, enumerated powers) that animates friends of our Republic to struggle steadfastly against usurpations by the national government. We do not need a new constitutional convention if our legitimate aim is to reaffirm the principles already clearly set forth in our current Constitution.

In other pieces published to support its call for a constitutional convention, the Goldwater Institute points to the “endless growth of the federal government” as the impetus for the crescendo of cries for a new constitutional convention to “regain control over the federal government.” Again, the Constitution is not the problem, so the remedy cannot be found in changing or amending it. In fact, it is the Constitution as presently written that serves as the first, final, and most powerful check on the unwieldy expansion of the scope of federal influence. In any event, until such time as the Constitution is faithfully followed, there is no reason to believe that any amendment passed at an Article V constitutional convention would not be ignored, misinterpreted, and violated as badly as existing clauses to justify the federal government’s unrepentant encroachment into the lives of Americans and into the sovereignty of the states.

Besides, the Constitution already specifically and explicitly grants only very limited powers to the national government and thus what we need is not a new constitutional convention, but a restoration of constitutional boundaries. This retrenchment is most ably accomplished through state nullification of the so-called laws passed by Congress, and by the refusal by consti-



**Violating a sacred oath:** All members of Congress swear to uphold and defend the Constitution, but many (if not most) of their votes violate the letter and spirit of that document.

tionally minded Congressmen to vote for the funding of any unconstitutional expenditures or the exercise of any power not enumerated or logically implied by the Constitution.

The second plank in the Goldwater Institute’s Article V convention platform is the historical record. It contends that the conventions held in Annapolis in September 1786 and Philadelphia in the summer of 1787 did not exceed their mandates, and cites them as evidence that a constitutional convention can accomplish great good with only limited scope. These were not Article V conventions. Natelson claims that neither of those conventions was a “runaway convention” and that the record supports this interpretation of the broad powers granted by state commissions carried by the delegates to those conventions. That account of those seminal events is not completely accurate.

A core premise of the Institute’s conclusion is that neither the Annapolis Convention nor the Constitutional Convention of Philadelphia exceeded its mandate. The report claims that, “48 of the 55 delegates [to the Philadelphia Convention] had instructions which allowed them to go beyond amending the Articles of Confederation.” To assert, then, that the Constitutional Convention was not “runaway” with regard to those 48 delegates is arguably true. However, what of the seven delegates whose commissions expressly forbade them from ratifying, or even participating in, any proposal calling for the dismantling of the government created by the Articles of Confederation? What of the states represented by those delegates? Yet after ratification of the Constitution crafted in Philadelphia, the citizens and governments in those states were equally bound to abide by the terms of that contract.



By logical extension, then, all the states would be equally bound by the amendments passed by delegates to a new constitutional convention called for under Article V.

Another relevant point regarding those early conventions is that while it is true that nothing of any revolutionary import was accomplished at Mt. Vernon or the convention at Annapolis, the hope of several of the key participants (Washington, Madison, and Hamilton, principally) in those conventions was that the convention in Philadelphia would not be hampered by the “temporizing or partial remedies” that hamstrung the previous attempts at establishing a more dynamic central authority. These great statesmen were frustrated that their new Rome was burning while the Neros in the Confederation Congress fiddled with half measures that did nothing more noble than protect their own petty seats of power.

Those familiar with the history of the early Republic know that violent centrifugal forces (including the literal burning of courthouses in Massachusetts and Richmond, Virginia) were throwing into sudden reverse the centripetal attraction that united the colonies in their war against the British crown. The newly independent states were flung into a chaotic destabilizing maelstrom of disaffection, debt, and outright armed rebellion against state governments and the embryonic (though already impotent) central authority created by the Articles of Confederation.

This post-bellum agitation was worrisome to many of our young nation’s leading lights. George Washington, James Madison, and Alexander Hamilton in particular were dismayed to see the goodwill deposited into the account of union after the War for Independence being prodigally spent to quash internecine uprisings of Americans against Americans. They rightly worried that this disunion would result in the fracture of the United States into two or more smaller confederacies.

It is a matter of historical record that many of our nation’s Founding Fathers revealed in their personal correspondence

their private aspirations for the meetings to be held in Mt. Vernon and Annapolis. James Madison and George Washington in particular express in letters to each other and to other correspondents that they hoped for a convention wherein the delegates would come with plenary power to establish a new government. In fact, George Washington wrote that he feared that “if the delegates come to it [the Constitutional Convention in Philadelphia] under fetters, the salutary ends proposed will in my opinion be greatly embarrassed and retarded, if not altogether defeated.”

While we rightly admire Washington, Madison, Hamilton, et al., it is more for what they did than how they did it. If we are intellectually honest with ourselves, we must admit that while there was perhaps no active, knowing dissembling in the calling, convening, and conducting of the conventions (including Philadelphia) that produced the Constitution we hold so dear, there was certainly a committed effort by these movers of men to fly a stronger national government under the sweep of the vigilant radar of Congress and the states.

### Who Would Our New Founders Be?

We are fortunate that the ulterior motives of the generation of statesmen who crafted our Constitution were noble, altruistic, and consistent with timeless principles of liberty and limited republican self-government. Were we to answer the call for the convening of a modern constitutional convention, what manner of men and women would attend it and would their goals be as honorable and praiseworthy as those set by our Founding Fathers?

It is unlikely. Moreover, there is no constitutional mechanism for controlling who would be selected as delegates to such a convention. Radical factions of every stripe would jockey to attend, slaving over the opportunity to tweak this or that aspect of the Constitution to suit their respective political or socioeconomic philosophies. Or, perhaps they would decide it would be easier to scrap the old document altogether and just begin anew — which is exactly what happened when the Articles of Confederation were cast aside in favor of an entirely new Constitution. The accomplishment of the Convention of 1787 could rightly be called a miracle, but what would prevent a modern-day convention from becoming a nightmare? The prospect of a convention endowed with power of this magnitude, populated by delegates determined to tinker with the precision gears that give movement to works of our mighty Republic, is frightening and should give pause to everyone presently promoting this cause or considering joining in it.

