

Rebuttal to
“Amending the Constitution by Convention:
A Complete View of the Founders’ Plan”

By Bill Walker

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Introduction

The purpose of this article is to rebut a theory presented by Professor Rob Natelson in his article entitled, "Amending the Constitution by Convention: A Complete View of the Founders' Plan" that fiduciary law principles can be applied to the convention process of Article V of the United States Constitution. Through such principles, the theory says, the states can regulate and control the election of convention delegates as well as the convention agenda. Professor Natelson primarily bases his theory on colonial-era quotations, which this article will show, are misinterpreted. Further, the quotes used are not best evidence of the true intent of the framers of the Constitution.

After having disposed by evidentiary proof of Professor Natelson's theory of fiduciary control of the amendment process, this article will present an alternative. A legal, constitutional method whereby the goal of Professor Natelson, limitation of any Article V Convention agenda, via state decisions can be achieved thus accomplishing the goal but by means which are not only constitutional, but were, as best evidence will prove, supported by the framers of the Constitution if not outright intended.

The issue of who will control an Article V Convention is fundamental to this nation. Professor Natelson urges that a few control the convention. This author favors the people having control. Professor Natelson favors limiting a convention to a single, pre-determined issue as well as outcome.

This author realizes much of the "genius" attributed to the Founders at the 1787 convention is actually the fact that the convention had no pre-determined agenda except to repair or otherwise correct the deficits of the existing national government. Consequently, the Founders were free to explore various proposals, ideas and concepts. To reject some, combine some, compromise others. Out of all this came our present Constitution. Professor Natelson's theory denies our country this same opportunity. This author adamantly believes such shortsighted political tactics as limiting a convention's agenda will ill serve this nation. Indeed, this author firmly believes if such a convention convenes as envisioned by Professor Natelson, it will do more harm than good.

This author believes that an open convention is the only protection against that which most who oppose a convention say they fear—a runaway convention. A "runaway" convention is a convention with a single state of mind, that is, agreement on all points by all members politically unified toward a single goal with no opposition whatsoever impeding its progress. Does not that describe perfectly the single-issue convention?

In contrast, an open convention will contain various factions of political points of view. This factious nature will ensure no runaway convention will occur, as all delegates will naturally serve their own interests before bowing in servitude, even to a large majority of other delegates. As a

result, there will be opposition and opposition always prevents runaway events, serving as a needed political brake and more importantly, political conscience.¹ It may sound counter-

¹ The author feels it is not too early in this article to point out an obvious fact often overlooked by critics of an Article V Convention. That fact is that Congress has the identical constitutional authority as a convention as to proposing amendments and unlike a convention is in session on a daily basis. Why are there no charges of a “runaway” Congress when referring to amendment? The answer is politically obvious. Congress is composed of countless representations of various political factions. Oversimplification labels these factions as liberal or conservative, democrat or republican. In fact, the factions are much more complex than this in the world of practical politics. The composition of the factions varies from issue to issue as to support and membership within Congress. The consequence of this political reality means that no one faction can garner enough political muscle to control all of Congress all of the time. There is nothing to suggest that elections which have created such a politically diverse representation in Congress would not produce the same result in a convention.

Clearly all of these factions in Congress have conflicting political agendas. In some instances the agenda is a single issue; other agendas comprise multiple issues. These agendas may be accomplished by legislative means but some is only possible by amendment—particularly if the faction desires to make their agenda as permanent as our legal system permits. In either event, the expectation therefore is those with a particular political agenda will make all effort to advance that agenda. Thus, if a faction possesses the requisite numbers in Congress to advance their agenda, they will do so. In case of amendment this means the faction controls two thirds membership (67%) or more in both houses of Congress. To advance a complex agenda of a faction numerically superior in control of Congress, the faction would propose numerous amendments reflecting that agenda. If so, the large number of amendment proposals demonstrates a “runaway” Congress. The historic record disproves this supposition. As shown in the table below in 13 sessions of Congress, a single political party has controlled both houses of Congress by two thirds membership or more. However, this fact has produced little in the way of massive or numerous amendment proposals.

Cong. Session	Session Dates	Cong. House	Total Seats	Majority Party	Number of Seats	Percentage	Amendment Proposed
8th	3/4/1803-	House	142	Dem.-Rep.*	103	72.5%	12th
8th	3/3/1805	Senate	34	Dem.-Rep.	25	73.5%	
9th	3/4/1805-	House	142	Dem.-Rep.	114	80.3%	
9th	3/3/1807	Senate	34	Dem.-Rep.	27	79.4%	
10th	3/4/1807-	House	142	Dem.-Rep.	116	81.7%	
10th	3/3/1809-	Senate	34	Dem.-Rep.	28	82.4%	
12th	3/4/1811-	House	143	Dem.-Rep.	107	74.8%	
12th	3/3/1813-	Senate	36	Dem.-Rep.	30	83.3%	
15th	3/4/1817-	House	185	Dem.-Rep.	146	78.9%	
15th	3/3/1819	Senate	42	Dem.-Rep.	30	71.4%	

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16th	3/4/1819-	House	186	Dem.-Rep.	160	86%	
16th	3/3/1821	Senate	46	Dem.-Rep.	37	80.4%	
17th	3/4/1821-	House	187	Dem.-Rep.	155	82.9%	
17th	3/3/1823	Senate	48	Dem.-Rep.	44	91.7%	
39th	3/4/1865-	House	193	Republican	136	70.5%	13 th
39th	3/3/1867	Senate	54	Republican	39	72.2%	
40th	3/4/1867-	House	226	Republican	173	76.6%	14 th
40th	3/3/1869	Senate	68	Republican	57	83.8%	
41st	3/4/1869-	House	243	Republican	171	70.4%	15 th
41st	3/3/1871	Senate	74	Republican	62	83.8%	
74th	3/3/1935-	House	435	Democrat	322	74%	
74th	1/3/1937	Senate	96	Democrat	69	71.9%	
75th	1/3/1937-	House	435	Democrat	334	76.8%	
75th	1/3/1939	Senate	96	Democrat	76	79.2%	
89th	1/3/1965-	House	435	Democrat	295	67.6%	25 th
89th	1/3/1967	Senate	96	Democrat	68	68%	

*Democrat-Republicans (Ancestral political party of modern Democrat party).

In sum, both houses of Congress has been controlled by a single political faction on thirteen different occasions; only five amendments were proposed with no Congress proposing more than a single amendment. Thus, there is no indication that Congress has ever become a “runaway” even when presented a political windfall allowing it to do so. There is nothing to suggest a convention, elected by the same electorate as that of Congress, will be any different. Indeed, the fact the convention will be the first in United States history most likely the means the electorate will not support a particular faction such that two thirds control of the convention by that single faction is a possibility.

References: The Historical Atlas of Political Parties in the United States Congress, 1789-1989 Kenneth C. Martis, author and editor; Ruth Anderson Rowles, cartographer; Gyula Pauer, production cartographer, Macmillan Publishing Co, 1989 pp. 77-79, 81, 84-86, 119, 121, 123, 189, 191, 219.; Congressional Research Service, The Constitution of the United States of America: Analysis and Interpretation, (Senate Document No. 103-6). Johnny H. Killian and George A. Costello, Eds. Washington DC; U.S. Government Printing Office, 1992.

Thus, the reason a concern about a “runaway” Congress has never been expressed is that despite the fact that on numerous occasions, a single political party has controlled both houses of Congress by two thirds membership or

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intuitive but a “controlled” single-issue convention is “runaway” convention whereas an “uncontrolled” multi-issue convention is not. The 1787 Federal Convention was a success because it allowed opposition in all forms, proposals of all descriptions and open, constructive debate. Men were able to speak their minds, share their experiences and present various suggestions as to the problems of the day. This allowed the convention, after nearly two months of discussion, to formulate our Constitution. Without an unfettered convention, free of all pre-conceived controls currently promoted by the single-issue advocates, the convention would not have created the Constitution. Indeed, it is certain it would have failed altogether.

There is little doubt today our nation faces a troubled state of affairs caused primarily by an inflated government. By degree, it has managed to assume gigantic proportions of control not only economically but politically as well. Countless citizens from both the political right and left have warned of the dangers of a federal government grown too large and left unchecked such

more, that Congress never demonstrated any inclination whatsoever to become a “runaway” Congress. As the table above demonstrates, the number of amendments proposed for ratification by the states is minimal—no more than a single amendment in any session of Congress far below what can be described as a “runaway” proposal body. The conclusion is obvious: despite the overwhelming numeric superiority of a particular faction in Congress, sufficient opposition existed to prevent massive constitutional amendment proposals as would be expected of a “runaway” Congress.

Therefore, in the area of amendment, despite one political party have numeric superiority over others, the facts show the opposition has always retained a voice in any possible amendment either in the proposal stage or during ratification as the failure of some amendment proposals by Congress demonstrates. This political reality, which the Founders were well aware of when drafting the amendment process, simply means the amendment process requires consent not only of the majority but the minority as well. As such, Congress has never become a “runaway” amendment Congress because sufficient opposition has always existed to prevent such a catastrophe. The factious nature of Congress will also exist at a convention. It therefore reasonable to postulate that this braking system, together with the built in safeguard of ratification, will prevent any “runway” possibility for an Article V Convention.

Thus, the same political truths, which control Congress and prevent it becoming a runaway, will also apply to a convention unless neutralized by artificial political means. Such would be the case if a convention’s agenda were “limited” such that opposition is limited if not eliminated. This is the primary reason the author opposes such limitations as he is convinced they will have the opposite effect than intended. Rather than make a convention more “safe” such political limitations and restrictions will serve to make the convention more dangerous and more prone to self-serving political control by special interests. Experience has shown when democracy is allowed to be a democracy it is a good system of government; it fails only when interfered with.

that it has wormed its way into every aspect of American life far beyond that intended by the original framers of the Constitution. Elections cannot address the issues of government excess when they are violations of the government system established by the Founders. Elections, by their nature are transitory in nature. Their effects are reversible by a future election. As system failure is the issue, it therefore requires addressing that system, rather than the mere replacement of those temporarily assigned by election to administer it. Fortunately, our Constitution provides a means to rectify issues, which span partisan party politics of elections. In effect, this means creates a new public policy binding the government to a direction it heretofore did not follow. Such means are amendments. The procedure for creating such amendments is located in Article V of the United States Constitution.²

Gathering political support among the general population are calls for an Article V Convention. An Article V Convention refers to the heretofore-unused term of Article V whereby a convention called by Congress at the request of two thirds of the states, proposes amendments to the Constitution. To date, Congress has proposed all amendments to the Constitution.³ Supporters of a convention argue that because much of the problem lies in excesses by Congress itself, that body will never propose amendments limiting its own power. This argument dates back to the very beginning of this country.⁴ By terms of Article V, all amendment proposals, whether by Congress or convention, require ratification by three fourths of the state legislatures or by state ratification conventions depending on which mode of ratification Congress elects. Amendments can curb or outright eliminate excesses of the federal government.

² "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: Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." U.S. Const. art. V.

³ However, as evidence cited later in this article will prove, the reason for Congress being the only method used to propose amendments despite the two methods allowed by Article V is not because the states have not requested a convention call but because Congress has deliberately, willfully and feloniously refused to obey the Constitution and call the convention. Most notably, this same evidence will show that on at least three separate occasions, the states have applied in sufficient numbers on individual amendment subjects to cause a convention call on the merits of each set of applications alone. Thus, the major premise of Professor Natelson's policy report is defeated. Despite the fact, the states have submitted applications for same subject; Congress has refused to call thus effectively asserting the right to veto these applications even if the states submit them.

⁴ "In opposition to the probability of subsequent amendments, it has been urged that the persons delegated to the administration of the national government will always be disinclined to yield up any portion of the authority of which they were once possessed." The Federalist No. 85, at 425 (Alexander Hamilton) (Gideon ed.,1818). See also *infra*, notes 211-225.

This interest in an Article V Convention has spurred interest in the academic and legal communities resulting in publication of scholarly works examining various aspects related to an Article V Convention. Because many such academics and legal scholars have failed to take the necessary time to specifically study amendatory law,⁵ many of these “works” contain misinformation or misinterpretations. While they may appear legitimate and reasonable on the surface, a close examination reveals flaws in their reasoning, logic and references. Because the question of an Article V Convention is so vital to our nation’s future, as it may be the last, indeed, the only chance to peacefully resolve the issues facing us today, a reliance on the true intent, the true law and the true meaning of Article V is obligatory. Thus, where legal articles make mistakes to the record, corrections are required.

On September 16 2010, the Goldwater Institute⁶ published a policy report entitled “Amending the Constitution by Convention: A Complete View of the Founders’ Plan” written by Robert G. Natelson, Senior Fellow, Goldwater Institute and Professor of Law at the University of Montana (Ret.).⁷ The Report⁸ summarizes its purpose as follows; “This report outlines the findings of an historical investigation into the Founders’ understanding of how the state-application-and-convention process was supposed to operate. The investigation was conducted as objectively as possible. This report does not purport to resolve every issue on the process – only those issues that can be resolved with Founding-era evidence.”⁹

While the use of Founding-era evidence may be useful in establishing some intent on the part of the Founders, unless all the record is examined, most especially that record which directly affected Article V, that is the actions, words and statements of the Founders during the 1787 convention, then such examination cannot be called “objective” or “complete.” In fact, the Natelson article discusses many founding documents but avoids what must be considered pri- ma fascia evidence or best evidence, the actual actions of the Founders at the convention. The fundamental premise of the Report is through the principles of principal/agent law, in combination with colonial era documents, many answers to questions raised throughout the years, usually by convention opponents, are answered. However many of the “answers” set forth by Pro-

⁵ This author spent five years studying amendatory law as it relates to an Article V Convention. Amendatory law contains elements of constitutional, civil and criminal law. The author is the first person in United States history to file federal lawsuits *Walker v United States*, C00-2125C USDC (2000) and *Walker v Members of Congress*, 06-244 S ct. (filed Aug. 16, 2006) regarding the obligation of Congress to call an Article V Convention. *See infra*, note 248.

⁶ 500 East Coronado Road, Phoenix, AZ 85004.

⁷ Among his many accomplishments, Professor Natelson was a featured speaker at the recent Cooley Law School Review Symposium on an Article V Convention held in Lansing, Michigan on September 16, 2010, a date coinciding with the release of the Report by Professor Natelson.

⁸ The policy report can viewed online at <http://www.goldwaterinstitute.org/article/5005>. Hereinafter referred to as “Report.”

⁹ Report, p. 3.

fessor Natelson do not stand against the full record of that era nor do they stand constitutional tests set forth by Supreme Court rulings, including language written in the original Constitution and hence, writings from the Founders.

