

## A CASE AGAINST A CONVENTION OF THE STATES

*Kevin M. Smith\**

### I. INTRODUCTION

Nine of the original thirteen states ratified the Constitution of the United States of America in 1788.<sup>1</sup> Nearly two hundred and thirty years later, it is the oldest “charter of government” still governing its people;<sup>2</sup> the next oldest is Norway’s Constitution, enacted in 1814.<sup>3</sup> The U.S. Constitution’s ratification followed the American Revolution, a conflict that happened because England’s King George and Parliament treated the colonies like an illegitimate child, taxing them as a means of paying for the British Empire’s many forays into foreign lands and not granting the colonists representation in Parliament—thus disallowing the colonists to have a say in how their taxes were spent.<sup>4</sup> There were other usurpations to which natural-born Englishmen were entitled due to birthright, tantamount to a denial of equal protection of the laws under post-Constitution America.<sup>5</sup> It is, therefore, a Constitution that emerged from trial by fire, vulcanized by the heat of righteous revolution insulated and protected by the Teflon-hard blood of

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<sup>1</sup> See, e.g., Sol Bloom, *Constitution Questions and Answers*, NAT’L ARCHIVES, <https://www.archives.gov/founding-docs/constitution-q-and-a> (last updated Oct. 6, 2016).

<sup>2</sup> See, e.g., *The Constitution—Charter of Freedom*, LOMA LINDA UNIV., <http://home.llu.edu/campus-and-spiritual-life/student-services/constitution-charter-of-freedom> (last visited Apr. 16, 2017).

<sup>3</sup> See *The Constitution*, STORTINGET, <https://www.stortinget.no/en/In-English/About-the-Storting/The-Constitution/> (last updated Mar. 8, 2015).

<sup>4</sup> See, e.g., Linda Alchin, *Causes of the American Revolutionary War*, LAND BRAVE (Feb. 2017), <https://www.landofthebrave.info/causes-of-the-american-revolutionary-war.htm>; *The American Revolution: 1763-1783*, LIBR. CONGRESS, <http://www.loc.gov/teachers/classroom-materials/presentationsandactivities/presentations/timeline/amrev/> (last visited Aug. 16, 2017).

<sup>5</sup> See Thomas H. Burrell, *A Story of Privileges and Immunities: From Medieval Concept to the Colonies and United States Constitution*, 34 CAMPBELL L. REV. 7, 101–02 (2011).

patriots.

The Constitution has survived the ravages of a Civil War fought over the rights of southern states to retain slaves to work their plantations, wrongheaded wars with neighboring nations, two world wars, a cold war that included two “hot” ones in Korea and Vietnam, two Persian Gulf wars, an ongoing war against terror, and many cultural revolutions spurred by the Constitution’s protections against discrimination and the government’s suppression of civil rights. How could our Constitution endure for so many years?

## II. A CASE AGAINST A CONVENTION OF THE STATES

### *A. If You Want a Constitution That Spans Generations, Better to Have Brilliant and Successful Revolutionaries Writing It Than Smart, Spoiled Brats*

The forty founding fathers who wrote the Constitution were brilliant—all of them, not just one or two. Among them were George Washington, Benjamin Franklin, James Madison, and Alexander Hamilton.<sup>6</sup> Almost all fought in the American Revolution.<sup>7</sup> More impressive was the diversity of the founders’ life experiences; few were “career” politicians.<sup>8</sup> Specifically:

- Thirty-five were lawyers, although not all practiced the law as a career.<sup>9</sup> Several were judges.<sup>10</sup>
- Thirteen—Blount, Broom, Clymer, Dayton, Fitzsimons, Gerry, Gilman, Gorham, Langdon, Robert Morris (as opposed to Governor Morris), Pierce, Sherman, and Wilson—worked in business, shipping, or as merchants.<sup>11</sup> Six—Blount, Dayton, Fitzsimons, Gorham, Robert Morris, and Wilson—worked in major land speculation.<sup>12</sup> Eleven—Bedford, Blair,

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<sup>6</sup> See, e.g., Joseph J. Ellis, *Founding Fathers: United States History*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Founding-Fathers> (last updated Feb. 3, 2017).

<sup>7</sup> See, e.g., *The Founders*, RICHARD CHARLES: BLOG (May 15, 2013), <http://usnvrepcan.blogspot.com/2013/05/the-founders.html>.

<sup>8</sup> See, e.g., Tom Kertscher, *Were the Founding Fathers “Ordinary People?”*, POLITIFACT (July 2, 2015), <http://www.politifact.com/wisconsin/article/2015/jul/02/founding-fathers-ordinary-folk/>.

<sup>9</sup> *America’s Founding Fathers: Delegates to the Constitutional Convention*, CHARTERS FREEDOM, [https://toolkit.archives.gov/exhibits/charters/constitution\\_founding\\_fathers\\_overview.html](https://toolkit.archives.gov/exhibits/charters/constitution_founding_fathers_overview.html) (last visited Mar. 2, 2017) [hereinafter *America’s Founding Fathers*].

