A Response to the Runaway Scenario

by Robert Natelson, July 21, 2021

In modern conditions, it is literally impossible for an amendments convention to exceed its authority; the "runaway" scenario derives from ignorance of basic facts.

Introduction

Many Americans favor constitutional amendments to correct dysfunctions in the federal government. Because experience shows that Congress is unlikely to propose such amendments, there is growing interest in the Constitution's procedure enabling the states to propose an amendment through a mechanism the Constitution calls a "convention for proposing amendments."

A convention for proposing amendments has never been held. While there are several reasons for this, a primary one has been the "runaway" scenario. This scenario was first widely popularized in the 1960s and 1970s by left-leaning politicians, judges, and activists eager to block amendments overruling liberal Supreme Court decisions. It is ironic that a handful of right-wing groups have swallowed their arguments.

This memorandum discusses their arguments. However, it is no substitute for careful reading of the essays at the **Article V Information Center**, https://articlevinfocenter.com/.

Constitutional Whack-A-Mole

The essence of the "runaway" scenario is that a convention for proposing amendments would be a "constitutional convention" in which the commissioners (delegates) could disregard limits on their authority and push America further along the road to perdition. The scenario seems to have misled enough people to effectively disable a core mechanism in our Constitution's system of checks and balances.

As explained below, the "runaway" writings display deep ignorance of both history and law. Some are so confused and/or frantic that you often have to re-state their objections before even beginning to rebut them. If you do rebut them, you find that doing so is like a game of Whack-A-Mole: No sooner do you dispose of one objection than another pops up. New objections often contradict earlier ones.

The Objections

Although Article V alarmists are always inventing new objections, thus far their principal ones are as follows:

- The composition and protocols of an amendment's convention is a complete mystery.
- An amendments convention is a constitutional convention, inherently sovereign, and "like the first constitutional convention" it may exceed its mandate—that is, "run away."
- Congress has power, either incidental to its call or pursuant to the Necessary and Proper Clause, to set the convention's agenda, rules, and powers, irrespective of the desires of the applying states, thereby enabling the Washington, D.C. establishment to re-write the Constitution.
- Even if the convention proposes useful amendments and the states ratify them, they will make no difference. (This is sometimes stated as, "They aren't following the Constitution anyway.")

Right-wing alarmists add that the existing Constitution is sufficient to deal with the current federal crisis if we follow the strategy of electing conscientious people, repealing the 17th amendment, and reclaiming the 10th amendment. Because those alarmists have been employing this strategy without success for over 60 years, their argument will not be considered further.

First Objection: You Do Not Know the Horrors Behind this Door!

This claim is that the composition and protocols of an amendment's convention are complete mysteries. The claim originated in a short 1963 article by Yale law professor Charles Black. But the article was not a piece of serious research; it was a polemic opposing some amendments then under public consideration. Yet convention opponents have been citing it ever since.

Black was wrong: There is no mystery. An amendments convention is a "convention of the states," the same kind of gathering occurring 40 times in U.S. history. Its make-up and basic procedures were well-established even before the Constitution was written. They were used in the 2017 Phoenix Balanced Budget Planning Convention.

Why did Black and his successors not know that an amendments convention is a convention of the states? Whatever the reason, they overlooked:

- a vast number of Founding-era records designating an amendments convention as a "convention of the states;"
- a U.S. Supreme Court case using the same label;
- a Tennessee Supreme Court case (ditto);
- legislative applications using the same language;
- the parliamentary common law, a long-established set of rules for group decision making;
- newspaper articles from the late 18th through the early 20th centuries; and
- two prior articles in Professor Black's own *Yale Law Journal*!

Second Objection: It Might Happen Again as We Imagined It Happened Before!

Otherwise stated, "An amendments convention is a constitutional convention. We've only had one constitutional convention and it exceeded its mandate. It 'ran away' and that could happen again."

A very quick answer to this claim is: "This isn't 1787. That convention met in secrecy and no one could follow its proceedings. Today the convention proceedings would be open and televised, so state lawmakers could watch them 24/7. The minute a commissioner stepped out of line, he'd get a call from home telling him, 'Straighten up or get recalled.'"