The Natelson Report Assertions

The Report “lists summarizes what the Founding-era record tells us of the state-application-and-convention process¹⁰ of Article V.”¹¹ Where there is no error in either statement or supporting material, this rebuttal will proceed no further. Footnotes or text later in this article address incorrect summations. The Report advanced the following summaries:

- During the Founding era, a “convention” did not necessarily – or even usually – refer to a plenary constitutional convention. Limited-purpose conventions were quite common, and several state constitutions employed them in their amendment procedures.
- During the 1787 federal convention, the Framers considered, but rejected, drafts that contemplated amendments by what people of their time called a “plenary” or “plenipotentary” convention. The Framers substituted instead a provision for a limited-scope assembly they called a “Convention for Proposing Amendments.” An Article V Convention is one of three limited-scope conventions the Constitution authorizes for specific purposes.^{12 13}

¹⁰ Professor Natelson creates a unique term in an attempt to persuade the reader to his point of view by placing hyphens connecting state application and convention process. While there is some merit to the notion based on the fact a convention cannot be held unless the states elect to apply for a convention call, the use of hyphens are ill advised especially given the professor is attempting to prove the convention is a “slave” to the states under principal/agent law.

¹¹ Report, pp. 25-26.

¹² While the professor is correct as to the three conventions contained in the Constitution, i.e., a ratification convention (Article V), a convention for proposing amendments (Article V) and conventions of nine States (Article VII) he is incorrect that all three are “authorized” by the Constitution. The professor ignores the fact Article V conventions can only exist after state ratification of the original Constitution. These conventions exclusively deal with amendments possibly added to the Constitution after ratification. They are subject therefore to the Constitution first becoming law of the land. Thus, that document authorizes these two conventions subject to the document itself taking effect. The third convention “conventions of nine States” was merely a recommendation by the 1787 Convention allowed under the Articles of Confederation as the entire process of “alteration” was ill-defined. There nothing in the Articles or in the congressional resolution creating the convention said the convention could not make such a recommendation. Under the terms of the law of the land then in effect, the Articles of Confederation, the states were not obligated to obey this constitutional requirement even though history shows all states eventually did. As the un-ratified Constitution was not law of the land, it had no force of law. Therefore, as the action of Rhode Island shows, which first held a referendum on March 24, 1788 that rejected the proposed Constitution; the

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language of the Constitution did not obligate the states to hold a ratification convention, as it had no force of law at the time. The states elected to hold these conventions based on their sovereign authority or authority granted them in the Articles of Confederation.

Black's Law Dictionary 133 (6th ed. 2002) [hereafter Black's Law Dictionary] defines "authorize" as "to empower; to give a right or authority to act. To endow with authority or effective legal power, warrant, or right. To permit a thing to be done in the future. It has a mandatory effect or meaning, implying a direction to act." As the un-ratified Constitution was not law of the land and had no force of law, it could not "authorize" the third convention only recommend it. Instead, the "authorization" derived from the Articles of Confederation, which mandated "a Congress of the United States agree[d]" to the "alteration" and "afterwards [be] confirmed by the legislatures of every State." (Articles of Confederation of 1781, art. XIII, para. 1.) Thus, unless the state legislatures of each state ratified or endorsed the actions of the convention recommended in the then un-ratified Constitution, it had no legal force of law or effect under the terms of the law of the land at that time.

The conclusion of this fact of law is obvious. In order to carry out the recommendation in the proposed Constitution of state ratification conventions, each state legislature had to agree to this provision. Each state had to pass legislation authorizing such conventions, provide the funds to hold such conventions, authorize and conduct the elections necessary to elect the delegates to such conventions and finally accept the outcome or result of the vote in such elections. Finally, the states had to bind themselves to this outcome by reporting back to the Articles of Convention Congress the ratification vote of the state made, not by the state legislature, but the conventions thereof. (See *infra*, note 13). The state legislatures called these conventions beginning with Delaware on September 28, 1787 and continuing until May 29, 1790 with the state of Rhode Island. In addition, the state of Vermont ratified the Constitution on January 10, 1791. The states also held elections electing delegates to the 1787 Federal Convention. These elections occurred between November 23, 1786 and May 14, 1787. The Documentary History of the Ratification of the Constitution. Vol. XIII-XIV. Ed. John P. Kaminski and Gaspare J. Saladino. State Historical Society of Wisconsin, 1981. pp. xl-xlii in vol. XIII.

Clearly, the Founders required a legal authorization of some description establishing that consent by nine state ratification conventions was a legal means to establish the Constitution as law of the land for those states so consenting. To do so required finding such justification in the current law of the land then in effect. Arguably Article X of the Articles of Confederation dealing with "[T]he Committee of the States" which Article X "authorized to execute, in the recess of Congress ... such powers of Congress ... by consent of the nine States, shall from time think expedient to vest them with..." might be construed as authorizing state ratification conventions. (Articles of Confederation of 1781, art X). The same could apply to Article XI preventing admission of new colonies to the confederation "unless such admission be agreed to by nine States." (Articles of Confederation of 1781, art. XI). There is no historic text however in the 1787 Federal Convention records showing the Founders considered these provisions of the Articles. The Constitution contains no such language making such a link. Article XIII of the Articles dealing with alteration of the Articles clearly places the final authority of such alteration in the "legislatures of every State." (Articles of Confederation of 1781, art. XIII, para. 1.) The Constitution had no legal force during its ratification process. Therefore, the Constitution did not "authorize" ratification conventions. Clearly, the authorization was by act of the state legislatures authorized under the Articles of Confederation. The legislatures, in turn, agreed to the ratification proposal in the Constitution as the means to "agree" to ratification of the Constitution.

¹³ The full texts of the state and congressional ratification documents are too long for reprint in this article. However sample excerpts from several of the documents show (1) delegates were elected to these conventions; (2) language used in these resolutions satisfied the terms the Constitution (ratify) and the Articles of Confederation (agree); (3) the ratification votes of the convention were returned to Congress as required by the Articles of Confederation.

“We the Deputies of the People of the Delaware State, in Convention met, ...have approved, assented to, ratified, and confirmed, and by these Presents, Do, in virtue of the Power and Authority to use given for that purpose, for and in behalf of ourselves and our Constituents, fully, freely, and entirely approve of, assent to, ratify, and confirm the said Constitution.” (Ratification of the Constitution by the State of Delaware, December 7, 1787); “In the Name of the People of Pennsylvania—Be it Known unto all Men that We the Delegates of the People of the Commonwealth of Pennsylvania in general Convention assembled Have assented to, and ratified, and by these presents Do in the Name and by the authority of the Same People, and for ourselves, assent to, and ratify the foregoing Constitution for the United States of America.” (Ratification of the Constitution by the State of Pennsylvania, December 12, 1787); “In Convention of the State of New Jersey—...Whereas the Legislature of this State did on the twenty ninth day of October last Resolve in the words following Vizt-“Resolved unanimously, That it be recommended to such of the Inhabitants of the State as are entitled to vote for Representatives in General Assembly, to meet ... on the fourth Tuesday in November next, at the several places fixed by law for holding the annual elections, to choose three suitable person to serve as Delegates ... that we the Delegates of the State of New-Jersey chosen by the People thereof...do hereby for and on the behalf of the People of the said State of New-Jersey agree to, ratify and confirm the same and every part thereof...” (Ratification of the Constitution by the State of New Jersey, December 18, 1787).

“That a convention be elected on the day of the next General Election and in the same manner as representatives are elected ... Now Know Ye, That We, the Delegates for the People of the State of Georgia in Convention met...Have assented to, ratified and adopted, and by these presents DO, in virtue of the powers and authority to Us given by the People of the said States for that purpose, for, and in behalf of ourselves and our Constituents, fully and entirely assent to, ratify and adopt the said Constitution...” (Ratification of the Constitution by the State of Georgia, January 2, 1788); “In the Name of the People of the State of Connecticut—We the Delegates of the People of State in general Convention assembled, pursuant to an Act of the Legislature in October last, Have assented to and ratified and by these presents do assent to, ratify and adopt the Constitution...” (Ratification of the Constitution by the State of Connecticut; January 8, 1788); “In Convention of the people of the state of South Carolina by their Representatives...DO in the name and behalf of the people of this State hereby assent to and ratify the said Constitution.” (Ratification of the Constitution by the State of South Carolina, May 23, 1788).

“In Convention of the delegates of the People of the Commonwealth of Massachusetts...submitted to us by a resolution of the General Court of the said Commonwealth...Do in the name & in behalf of the People of the Commonwealth of Massachusetts assent to & ratify the said Constitution of the United States of America.” (Ratification of the Constitution of the State of Massachusetts); February 6, 1788); “In Convention of the Delegates of the People of the State of Maryland ... We the Delegates of the people of the State of Maryland ...submitted to us by a Resolution of the General Assembly of Maryland in November Session... do for ourselves and in the Name and on the behalf of the People of this State assent to and ratify the said Constitution.” (Ratification of the Constitution by the state of Maryland, April 28, 1788); “In Convention of the Delegates of the People of the state of New-Hampshire...The Convention...submitted to us by a Resolution of the General Court of said State...and acknowledg-

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ing... with each other by assenting to & ratifying a new Constitution...Do in the Name & behalf of the People of the State of New-Hampshire assent to & ratify the said Constitution of the United States of America." (Ratification of the Constitution by the state of New Hampshire; June 21, 1788).

"Virginia to wit. We the Delegates of the People of Virginia duly elected in pursuance of a recommendation from the General Assembly...Do in the name and in behalf of the People of Virginia...We the said Delegates in the name and in behalf of the People of Virginia do by these presents assent to and ratify the Constitution..." (Ratification of the Constitution by the state of Virginia; June 26, 1788); "We the Delegates of the People of the state of New York, duly elected and Met in Convention...We the said Delegates, in the Name and in the behalf of the People of the State of New York Do by these presents Assent to and Ratify the said Constitution." (Ratification of the Constitution by the State of New York; July 26, 1788); "In Convention... Resolved, that this Convention in behalf of the freemen, citizens and inhabitants of the State of North Carolina, do adopt and ratify the said Constitution and form of Government." (Ratification of the Constitution by the State of North Carolina; November 21, 1789); "Ratification of the Constitution by the Convention of the state of Rhode-Island and Providence Plantations...We the Delegates of the People of the state of Rhode-Island and Providence Plantations, duly elected...We the said delegates, in the name and in the behalf of the People, of the State of Rhode-Island and Providence-Plantations, do by these Presents, assent to, and ratify the said Constitution." (Ratification of the Constitution by the State of Rhode Island, May 29, 1790).

"Wednesday July 2, 1788. Congress assembled present Newhampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Virginia, North Carolina, South Carolina & Georgia & from Maryland M. Contee. The State of Newhampshire having ratified the constitution transmitted to them by the Act of the 28 of Sept^r last & transmitted to Congress their ratification & the same being read, the president reminded Congress that this was the ninth ratification transmitted & laid before them. Whereupon On Motion of Mr. Clarke seconded by Mr. Edwards Ordered That the ratifications of the constitution of the United States transmitted to Congress be referred to a commee to examine the same and report an Act to Congress for putting the said constitution into operation in pursuance of the resolutions of the late federal Convention." (Resolution of Congress, July 2, 1788, Submitting Ratification of the Constitution to a Committee).

"Saturday. Sept 13, 1788. Congress assembled present New Hampshire, Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Virginia, North Carolina, South Carolina & Georgia & from Rhode Island Mr. Arnold & from Delaware Mr. Kearney. Whereas the Convention assembled in Philadelphia pursuant to the resolution of Congress of the 21st of Feby 1787 did on the 17th of Sept in the same year report to the United States in Congress assembled a constitution for the people of the United States, Whereupon Congress on the 28 of the same Sept did resolve unanimously "That the said report with the resolutions & letter accompanying the same be transmitted to the several legislatures in order to be submitted to a convention of Delegates chosen in each state by the people thereof in conformity to the resolves of the convention made and provided in that case." And whereas the constitution so reported by the Convention and by Congress transmitted to the several legislatures has been ratified in the manner therein declared to be sufficient for the establishment of the same and such ratification duly authenticated have been received by Congress and are filed in the Office of the Secretary..." (Resolution of the Congress of September 13, 1788 Fixing Date for Election of a President and Organization of the Government Under the Constitution, in the city of New York).

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- It is erroneous to label a convention for proposing amendments a “constitutional convention” or to conclude that it has any power beyond proposing amendments to the states for ratification. Any amendments it does propose are of no effect unless ratified by three-fourths of the states.
- A state legislature’s “Application” is its address to Congress requesting a convention. The state governor has no required role in this process.¹⁴
- The almost universal Founding-era assumption was that legislatures applying for a convention to propose amendments usually would guide the convention by specifying particular subject areas for amendment.¹⁵
- The convention to propose amendments is an agent of the state legislatures. As such, it must remain with [sic] the scope of its call. If the convention opts to suggest amendments outside its call, those suggestions are not legal proposals but merely recommendations for later action under some future procedure.¹⁶

The Documentary History of the Constitution, Vol. II (1894) pp.25-26,44-45,46,61-64,65,66,82-84,87-89,93-96,121,122,138-140,141-144,145,146,160,161-162,190-203,262,263,264,266-275,276,290,310-320, 377-385.

¹⁴ Professor Natelson neglected in his summary to include a very important word, “call” i.e., “convention call.” Article V is explicit, “on the application of two thirds of the several state legislatures [Congress] shall call a convention for proposing amendments...” Thus, the expressed purpose of the application is a convention call.

According to Black’s Law Dictionary, 98-99 “application” is defined as, “The act of making a request for something. A petition.” Webster’s Third New International Dictionary Of The English Language Unabridged 105 (2002) [hereafter Webster’s Dictionary] defines as “a formal communication either spoken or written: as a: a usually formal speech or talk especially as prepared for delivery to a special group <his commencement address was subsequently published> b: a formal petition especially by a legislative body to an executive or sovereign c: a formal statement of policy or opinion by a sovereign or president to the people or to a legislative body <an address by the president to Congress>”

As the action in question is a request by a legislative body to Congress, another legislative body, the word “address” is inappropriate as Congress is not “an executive” under the terms of the Constitution nor is it sovereign as used by Webster’s Dictionary’s indicating a sovereign authority such as a king.

¹⁵ The terminology employed by Professor Natelson describing this “assumption” varies throughout the professor’s Report. However, his overall assertion, rebutted in detail in this article, is that through the principles of fiduciary law the states have the right to regulate the agenda of an Article V Convention to a single issue selected by the states and limit the convention strictly to that issue.

¹⁶ This is assertion is refuted by later text in this article. See *infra generally* “The Congressional “Pocket Veto” Problem”, notes 282-287.

- Although the Constitution generally provides for Congress to act as the agent of the people rather than of the states, for the state-application-and-convention procedure, the Founders retained the Articles of Confederation model. In other words, during that procedure, the state legislatures are the principals, and Congress and the convention to propose amendments are their agents.¹⁷

- As the agent of the state legislatures, Congress must call a convention for proposing amendments if two-thirds of the states apply for one, must treat all states equally during the process, and must obey any common restrictions imposed by the states in their applications. The states, not Congress, are to determine how delegates are selected.¹⁸

- The President has no constitutional role in the state-application-and-convention process.¹⁹

¹⁷ There is no support in the Articles of Confederation for this position and, as will be demonstrated, no original historic record relating to actual actions taken by the Founders that supports it either. In the first place, the Articles of Confederation did not contain a convention in any form regarding altering that document. In other words, the convention did not exist meaning it was impossible under the terms of the Articles of Confederation for any principal/agent relationship to exist. The Articles of Confederation do not use the word “amendments.” Rather the Articles use the singular word “alteration” describing incorporating any change into the Articles. The language of the Articles of Confederation states, “...nor shall any alteration at any time hereafter be made in any of them [Articles of Confederation]; unless such alteration be agreed to in a Congress of the United States, and afterwards confirmed by the legislatures of every State.” (Articles of Confederation of 1781, art. XIII, para. 1). This language defeats Professor Natelson’s proposition. Clearly, it required the consent of Congress to effect any alteration before it was submitted to the states. This means Congress was not an agent of the states and, as already noted, there was no convention process in the Articles of Confederation. Thus, there was no Articles of Convention “model” of principal/agent as Professor Natelson alleges.