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

Clymer, Dayton, Fitzsimons, Franklin, King, Langdon, Robert Morris, Charles Cotesworth Pinckney, and Sherman—were securities speculators.<sup>13</sup> Twelve—Bassett, Blair, Blount, Butler, Carroll, Jenifer, Mason, Charles Pinckney, Charles Cotesworth Pinckney, Rutledge, Spaight, and Washington—owned farms or plantations.<sup>14</sup>

- Franklin, McHenry, and Mifflin were “retired from active economic endeavors.”<sup>15</sup> Franklin and Williamson were also engaged in scientific pursuits.<sup>16</sup> The physicians in the group were McClurg, McHenry, and Williamson,<sup>17</sup> and Johnson served as president of a university.<sup>18</sup> As far as spiritual ventures were concerned, Baldwin was a former minister,<sup>19</sup> while at least Williamson, Madison, and Ellsworth had not been ordained but had studied some theology.<sup>20</sup>
- Washington and Robert Morris were wealthy,<sup>21</sup> as were a few others—Carroll, Houston, Jenifer, and Mifflin.<sup>22</sup>
- Baldwin, Blair, Brearly, Gilman, Jenifer, Livingston, Madison, and Rutledge were the only nine out of forty to receive much income from serving in public office.<sup>23</sup>

Suffice to say that successful men masterminded a Constitution intended to preserve the freedoms in which they believed, thanks to real-life experience, and one that enabled them and their posterity to live free, personally and economically, into the foreseeable future and beyond. They went into the process believing in the Declaration of Independence’s tenet of faith that “all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”<sup>24</sup> They believed that a Constitution should

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

restrain the national government from interfering with local control as well as from suppressing the People's unalienable rights.<sup>25</sup>

*B. "The Tree of Liberty Must be Refreshed from Time to Time with the Blood of Patriots and Tyrants"*<sup>26</sup>

Fast-forward 227 years. Americans are once again disillusioned by the direction the country has taken. Specifically, since 1937, the federal government (all three branches) has expanded to impact many aspects of civilian lives that the founding fathers never envisioned. The government can now control the quantity of crops that a citizen can grow for his own consumption.<sup>27</sup> Teachers cannot pray with their students.<sup>28</sup> The right to abortion has been read into amendments, including the First, Fourth, Ninth, and Fourteenth.<sup>29</sup> The federal government has forced its citizens to buy health insurance.<sup>30</sup> The national debt has grown so large that few envision any chance of ever seeing a dime from the social security trust fund that they have been contributing to for all of their working lives.<sup>31</sup> In the words of Howard Beale from the movie *Network*: "I'm as mad as hell, and I'm not going to take this anymore!"<sup>32</sup>

What is the answer to this encroaching government? Some say another convention of the states, which would allegedly be limited to amending the Constitution to reign in the executive, legislative, and judicial branches to where they were before their "illegal" encroachments.<sup>33</sup> However, we must be very careful with what we ask for because we might get it, and the more important question is whether a modern manifestation of a constitutional convention would destroy rather than protect our unalienable rights.

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<sup>25</sup> See *id.*; ARTICLES OF CONFEDERATION of 1777, art. II.

<sup>26</sup> Letter from Thomas Jefferson to Col. William S. Smith (Nov. 13, 1787), in THE WRITINGS OF THOMAS JEFFERSON 371, 373 (1903).

<sup>27</sup> See *Wickard v. Filburn*, 317 U.S. 111, 128–29 (1942) (holding that crops grown for personal use are subject to commerce clause restrictions on production).

<sup>28</sup> See *Engel v. Vitale*, 370 U.S. 421, 424 (1962) (holding that prayer and even silence observance in public school is considered sponsorship of religion).

<sup>29</sup> See *Roe v. Wade*, 410 U.S. 113, 152, 153, 154 (1973) (citations omitted).

<sup>30</sup> See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 574, 588 (2012) (finding the Affordable Care Act mandate to actually be a tax, and therefore, a constitutional exercise of Congress's tax and spending powers).

<sup>31</sup> See, e.g., Jonnelle Marte, *Social Security Trust Fund will be Empty in Less than 20 Years*, WASH. POST (June 22, 2016), [https://www.washingtonpost.com/news/get-there/wp/2016/06/22/social-security-and-medicare-still-face-shortfalls-trustees-say/?utm\\_term=.794760425188](https://www.washingtonpost.com/news/get-there/wp/2016/06/22/social-security-and-medicare-still-face-shortfalls-trustees-say/?utm_term=.794760425188).

<sup>32</sup> NETWORK (Metro-Goldwyn-Meyer 1976).

<sup>33</sup> See *The Solution*, CONVENTION STS., <https://www.conventionofstates.com/solution> (last visited Mar. 4, 2017).

*C. The Scope of the First Constitutional Convention was Limited to Amending, too, but It Produced a Brand New Constitution*

The Articles of Confederation and Perpetual Union was the first written Constitution of the United States of America.<sup>34</sup> Under the Articles of Confederation, the states remained sovereign and independent.<sup>35</sup> Congress was the last resort when states disputed matters.<sup>36</sup> Congress could make treaties and alliances, as well as maintain a military and create currency.<sup>37</sup> However, the Articles of Confederation did not give Congress the power to tax and collect revenue from the states, and Congress had no power to regulate commerce.<sup>38</sup> The result of these shortcomings was that the United States as a nation had little power over its component states.

Indeed, the inability to regulate commerce alone resulted in states competing against each other for trade agreements, which created the danger that the union might separate if one state's bargaining power unfairly excluded another's (or several others') economic interests.<sup>39</sup> The survival of the union depended on rectifying these shortcomings by giving the central government more control over issues that demanded unity, such as collecting revenues to meet the federal government's obligations,<sup>40</sup> and a unified trade policy to prevent individual states from negotiating trade agreements that favored individual state's interests over the nation's collective interests.<sup>41</sup> It also needed the ability to raise a national army with the means to tax the states for the costs of the common defense.<sup>42</sup>

In February 1787, the Continental Congress called for a convention of delegates "to 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."<sup>43</sup> This language has been interpreted to mean that the first convention

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<sup>34</sup> See *Primary Documents in American History: The Articles of Confederation*, LIBR. CONGRESS, <http://www.loc.gov/rr/program/bib/ourdocs/articles.html> (last visited Feb. 28, 2017).

<sup>35</sup> ARTICLES OF CONFEDERATION of 1777, art. II.