One advantage of this response (besides the fact that any fair person can see it is true) is that it turns against the runaway alarmists their own argument that conditions have changed since 1787. Realistically, though, it's unlikely that any proposal outside the convention's authority would survive a single "out of order" objection from the convention floor.

There are many other responses—in fact, so many you can easily get tied up in "protesting too much." I'll list them and you can make your choice:

- First: An amendments convention is not a "constitutional convention." That's a 20th century misnomer. It's a misnomer because it implies that the convention may re-write the entire Constitution. But Article V explicitly limits the convention to proposing "Amendments to THIS Constitution.". Of course, someone might respond by saying, "Any gathering to addresses changes in constitutional rules is a 'constitutional convention.'" The answer is, "Then why did you say we've had only one constitutional convention? By your definition, we had 'constitutional conventions' in 1754, 1774, 1780, 1786, 1814, and 1861. And none of them ran away." This can leave opponents flatfooted because, of course, they are invariably ignorant of those other conventions.
- Second: The 1787 convention did not run away. The claim that it did so originated as a smear against the Framers by the Constitution's opponents. It relies on the assumption that the Constitutional Convention was called by the Confederation Congress and received its powers from the congressional call. But this is wrong. The Constitutional Convention was called by Virginia in December, 1786 and empowered by the states themselves (under their reserved powers) to re-write the entire political system. The February 21, 1787 congressional resolution the alarmists cite as the "call" was, by its very wording, a mere expression of "opinion."
- Third: If we've had 40 conventions of states and only one exceeded its charge, then those are pretty good odds, aren't they? Especially since many of those 39 were much more recent than the 1787 convention.
- Fourth: The Electoral College is a kind of convention. It's chosen for a specific purpose and empowered directly by the Constitution. Should we stop holding presidential elections because the Electoral College might run away?

- ❖ Fifth: No amendment outside the convention's authority will go to the states for ratification because Congress will refuse to choose a "mode of ratification."
- ❖ Sixth: Even if the convention exceeded its call and somehow got to the states for ratification—so what? No amendment is effective unless three fourths of the states ratify it, *including the same states the convention disobeyed!*

Third Objection: Many Constitutional "Scholars" say the Convention Can't Be Limited

This objection is supported by (1) citing older articles (1960s – 1980s), (2) circulating flyers claiming conventions are sovereign and cannot be limited, and (3) presenting testimony from people who purport to be Article V scholars but are not. Let's take each in order:

Older articles. During the 1960s through 1980s law professors wrote several articles claiming a convention cannot be limited. They all overlooked the relevant materials listed in the response to the first objection. Those articles were corrected by a leading book, Russell Caplan's *Constitutional Brinksmanship*, published in 1988 by Oxford University Press.

To my knowledge, every scholar publishing articles or books on the subject during the 21st century agrees that a convention can be limited. They include University of San Diego Professor Michael Rappaport, Middle Tennessee State University Professor John Vile, former U.S. House of Representatives counsel Michael Stern, and myself. As far as I know, since 2000 no scholar has contradicted this conclusion in any academic journal.

The "convention can do anything" view. This view directly contradicts established constitutional law. The established constitutional law is that when assemblies act under Article V, they derive their authority exclusively from the Constitution, and their power is limited accordingly. To take one example: A state convention commissioned to consider only a particular amendment can be limited to that purpose. In Re Opinions of the Justices, 204 N.C. 306, 172 S.E. 474 (1933). The courts can stop any proposed amendment outside the convention's authority.

The John Birch Society (JBS) has circulated a flyer claiming that conventions are inherently unlimited and citing *Corpus Juris Secundum,* a legal encyclopedia. The flyer is legal gibberish. I've written a legal memorandum for the Convention of States movement dissecting it. Incidentally, you should never accept *any* JBS legal argument as true. They rarely know what they are talking about.

Testimony from "experts." Throughout all of the legislative hearings held over the last decade, opponents have *never* presented testimony from a scholar who has published Article V research in any academic journal. The most academic testifying most frequently in opposition is a "progressive" law professor with no publication credits on Article V.