¹⁸ The author disagrees with this assertion. See *infra*, notes 231-254.

¹⁹ While the author agrees with Professor Natelson as to this conclusion, he must add while Professor Natelson presents references to reinforce his assertions, he fails in many cases to use best evidence. In some cases, this evidence contradicts his assertions. For example, Professor Natelson, who attempts to limit his resources to quoting colonial era sources, fails to mention in his references, *Hollingsworth v State of Virginia*, 3 U.S. 378 (1790). As noted by the court, “Two objections are made: 1st, That the amendment has not been proposed in due form. But has not the same course been pursued relative to all the other amendments, that have been adopted? [FN] And the case of amendments is evidently a substantive act, unconnected with the ordinary business of legislation, and not within the policy, or terms of investing the President with a qualified negative on the acts and resolutions of Congress. FN Chase, Justice. There can, surely, be no necessity to answer that argument. The negative of the President applies only to the ordinary cases of legislation: He has nothing to do with the proposition, or adoption, of amendments to the Constitution.” *Hollingsworth v. State of Virginia*, 3 U.S. 378, 381 (1790).

Professor Natelson felt obliged to limit his arguments primarily to that of colonial origin. This author believes such limitation to be incorrect when such arguments present incorrect information. A true presentation based on original material from the colonial era must include presentation noting how more recent events have altered that material. In short, the presentation must present all available evidence.

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- The convention establishes its own rules, including its voting rules. The initial default rule is “one state, one vote.”²⁰
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The fact the president can have no part in the amendatory process must also extend to any legislative attempt by Congress to regulate the convention. Article V does not grant Congress this legislative discretion. Further, there is no comfort found in the “necessary and proper” clause of Article I as it clearly refers only to the “forgoing” powers found in Section 8 of that article. “To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” U.S. Const. art I §9, cl. 18.

As the court stated, “The negative of the President applies only to the ordinary cases of legislation: He has nothing to do with the proposition, or adoption, of amendments to the Constitution.” Obviously, legislation intended to control a convention would have something to do with the “proposition ... of amendments to the Constitution.” Otherwise, there would be no purpose in such legislation. Equally obvious is the fact if the president could participate in the amendatory process by having veto power over legislation intended to regulate a convention, the president is part of the amendatory process. The Founders realized that such a veto situation could result in the president controlling the entire amendment process. For that reason they never even considered involving the president in the amendment process. Indeed with all the discussions, debates and arguments that ensued over the Constitution during its formation and ratification there is not one record of anyone ever even discussing the possibility of the president being involved in the amendment process.

²⁰ While the author agrees with this conclusion that the convention will vote based on one state, one vote rather than by individual delegates, he disagrees with the proposition that the “one state, one vote” rule can be dispensed with after a convention is convened by decision of the convention. The proposition of the 14th Amendment “equal protection under the law” prevents any scheme in which one state by any manner obtains more authority or vote, than any other state.

“While acknowledging the currency of the view that *“if the law deals alike with all of a certain class”* it is not obnoxious to the Equal Protection Clause and that *“as a general proposition, this is undeniably true,”* the Court in *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U.S. 150, 155, said that it was *“equally true that such classification cannot be made arbitrarily . . .”* *Classification “must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.”* *Ibid.* “[A]rbitrary selection can never be justified by calling it classification.” *Id.*, at 159. This approach was confirmed in *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U.S. 96, 104 -105, and in numerous other cases. [Footnote omitted] *McLaughlin v Florida*, 379 U.S. 184, 190-191 (1964) [emphasis added].

This court ruling and numerous others establish that unless there is justification for classification of states into different groups, i.e., giving one state more voting power at a convention than another, such a classification is unconstitutional. There is no substance or support that citizens who would comprise a convention, would be elected by citizens, all of whom are subject to the Constitution, suddenly obtains independence from that Constitution simply because they are fulfilling a role entirely created by that Constitution. On the contrary, the text of the Constitution, in total, make it clear convention delegates are entirely subservient to the Constitution. Hence, a convention cannot make a rule that is in conflict with the Constitution as it is limited to a single purpose; amendment proposal

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- Because the Constitution grants the convention, not the states, power to “propose amendments,” the states cannot require the convention to adopt a particular amendment or dictate its language. The convention is required to stay within any state-specified subject matter, but the actual drafting is the convention’s prerogative.²¹

- The Constitution imposes a limit on the power the state legislatures have over Congress in this process: Congress, not the states, selects among the two modes of ratification. As the agent of the state legislatures, however, Congress should not designate a ratification procedure for convention resolutions outside the convention’s call. Such recommendations are merely recommendations for some future consideration; they are not legal proposals.²²

The Major Fallacy of Professor Natelson

Before beginning a very long and detailed examination of Professor Natelson’s Report it should be noted there is a major fallacy with the entire work—specifically the premise on which all of Natelson’s assumptions regarding a convention rest. Robert Natelson, who is regarded as an expert in colonial history, ignores the most obvious fact of all—the actions he cites as justification for his theory—the actions of the colonies during the colonial period were done by *English* colonies, not American states.

There is no question but that all colonies founded by the British in the colonial age regardless of by whatever type of charter all shared one common trait—the charters were grant-

which in no way can be stretched to include judicial interpretation or legislative power. Thus, laws in effect and current court rulings affect the convention, not the other way around.

Similarly, the function of both convention and Congress is constitutionally indivisible, i.e., the proposal of amendments to the Constitution. The effect of the proposal, if ratified, is identical. The Constitution authorizes no other political bodies to make amendment proposal. Article V strictly and equally limits the power of amendment proposal upon both convention and Congress. Given these facts, there is no possible way to classify the two bodies differently, i.e., two legal classes, as they are identical as to authority, effect, limit and exclusiveness. As the Constitution excludes all others from amendment proposal, there is no constitutional basis for anybody to create a classification. There is no authority in the Constitution allowing any political or judicial body to do so (*See Hawke v Smith*, 253 U.S. 221, 227 (1920): “It is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed.” More importantly, there is no “difference which bears a reasonable and just relation to the act in respect to which the classification is proposed” as the functions of both Congress and convention are identical in all respects.

²¹ This assertion is refuted later in this article. *See infra*, notes 255-257; 297-326.

²² This assertion is refuted later in this article. *See generally* “The Congressional “Pocket Veto” Problem, notes 282-307.

ed by and under the sovereign authority of whatever king of England happened to be on the throne at the time of the assignment. In some instances, the charters that created the colonies were for business purposes, others were owned outright by the crown. Nevertheless all British colonies functioned under the authority of the king. The king, as was expressed by numerous British legal authorities was the law of England as well as the British Empire. Hence, as the colonies operated under the authority of the king they also operated under the authority of *British* law.

As discussed later in this paper, the primary distinction between British sovereignty and American sovereignty is the former believed sovereignty resided with the king, the latter held sovereignty resided with the people. Thus there is a fundamental division between American and British law. The two laws share many characteristics but one fact is indisputable—what is legal under British law (particularly during the colonial age when the king of England wielded far more direct authority and power than present day) and what is legal under American law are not always the same. The same principle holds true for actions of the colonies allowed by British law (or sovereign consent by the king). What the king permitted his colonies to do *prior* to those colonies becoming states (and thus becoming subject to American law) and what those states are permitted to do under American law have no bearing on each other whatsoever.

It is true in many cases the actions of the colonies and states are identical. Obvious examples are the right of the colony/state to regulate commerce, punish criminal acts, record public record and so forth. However in the area of conventions, there are distinct differences between English law and American law which will be discussed in more detail presently. The fact that colonies could take certain actions regarding conventions and what American law (i.e. the Constitution) allows are distinctly different. Hence the authority of the states today is far different than what the colonies enjoyed. In some instances, the authority of the states is greater than the colonies, in some instances, it is less. But the primary fact remains—Professor Natelson ignores this fundamental fact in his theory, that what authority was granted a colony under British law to regulate a convention is different than what is granted a state under American law.

The fallacy of ignoring that two separate legal systems are involved but, in the view of Professor Natelson, treated as the same despite obvious historic record to the contrary, means Professor Natelson's entire premise falls to the ground. The professor insists on comparing apples and oranges, that is to say grants of authority given by a British king (nullified after American independence achieved in 1783) and subsequent American law. Thus the professor's primary assertion of fiduciary law controlling a convention may be true in British law as the colonies were granted such authority by the king. But the professor ignores the fact that under American law no such premise exists in the Constitution and therefore his assertion is invalid because the supporting law he asserts no longer exists in this country and therefore neither can his premise.

Examination of Terms and Definitions

Professor Natelson begins his Report by defining certain terms on which he then bases the entire premise of his paper.²³ The professor defines “fiduciary” as “...a person acting on behalf of, or for the benefit of, another, such as an agent, guardian, trustee, or corporate officer.” He then continues, “The rules governing fiduciaries in the 18th century were strict, and much like those existing today. [FN] A document creating the fiduciary relationship could, and still may, modify those rules somewhat.”²⁴ The professor adds in a footnote [FN] “The author [Professor Natelson] has written extensively on this subject, and his conclusions have not been contested by other scholars.”²⁵ One reason Professor Natelson may not have been “contested” by other scholars is that he appears to stand alone in his theory that fiduciary law can be applied to the amendment process of Article V of the Constitution in that he is the first one to propose such a leap.²⁶ While there are extensive published works on fiduciary law, none of these sources ap-

²³ “To understand the rules in the Constitution and how they were supposed to operate, one must understand the Founders’ concept of fiduciary government.” (See Report, p. 4). However, there is a difference which Professor Natelson fails to explain between a “concept of fiduciary government” that is a government based on trust between the people and that government and the assumption that states assume entire control of an Article V Convention where no such “rules in the Constitution” exist. Indeed, throughout his entire presentation, the professor avoids citing specific language of the Constitution that provides the “rules” he writes about, i.e., actual constitutional language that supports his view.

²⁴ See Report, p. 4.

²⁵ Professor Natelson then states, “For general support for this section, see *The Constitution and the Public Trust*, 52 Buff. L. Rev. 107 (2004) (documenting the Founders’ belief in fiduciary government); *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 Tex. Rev. L. & Pol. 239 (2007) (describing the general content of 18th-century fiduciary law); *The Origins of the Necessary and Proper Clause* (with Lawson, Miller & Seidman) (Cambridge Univ. Press, forthcoming); and *The Agency Law Origins of the Necessary and Proper Clauses*, 55 Case W. Res. L. Rev. 243 (2004) (discussing the powers of agents under 18th-century law); and Robert G. Natelson, *The Original Constitution: What It Actually Said and Meant* 9-11 (2010).”

²⁶ The basis of Professor Natelson’s argument fundamentally rests on his view of the Constitution, the states and Congress. He clearly intends to apply fiduciary law, which up to now has applied to commercial or contract law, to constitutional or public law. His view is not widely accepted.

As noted in correspondence between the author and Tamar Frankel, Professor of Law, Boston University, Michaels Faculty Research Scholar, author of “Fiduciary Law” (2010) (Oxford University Press); “Trust and Honesty” (2006) (Oxford University Press); “Securitization” (2006) (Fathom Publishing Company), “Fiduciary law in the political sense is similar to the law in the private arena. The political sense deals with entrustment of power by the people for the people. They are the entrustors. ... [The] question really relates to the relationship between the individuals, the states and the Congress under the Constitution. Analogizing these relations to State laws regulating corporations (mini-states) and their relationships to the shareholders (voting) may be farfetched. The question would be whether you can analogize the States’ powers to those of a corporations subject to the ultimate source of power, the Constitution – the law of all states.” [Emphasis added].

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pear to support the notion of extending fiduciary law from its traditional role of what can be described as contract law or employment law to include such authority in constitutional amendatory law.

An immediate point is required. Professor Natelson repeatedly refers to “fiduciary law” rather than fiduciary principles (for example) in his Report. Obviously, he intends therefore, by use of the word “law” that the matter be set at that standard. A law is binding. A resolution or petition is not.²⁷ It is therefore logical, from the point of view of Professor Natelson that he would select the word “law” describing his theory, as one of the principles of fiduciary law is that instructions from the principal must be binding upon the agent. Logically, therefore the principal, in this case, the states, must operate in such a manner as to be able to issue binding instructions to the agent in this case, the convention in regards to convention agenda. In specific of states the only means whereby the state can issue binding instructions is by issuance of a law. His premise can be summed briefly: the states have the authority to issue a set of instructions in their applications to Congress to limit the discussions and actions of a convention that results by those applications being acted upon by Congress.

Professor Frankel then continued, “[M]y answer is: Look to the source of the power—in both cases—the people. Look to whom do they look for services. Be they individuals or institutions. Define the services. Be they money management or police and army protection. Look what powers are needed to perform the services. If the powers are necessary—the fiduciaries can perform them, subject to the people’s decision and direction. This would be fiduciary law.”

In sum, fiduciary law may apply in the governmental area, but it is the *people* rather than the states that act as principals. The states or the state legislatures are fiduciaries. Thus, as the people have already spoken and gave instructions through the creation of the Constitution, it follows such instructions as Professor Natelson suggests (see Report, p. 26) must be contained within that document expressly, or by reasonable implication. However, Article V permits no such implication. The Supreme Court supports this conclusion. In *United States v Sprague*, 282 U.S. 716, 730, 731 (1931) excluded, “rules of construction” or “interpolation or addition” from Article V. Thus, such method of interpretation are not to be applied to Article V. Moreover, in *Hawke v Smith*, 253 U.S. 221, 226, 227 (1920), stated conventions shall be “deliberative assemblages representative of the people...” Taken together, the two court decisions mandate that any fiduciary obligation any convention delegates have must be for the benefit of the people. This fact precludes the state legislatures’ control of the convention through appointment of delegates and dictation of convention agenda as they are not fiduciary principals in the matter and therefore have no fiduciary powers beyond that expressly designated in the Constitution. The only expressed fiduciary power in Article V is the obligation of Congress to call a convention “on the application of two-thirds of the several state legislatures...” (See also *infra*, note 43—portion on *McCulloch v. State of Maryland*).

²⁷ See *infra*, note 44 (portion regarding difference between resolution and law).