<sup>36</sup> See *id.* art. IX, para. 2.

<sup>37</sup> See *id.* art. IX, para. 1.

<sup>38</sup> See *id.* art. VIII.

<sup>39</sup> See, e.g., *Constitution of the United States—A History*, NAT'L ARCHIVES, <https://www.archives.gov/founding-docs/more-perfect-union> (last updated Oct. 6, 2016).

<sup>40</sup> See THE FEDERALIST No. 12 (Alexander Hamilton).

<sup>41</sup> See THE FEDERALIST No. 11 (Alexander Hamilton).

<sup>42</sup> See THE FEDERALIST No. 41 (James Madison).

<sup>43</sup> THE FEDERALIST No. 40 (James Madison).

was supposed to amend and revise the Articles of Confederation to address its shortcomings and not to replace it with an entirely new document.<sup>44</sup> But that is not what happened. Instead, the Articles of Confederation were thrown out and an entirely new form of government was adopted—one that preserved state sovereignty for local issues,<sup>45</sup> and vested in the federal government powers necessary for maintaining a strong Union on matters of national interests.<sup>46</sup> It also codified the separation of powers with three co-equal branches of government—the legislative,<sup>47</sup> executive,<sup>48</sup> and judicial<sup>49</sup>—and provided for an amendment process that enabled future generations to modify the Constitution to address issues not considered by the convention, such as the first ten amendments that preserved for posterity our “unalienable rights,” commonly known as the “Bill of Rights.”<sup>50</sup>

We were lucky. Although the first convention’s delegates went beyond their mandate, they had risked life and limb to stand up to King George and the English Parliament in the Revolution and knew the price to be paid by yielding to an oppressive government.<sup>51</sup> As Benjamin Franklin put it when the founders signed the Declaration of Independence: “We must . . . all hang together, or most assuredly we shall all hang separately.”<sup>52</sup> As stated earlier in this article, the founders were brilliant, successful men before, during, and after the Revolution. They were uniquely qualified to represent not only their generation, but all future generations. They were also still nursing the wounds, both literal and figurative, inflicted during the Revolution. The same cannot be said about

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<sup>44</sup> See *id.*

<sup>45</sup> See U.S. CONST. amend. X.

<sup>46</sup> See U.S. CONST. art. I, § 8.

<sup>47</sup> See U.S. CONST. art. I, § 1.

<sup>48</sup> See U.S. CONST. art. II § 1, cl. 1.

<sup>49</sup> See U.S. CONST. art. III, § 1.

<sup>50</sup> See U.S. CONST. art. V; see also *Equal and Inalienable Rights*, DOCUMENTS FREEDOM, <https://www.docsoffreedom.org/readings/equal-and-inalienable-rights> (last visited Apr. 20, 2017) (“All men are equal in the sense that, since we are all human, we are born with certain inherent, natural, and unalienable rights. Those rights include ‘life, liberty, and the pursuit of happiness.’”). The Constitution has been amended twenty-seven times. See *The Constitution of the United States of America*, UNIV. OKLA. C. L., <http://www.law.ou.edu/hist/constitution/Amend.unrat.shtml> (last visited Apr. 20, 2017). Moreover, there were six other unsuccessful attempts to amend the Constitution, all failing to secure the necessary approval of two-thirds of the states. See *id.* All of these amendments were approved by Congress and either passed or failed at the state level. See *id.*

<sup>51</sup> See THOMAS JEFFERSON, A SUMMARY VIEW OF THE RIGHTS OF BRITISH AMERICA (1774) (Paul Leicester Ford ed., Historical Printing Club 1892).

<sup>52</sup> PAUL ARON, WE HOLD THESE TRUTHS . . . AND OTHER WORDS THAT MADE AMERICA 51 (2008).

today's leaders.

*D. Slavery Does Not Render the Founding Fathers Illegitimate and Is Not the Three-Thousand-Pound Gorilla That Many People Think It Is*

I am sure that many reading this article are adding a “but” to my compliments of the founding fathers. They owned slaves.<sup>53</sup> They did, which begs the question whether they were truly qualified to consider the proposition that “all men are created equal.”<sup>54</sup> The assumption is that they must have excluded slaves from their definition of “men.”<sup>55</sup> But I maintain that this is a red herring. Rather, the founders believed that slavery was anathema to the principles contained in the Declaration and the rights enumerated in the Bill of Rights.<sup>56</sup> Consider Thomas Jefferson's view, the man who wrote the Declaration:

The abolition of domestic slavery is the great object of desire in those colonies, where it was unhappily introduced in their infant state. But previous to the enfranchisement of the slaves we have, it is necessary to exclude all further importations from Africa; yet our repeated attempts to effect this by prohibitions, and by imposing duties which might amount to a prohibition, have been hitherto defeated by his majesty's negative: Thus preferring the immediate advantages of a few African corsairs to the lasting interests of the American states, and to the rights of human nature, deeply wounded by this infamous practice. Nay, the single interposition of an interested individual against a law was scarcely ever known to fail of success, though in the opposite scale were placed the interests of a whole country. That this is so shameful an abuse of a power trusted with his majesty for other purposes, as if not reformed, would call for some legal restrictions.<sup>57</sup>

The colonists, therefore, tried to wean themselves from the institution of slavery almost one hundred years before the Civil War, but were thwarted in their attempts by British policies

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<sup>53</sup> See, e.g., *Slavery and the Constitution*, DOCUMENTS FREEDOM, <https://www.docs-offfreedom.org/readings/slavery-and-the-constitution> (last visited Apr. 20, 2017).