A JBS operative who testifies frequently before state legislative committees introduces himself as a "constitutional scholar"— but fraudulently so because he has no relevant background or training. Before taking his current job with JBS he was a bicycle repairman.

Fourth objection: The Convention could change the ratification process

This argument is "Just as the 1787 convention changed the Articles of Confederation rule requiring that amendments be approved by all states, so a future 'constitutional convention' could change the rule that three fourths of the states must ratify."

As any qualified constitutional lawyer can tell you, this argument derives from the planet Neptune:

- It misinterprets the power of the 1787 convention, which met under the states' reserved powers and not under the Articles of Confederation;
- it contradicts the specific words of Article V, which lays out how amendments to "this Constitution" must be ratified;
- it contradicts 200+ years of Article V court decisions, which rule that every actor in the amendment process must follow the rules laid out in Article V; and
- it defies reality: The convention has no military force nor even any existence after adjournment. How will it enforce its decree? Call out the army?

Fifth Objection: **The Framers inserted the convention process in the Constitution only to correct drafting errors, not to correct abuses**

This objection appears to originate with a paid JBS operative, and it reflects the shortcomings in his own research. Constitutional Convention delegate George Mason of Virginia promoted the convention procedure at the Constitutional Convention specifically to correct federal abuse. The Article V Information Center has collected other Founding-Era sources to the same effect. See *The Founders Pointed to Article V as a Cure for Federal Abuse*, at https://articlevinfocenter.com/the-founders-pointed-to-article-v-as-a-cure-for-federal-abuse/.

Sixth Objection: Congress Is the Puppet Master!

This objection originated with Professor Black. He asserted that Congress has power, either as incidental to its call or pursuant to the Necessary and Proper Clause (U.S. Constitution, Article I, Section 8, Clause 18), to set the convention's agenda, rules, and powers, irrespective of the desires of the applying states.

This was bad constitutional law then, and intervening court decisions have made it worse.

- First, the Necessary and Proper Clause does not actually give Congress additional power; it is, as Chief Justice Roberts and many others have observed, merely a

memorial that the Federal Congress, unlike the Confederation Congress, has powers incidental to those enumerated.

- Second, the Necessary and Proper Clause authorizes the making of "laws." The courts have ruled consistently that the Article V amendment procedure is not constrained by ordinary laws, but is instead is subject to the rules of the Constitution as interpreted by historical practice.
- Third, the convention is not an entity covered by the Necessary and Proper Clause. Nor is Congress when calling the convention.

The objection is also wrong as a matter of *agency* law: As the California Supreme Court recently pointed out in an Article V case, one cannot have incidental power to invade the prerogatives of another. The Constitution granted state legislatures authority to force a convention to *bypass* Congress. Congress does not have incidental power to disable the mechanism designed to check it.

Some opponents round out this objection by saying that the Supreme Court has held Article V cases to be "non-justiciable"—that resolving all Article V issues is left to Congress, and the courts do not interfere. But courts at all levels have adjudicated at least 40 reported Article V cases, and objections to justifiability have been uniformly overruled.

Seventh Objection: It's Hopeless!

The claim here is that even if the convention proposes useful amendments and the states ratify them, they will make no difference.

This is historical nonsense. Constitutional amendments have been powerful tools for reform. This would be a very different country without the Bill of Rights, without amendments abolishing slavery, ensuring minorities equal rights, enfranchising women, and limiting the president to two terms.

It is sad but true that the judiciary and other branches of government usually respect amendments more than they respect many parts of the original Constitution.

Time to Wake Up from the Nightmare

The Founders inserted the convention procedure for state legislatures to use—particularly in times of federal overreaching. If James Madison and John Dickinson were to come among us today, and we were to tell them of our current predicament, what would they say?

No doubt, they would ask if we had resorted to the state-driven process in Article V to correct the problem. And when we admitted that we had not—that we had allowed ourselves to be gulled by alarmists and quacks—what would these Founders say then?

They would tell us that the whole mess was our own fault. And they would be right.

Partial Bibliography

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All of the following are available without cost in the Article V Information Center's "Research/Resources" section: https://articlevinfocenter.com/researchresources/

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