However, an application is not law; it is a petition.²⁸ In order for the state to assert instructional control of the convention as required under fiduciary law requires the state operate at the level of law meaning the state must issue a law, not a petition. This law is of course must be based on the state's authority which is derived, not from the federal Constitution, but the state's own constitution as this is where legislative authority to make law resides. The problem lays in the fact the Tenth Amendment as well as the Supremacy Clause forbids state constitutions from having any authority over the federal Constitution.²⁹ Moreover, the Supreme Court has directly addressed the legal authority of states operating to amend the Constitution and determined states operate under the authority of the federal Constitution, not their own Constitutions.³⁰

²⁸ "A putting to, placing before, preferring a request or petition to or before a person. The act of making a request for something. A petition. ... An appeal or petition, especially as written or presented; a putting to, placing before; preferring a request or petition to or before a person; the act of making a request for something. Sparacino v. Ferrona, 9 Ill.App2d 422, 133 N.E.2d 753, 755." Black's Law Dictionary 1145-1146.

²⁹ "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people." U.S. Const. amend. X. The Constitution reserves the power to make law in the Constitution to federal bodies, i.e., the Congress and the President. The entire amendment process is exclusive to the federal Constitution, not any of the state constitutions. The Tenth Amendment separates the amendment process from any authority derived from those state constitutions. It leaves the federal Constitution as the sole and supreme authority regarding amendment as described by the Supremacy Clause. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, § 2.

³⁰ "And in the case of amendments is evidently a substantive act, unconnected with the ordinary business of legislation.." Hollingsworth v. Virginia, 3 U.S. 378, 381 (1798). "The only question really for determination is: What did the framers of the Constitution mean in requiring ratification by "legislatures"? That was not a term of uncertain meaning when incorporated into the Constitution What it meant when adopted it still means for the purpose of interpretation. A Legislature was then the representative body which made the laws of the people. ... It is true that the power to legislate in the enactment of the laws of a state is derived from the people of the state. But the power to ratify a proposed amendment to the federal Constitution has its source in the federal Constitution. The act of ratification by the state derives its authority from the federal Constitution to which the state and its people have alike assented." ... "There can be no question that the framers of the Constitution clearly understood and carefully used the terms in which that instrument referred to the action of the Legislatures of the states. When they intended that direct action by the people should be had they were no less accurate in the use of apt phraseology to carry out such purpose. The members of the House of Representatives were required to be chosen by the people of the several states. Article 1, section 2." ... "It was held [referring to Davis v. Hildebrandt, 241 U.S. 565 (1916)] affirming the judgment of the Supreme Court of Ohio, that the referendum provision of the state Constitution, when applied to a law redistricting the state with a view to representation in Congress, was not unconstitutional. Article 1, section 4, plainly gives authority to the state to legislate within the limitations therein named. Such legislative action is entirely different from the requirement of the Constitution as to the expression of assent or dissent to a proposed amendment to the Constitution. In such expression no legislative action is authorized or required." Hawke v. Smith, 253 U.S. 221, 227, 230-231 (1920). [Emphasis added].

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Thus, the states do not possess the authority of law making granted by their state constitutions when they involve themselves in the amendment process of the federal Constitution. Without such law-making authority, the states lack a basic principle of fiduciary law—the ability to make their instructions binding. An application, as stated, is not a law. Therefore, any instructions contained within an application (including those attempting to limit a convention to a specific amendment issue) are not fiduciary as they operate without binding authority of law as the states lack any means to impose such restriction.

An examination of other definitions of the terms employed by Professor Natelson shows the professor omitted key definitions of words central to the understanding of fiduciary law. Without supporting citation, for example, Professor Natelson states, “The branch of fiduciary law most relevant to the state-application-and-convention process is the law of *agency*. Three rules applying to agents, both then and now, are particularly important for our purposes: [1] The wording of the instrument by which the principal (employer) empowers the agent, read in light of its purposes, defines the scope of the agent’s authority. [2] An agent is required to remain within the scope of this authority. If he undertakes unauthorized action, he is subject to legal sanctions. The unauthorized action generally considered invalid. [3] If under the same instrument an agent serves more than one person (as when a manager serves a business owned by three partners), the agent is required to treat them all equally and fairly ---- or, in the language of the law, “impartially.”³¹

To ensure accuracy, an examination of the definitions of words related to fiduciary law is mandatory in this discussion. “Fiduciary” comes from the word “fiducia.” Webster’s defines “fiducia” as “a contract used under Roman and civil law (as in the emancipation of children, in connection with testamentary gifts, and in pledges) and constituting essentially a contract of sale

The Supreme Court states ratification is not an act of legislation, nor is such action “authorized or required.” This is proved the Court says, by the fact “the framers of the Constitution clearly understood and carefully used ... apt phraseology” (i.e., “ratification” or “ratify”) to indicate their intent. Suggesting the Court holds “ratification” is a word of “apt phraseology” to express intent, while the word “application” (i.e., “petition”) chosen by the Founders who “clearly understood and carefully used ... apt phraseology” is not, is absurd. If the Founders “clearly understood apt phraseology”, it is reasonable to assert they clearly understood all words employed by them in the Constitution equally well. The definition of the word “application” has never meant “legislation” or “an act of legislation.” Thus, the word prevents an intent or meaning construed to grant the states via state constitutional authority regulation of a convention based on fiduciary or any other law. The “apt phraseology” of the word “application” chosen by the Founders precludes any assumption of authorization of “legislative action” by the states. *See supra*, note 28.

³¹ Report, p. 4. There is no citation by Professor Natelson supporting his claim the most relevant law to the convention process is agency law. Indeed, as shown above, (*see supra*, note 26) other experts on fiduciary law believe such a link to be “far-fetched.” Professor Natelson clearly views the relationship between the states and a convention analogous, if not identical, to an employer/employee relationship. (*See* point [1] in quote). Despite stating such “law” exists, the professor fails to cite a single example of actual law, federal or state, where such agency controls by the states actually exist.

to a person usually mancipation coupled with an agreement that the purchaser should sell the property back upon the fulfillment of certain conditions.”³²

The term “mancipation” is defined by the same dictionary as “the act of enslaving; involuntary servitude: slavery”³³ “Contract” is defined as “an agreement between two or more persons or parties to do or not to do something; especially an agreement that is legally enforceable.”³⁴ The definition of “Agreement” is “an arrangement (as between two or more parties) as to a course of action; a contract duly executed and legally binding on the parties entering into it.”³⁵ Both contract and agreement defined as “written instrument”... “To evidence” ... “an agreement” [or to show] “the terms and conditions of a contract.” “Agent” is defined “one that acts for or in the place of another by authority from him: as a: a representative, emissary, or official of a government <a crown agent> <an Indian agent> <a secret-service agent>.”³⁶

An examination of the ordinary definitions of words is entirely appropriate when discussing the intent and meaning of the Constitution. As noted by the Supreme Court, “[T]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention is clear there is no room for construction and no excuses for interpolation or addition.”³⁷ Moreover, in reaching his conclusions based on his definitions, Professor Natelson ignored or avoided several key elements of principal/agent law. Among these is that “the principal is liable for the consequences of acts that the agent has been directed to perform.” Equally important is that “[A]n agency re-

³² Webster’s Dictionary 845.

³³ *Id.* Professor’s Natelson’s constitutional “interpretation” conflicts with the Constitution. A key word in the definition of “fiduciary” involves the word “mancipation.” In turn, the definition of the word is “involuntary servitude.” This act is expressly prohibited by the Thirteenth Amendment: “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” U.S. Const. amend. XIII. Thus, unless Professor Natelson wishes to assert that only after criminal conviction may a citizen become a convention delegate, his theory raises serious constitutional questions just on the definitions of the words used in his theory.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *United States v Sprague*, 282 U.S. 716, 731 (1931). The court then cited the following cases *Martin v Hunter’s Lessee*, 1 Wheat, 304; *Gibbons v Ogden*, 9 Wheat. 1; *Brown v Maryland*, 12 Wheat. 419; *Craig v Missouri*, 4 Pet. 410; *Tennessee v Whitworth*, 117 U.S. 139, 6 S. Ct. 649; *Lake County v. Rollins*, 13 U.S. 662, 9 S. Ct. 651; *Hodges v United States*, 203 U.S. 1, 27 S. Ct. 6; *Edwards v Cuba R. Co.*, 268 U.S. 628, 45 S. Ct. 614; *The Pocket Veto Case*, 279 U.S. 655, 49 S. Ct. 463; *Story on the Constitution* (5th Ed.), 451; *Cooley’s Constitutional Limitations* (2d Ed.) pp. 61, 70.

lation is created by the consent of both the agent and the principal; no one can unwittingly become an agent for another.”³⁸

While Professor Natelson does not discuss this possibility in great length, these two principles of fiduciary law mean that (1) should a convention be convened under the principles of fiduciary law expressed in the Report, it will be state legislatures, and the members thereof, not the convention delegates, who will be “liable for consequences of acts” by the delegates. Second, and perhaps more important, fiduciary law requires the consent of the perspective agent to be an agent meaning it would be incumbent on the state legislatures, under fiduciary law, to present instructions to the perspective agent before that person consented to become an agent. Hence, the state legislatures will have to create a complete set of instructions before the convention convening. This limits the state’s political alternatives to a specified course which convention events may not be compatible with as conflicting instructions from other states may arise. This causes great delay at the convention. Delegates will cause state legislatures to create new instructions to meet new situations. In some cases this means calling of the legislature back into session, which may not be possible or practical. In most circumstances, such action can only occur by consent of the governor who may refuse permission. In short, in this fast moving political world even assuming the agent (convention delegate) does obey the instructions by the state legislatures, there is no guarantee those instructions will be adequate to the task of a convention. Where 50 sets of instructions will exist, most likely in conflict with one another and with no means possible for any agent (delegate) to make any change necessary to resolve the impasse problems will arise.³⁹ Perhaps when viewed this way, it is understandable why most states in 1787 chose not to give their delegates any more than general instructions instead of the limiting, all controlling agenda instructions Professor Natelson advocates in his Report as such control would stifle the convention such that it might not get anything done whatsoever.⁴⁰

³⁸ Taken from “Fiduciary” West’s Encyclopedia of American Law, 2nd Ed. edition, Ed. Jeffrey Lehman and Shirelle Phelps. (2005), The Gale Group, Inc.

³⁹ This is not only the view of the author but founding-era leaders as well. *See infra*, note 203.

⁴⁰ For a more detailed discussion on this, *see infra* notes 43,44. There is another reason the state legislatures limited their instructions. They were not empowered to give such instructions, as they, the state legislatures, were not principals.

As noted by Professor Tamar Frankel, “[M]y answer is: Look to the source of the power—in both cases—the people. Look to whom do they look for services. Be they individuals or institutions. Define the services. Be they money management or police and army protection. Look what powers are needed to perform the services. If the powers are necessary—the fiduciaries can perform them, *subject to the people’s decision and direction*. This would be fiduciary law. ... In sum, fiduciary law may apply in the governmental area, but it is the *people* rather than the states that act as principals.” *See supra*, note 26.

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In summation, a closer examination of the definitions provided by Professor Natelson of fiduciary law demonstrates that he has ignored several key parts of the law in order to make his “theory” fit the facts as required. His fiduciary law theory as the means for states to control a convention is not widely accepted among other fiduciary law experts. It has been termed “far-fetched” by one recognized author in the field.

Examination of Best Evidence

This author does not dispute the fact asserted by Professor Natelson that “[c]entral to Founding-era political theory was that rightful government was (in John Locke’s phrase) a ‘fiduciary trust.’”⁴¹ Nor does the author take issue with the professor’s statement that the “Founders believed that public officials were, or should be, bound, always morally but often legally, to meet fiduciary standards. They did not see this as merely an ideal but rather as a principle of public law.” The proper question is not whether the Founders believed in fiduciary law principles that is a system of government based on trust and the moral obligation of public officials to the law, but whether they incorporated actual fiduciary law as interpreted by Professor Natelson into Article V. If so, then it must be determined whether such incorporation grants fiduciary authority as interpreted by Professor Natelson in his Report.

To determine this requires the use of best evidence which the professor used sparingly in his citations of colonial-age law; the actual record of the 1787 convention, specifically the development of Article V and the convention in that article. If such evidence shows a clear direction of thought and action by the convention that fiduciary control of the convention was to be the states (or by Congress in the case of veto of submitted proposed amendments) then the matter ends there. However, if official record proves to the contrary, then the assertions of Professor Natelson are invalid. It does not logically follow that just because the Founders believed in a particular principle of law that when it came to formulating the Constitution or more especially one aspect of that document that they blindly incorporated what can only be described as dic-

Professor Natelson fails to account in his theory for the fact the people elected the delegates to 1787 Federal Convention rather than by state legislature appointment. *See supra*, note 12. This fact means if any fiduciary relationship existed, the people rather than the state legislatures assumed the role of principal. Professor Natelson’s theory depends on the assumption the state legislatures, rather than the people, are principals in any fiduciary relationship. He uses colonial-era records (but not convention records itself) surrounding the 1787 Federal Convention justifying his position. Historic record of actual convention events, include those leading up to the convention, refutes his assumption and a core provision of his theory.

⁴¹ Report, p. 4.

tatorial control of the convention by the states under the guise of principal/agent law.⁴² A careful examination of the 1787 Convention as it relates to the creation of Article V is mandated. Special attention on how the various proposals, versions and changes to that article affected its intent and purpose is mandated. In short, an examination of the actual record of the Federal Convention of 1787 rather than using indirect material as Professor Natelson does in his Report is required in order present best evidence.

The History of the Article V Convention Clause at the 1787 Federal Convention

On recommendation of the Annapolis Convention,⁴³ the Federal Convention of 1787 resulted from a resolution issued by Article of Confederation Congress.⁴⁴ Twelve of the thirteen states

⁴² Professor Natelson ignores at least one major historic fact in the formulation of his fiduciary control theory. It is well-documented historic fact one of the principle reasons for calling the 1787 Federal Convention was the refusal by Rhode Island to agree to any alterations in the Articles of Confederation. Indeed, the record shows Rhode Island was so opposed to any changes it refused to send any representatives to the 1787 convention. If the convention believed it was a fiduciary body, our nation would still be under the terms of the Articles of Confederation with no alterations whatsoever. Why? Because Rhode Island, in refusing to accept any change to the Articles thus defeating any such proposal established its own fiduciary relationship. In this relationship, Rhode Island was the principal—the rest of the states, the agents. The refusal of Rhode Island to consent to any change whatsoever to the form of government then in existence was major driving force to create the Constitution, a form of government that did not allow principal control by any one state or group of states. Given the fact of Rhode Island's actions, the convention clearly would not be prone to create a document that such an event, control by any state or group of states, over the amendment process of the form of government, could transpire again without substantial consent by a vast majority of the states. See *infra*, note 47.

⁴³ The historic records show debate of several versions of the resolution before Congress approved a final version on February 21, 1787. The debate texts contain significant information in light of Professor Natelson's assertion. Examination is obligatory. This first requires examining the language of the "Proceedings of Commissioners to remedy defects of the Federal Government" September 11, 1786 commonly referred to as the Annapolis Convention. Only representatives of five states attended the convention (New York, New Jersey, Pennsylvania, Delaware and Virginia). The commissioners reported to Congress they had "found that the States of New York, Pennsylvania, and Virginia, had, in substance, and nearly in the same terms, authorized their respective Commissioners 'to meet such Commissioners as were, or might be appointed by the other States in the Union ... to take into consideration the trade and Commerce of the United States, to consider how far an [sic] uniform system in their commercial intercourse and regulations might be necessary to their common interest and permanent harmony, and to report to the several States such an Act, relative to this great object, as when unanimously ratified by them would enable the United States in Congress assembled effectually to provide for the same.'" Documents Illustrative of the Formation of the Union of the American States, Government Printing Office, 1927, House Document No. 398.