<sup>54</sup> See *id.*

<sup>55</sup> See *id.*

<sup>56</sup> See *id.*

<sup>57</sup> JEFFERSON, *supra* note 51.

intended to maximize slave trade profits of its citizens in Britain while hampering the colonists' economic interests.<sup>58</sup> Moreover, the colonies' agrarian-based economy relied on slavery, and eradicating it was not economically viable at the time.<sup>59</sup>

Notwithstanding Jefferson's own reliance on slave labor, he tried to inject his anti-slavery views into the various founding documents he authored, for example: "No person hereafter coming into this county shall be held within the same in slavery under any pretext whatever,"<sup>60</sup> and the initial language that he included in the Declaration:

[George III] has waged cruel war against human nature itself, violating it's [sic] most sacred rights of life and liberty in the persons of a distant people who never offended him, captivating and carrying them into slavery in another hemisphere, or to incur miserable death in their transportation hither. [T]his piratical warfare, the opprobrium [sic] of *infidel* powers, is the warfare of the *Christian* king of Great Britain. [Determined to keep open a market where *men* should be bought and sold,] he has prostituted his negative for suppressing every legislative attempt to prohibit or to restrain this execrable commerce [determined to keep open a market where *men* should be bought and sold]: and that this assemblage of horrors might want no fact of distinguished die, he is now exciting those very people to rise in arms among us, and to purchase that liberty of which *he* had deprived them, by murdering the people upon whom *he* also obtruded them: thus paying off former crimes committed against the *liberties* of one people, with crimes which he urges them to commit against the *lives* of another.<sup>61</sup>

Jefferson was not the only founding father who abhorred slavery. James Madison said in his speech at the first constitutional convention: "We have seen the mere distinction of color made in the most enlightened period of time, a ground of the most oppressive

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<sup>58</sup> *See id.*

<sup>59</sup> *See, e.g.,* HOWARD DODSON, JUBILEE: THE EMERGENCE OF AFRICAN-AMERICAN CULTURE 31, 33 (2002).

<sup>60</sup> *See* Thomas Jefferson, Draft Constitution for Virginia (June 1776), [http://avalon.law.yale.edu/18th\\_century/jeffcons.asp](http://avalon.law.yale.edu/18th_century/jeffcons.asp).

<sup>61</sup> Thomas Jefferson, A Declaration by the Representatives of the United States of America, in General Congress Assembled (draft) (June 28, 1776), <http://www.let.rug.nl/usa/documents/1776-1785/jeffersons-draft-of-the-declaration-of-independence.php>.

dominion ever exercised by man over man.”<sup>62</sup> John Adams stated: “Every measure of prudence, therefore, ought to be assumed for the eventual total extirpation of slavery from the United States. . . . I have, through my whole life, held the practice of slavery in . . . abhorrence.”<sup>63</sup> George Washington,<sup>64</sup> Alexander Hamilton,<sup>65</sup> Benjamin Franklin,<sup>66</sup> Patrick Henry,<sup>67</sup> Thomas Paine,<sup>68</sup> and John Jay<sup>69</sup> are also on record as opposing slavery.

The most cited evidence in support of the idea that the founders considered slaves to be subhuman is their support of the “Three-Fifths Compromise,” which adjusted the proportionate representation of slaves in Congress from zero to three-fifths of a person.<sup>70</sup> In reality, this was a genius inclusion that empowered

<sup>62</sup> THOMAS G. WEST, *VINDICATING THE FOUNDERS: RACE, SEX, CLASS, AND JUSTICE IN THE ORIGINS OF AMERICA* 5 (1997).

<sup>63</sup> *Id.*

<sup>64</sup> See Letter from George Washington to Lawrence Lewis (Aug. 4, 1797), in 36 *THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 1745-1799*, at 2 (John C. Fitzpatrick ed., 1931) (“I wish from my soul that the Legislature of this State could see the policy of a gradual Abolition of Slavery.”).

<sup>65</sup> Writing under the pseudonym Philo Camillus, Hamilton wrote: “The laws of certain states . . . give an ownership in the service of negroes as personal property. . . . But being men, by the laws of God and nature, they were capable of acquiring liberty—and when the captor in war . . . thought fit to give them liberty, the gift was not only valid, but irrevocable.” Alexander Hamilton, Philo Camillus No. 2 (Aug. 7, 1795), <https://founders.archives.gov/documents/Hamilton/01-19-02-0010>.

<sup>66</sup> See *WORDS OF THE FOUNDING FATHERS: SELECTED QUOTATIONS OF FRANKLIN, WASHINGTON, ADAMS, JEFFERSON, MADISON AND HAMILTON WITH SOURCES* 188 (Steve Coffman ed., 2012) (“[I] have conceived a higher opinion of the natural capacities of the black race than I had ever before entertained. Their apprehension seems as quick, their memory as strong, and their docility in every respect equal to that of white children.”).

<sup>67</sup> See Letter from Patrick Henry to Robert Pleasants (Jan. 18, 1773), in *ROBERT DOUTHAT MEADE, PATRICK HENRY: PATRIOT IN THE MAKING* 300 (1957) (“I believe a time will come when an [opportunity] will be offered to abolish this lamentable Evil. Every thing we can do is to improve it, if it happens in our day, if not, let us transmit to our descendants together with our Slaves, a pity for their unhappy Lot, [and] an abhorrence for Slavery.”).

<sup>68</sup> See Letter from Thomas Paine to Benjamin Rush (Mar. 16, 1790), <http://www.thomas-paine.org/letters/other/to-anonymous-march-16-1790.html> (“I wish most anxiously to see my much loved America. It is the country from whence all reformation must originally spring. I despair of seeing an abolition of the infernal traffic in Negroes. We must push that matter further on your side of the water. I wish that a few well instructed could be sent among their brethren in bondage; for until they are enabled to take their own part, nothing will be done.”).