Also, what are the chances that the representatives chosen to deliberate these heady matters would be men of character and wisdom who understand and support minimal government and the division of powers under the Constitution? Will we be twice blessed with an assembly of “demigods”? How many such men can actually be found in any of our modern-day councils — and how many of them would actually be selected as convention delegates? Even if Providence were to guide every step of

# We the People of the United States

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**One tyranny for another?** Did our Founding generation declare independence from the tyranny of the British crown only to have us accept a new tyranny from federal overlords in Washington, D.C.?

this perilous process and the delegates selected were people of the sort who built our present system, the wise words of James Madison must be remembered and pondered in this regard: “Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob.”

Furthermore, despite the reassurance of the proponents of a new constitutional convention, tradition can be no reliable guide in this area as there are no immovable metes and bounds to which participants must adhere. Their theory works well in a vacuum, but in the real world of politics and lobbyists, there is real danger of the destruction of the Constitution — even, as Roger Sherman warned his colleagues in the Philadelphia Convention, unto the abolition of state sovereignty altogether.

A related historical problem is that in the propaganda published to support the call for an Article V convention, advocates interpret far too liberally the language of the documents granting agency to delegates to the conventions held earlier in our history. To argue, for example, that the authorization given by the state of Georgia to its representatives to effect “all such Alterations and farther Provisions as may be necessary to render the Federal Constitution adequate to the exigencies of the Union” granted them broad, unshackled power to work to create a new constitution stretches the bounds of defensible exegesis and reads like convenient casuistry.

The averment, for example, that the phrase “Federal Constitution” as used by Georgia was simply the 18th-century way of defining “the entire political system” (such as is typically applied to the much-heralded “unwritten” constitution of the United Kingdom) would be more persuasive if at the time of the drawing of that document there was not a written federal constitution in legal effect. As susceptible to well-founded and legitimate criticism the Articles of Confederation were, the unavoidable fact is that on the day the Georgia delegates were handed the parchment approving their attendance at the Phila-

delphia Convention in May, they were living under a legally operable and binding federal constitution.

One of the most self-serving of the errors contained in Natelson’s “Part 1” published by the Goldwater Institute is that of assuming the basis of its opponents’ argument. The document supposes that those constitutionalists who fear a modern-day runaway convention base their case on the wording of the Confederation Congressional resolution recommending that states send commissions to the convention to be held in May of 1787 in Philadelphia.

### Runaway Reality

Specifically, Natelson and his allies erect the straw man of the aforementioned resolution in order to prove that the attendees at the Philadelphia Constitutional Convention did not exceed the express authority granted them by their respective state governments. (The resolution proposed that a convention be held “for the sole and express purpose of revising the Articles of Confederation.”) On the contrary, those who oppose an Article V convention are as aware as those on the other side of the issue that the resolution passed by the Confederation Congress was of no more than persuasive legal authority. It is the instructions given by the states to their agents, the delegates, that hold the key to whether or not the convention held in Philadelphia in 1787 was “runaway” or not.

In actuality, those aligned against the call for an Article V convention are as familiar as Natelson with the purposes and prejudices of states and the men sent by them to protect their interests at the Constitutional Convention.

Finally, there is one salient point that is ignored by Natelson in his use of the accounts of historical conventions to quell the fears of those yet wary of what might happen at a modern convention.

Even if one assumes for the sake of argument that there was



nothing “runaway” about the Annapolis or Philadelphia conventions and that the delegates that attended those meetings rigidly adhered to a narrowly tailored agenda of limited scope, that assumption is immaterial in the discussion of the potential dangers of an Article V convention.

The simple, material, and irrefutable fact is that Article V did not exist when those earlier meetings convened and therefore neither the agenda nor the legally permissible outcome were governed by the provisions thereof. One cannot convincingly argue that a convention called under other auspices and other authority, all of which predated the current Constitution, would be at all binding on the procedure or purpose of a constitutional convention called according to the mandates of Article V.

In spite of their many historical errors and mistakes in judgment, many of those proselytizing for an Article V convention are very convincing. One is reminded of the words of King Agrippa, when confronted with the compelling arguments of St. Paul, “Almost thou persuadest me.” Alas, however, we are not persuaded.

Indisputably, every American worthy of the label “constitutionalist” agrees with the position that the federal government has obliterated the barriers placed by the Constitution of 1787 around its very limited powers. Furthermore, we all agree that

the time has come for very drastic measures to be employed if we are to rescue our beloved Republic from the brink of absolutism upon which it is now precariously hanging.

THE NEW AMERICAN (and The John Birch Society) part company with the Goldwater Institute, Robert Natelson, and their companions, however, in the way such salvation is to be best accomplished. In our view, we do not need a new constitutional convention, regardless of how limited in scope it may claim to be. What we need is a return to the principles of federalism, limited government, enumerated powers, and popular sovereignty already a part of our existing Constitution.

We are not persuaded that such a convention would conform to restraints or limits placed upon it by the states or Congress. Even the Goldwater Institute’s own paper admits that, “abuses of the Article V constitutional amendment process are possible.” Given the ready availability of the salubrious and side-effect free remedy of returning to the principles of the Constitution as presently established, there is no need to assume the risks inherent in such possible abuses and the fatal side effects that may accompany the radical treatment of a new convention. The cure, in this case, would almost certainly be worse than the disease. The fate of our nation and our Constitution hangs in the balance. ■

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