The commissioner's report then continued that the states of Delaware "given similar powers to their Commissioners with this difference only that the Act to be framed in virtue of those powers is required to be report 'to the United States in Congress assembled, to be agreed to by them, and confirmed by the Legislatures of every State.'"

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Unquestionably, the states, as Professor Natelson contends, operated under the principles of fiduciary law at the Annapolis Convention. The states specifically limited “the commissioners (agents) to discussion of “trade and Commerce of the United States.” However, despite these precise fiduciary instructions the commissioners did not obey them. Citing a lack of member states sending delegates to the convention, the commissioners refused to carry out the fiduciary instructions. They stated, “That the express terms of the powers to your Commissioners supposing a deputation from all the States, and having for object the Trade and Commerce of the United States, Your Commissioners did not conceive it advisable to proceed on the business of their mission, under the Circumstance of so partial and defective a representation.” A careful examination of the words of the fiduciary statement shows the commissioners were to proceed regardless of number of states as the instructions mandated action meeting with “commissioners as were, or might be, appointed...”

Moreover, the commissioners themselves railed against the limited nature of the fiduciary instructions stating, “Deeply impressed however with the magnitude and importance of the object confided to them on this occasion, your Commissioners cannot forbear to indulge an expression of their earnest and unanimous wish, that speedy measures may be taken, to effect a general meeting, of the States, in a future Convention, for the same, and such other purposes, as the situation of public affairs, may be found to require. If in expressing this wish, or in intimating any other sentiment, your Commissioners should seem to exceed the strict bounds of their appointment, they entertain a full confidence, that a conduct, dictated by an anxiety for the welfare, of the United States, will not fail to receive an indulgent construction.” [Emphasis added].

The commissioners relied on another point of fiduciary law not mentioned by Professor Natelson at this point in his Report. The agent may alter the instructions of the principal. Any fiduciary instruction is subject to “indulgent construction.” Thus, if the principal accepts the actions of the agent without objection by such action of the principal in consenting to those acts of the agent, they have become part of the fiduciary instructions modifying such previous instructions as appropriate.

If such fiduciary principle applied to the Constitution, it eliminates the charge of a “runaway” convention usually leveled by opponents to an Article V Convention. By such principle of knowledgeable acceptance of acts of agent retroactively binds a principal to the actions of the agent. Thus, there can be no “runaway” convention, as any such acts became retroactively part of the instructions given by the states when they ratified the proposed Constitution. *See infra*, note 230. While not based or dependent on fiduciary law, a similar principle exists in constitutional law. This is the principle of sovereign authority, which resides with the people, not the states. This constitutional principle explains why the states cannot control a convention—rather it is an authority reserved to the people. As described by the Supreme Court: “The constitution of the United States was made for the whole people of the union and is equally binding upon all the courts and all citizens.” *Farmers’ & Mechanics’ Bank of Pa. v. Smith*, 19 U.S. 131, 134 (1821).

As described in much greater detail by the Supreme Court in *McCulloch v State of Maryland*, the court said, “[T]he counsel for the State of Maryland have deemed it of some importance, in the construction of the Constitution, to consider that instrument not as emanating from the people, but as the act of sovereign and independent States.

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The powers of the General Government, it has been said, are delegated by the States, who alone are truly sovereign, and must be exercised in subordination to the States, who alone possess supreme dominion.

It would be difficult to sustain this proposition. The convention which framed the Constitution was indeed elected by the State legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation or pretensions to it. It was reported to the then existing Congress of the United States with a request that it might 'be submitted to a convention of delegates, chosen in each State by the people thereof, under the recommendation of its legislature, for their assent and ratification.'

This mode of proceeding was adopted, and by the convention, by Congress, and by the State legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively and wisely, on such a subject—by assembling in convention. It is true, they assembled in their several States—and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account cease to be the measures of the people themselves, or become the measures of the State governments.

From these conventions the Constitution derives its whole authority. The government proceeds directly from the people; is 'ordained and established' in the name of people, and is declared to be ordained, 'in order to form a more perfect union, establish justice, insure domestic tranquility, and secure the blessings of liberty to themselves and to their posterity.'

The assent of the States in their sovereign capacity is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it, and their act was final. It required not the affirmance, and could not be negatived, by the States Governments. The Constitution, when thus adopted, was of complete obligation, and bound the State sovereignties.

It has been said that the people had already surrendered all their powers to the State sovereignties, and had nothing more to give. But surely the question whether they may resume and modify the powers granted to Government does not remain to be settled in this country. Much more might the legitimacy of the General Government be doubted had it been created by the States. The powers delegated to the State sovereignties were to be exercised by themselves. To the formation of a league such as was the Confederation, the State sovereignties were certainly competent. But when, 'in order to form a more perfect union,' it was deemed necessary to change this alliance into an effective Government, possessing great and sovereign powers and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all. The Government of the Union then (whatever may be the influence of this fact on the case) is emphatically and truly, a Government of the people. In form and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.

This Government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted to it would seem too apparent to have required to be enforced by all those arguments which

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its enlightened friends, while it was depending before the people, found necessary to urge; that principle is now universally admitted." *McCulloch v. State of Maryland*, 17 U.S. 316, 402-405 (1819). [Emphasis added]. (See *also supra*, note 26).

Thus, when the states ratified the proposed Constitution acting through representatives elected by the people, the people gave sovereign consent to that document to be law of the land and bound themselves to it. In taking such action, the people automatically approved the means and the methods for creation of the document. That is, the people consented to the actions of the 1787 Federal Convention notwithstanding any contrary instructions previously given by the states.

The commissioners then stated, "In this persuasion, your Commissioners submit an opinion, that the idea of extending the powers of their Deputies, to other object, than those of Commerce, which has been adopted by the State of New Jersey, was an improvement on the original plan, and will deserve to be incorporated into that of a future Convention; they are the more naturally led to this conclusion, as in the course of their reflections on the subject, they have been induced to think, that the power of regulating trade is of such comprehensive extent, and will enter so far into the general System of the federal government, that to give it efficacy, and to obviate questions and doubts concerning its precise nature and limits, may require a correspondent adjustment of other parts of the Federal System. ... In the choice of the mode, your Commissioners are of opinion, that a Convention of Deputies from the different States, for the special and sole purpose of entering into this investigation, and digesting a plan for supplying such defects as may be discovered to exist, will be entitled to a preference from considerations, which will occur, without being particularized."

⁴⁴ The first resolution discussed in Congress on February 21, 1787 reads as follows:

"Congress having had under consideration the letter of John Dickinson esqr chairman of the Commissioners who assembled at Annapolis during the last year also the proceedings of the said commissioners and entirely coinciding with them as to the inefficiency of the federal government and the necessity of devising such farther provision as shall render the same adequate to the exigencies of the Union do strongly recommend to the different legislatures to send forward delegates to meet the proposed convention on the second Monday in May next at the city of Philadelphia." According to public record, the state of New York "thereupon laid before Congress instructions which they had received from their constituents & in pursuance of the said instructions moved to postpone the farther consideration of the report in order to take up the following proposition to wit."

New York's resolution read, "That it be recommended to the States composing the Union that a convention of representatives from the said States respectively be held at on for the purpose of revising the Articles of Confederation and perpetual Union between the United States of America and reporting to the United States in Congress assembled and to the States respectively such alterations and amendments of the said Articles of Confederation as the representatives met in such convention shall judge proper and necessary to render them adequate to the preservation and support of the Union."

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On the question to postpone, the motion of New York was defeated; one state divided (Connecticut) three states in favor (Massachusetts, New York, Virginia), the rest negative (New Jersey, Pennsylvania, Delaware, Maryland, North Carolina, South Carolina, Georgia).

Massachusetts then moved “to postpone the farther consideration of the report in order to take into consideration a motion which they [Massachusetts] read in their place, this being agreed to, the motion of the delegates for Massachusetts as taken up and being amended was agreed to as follows”:

“Whereas there is provision in the Articles of Confederation & perpetual Union for making alterations therein by the assent of a Congress of the United States and of the legislatures of the several States; And whereas experience hath evinced that there are defects in the present Confederation, as a mean to remedy which several of the States and particularly the State of New York by express instructions to their delegates in Congress have suggested a convention for the purposes expressed in the following resolution and such convention appearing to be the most probably mean of establishing in these states a firm national government.

Resolved that in the opinion of Congress it is expedient that on the second Monday in May next a convention of delegates who shall have been appointed by the several states be held at Philadelphia for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the states render the federal constitution adequate to the exigencies of Government & the preservation of the Union.” Journals of the Continental Congress, Vol. 38 (manuscript), Library of Congress.

There is a subtitle point regarding this resolution in relation to fiduciary law. While it is clear the commissioners of the Annapolis Convention clearly operated under specific, direct fiduciary instructions limiting them to the discussion of a single subject (Trade and Commerce) the Congress did not accept the recommendation of the commissioners and thus the fiduciary instructions thereto attached. Instead, Congress deferred to first the State of New York and an entirely new recommendation not made under the instructions given the states at the Annapolis Convention. It then set aside this recommendation only to consider and ultimately approve a recommendation from the State of Massachusetts, a state that did not even send delegates to the Annapolis Convention. The only conclusion to derive from this act was that Congress transcended the convention from that of state control (principal/agent limited to a specific issue (trade/commerce) to federal control. Congress, acting on its own initiative (as there was no provision in Articles of Confederation describing exactly who could propose “an alteration) then issued its resolution. Thus, there can be no support for fiduciary control by the states of the 1787 Federal Convention as such instructions would have limited the convention only to discussion of trade and commerce. If there was a fiduciary obligation owed the states by the 1787 Federal Convention delegates, its basis was not the specific fiduciary instructions of the Annapolis Convention.

Congress, obviously believing there was no fiduciary obligation on its part, set aside the instructions for a non-binding set of instructions of its own. The fiduciary instructions of the Annapolis Convention limited the convention to specific issue, trade and commerce. Such instructions would have prevented the creation of the Constitution. The instructions would have created a single-issue convention (such as is sought today) that would have been in-

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adequate to the task of addressing the issues of that time. As the vast changes made in the Constitution vis-à-vis the Articles of Confederation indicate, the issues of the day went far beyond trade and commerce.

Thus, history shows a pre-determined, single-issue outcome convention is potentially more dangerous than a “runaway” convention as it may, and most likely, will not solve the problems of this nation. The single-issue “nanny-state” instructions may prevent a convention from becoming a “runaway.” However, these same instructions also bind a convention preventing consideration of vital issues outside those instructions. Conventions are a last resort in the political process. By such time of a convention, dangerous political forces exist that must be resolved. If they are not resolved, they can cause the downfall of a nation. To bind a convention therefore to a single pre-determined issue and outcome places the nation in a precarious historic position. Unless the states guess right, their pre-determined outcome may not resolve anything. More importantly, it will cause the nation to miss a golden opportunity, which rarely occurs in the political process—the chance to get it right. Wisely, Congress ignored the fiduciary instructions associated with the Annapolis Convention. Instead, it issued a general, legally non-binding set of instructions in the form of a congressional resolution.

An examination of the definition of the word “resolution” is appropriate. “A formal expression of the opinion or will of an official body or a public assembly, adopted by vote; as a legislative resolution. Such may be either a simple, joint or concurrent resolution. The term is usually employed to denote the adoption of a motion, the subject-matter of which would not properly constitute a statute, such as a mere expression of opinion; an alteration of the rules; a vote of thanks or of censure, etc. Such is not law but merely a form in which a legislative body expresses an opinion. Baker v City of Milwaukee, 271 Or. 500, 533 P.2d 772, 775. Black’s Law Dictionary 1310. [Emphasis added].

A “law” is defined as “That which is laid down, ordained, or established. A rule or method according to which phenomena or actions co-exist or follow each other. Law, in its generic sense, is a body of rules of action or conduct prescribed by controlling authority, and having binding legal force. United States Fidelity and Guaranty Co. v. Guenther, 281 U.S. 34, 50 S.Ct. 165, 74 L.Ed. 683. That which must be obeyed and followed by citizens subject to sanctions or legal consequences is a law. Law is a solemn expression of the will of the supreme power of the States. Calif. Civil Code, § 22.” Black’s Law Dictionary 884. [Emphasis added].

The chief distinction between a ‘resolution’ and a ‘law’ therefore is that the former is used whenever the legislative body passing it wishes merely to express an opinion as to some given matter or thing and is only to have a temporary effect on such particular thing. A ‘law’ it is intended to permanently direct and control matters applying to persons or things in general.”

Congress issued a resolution rather than a law in calling for the 1787 Federal Convention. The resolution had no force of law. Thus, it cannot be connected in anyway with any part of law including principal/agent law. The resolution emanated exclusively from Congress. By deliberate vote and acts, Congress set aside any fiduciary recommendation. Therefore, Congress, in its non-binding resolution, gave no fiduciary instructions. As the convention convened based on the congressional resolution it is beyond doubt the convention occurred because of an opinion of Congress rather than any fiduciary instructions. Moreover, its subsequent acceptance of the convention’s actions eliminates any question the convention operated contrary to any fiduciary instructions or violated the intent and spirit of the non-binding resolution. The clear principle acknowledged by Professor Natelson of fiduciary law is ir-

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sent delegates to the convention with Rhode Island abstaining. Under the terms of the Articles of Confederation, the law of the land at that time, there was no such thing as “amendment.”⁴⁵ Instead, the Articles of Confederation allowed for an “alteration” but such alteration was only permissible by unanimous consent of all the state legislatures.⁴⁶ Throughout the history of the confederation, Rhode Island had consistently refused to consent to any changes in the Articles, leaving the rest of the Union stymied and unable to meet the changing demands of the nation.⁴⁷

The genesis of Article V begins in what was termed the “Virginia Plan.” This “plan” was a set of fifteen resolutions introduced by Governor Edmund Randolph of the Commonwealth of Virginia.⁴⁸ The Virginia plan contained the basic framework of the Constitution as it was finally adopt-

refutable: in order for there to be a fiduciary relationship between principal and agent there must be a set of legally binding instructions between principal and agent. In the instance of Congress (as well as the states) the only way this is possible is for that body to pass a law controlling the issue. Congress issued no law. A resolution is not legally binding. Therefore, it cannot contain legally binding fiduciary instructions. It therefore is not a fiduciary instrument. As there were no instructions, there can be no fiduciary relationship. *See infra*, note 164.

⁴⁵ The Articles of Confederation only permitted “an alteration” to the Articles which probably explains why the New York resolution calling for the 1787 convention was ignored by Congress in favor of language only referring to “alterations”. (*See* note 44 *comparing* language of Annapolis Convention, New York resolution and Massachusetts’s resolutions).

⁴⁶ *See supra*, note 12.