<sup>69</sup> See Letter from John Jay to R. Lushington (Mar. 15, 1786), in 3 *THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY* 185 (Henry P. Johnston ed., 1902) (“It is much to be wished that slavery may be abolished. The honour of the States, as well as justice and humanity, in my opinion, loudly call upon them to emancipate these unhappy people. To contend for our own liberty, and to deny that blessing to others, involves an inconsistency not to be excused.”).

<sup>70</sup> See U.S. CONST. art. I, § 2, cl. 3, *amended by* U.S. CONST. amends. XIV, XVI (“Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service

future generations to eradicate slavery when the opportunity arose. Slave states wanted representation in Congress based on total population, slave and free—they did not want a slave to count as three-fifths of a person for the purpose of calculating the number of representatives they sent to Congress.<sup>71</sup> This would have given slave states a solid majority in Congress for decades, ensuring that not only would slavery continue in perpetuity in the original thirteen colonies, but would extend into the territories.<sup>72</sup>

The effects of the Three-Fifths Compromise, while initially increasing the power of the slave-owning states, was soon mitigated by the faster rate of population growth in the northern states of people who counted as whole persons for representation purposes,<sup>73</sup> eventually leading to the banning of the importation of slaves from Africa in 1807,<sup>74</sup> as well as a ban on the exportation of slaves to the territories<sup>75</sup>—two policies that eventually led to the Civil War and the emancipation of all slaves.<sup>76</sup> In the end, the Three-Fifths Compromise, therefore, did not protect slaveholders' interests. It took almost one hundred years after the American Revolution to free all slaves,<sup>77</sup> but had today's political leaders been transported back in time and been responsible for drafting the Constitution, I

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for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.”).

<sup>71</sup> See Earl M. Maltz, *Slavery, Federalism, and the Structure of the Constitution*, 36 AM. J. LEGAL HIST. 466, 469 (1992).

<sup>72</sup> See *id.*; *Results from the 1860 Census*, CIV. WAR HOMEPAGE, [http://www.civil-war.net/pages/1860\\_census.html](http://www.civil-war.net/pages/1860_census.html) (last visited Feb. 28, 2017). The 1860 census revealed the long-term impact of the Three-Fifths Compromise. *Id.* Of a total U.S. population of 31,183,582, 3,950,538 were slaves, and slave populations were concentrated in fifteen of thirty states. *Id.* The slave states with the highest slave populations were composed of fifty percent or more slaves. *Id.* Thus, reducing the proportional representation of the slave population by forty percent had a substantial impact on public policy and legislation. See *id.*

<sup>73</sup> See *What Was the Three-Fifths Compromise?*, LAWS, <http://constitution.laws.com/three-fifths-compromise> (last visited Apr. 20, 2017).

<sup>74</sup> See Act of Mar. 2, 1807, ch. 22, 2 Stat. 426 (banning the importation of slaves into the United States).

<sup>75</sup> See *Primary Documents in American History: Missouri Compromise*, LIBR. CONGRESS, <https://www.loc.gov/rr/program/bib/ourdocs/Missouri.html> (last visited Apr. 20, 2017) (“[T]he Missouri Compromise was passed in 1820[,] admitting Missouri as a slave state and Maine as a free state. Furthermore, with the exception of Missouri, this law prohibited slavery in the Louisiana Territory north of the 36° 30′ latitude line. In 1854, the Missouri Compromise was repealed by the Kansas-Nebraska Act. Three years later the Missouri Compromise was declared unconstitutional by the Supreme Court in the *Dred Scott* decision, which ruled that Congress did not have the authority to prohibit slavery in the territories.”); but see *Dred Scott v. Sandford*, 60 U.S. 393, 452 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV (holding that Congress lacked the power to regulate slavery).

<sup>76</sup> See generally ENCYCLOPEDIA OF AMERICAN HISTORY 164 (John Mack Faragher ed., 1998) (citing differences in opinion over the status and expansion of slavery as a cause of the Civil War); cf. U.S. CONST. amend. XIII.

<sup>77</sup> See U.S. CONST. amend. XIII.

doubt they would have had the foresight to understand how brilliant it was to allow the Three-Fifths Compromise to bind the country together while simultaneously setting the country up for slavery's future demise.

*E. Today's Politicians Lack the Intellectual Capacity and Moral Integrity to Avoid the Unintended Consequences of a Convention of the States . . . or Might Know Exactly What's at Stake*

At the time of this article's publication, the United States just emerged from a historically divisive 2016 presidential election. Donald Trump is the President, and even Republicans did not necessarily consider him the ideal person for the job.<sup>78</sup> Hillary Clinton was the Democratic nominee,<sup>79</sup> and while she is arguably a more qualified statesman, she had several other issues which led to her defeat. For example, she was embroiled in multiple controversies that raised serious questions about her character, such as the use of a personal email server to store classified communications related to her work as Secretary of State,<sup>80</sup> and an ongoing pay-to-play scandal involving the Clinton Foundation.<sup>81</sup> President Trump has issues, too, which include misogynistic views that include him stating that he was so famous and powerful that he could "grab [women by the] pussy,"<sup>82</sup> as well as a fraud investigation of his namesake Trump University that led to a \$25 million civil settlement.<sup>83</sup>

There is not enough room in this article to address all the shortcomings of many of today's representatives, senators, governors, and other contemporary political leaders; but specific

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<sup>78</sup> See, e.g., *Conservatives against Trump*, NAT'L REVIEW (Jan. 21, 2016), <http://www.nationalreview.com/article/430126/Donald-trump-conservatives-oppose-nomination> (collecting essays by conservatives articulating why Donald Trump was not the ideal republican candidate).