⁴⁷ An example of Rhode Island's opposition is found in Federalist 40 “[W]as it not an acknowledged object of the convention and the universal expectation of the people, that the regulation of trade should be submitted to the general government in such a form as would render it an immediate source of general revenue? Had not Congress repeatedly recommended this measure as not inconsistent with the fundamental principles of the Confederation? Had not every State but one; ...so far complied with the plan of Congress as to recognize the principle of the innovation?” The Federalist no. 40, at 217 (James Madison) (Gideon ed.,1818).

⁴⁸ Any suggestion that the states gave fiduciary instructions to the delegates is unsupported by best evidence as this evidence shows several variations on each proposal including that of Alexander Hamilton. The law of principal/agent is clear: the agent must receive a set of instructions (singular) from the principal. How can there be a principal/agent relationship if the agent, has to choose which set of instructions from a principal he will obey? In the case of the Virginia Plan, depending on which variation is read, the Plan consisted of 15 points with some versions showing key words crossed out and in some instances other words inserted in. Proposal Number 13 dealing with amendment had several variations. In one version, (A) the text read, “Res^d that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto. A second version (B) read, “That provision ought to be made for the amendment of the articles of union whensoever it shall seem necessary; and that the assent of the national legislature ought not to be required thereto. A third version (C) read, “agreed 13. That provision ought to be made for the amendment of the Articles of the Union, whensoever it shall seem necessary (and that the assert of the National Legislature ought to be required). [Emphasis added]. (A) Debates in the Federal Convention of 1787 Reported by James Madison, New York, (1920) pp. 23-26. (B) Secret Proceedings and Debates of the Convention Assembled at Philadelphia in the Year 1787, for the Purpose of Forming the Constitution of the United States of

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ed, including provisions for a national legislature of two branches with members of both houses apportioned according to population, a national executive and a national judiciary. The smaller states resisted the Virginia Plan, primarily because of its apportionment proposal for both houses of the national legislature be by population. This opposition submitted its own plan, termed the New Jersey plan⁴⁹, largely based on the existing Articles of Confederation. In addition, Alexander Hamilton, delegate from the state of New York, submitted his own set of proposals.⁵⁰

Depending on which version is examined, the Virginia Plan required “that provision ought to be made for the amendment of the Articles of the Union, whensoever it shall seem necessary” and “that the assent of the National Legislature ought (or ought not) to be required.” Based on research of the author, the general interpretation of the proposal favored the former interpretation (ought not to be required) rather than the latter interpretation (ought to be required). If so, then it is clear the state of Virginia did not have fiduciary law in mind when it made the first proposal regarding amendment. Obviously, as there are and were only two political groups (the national government and the state governments) involved in any federal system be it the Articles of Confederation or the Constitution, the obvious intent was that the states, and only the states would propose amendments to the national form of government whatever that might be. As the instruction did not specify a convention nor give any other details, it is clear this lack of detail enabled the agent, in this case, the delegates from Virginia to “fill in the details.” Moreover, the lack of instructions from any other source meant the other delegates were entirely free to discuss and propose however they felt best, in other words, use their best judgment to solve the problems presented them. A principal/agent relationship clearly requires a set of instructions not only instructing the agent what he can do but what he cannot do. Finally, the fact the instructions did not designate any third party whatsoever in the proposal means it must be assumed the states themselves would propose, most likely through their state legislatures. As such, there would be no principal/agent relationship as the principal (the state legislature) would act autonomously and thus require no agent to act for them. Thus, Professor Natel-

America, Robert Yates, App., pp. 209-212 (1838). (C) Documentary History of the Constitution of the United States of America, Vol. 1, pp. 332-335 (1894).

⁴⁹ As with the Virginia Plan, the New Jersey Plan contained several different versions. None these dealt with amendment. (*Compare generally* versions found in Debates in the Federal Convention of 1787 Reported by James Madison (New York, 1920) pp. 102-104; Documentary History of the Constitution, Vol. 1, pp. 322-326 (1894); American Museum, Vol. III, pp. 362-363. Documents Illustrative of the Formation of the Union of the American States, Government Printing Office, 1927. House Document No. 398.

⁵⁰ As with the New Jersey plan, Hamilton’s proposals, four in all, did not address amendment. *Compare generally* versions in Debates in the Federal Convention of 1787 Reported by James Madison (New York, 1920) pp. 118-120; The Works of Alexander Hamilton, edited by Henry Cabot Lodge, (New York and London, 1885), vol. 1, pp. 331-333; Documentary History of the Constitution of the United States of America vol. 1, pp. 327-329 (1894); Life and Correspondence of George Read, (Philadelphia, 1870), pp. 453-454.

son's assertion that the Founders used fiduciary law, in so far as intending the states control the agenda by controlling the subject matter of amendment issues is neither proven by actual text of the Founders' action at the convention, nor disproved. What is irrefutable is the states approached amendment with the clear idea in mind that the states would amend the Constitution, absent of any federal veto or consent, thus controlling the document entirely and that state legislatures would act directly to do so offering amendment proposals as each legislature saw fit.

Amending a constitution was not a new concept to 1787 Federal Convention delegates.⁵¹ Many state constitutions of the time contained amendment procedures.⁵² Even the Articles of Confederation allowed for "alteration"⁵³ but as the Articles required unanimous consent of all confederation states to so alter, this method viewed as more hindrance than help.⁵⁴

There are two fundamental differences between Article V of the Constitution and Article XIII of the Articles of Confederation.⁵⁵ Beyond the obvious that Article V is more detailed in describing the process by describing which political bodies may propose amendments (Congress and a convention) Article V makes it impossible for any single political body or group to control the Constitution through the amendment process. Thus, Article V reserves to the states the right to compel Congress to call a convention if a sufficient number of states require Congress to so act. This permits an independent body other than Congress to propose amendments, one that is outside the political control of Congress. The reason for this change was the desire by the delegates to retain in the several states the power to circumvent a recalcitrant or abusive Congress by initiating a convention for proposing amendments.⁵⁶ As noted by Professor Natelson, this action established a principal/agent relationship with specific, direct instructions in the Constitution. The instructions are limited in form and description. They specifically mandate Congress call a convention "on the application of two thirds of the several state legislatures." The instructions do not include instructions that grant the right, duty or authority of the states to regulate or control the agenda of a convention by limiting what issues or amendment subject[s] that convention may discuss. Instead, as noted by Professor Natelson, "Under both the Articles of

⁵¹ Voegler, Amending the Constitution by the Article V Convention Method, 55 N.D.L. Rev. 355, 359 (1979) (quoting L. Orfield, *The Amending of the Federal Constitution* 1 (1942).

⁵² *See generally Id.* at pp.359-60.

⁵³ *See supra*, note 17.

⁵⁴ Quoting convention delegate Charles Pinckney of South Carolina, "[I]t is to this unanimous consent, the depressed situation of the Union is undoubtedly owing." *The Record of the Federal Convention of 1787*, vol. 3, p.120 (1911) [hereinafter 1,2,3, or 4 Farrand] *See also* M. Farrand, *The Records of the Federal Convention of 1787* (rev. ed 1937) (containing corrections and a more detailed index).

⁵⁵ *Compare* U.S. Const. art. V, *supra* note 2 with Articles of Confederation of 1781, art. XIII, para. 1, *supra* note 12.

⁵⁶ 1 Farrand, p. 203; *see also* 3 Farrand, p. 127.

Confederation and the Constitution, Congress was a fiduciary institution. Under the Confederation, Congress generally was the fiduciary (specifically, the agent) of the *states*. Under the Constitution, Congress generally is the agent of the American *people*. However, the congressional role in the state-application-and convention procedure differs importantly from its usual role as an agent of the people. In calling the convention and sending the convention's proposals to the states, Congress acts as an agent of the *state legislatures*. In this respect, the Framers retained the Confederation way of doing things in the interest of allowing the states to bypass Congress."⁵⁷ While the author agrees with Professor Natelson regarding the fact Congress is an agent of the states in a convention call, in that Congress acts expressly to issue the call at the behest of the states' applications, this establishes firmly a fiduciary relation between the states and Congress not between the states and the convention.

The second fundamental point, which relates to the first, is that states, under Article V, may not propose amendments to the Constitution. Only Congress and a convention are empowered to do this.⁵⁸ Moreover, Article V eliminates any unanimous consent either in proposing amendments or in the ratification procedure and replaces it with two thirds or three-fourths majorities respectively. Thus, if there is a fiduciary relationship between the states and a convention or if the Founders intended such a relationship, the genesis of Article V does not provide it. This fact warrants full investigation to discover if any such intent lies in the transformation of Resolution 13 of the Virginia Plan⁵⁹ to final version of Article V.

The Amendatory Provision Convention Record: May 29, 1787-June 11, 1787

Alexander Hamilton advanced the first proposal of involving actual language of what was to become Article V in a draft given to several members of the convention but never formally proposed by him.⁶⁰ The text of the proposal differed starkly from that of the Virginia Plan. It stated, "This Constitution may receive such alterations and amendments as may be proposed by the Legislature of the United States, with the concurrence of two-thirds of the members of both Houses, and ratified by the Legislatures of, or in Conventions of deputies chosen by the people in, two-thirds of the States composing the Union."⁶¹

⁵⁷ Report, pp. 19-20. [Emphasis in original text; footnotes omitted].

⁵⁸ See also *infra*, notes 255-257.

⁵⁹ See *supra*, note 48.

⁶⁰ 3 Farrand p. 617.

⁶¹ *Id.*, p. 630.

There is no question whatsoever that no fiduciary relationship controlling an amendment convention by the state legislatures existed in this draft proposal. First, the proposal does not mention an amendment convention. Second, all amendment proposals were by “the Legislature of the United States (Congress). Third, the only participation of the state legislatures in this proposal was in one of two methods of ratification with the other mode of ratification clearly chosen by the people. Thus, any such convention was an agent of the *people* rather than of the state legislatures. Therefore, there is no support for Professor Natelson’s assertions in what must be viewed as best evidence, the actual language of proposals by and at the convention, that the Founders intended a fiduciary relationship.

Most importantly, even at this earliest state in the creation of Article V, that agreement on subject matter of a proposed amendment was immaterial to the Founders vis-à-vis causing an amendment to occur.⁶² While there was disagreement over who would propose an amendment

⁶² Of course, one could argue numeric support of and agreement over subject matter are identical. Thus, “same subject” proponents state a numeric two-thirds support of identical agreement of the same amendment issue must occur to cause Congress to call a convention. Those advocating this interpretation as the basis of a convention call by Congress always interpret “Same subject” or “issue” in this fashion. Political agenda and “Same subject” are always linked. A group, favoring the passage of a specific political proposal or agenda involving constitutional amendment intended to further that agenda always supports “same subject.” Thus, these groups want a convention, but only for their political purposes and agenda, to the exclusion of all others. While these groups advocate a “single-issue” convention, in reality they desire an unfettered “runaway” convention with no political obstacle or objection blocking their political goals and objectives. To allow an open convention, uncontrolled by any single political movement, is a political obstacle to those individual political movements. To overcome this obstacle, these groups conclude two-thirds of the states must submit applications for an Article V Convention containing applications with a request for the same amendment issue proposal, i.e., their same amendment subject or issue before Congress calls a convention. This erroneous conclusion misses the point of the Founder’s intent expressed in Article V.

As will be shown in this article such a discussion or concept never occurred to the Founders before, during or after the 1787 Federal Convention. The only standard referred to by them for amendment passage was numeric ratios of consent by states, members of Congress or convention delegates.

As will be shown in this article, those who “interpret” an Article V Convention call as meaning application for “same amendment issue” always overlook that Article V not only contains the process of application but also specifies the subject of those applications. As noted by the Supreme Court Article V contains no ambiguity. Therefore, no “rules of construction”, “interpolation” or “addition” can alter Article V. (*See infra*, notes 264-287). Hence, the sole subject of the convention clause is the only constitutionally allowed subject any application may address. Anything else contained in an application such as political support for a specific amendment issue, is political dictum. Congress (and the states) must therefore ignore such dictum when determining to call a convention. Article V establishes a numeric ratio of applying states to all states in the union to determine when a convention call must occur. Hence, the sole basis of determination is a simple numeric count of how many states have applied for a convention call. The sole subject in Article V vis-à-vis a convention call is whether or not the states approve of calling of a convention to propose amendments to the Constitution by submissions of applications to Congress or not.

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(the states or Congress) between the Virginia Plan and the Hamilton proposal, there was unanimity on a central point. From earliest concept to final version, the predication of the amendment process was numeric counts. The Founders never considered prior agreement on specific amendment subject issue by the states as a term or condition of the amendment process. Hamilton's proposal clearly revolved around a numeric concurrence (two-thirds) in order for an amendment to become part of the Constitution and, as will be shown, this principle remains inviolate throughout the entire 1787 Federal Convention process. Hence, under the terms of Hamilton's proposal, if two thirds of the houses of the Legislature of the United States gave "concurrence" the amendment was proposed. The same numeric principle held true as to ratification. Save for major changes in language, the addition of the amendment convention and two stipulations preventing amendment of specific parts of the Constitution, Hamilton proposed the basic framework of Article V.⁶³

Yet, there was vast discussion before Article V was completed. On June 5, 1787, convention delegates began discussion on Resolution 13 of the Virginia Plan. Charles Pinckney stated he "doubted the propriety or necessity of it"⁶⁴ meaning he saw no reason to include an amend-

In short, the subject described in Article V determines whether the states want to amend the Constitution at all. Without such support from the states, no amendment process can begin. By requiring two-thirds support, the Founders ensured amendment for needful rather than frivolous reasons. Such desire would represent a substantial portion of the nation rather than a small minority. Hence, they specified not only the process of a convention call ("on the application of two-thirds of the several state legislatures...") but also the purpose of the application ("[Congress] shall call a convention for proposing amendments...").

Based on their own experience at the 1787 convention, the Founders realized a convention would debate various amendment proposals. They wisely left that process open to permit open political debate with no set terms or conditions that might, in time, prove inadequate or outdated. However, they resolved the key constitutional question of whether a convention must convene by placing a peremptory provision in the Constitution. The question of whether or not the states desired a convention was thus left to the states to decide. The provision, regardless of political winds, ensured constitutional protection to the states allowing amendment without national government approval.

⁶³ Some have intimated James Madison was opposed to an Article V Convention by taking comments in letters Madison wrote after the convention out of context and presenting this as "evidence" to suggest this assertion. (See Bill Walker, *Misquoting James Madison's Article V Convention Position; Yet Another Lie By Phyllis Schlafly Misquoting James Madison's Article V Convention Position*, <http://www.nolanchart.com/article7638.html> April 21, 2010 8:46 a.m.). The facts speak differently. While Hamilton proposed the basic framework of Article except as noted, Madison proposed the basic language of what became the final version of Article V later in the convention process. In that version, Madison called for state ratification conventions. See *infra*, notes 120,124, 127. Moreover, as the recorded vote on the motion to insert a proposing convention into the text of Article was "unanimous" obviously, delegate Madison supported an Article V Convention along with all other delegates. See *infra*, notes 140-141.