<sup>79</sup> See, e.g., Patrick Healy & Jonathan Martin, *Democrats Make Hillary Clinton a Historic Nominee*, N.Y. TIMES (July 26, 2016), <https://www.nytimes.com/2016/07/27/us/politics/dnc-speakers-sanders-clinton.html>.

<sup>80</sup> See, e.g., Eric Bradner, *Hillary Clinton's Email Controversy, Explained*, CNN, <http://www.cnn.com/2015/09/03/politics/Hillary-clinton-email-controversy-explained-2016/> (last updated Oct. 28, 2016).

<sup>81</sup> See, e.g., Cal Thomas, *Where There's Smoke There's Fire*, WASH. TIMES (Aug. 29, 2016), <http://www.washingtontimes.com/news/2016/aug/29/Hillary-clintons-ethical-problems/>.

<sup>82</sup> See Penn Bullock, *Transcript: Donald Trump's Taped Comments About Women*, N.Y. TIMES (Oct. 8, 2016), <https://www.nytimes.com/2016/10/08/us/donald-trump-tape-transcript.html>.

<sup>83</sup> See Doug Stanglin, *Trump Settles Fraud Case against Trump University for \$25M*, USA TODAY (Nov. 18, 2016), <http://www.usatoday.com/story/news/2016/11/18/reports-trump-nears-settlement-trump-u-fraud-case/94068946/>.

shortcomings are not the point—rather, it is whether contemporary leaders have the character and moral compass to protect our unalienable rights. Recently retired Judge Richard Posner of the U.S. Court of Appeals for the Second Circuit, the go-to federal appeals judge on economic issues,<sup>84</sup> recently revealed his thoughts on the “proper” role of constitutional jurisprudence in modern court decisions:

“I see absolutely no value to a judge of spending decades, years, months, weeks, day, hours, minutes, or seconds studying the Constitution, the history of its enactment, its amendments, and its implementation . . . ,” he wrote. “Eighteenth-century guys, however smart, could not foresee the culture, technology, etc., of the 21st century.” He added, “let’s not let the dead bury the living.”<sup>85</sup>

Retired U.S. Supreme Court Justice John Paul Stevens believed that the Second Amendment should be re-worded to limit its application to those serving actively in the militia, specifically: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms *when serving in the Militia* shall not be infringed.”<sup>86</sup>

Further, Justice Ruth Bader Ginsburg disagreed with the Court’s decision in *District of Columbia v. Heller* that the Second Amendment guarantees an individual the collective right to keep and bear arms, and even equated *Heller* with that of the *Dred Scott* decision<sup>87</sup>—the one that returned a slave who made it to a free state back to his owner.<sup>88</sup> Do we want these modern constitutional law jurists influencing a newly empaneled convention and risk implementing their unconventional views on the American people?

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<sup>84</sup> See, e.g., RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* xix (4th ed. 1992).

<sup>85</sup> See Jessica Chasmar, *Judge Richard Posner: “No Value” in Studying the U.S. Constitution*, WASH. TIMES (June 27, 2016), <http://www.washingtontimes.com/news/2016/jun/27/richard-posner-no-value-in-studying-us-constitution/>.

<sup>86</sup> See John Paul Stevens, *The Five Extra Words that Can Fix the Second Amendment*, WASH. POST (Apr. 11, 2014), [https://www.washingtonpost.com/opinions/the-five-extra-words-that-can-fix-the-second-amendment/2014/04/11/f8a19578-b8fa-11e3-96ae-f2c36d2b1245\\_story.html?utm\\_term=.360bd9bbaa1b](https://www.washingtonpost.com/opinions/the-five-extra-words-that-can-fix-the-second-amendment/2014/04/11/f8a19578-b8fa-11e3-96ae-f2c36d2b1245_story.html?utm_term=.360bd9bbaa1b).

<sup>87</sup> See Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 4–5, 6 (2010).

<sup>88</sup> See *Dred Scott v. Sandford*, 60 U.S. 393, 452 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

*F. We Will Never See a Group of Men as Qualified and Selfless as the Founding Fathers!*

Comparing today's leaders to the founders is sobering and somewhat depressing. Our first President was George Washington: hero of the American Revolution, a successful farmer, and businessman.<sup>89</sup> The second, John Adams, was a successful farmer and lawyer who had a stellar reputation in both professions.<sup>90</sup> He was so committed to the unalienable rights preserved in the Bill of Rights that he agreed to represent eight British soldiers charged with murder for firing into a crowd of rioting colonists.<sup>91</sup> They were acquitted.<sup>92</sup> The third was Thomas Jefferson, who was a successful farmer, inventor, and scholar, and wrote the Declaration of Independence.<sup>93</sup>

These first three presidents combined with men such as Alexander Hamilton, James Madison, John Jay, and all those who participated in the first convention, would have never allowed the adoption of a Constitution that curtailed individual rights or gave more power to the federal government than what was essential to maintain the Union.<sup>94</sup> They had the life experiences, wisdom, and intelligence to foresee the unintended consequences of a poorly conceived Constitution, even if the intention of such a document was to protect the American people.<sup>95</sup> To quote Benjamin Franklin: "Those who would give up essential Liberty to purchase a little temporary Safety, deserve neither Liberty nor Safety."<sup>96</sup> Can the same be said for the potential delegates to a contemporary convention of the states? If not, can the scope be limited to prevent them from eradicating our freedoms completely?

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<sup>89</sup> See, e.g., RON CHERNOW, *WASHINGTON: A LIFE* 483 (2010).

<sup>90</sup> See, e.g., DAVID MCCULLOUGH, *JOHN ADAMS* 18 (2001).

<sup>91</sup> See, e.g., *id.* at 66.

<sup>92</sup> See *id.*

<sup>93</sup> See, e.g., JON MEACHAM, *THOMAS JEFFERSON: THE ART OF POWER* xxi, 479, 504 (2012).