⁶⁴ 1 Farrand, p. 121.

ment procedure in the new Constitution despite his earlier concerns.⁶⁵ However Elbridge Gerry, delegate from Massachusetts, stated, “The novelty & difficulty of the experiment requires periodical revision. The prospect of such a revision would also give intermediate stability to the Govt. Nothing has yet happened in the States where this provision existed to proves [sic] its impropriety.”⁶⁶

The delegates then voted to postpone further discussion returning to discuss Resolution 13 on June 11, 1787. On this date, Colonel George Mason of Virginia, speaking in support of amendment in the Constitution, “urged the necessity of such a provision.”⁶⁷ After Governor Randolph, delegate from Virginia, “enforced” Colonel Mason’s arguments,⁶⁸ the delegates unanimously agreed to the portion of Resolution 13 stating that “provision ought to be made for the amendment of the Articles of the Union whensoever it shall seem necessary,”⁶⁹ but postponed a decision on whether the assent of the national legislature would be required.⁷⁰ Thus, when Governor Randolph reported on the state of the resolutions several days later, the text of the resolution concerning the amendment process (now re-numbered as Resolution 17) was as follows, “Resolved that provision ought to be made for the amendment of the articles of union whensoever it shall seem necessary.”

Again, there is no question that at this stage of the proceedings of the 1787 Federal Convention, there was no principal/agent relationship whatsoever. All the convention had decided by June 11, 1787 was that a “provision ought to be made for the amendment of the articles of union whensoever it shall seem necessary.” In other words, they agreed an amendment procedure should be part of the future Constitution but at this stage did not describe any party to it nor provided any instructions regarding it. Without at least two parties (principal and agent) and without a set of instructions from the principal to the agent, a fiduciary relationship cannot exist. Therefore, no fiduciary law principle could possibly attach at this stage. None of the elements required for such a relationship existed.

⁶⁵ See *supra*, note 54.

⁶⁶ 1 Farrand, p. 122.

⁶⁷ *Id.*, p. 202. Mason then continued, “The plan now to be formed will certainly be defective, as the confederation has been found on trial to be. Amendments therefore will be necessary, as it will be better to provide for them, in an easy, regular and constitutional way than to trust to chance and violence. It would be improper to require the consent of the Natl. Legislature, because they may abuse their power, and refuse their consent on that very account. The opportunity for such abuse, may be the fault of the Constitution calling for amendmt.” *Id.*, p. 203.

⁶⁸ *Id.*, p. 203.

⁶⁹ *Id.*, p. 194.

⁷⁰ *Id.*

Miscellaneous Concerns Related to Amendment: June 29, 1787-July 23, 1787

During the time period between the end of June 1787 and mid-July 1787, convention delegates only briefly discussed amendment of the Constitution, and then only in connection with other matters. For example, on June 29, 1787 during debate on whether each state should have an equal vote in the second house (i.e., the Senate),⁷¹ Judge Oliver Ellsworth of Connecticut stated he would not be surprised if the new Constitution should require amendment in the future. Ellsworth stated amendment might be required even though “we made the general government the most perfect in our opinion....”⁷² Ellsworth continued, “Let a strong Executive, a Judiciary & Legislative power be created, but Let not too much be attempted; by which all may be lost.”⁷³ He added, “[I am] not in general a half-way man, yet [I] prefer doing half the good we could, rather than do nothing at all. The other half may be added, when the necessity shall be more fully experienced.”⁷⁴

James Madison responded to Judge Ellsworth regarding his statements on continually striving for the best possible plan of government and the difficulties other governments had experienced in changing their form of government once in place: “I would always exclude inconsistent principles in framing a system of government. The difficulty of getting its defects amended are great and sometimes insurmountable. The Virginia state government was the first which made, and through its defects are evident to every person, we cannot get it amended. The Dutch have made four several attempts to amend their system without success. The few alterations made in it were by tumult and faction, and for the worse.”⁷⁵

Despite these expressed concerns, the entire convention considered Resolution 17-“That provision ought to be made for the amending of the articles of union, whensoever it shall seem necessary”⁷⁶ for the first time on July 23, 1787.⁷⁷ The Resolution passed unanimously, apparently without discussion.⁷⁸

⁷¹ 1 Farrand, p. 469.

⁷² *Id.*, p. 475.

⁷³ *Id.*, p. 469.

⁷⁴ *Id.*

⁷⁵ *Id.*, pp. 475-476.

⁷⁶ 2 Farrand, p. 84.

⁷⁷ *Id.*

⁷⁸ *Id.* Despite discussion by convention delegates expressing concerns over amendment in the government process, there is no record of the delegates believing fiduciary control by the states over that process, or any part of it, would solve the issues they raised in their comments. If the delegates were so inclined to believe such a process would serve to resolve their concerns, it is reasonable to assume that the time of discussing the problem, they

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Delegates discussed Resolution 17 in relation to another resolution. That resolution stated, “The legislative, Executive, and Judiciary Powers within the several States, and of the national Government, ought to be bound by oath to support the articles of the union.”⁷⁹ During discussion, James Wilson of Pennsylvania stated, “he was never fond of oaths” and that “[h]e was afraid they might too much trammel the ... Members of the Existing Got in case future alterations should be necessary; and prove an obstacle to Resol: 17, just agd. to.”⁸⁰ Nathaniel Ghorum, delegate from Massachusetts disagreed saying, “Mr. Ghorum [sic] did not know that oaths would be of much use: but could see no inconsistency between them and the 17. Resol: or any regular amendt. of the Constitution. The oath could only require fidelity to the existing Constitution. A constitutional alteration of the Constitution, could never be regarded as a breach of the Constitution, or of any oath to support it.”⁸¹⁸²

Elbridge Gerry of Massachusetts agreed with Gorham. Gerry then added he considered oaths as having value by impressing upon the officers of the new government the fact the state and federal governments were not distinct governments but were instead components of a general system, thereby preventing the preference that existed in favor of the state governments.⁸³

would have also advanced the proposition that a fiduciary relationship between the states and the process would serve to resolve and address those concerns. The absence of any such assertion seems to indicate while the Founders may have “believed that public officials were, or should be, bound, always morally but often legally, to meet fiduciary standards [which was not only] an ideal, but ... a principle of public law” (Report, p. 4) such belief was not applied when considering amendment of the government. Rather, as Resolution 17 indicates the process of amendment i.e., the need for amendment and provision thereof, was central in their collective minds.

⁷⁹ 2 Farrand, p. 84.

⁸⁰ 2 Farrand, p. 87.

⁸¹ 2 Farrand, pp. 87-88.

⁸² With all due respect to Mr. Ghorum, the author must disagree with his conclusion “that oaths would [not] be of much use.” A provision for oaths of office became part of the Constitution (Article VI, § 3: “The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution...”). It was on the basis of this constitutional requirement the author was able to file a federal lawsuit demanding Congress obey its oath of office and call a convention as mandated by Article V. Without the oaths of office provision in place in the Constitution, there is nothing compelling obedience to the terms of the Constitution.

⁸³ 2 Farrand, p. 88. The Supreme Court reflected this view that “state and federal governments [are] not distinct governments but ... instead components of a general system...” in regards to Article V in holding “...[R]atification by a state of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the state to a proposed amendment.” *Hawke v Smith*, 253 U.S. 221, 229 (1920). The Court then continued, “It is true that the power to legislate in the enactment of the laws of a state is derived from the people of the state. But the power to ratify a proposed amendment to the federal Constitution has its source in the federal Constitution. The act of ratification by the state derives its authority from the federal Constitution to which the state and its people have alike assented.” *Id.*, 230.

The Committee of Detail: July 26, 1787-August 6, 1787

Submission of resolutions approved by the convention began on July 26, 1787.⁸⁴ The committee's purpose was to transform the principles set out in the resolutions into a detailed and workable constitution.⁸⁵ The committee consisted of John Rutledge of South Carolina, Edmund Randolph of Virginia, Nathaniel Gorham of Massachusetts, Oliver Ellsworth of Connecticut and James Wilson of Pennsylvania.⁸⁶ The committee took approximately one week to complete its work.⁸⁷ The committee had before it numerous proposals relating to the amendment process

⁸⁴ 2 Farrand, p. 117.

⁸⁵ There is little doubt the Committee of Detail was an important turning point in the convention. At this point, the convention made the irrevocable decision to write a new document rather than proposing a series of alterations to the Articles of Confederation. The number of resolutions and the various issues they addressed submitted by the states made such a course almost inevitable.

The Founders faced two undeniable political facts. (1) The Articles of Confederation mandated unanimous consent by all states of each alteration the convention might propose. (2) Given the fact Rhode Island had refused to even send delegates to the convention, the political prospects of any proposal becoming part of the Articles of Confederation was null, as Rhode Island would defeat ratification of any proposals. Thus, despite obvious weaknesses of the Articles of Confederation exposed and reflected by the resolutions, the political reality was that an extremely small part of the Union was effectively holding the rest hostage to a form of government that all realized was incapable of meeting "the exigencies of the Union." Thus, the threat of a single "no" ratification vote entirely changed the direction of the convention. From a strictly political point of view, it was far easier to put all the eggs in one basket and get that ratified than fight the literally hundreds of individual ratification battles needed to get each individual proposed change into the Articles of the Confederation. This historic fact, together with similar ratification actions of the states serves as the basis of a proposal by this author described later in this article regarding control of convention agenda. See *infra*, notes 340-343.

A similar situation exists today in the political opposition of the John Birch Society to calling an Article V Convention. A small extremist group using an effective political campaign has effectively frozen the Constitution making amendment impossible and thus unable to address the current needs of the nation. Like the dangers seen by the Founders in 1787, these dangers threaten this nation and have the obvious potential to destroy it. The Founders in 1787 had the wisdom to make the changes necessary to avoid the danger and provided the means to do again in the future as required in the form of new amendments. They had the wisdom to realize it was either change or die. The question today is whether the nation today has equal wisdom or will continue to follow the political extremists who oppose an Article V Convention but offer no alternative to resolve the issues in question. The Founders produced a document and means to resolve the issues. The extremists have not.

⁸⁶ 2 Farrand, p. 97.

⁸⁷ See generally *Id.*, p. 117.

including the proposals contained in the Virginia Plan⁸⁸ and the Pinckney Plan.^{89 90} The Virginia Plan had originally contained the proviso “that the assent of the National Legislatures ought not to be required thereto”⁹¹ but the convention had voted to adopt the first part of the Virginia Resolution,⁹² but discussion on the second part of the Resolution was postponed.⁹³

In discussing fiduciary control by the states of a convention, the next relevant document existing in the records of the Committee of Detail is a draft copy of portions of the Constitution before the committee. This draft reveals substantial information on the thought processes of the Committee through the editing process contained in the document itself. In other words, it is best evidence as to the thinking of the Founders as to the prospect of including fiduciary control by the states in the amendment process, especially the editing related to the introduction of the concept of a convention for proposing amendments to the Constitution. These references also demonstrate the thought processes surrounding whether amendment to the Constitution was one at a time (singly⁹⁴). This document, initially in the handwriting of Edmund Ran-

⁸⁸ The language of the Virginia proposal remained unchanged from its May 20, 1787 version which was, “Resolved that provision ought to be made for the Amendment of the Articles of Union, whensoever it shall seem necessary.” See 2 Farrand, p.133 (Comm. Of Detail, Doc. I); See also *Id.*, p. 22.

⁸⁹ 2 Farrand, p. 136 (Comm. Of Detail, Doc. III); See also *Id.* p. 98. Other proposals such as the New Jersey Plan or Patterson proposal was also before the committee but did not contain any provisos dealing with amendment.

⁹⁰ The actual text of the Pinckney Plan has been lost to history. Professor Farrand reconstructed the text as most likely reading, “The assent of the Legislature of the States shall be sufficient to invest future additional Powers in the U.S. in C. ass. And shall bind the whole confederacy.” 3 Farrand, p. 609. The only surviving document of the portion of the Pinckney Plan before the Committee of Detail is an outline of that plan containing only the following reference to amendment: “24. The Articles of Confederation shall be inviolably observed, and the Union shall be perpetual; unless altered as before directed.” 2 Farrand, p. 136 (Comm. Of Detail, Doc. III). It is unclear what is meant by the term “unless altered as before directed” but it is reasonable to assume this language referred to some other reference in the Plan now lost to history.

⁹¹ See *supra*, note 48.

⁹² See *supra*, note 69.

⁹³ See *supra*, note 70.

⁹⁴ “But every amendment to the Constitution, if once established, would be a single proposition, and might be brought forward singly. There would then be no necessity for management or compromise in relation to any other point no giving or taking. The will of the requisite number would at once bring the matter to a decisive issue. And consequently, whenever non, or rather ten States, were united in the desire of a particular amendment, that amendment must infallibly take place.” The Federalist no. 85, at 425 (Alexander Hamilton) (Gideon ed.,1818).

Many have attempted to use these words to suggest a convention can be limited to a single subject (“brought forth singly”). However, when read in context, the words do not mean a convention or Congress can propose only one amendment. Instead, they convey the meaning the states consider each proposal on its own merits, judge each proposal individually, and exclusively ratify each proposal individually, each by a specified number of states, (“The will of the requisite number would at one bring the matter to a decisive issue.”). Any doubt a convention can

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dolph, read: “An alteration may be effected in the articles of union on the application of two-thirds of the state legislatures.”⁹⁵ There is no question in this earliest version of the actual proposed text of the Constitution in the committee that a principal/agent relationship was most likely not intended. In the first place, it is quite clear the application in question was for proposing an actual alteration to the articles of union, that is, the application would contain specific language affecting the articles of union. Further, the language states the state legislatures would write such an application not a designated agent. Therefore, this version did not contemplate a principal/agent relationship, as it did not designate an agent. The state legislatures would be responsible for the actual writing of the application in question and hence would not employ an agent. To suggest the state legislatures would likely assign a certain individual to convey the decision of the state legislature to other legislatures or a national legislature thus establishing a principal/agent relationship is fallacious. The decision in question would lie entirely with the state legislatures. It would not lie with any act or action of an individual outside that body. The decision is fait accompli and executed. No action of an agent is required. Thus, the relationship is an individual serving in the miniscule duty of courier rather than an agent empowered to carry out any instructions. Other than delivering the decision of the state legislature to the specified parties, the courier would perform no other actions. The relationship is not fiduciary.

Randolph subsequently struck out the words “two-thirds” and replaced them with the word “nine,”⁹⁶ then apparently allowed John Rutledge to make suggestions and changes on the document. Rutledge changed the language back to two-thirds of the state legislatures and then, significantly, added the first reference to the use of a convention as part of the amendment process.⁹⁷ Rutledge’s version read, “An alteration may be effected in the articles of union, on the application of 2/3d of the state legislatures by a Covn.”⁹⁸

There is no question the text intends a principal/agent relationship. Obviously, the words intended a convention, in some unspecified manner, would represent “the application of 2/3d of

propose multiple amendments on multiple subjects are defeated in several ways. First, the history of the language of Article V discussed in detail in this article supports the multiple amendment authority. Second, by the final language of Article V allowing both Congress and convention to propose “amendments” conclusively proves the point. Third, the action of Congress in simultaneously proposing twelve amendments (eleven of which were eventually ratified) provides irrefutable proof a proposing body can propose multiple amendments. Fourth, the historic record proves each state ratified or refused to ratify each amendment known collectively as the Bill of Rights individually rather than collectively with a single general vote. This act conclusively proves the states understood each proposed amendment was judged “singly.” See also notes 211-225.