<sup>94</sup> See, e.g., Calvin H. Johnson, *The Dubious Enumerated Power Doctrine*, 22. CONST. COMMENTARY 25, 26 (2005); Irving Brant, *James Madison: President of United States*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/James-Madison> (last updated May 29, 2013).

<sup>95</sup> See, e.g., *America's Founding Fathers*, *supra* note 9.

<sup>96</sup> See Eugene Volokh, *Liberty, Safety, and Benjamin Franklin*, WASH. POST (Nov. 11, 2014), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/11/liberty-safety-and-benjamin-franklin/?utm\\_term=.cb79e5b0fee3](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/11/liberty-safety-and-benjamin-franklin/?utm_term=.cb79e5b0fee3).

*G. The Scope of a States-Initiated Constitutional Convention is up to the Convention's Delegates, Notwithstanding the "Rules" Set by their States*

The drumbeat for a convention of the states is steadily increasing, with several former Republican presidential candidates already on the convention bandwagon. Specifically, “[Marco] Rubio joined several fellow GOP candidates who have expressed their support for a convention, including Kentucky Sen. Rand Paul, retired neurosurgeon Dr. Ben Carson, former Arkansas Gov. Mike Huckabee[,] and Ohio Gov. John Kasich.”<sup>97</sup> It is not just a national-level movement, either. A few state legislatures have already voted on whether to convene a convention, including my home state of Kansas, although it failed to secure enough affirmative votes in its most recent vote.<sup>98</sup> So far, five states, “Tennessee, Alabama, Alaska, Florida[,] and Georgia[,] have formally adopted Article V resolutions,”<sup>99</sup> with the magic number being thirty-four.<sup>100</sup> Article V resolutions have been introduced in thirty-three states thus far.<sup>101</sup> Hence, it is just a matter of time to get the resolutions to a vote.<sup>102</sup> Once the requisite number is reached, Congress is constitutionally obligated to convene a convention.<sup>103</sup>

The scope of the second convention is allegedly “proposing amendments to the U.S. Constitution that impose fiscal restraints on the federal government, limit the power and jurisdiction of the federal government, and limit the terms of office for its officials and for members of Congress.”<sup>104</sup> However, how the convention is constituted, the rules under which it operates, and the scope of its mandate, is not up to the states.<sup>105</sup> Therefore, once the convention is seated, it, not Congress or the state legislatures, sets its own

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<sup>97</sup> See Ben Marquis, *Major GOP Presidential Candidate Endorses “Convention of the States” to Stop Obama*, CONSERVATIVE TRIB. (Jan. 2, 2016), <http://conservativetribune.com/gop-convention-of-the-states/>.

<sup>98</sup> See *Kansas House Rejects Proposal to Call Convention of States*, LAWRENCE J.-WORLD (Feb. 22, 2016), <http://www2.ljworld.com/news/2016/feb/22/kansas-house-vote-calling-convention-states/>.

<sup>99</sup> Barbara Hollingsworth, *Tennessee becomes 5th State to Pass Resolution Calling for Article V Convention*, CNS NEWS (Feb. 10, 2016), <http://www.cnsnews.com/news/article/barbara-hollingsworth/tennessee-becomes-5th-state-pass-resolution-calling-article-v>.

<sup>100</sup> See U.S. CONST. art. V.

<sup>101</sup> See Hollingsworth, *supra* note 99.

<sup>102</sup> See *id.*

<sup>103</sup> See U.S. CONST. art. V.

<sup>104</sup> Hollingsworth, *supra* note 99.

<sup>105</sup> See U.S. CONST. art. V; Hollingsworth, *supra* note 99.

rules and scope for proposing amendments.<sup>106</sup> As long as the legislatures of three-fourths of the states ratify the resulting proposals,<sup>107</sup> they become part of the Constitution.<sup>108</sup> Indeed, only one amendment to date has been repealed: the Eighteenth, which prohibited “the manufacture, sale, or transportation of intoxicating liquors.”<sup>109</sup> It took the twenty-first amendment to repeal it.<sup>110</sup> The big problem, given the character of our nation’s current crop of leaders, is that Article V provides no limit to what a convention can present for ratification to the states.<sup>111</sup> We should tread lightly.

[T]he processes for impaneling the convention, selecting the delegates, setting the convention’s voting rules, and determining what issues the convention would consider and how much of the Constitution it would seek to rewrite are a mystery. That means that under a convention, anything goes. There are no rules, guideposts or procedures in any of these areas.<sup>112</sup>

If you are confident that a convention will not exceed its mandate and that the outcome will not result in degradation of the Constitution’s protections of our unalienable rights: fine. Press forward with petitioning your state representative and senator to vote on a resolution demanding that Congress convene a convention. However, there is a better, more secure way to accomplish the same objective—one that will not give enemies of freedom the chance to destroy the liberties that Americans hold dear.

*H. Congress Has Voted to Amend the Constitution Twenty-Four Times, so Why Not Vote for National Representatives and Senators Who Will Make It Twenty-Five Times?*

There are several possible outcomes to a state-initiated convention of the states. It could propose amendments that only “impose fiscal restraints on the federal government, limit the power

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<sup>106</sup> See U.S. CONST. art. V; Hollingsworth, *supra* note 99.

<sup>107</sup> See U.S. CONST. art V.

<sup>108</sup> See *id.*

<sup>109</sup> See U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI.

<sup>110</sup> See U.S. CONST. amend. XXI.

<sup>111</sup> See U.S. CONST. art. V; Robert Greenstein, *A Constitutional Convention Could Be the Single Most Dangerous Way to “Fix” American Government*, WASH. POST (Oct. 21, 2014), [https://www.washingtonpost.com/posteverything/wp/2014/10/21/a-constitutional-convention-could-be-the-single-most-dangerous-way-to-fix-american-government/?utm\\_term=.416e6516df75](https://www.washingtonpost.com/posteverything/wp/2014/10/21/a-constitutional-convention-could-be-the-single-most-dangerous-way-to-fix-american-government/?utm_term=.416e6516df75).

<sup>112</sup> Greenstein, *supra* note 111.

and jurisdiction of the federal government, and limit the terms of office for its officials and for members of Congress.”<sup>113</sup> It could propose amendments that dramatically alter the Bill of Rights and expand the police power of the government, as well as federal jurisdiction over the minutia of our lives. It could do nothing. The second outcome combined with its ratification is the most terrifying scenario, but it is within the realm of possibility. In the words of the late U.S. Supreme Court Justice Antonin Scalia: “I certainly would not want a constitutional convention. Whoa! Who knows what would come out of it?”<sup>114</sup> Hence, perhaps the best option is to pursue the path that has previously resulted in eighteen changes that were exactly what the People had demanded at the time of the resulting amendments’ ratifications, thus eliminating the risk of the worst-case scenario.

We must demand that Congress pass proposed amendments that the states can consider for ratification, and we must vote for a President, representatives, and senators who will take action to preserve our rights through the amendment process. A good starting point would be an amendment to repeal the Seventeenth Amendment, which would allow state legislatures to nominate and affirm their U.S. senators, as well as recall them if they stray from their states’ best interests, thus restoring accountability to this chamber of Congress.<sup>115</sup>

“The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to th[e] Constitution.”<sup>116</sup> Then, if three-fourths of the states approve the proposed amendments, they become part of the Constitution.<sup>117</sup> Obviously, this option depends on how responsive representatives are to their constituents’ demands. Yet, a known enemy may be better than an unknown enemy. This method has worked from the beginning. The reason that we have had only one convention of the states is because this method works.<sup>118</sup> While a few of the amendments, in

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<sup>113</sup> Hollingsworth, *supra* note 99.

<sup>114</sup> Greenstein, *supra* note 111.

<sup>115</sup> See U.S. CONST. amend. XVII. Under the original constitutional language, if a senator failed to represent his state’s interests, his state could recall and replace him without delay. See, e.g., David Schleicher, *Conservatives’ Illogical, Inconsistent Effort to Repeal the 17th Amendment*, SLATE (Feb. 27, 2014), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/02/conservatives\\_17th\\_amendment\\_repeal\\_effort\\_why\\_their\\_plan\\_will\\_b\\_ackfire.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/02/conservatives_17th_amendment_repeal_effort_why_their_plan_will_b_ackfire.html).

<sup>116</sup> U.S. CONST. art. V.

<sup>117</sup> See *id.*

<sup>118</sup> See, e.g., Michael Farris & Jenna Ellis, *A Convention of the States to Amend the Constitution*, NAT’L REVIEW (Sept. 29, 2016), <http://www.nationalreview.com/article/440506>

hindsight, had unintended consequences, there was enough consensus at one point that three-fourths of the states ratified them.<sup>119</sup> Moreover, when the consequences were so dire that the People demanded repeal,<sup>120</sup> the process worked again.<sup>121</sup>

### III. CONCLUSION: THERE IS MUCH MORE TO LOSE WITH A CONVENTION THAN TO GAIN

In conclusion, I am drawn back to my primary concern about a second convention of the states. Can we find forty like-minded patriots today who will respect the ideals of America's founding principles and have the wisdom and intelligence of our founding fathers? Indeed, we will need more than forty given the fact that we now have fifty, not thirteen, states. If each state gets two representatives, that is already sixty more than were present in the first convention. Who will fight for the right to represent his or her state? Also, if representation at the convention is proportional, it is possible that more liberal states, such as New York and California, will have a disproportionate influence over the convention, which also means that liberal thought leaders such as Judge Posner, and Justices Ginsburg and Stevens—people who at times seem almost hostile to the founding fathers' vision of freedom<sup>122</sup>—will have an undue influence over the process.

The best-case scenario is a process dominated by establishment Republicans and Democrats, with most representatives giving more loyalty to their parties than to the nation and the people they are supposed to represent, much like most presidential primaries—which is not a best-case scenario at all. We will not see very many *citizen* representatives like post-revolutionary America enjoyed.<sup>123</sup> We will certainly not see many men or women who have experienced trials by fire similar to the founding fathers'. Will such

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/constitutional-amendments-states-convention.

<sup>119</sup> *See id.*

<sup>120</sup> *See, e.g.*, U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI; Farris & Ellis, *supra* note 118.

<sup>121</sup> *See, e.g.*, U.S. CONST. amend. XXI; Farris & Ellis, *supra* note 118.

<sup>122</sup> *See supra* Section II(E).

<sup>123</sup> *See* Letter from Thomas Jefferson to Arthur Campbell (Sept. 1, 1797), <https://founders.archives.gov/documents/Jefferson/01-29-02-0409> ("All [reforms] can be . . . [achieved] peaceably, by the people confining their choice of Representatives and Senators to persons attached to republican government and the principles of 1776, not office hunters, but farmers whose interests are entirely agricultural. Such men are the true representatives of the great American interest, and are alone to be relied on for expressing the proper American sentiments.").

people exercise the restraint needed to keep from gutting the protections afforded by the Bill of Rights? Will they scale back the federal government according to their mandate or, instead, respond to their parties' demands to give the federal government even more power to collect taxes and divvy up federal funds more generously to big-money donors and lobbyists? Are they men and women willing to risk their very lives to stand up for the freedoms of their fellow patriots? For me, the answer to the last question is a resounding "no." I hope you agree. After all, we all have a lot to lose.