⁹⁵ 2 Farrand, p. 137, note 6, 148 (Comm. Of Detail, Doc. IV).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

the state legislatures” in order to effect “an alteration ... in the articles of union.” Obviously, such a convention would operate under the direct instruction of those two-thirds of the state legislatures. Just as obviously, such a convention would most likely not consist of all members of all state legislatures (though this is not made clear by the language of the proposal). Hence, presumably representatives most likely appointed by the various legislatures would propose the alteration. However, the language is not clear as to who would write the proposal, state legislature or convention. Therefore, while the intent may be a principal/agent relationship, it is impossible to emphatically state this. Thus, had the language of Article V had remained unchanged the language of the Founders in the convention itself would validate Professor Natelson’s assertion. The problem is, history shows otherwise.

Rutledge then crossed out the entire language quoted above and replaced it with the following, “on appln. of 2/3ds of the State Legislatures to the Natl. Leg. They call a Convn. To revise or alter ye. Articles of union.”⁹⁹ The effect of this change in language is clear as to a principal/agent relationship. With a single stroke of a pen, Rutledge removed any such relationship in the language. Instead, he replaced it with language clearly indicating the purpose of the application was not to write an amendment, but cause the “Natl. Leg. (National Legislature) to call a convention. In turn, the convention would then propose revisions or alterations to the “Articles of union.” Thus, as the purpose of the application altered from instructing convention delegates to act in accordance to instructions of the state legislatures to instructing Congress to call a convention, the purpose of the application was no longer control of the convention. The proof of this assertion is obvious. If the Founders had intended the original principal/agent relationship continue to exist, Rutledge would not have crossed out that language. Thus, as early as the first revision of the first draft of Article V, the Founders removed the concept of fiduciary control by the states over a convention by altering the purpose of the instructions that would do from controlling the convention to controlling Congress. There is no question this established a fiduciary relationship between the states and Congress. It did so at the cost of removing such a relationship between the states and a convention.

Rutledge’s revisions were included in subsequent drafts (now in Wilson’s handwriting) created by the Committee of Detail, but with an important addition. “This Constitution ought to be amended whenever such Amendment shall be necessary; and on the Application of the Legislatures of two-thirds of the States of the Union, the Legislature of the United States shall call a Convention for that Purpose.”¹⁰⁰

This important addition again reintroduced the concept of a principal/agent relationship into Article V. Without question, had the language remained unchanged a convention would have been limited to proposal of a single amendment (“such Amendment”). Without question, Con-

⁹⁹ *Id.*

¹⁰⁰ *Id.*, p. 152 n. 14, 159 & n.16 (Comm. Of Detail, Doc. VIII).

gress would have been limited to calling a convention for the specific purpose of proposing such an “amendment.” Under such circumstances, Professor Natelson’s assertions are entirely correct. Clearly, a principal/agent relationship would have to exist at the convention instructing delegates to expressly carry out the instructions of two-thirds of the state legislatures to propose a single amendment. This proposed language allowed the convention no latitude as to proposal. It limited the convention to a single amendment proposal. The language also limited Congress to convention call language expressly limiting the convention to the proposal of a single amendment. These are clear, unambiguous instructions from the states to a convention. Under the principles of principal/agent law, no other conclusion is possible.

However, as will be shown, the convention abandoned this proposed language. Early drafts of any document have historic significance. However, legally and constitutionally, the only version of Article V with any legal effect is the final version approved by the convention and ratified by the states. It is that version and none other, which, in subsequent events, by the courts used to make constitutional interpretations. Hence, it is that version which determines whether a principal/agent relationship exists in Article V.

On August 6, 1787, the Committee of Detail submitted the first draft of the Constitution to the Convention.¹⁰¹ The amendatory process contained Article XIX of the draft provided, “On the application of the Legislatures of two-thirds of the states of the Union, for an amendment of this Constitution, the Legislatures of the United States shall call a Convention for that purpose.”¹⁰²

Article XIX: August 30, 1787-September 10, 1787

On August 30, 1787, the convention began discussion on Article XIX.¹⁰³ Gouverneur Morris of Pennsylvania suggested “that the Legislature should be left at liberty to call a Convention, whenever they please.”¹⁰⁴ Morris’ suggestion was defeated and the delegates passed the proposal without objection.¹⁰⁵

¹⁰¹ *Id.*, p. 176.

¹⁰² *Id.*, p. 188.

¹⁰³ *Id.*, p. 461.

¹⁰⁴ *Id.*, p. 468.

¹⁰⁵ *Id.*, p. 461. As already noted, as passed, the amendatory article only allowed the states initiate the amendment process, limited a proposal to a single amendment subject from a convention and limited the Congress to a convention expressly for that specific purpose, in short, a single subject convention. Congress could not propose amendments. No provision allowed the states to ratify any proposed amendment. Based on specific language of

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On September 10, 1787, Elbridge Gerry of Massachusetts moved to reconsider Article XIX.¹⁰⁶ Gerry expressed concern that a majority of States could, through the amendment process, “bind the Union to innovations that may subvert the State-Constitutions altogether.”¹⁰⁷ Alexander Hamilton of New York seconded Gerry’s motion to reconsider but rejected Gerry’s concerns, asserting Congress should also have the power to call a convention.¹⁰⁸

James Madison next spoke on the subject stating his concerns on the lack of specificity in the terms employed in Article XIX. “Mr. Madison remarked on the vagueness of the terms ‘call a Convention for the purpose’ as sufficient reason for reconsidering the article. How was a Convention to be formed? By what rule decide? What the force of its acts?”¹⁰⁹

Following this discussion the convention then voted to reconsider the amendatory provision.¹¹⁰ Hamilton’s argument persuaded many delegates the national legislature should be able to pro-

the proposal, the states clearly had a principal/agent relationship. The language of Article XIX makes no other interpretation possible.

¹⁰⁶ *Id.*, p. 555.

¹⁰⁷ *Id.*, pp. 557-58.

¹⁰⁸ “[Hamilton] did not object to the consequences stated by Mr. Gerry—There was no greater evil in subjecting the people of the U.S. to the major voice than the people of a particular State- It had been wished by many and was much to have been desired that an easier mode for introducing amendments had been provided by the articles of Confederation. It was equally desirable now that an easy mode should be established for supplying defects which will probably appear in the new System. The mode proposed was not adequate. The State Legislatures will not apply for alterations but with a view to increase their own powers-The National Legislature will be the first to perceive and will be most sensible to the necessity of amendments, and ought also to be empowered, whenever two-thirds of each branch should concur to call a Convention--- There could be no danger in giving this power, as the people would finally decide in the case.” 2 Farrand, p.558.

Relative to discussion of fiduciary control by the states, Hamilton, at this stage of the convention debate, was discussing Congress being able to control a convention. Thus, at this stage, the thinking of the Founders (or at least Hamilton) was an amendment convention should propose all amendments whether originated by Congress or the states. In regards to fiduciary law, the conflict is obvious. No servant can serve two masters. Therefore, Congress and the states cannot both bind a convention. Obviously both parties could easily give conflicting instructions to the same set of agents.

The thinking of the Founders at this stage of convention debate was a convention exclusively regulated by the states, would propose all amendments—hence, a fiduciary relationship. The debate centered on whether to empower Congress with involvement in the amendment process at all. Hence, Hamilton’s effort to permit Congress the power to call a convention on its own involved creating a second principal/agent relationship, this time between Congress and a convention.

¹⁰⁹ 2 Farrand, p. 558.

¹¹⁰ *Id.*, p. 555.

pose amendments directly (even though Hamilton in his remarks is quoted as Congress calling a convention for proposing rather than proposing directly) without the need for calling a convention for proposing amendments.¹¹¹ Roger Sherman of Connecticut then moved to add the following underlined words to Article XIX. “On the application of the Legislatures of two-thirds of the States of the Union, for an amendment of this Constitution, the Legislatures of the United States shall call a Convention for that purpose or the Legislature may propose amendments to the several States for their approbation, but no amendments shall be binding until consented to by the several States.”¹¹² Elbridge Gerry seconded Sherman’s motion.¹¹³

The change in proposed language is significant. First, the language removed Congress from a principal/agent relationship with the convention. Where before Congress was required to submit a proposed amendment to a convention proposing amendments now Congress was empowered to propose amendments directly and no longer had control of the convention vis-à-vis a fiduciary relationship. On the other hand, the principal/agent relationship of the states to the convention was untouched. However as written, Congress was empowered to propose amendments while the states were limited to proposing an amendment. The ratification procedure was also unequal. Proposed amendments required “approbation ... consented to by the several States” but no such limitation was imposed on the states meaning all that was required to amend the Constitution by the states was for two-thirds of the states to apply for a convention call for a specific amendment while Congress could propose amendments but subject to approval by the states.

The delegates however realized the language of this addition by Sherman would result in returning to the unanimous consent rule of the Articles of Confederation for alteration.¹¹⁴ James Wilson moved to insert the words “two-thirds” so amendments would be binding on the consent of two-thirds of the several states.¹¹⁵ Wilson’s motion was narrowly defeated (five states in favor, six opposed).¹¹⁶ Wilson then moved to alter the Resolution by inserting the words “three-fourths” of the several states, which passed without objection.¹¹⁷ Article XIX read “On the application of the Legislatures of two-thirds of the States in the union, for an amendment of this Constitution, the Legislature of the United States shall call a Convention for that purpose or

¹¹¹ *Id.*, pp. 558-59.

¹¹² *Id.*, pp. 555.

¹¹³ *Id.*, p. 558.

¹¹⁴ *See supra*, note 12.

¹¹⁵ 2 Farrand, p. 558.

¹¹⁶ *Id.*, pp. 558-59.

¹¹⁷ *Id.*, pp. 555.

the Legislature may propose amendments to the several States for their approbation, but no amendments shall be binding until consent to by three-fourths of the several states.”¹¹⁸

Under this version, either the national legislature or a convention could propose an amendment to the Constitution. However, technically the States only had the power to propose an amendment. Congress had the power to propose amendments.¹¹⁹ All proposed amendments regardless of source required approval by three-fourths of the states. The fiduciary relationship of the states to the convention remained untouched.

James Madison then proposed a change in the content of the amendatory provision. He moved to postpone consideration of the Article presently before the convention as amended. He moved the convention instead consider the following proposal. “The Legislature of the U--- S--- whenever two-thirds of both Houses shall deem necessary, or on the application of two-thirds of the Legislatures of the several States, shall propose amendments to this Constitution which shall be valid to all intents and purposes as part thereof, when the same shall have been ratified by three-fourths at least of the Legislatures of the several States, or by Conventions in three-fourths thereof, as one or the other mode of ratification may be proposed by the Legislature of the U.S[.]”¹²⁰

The significance of this proposal by Madison in regards to a principal/agent relationship between states and convention is clear. Madison’s proposal removed the convention from the article. It thus removed any fiduciary relationship associated with it. The proposal returned

¹¹⁸ *Id.*, p. 188.

¹¹⁹ The difference between “amendment” and amendments” is more than simple grammar. Behind this simple addition and assignment lies a tremendous difference in political power. A political body granted the authority to propose “amendments” can address a multitude of issues simultaneously. A political body (or bodies) limited to proposing “amendment” can only address one issue at any one time. Then the political body must begin the process again at a different time. Thus, its power is greatly reduced vis-à-vis a political body that is free to address as many issues as it wishes. The early proposals provided an inherent political imbalance between the states and their proposing body (convention, amendment) and the Congress and its ability to propose “amendments.” Later version of Article V corrected this. The final version of Article V allows both Congress and convention to propose “amendments.” Thus, the proposing ability of both convention and Congress is identical. Either can address as many issues as required.

The plural allowance of amendment also serves a second purpose. It prevents Professor Natelson’s theory from having merit. The professor predicates his theory on two thirds of the states applying for a single amendment issue to the exclusion of all others. However, the word “amendments” in the term “convention for proposing amendments” obviously means the states through their applications cannot limit a convention to a single amendment issue. Such limit is unconstitutional. It attempts to limit a convention’s amendment power to a singular power. In fact, the Constitution mandates the power be plural, i.e., proposing amendments as opposed to proposing amendment.

¹²⁰ *Id.*, p. 555.

proposing amendments directly to the state legislatures (sans any convention) and to the “Legislature of the U.S.” For the first time a proposal describes ratification conventions as part of the amendment process. This proposal excluded any principal/agent relationship between the states and ratification conventions. If it did exist, the relationship would permit the legislatures to dictate ratification of a proposed amendment when the Constitution clearly excluded such choice and authority if the Congress chose the alterative mode of ratification. In removing the convention from the proposal, it was necessary for the national legislature to proposal all amendments meaning the states had no independent means to secure amendment proposal other than submission to Congress.

Apparently, the delegates did not discuss this significant change in the amendatory process. Had the delegates intended a principal/agent relationship between state and convention and as Madison’s proposal thwarted such relationship, one would expect debate. However, there was none. The only logical conclusion to this fact is that the delegates never intended such a relationship in the first place. This decision also contradicted the second clause of the Virginia Plan that “the assent of the National Legislature ought not to be required.”¹²¹ The delegates had repeatedly postponed discussion of this question of assent¹²² despite Colonel Mason’s statements opposing the requirement for consent of the national legislature to propose an amendment.¹²³

Subsequent events at the convention remove any doubt the delegates intended to take up Madison’s proposal, which did not contain a fiduciary relationship in lieu of the previous proposal, which contained such a relationship. Alexander Hamilton seconded Madison’s motion. John Rutledge of South Carolina objected to giving a majority of states the ability to amend the Constitution on the subject of slavery.¹²⁴ Madison acceded to Rutledge’s suggestion to add a proviso which provided that “no amendments which may be made prior to the year 1808, shall in any manner affect the 4 & 5 section of the VII article [.]”¹²⁵ ¹²⁶ Madison’s amended proposal

¹²¹ 1 Farrand, p. 22. *See supra*, note 48.

¹²² *See supra*, notes 70,93.

¹²³ 1 Farrand, pp. 202-03.

¹²⁴ “Mr. Rutledge said he never could agree to give a power by which the articles relating to slaves might be altered by the States not interest in that property and prejudiced against it.” 2 Farrand, p. 559.

¹²⁵ 2 Farrand, p. 559.

¹²⁶ The fourth and fifth sections of Article VII (later revised to become the “first and fourth Clauses in the Ninth Section of the first Article” contained the following provisions, “The Migration or Importation of Such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such importation, not exceeding ten dollars for each Person.” Article I, § 9, Clause 1. The fourth clause of Article I, § 9 reads, “No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.” 2 Farrand, pp. 182-83.

included a proviso ensuring the continuation of slave trade in the United States until 1808. Convention delegates then approved Madison's revised amendatory proposal.¹²⁷ From this point forward debate and revision centered exclusively on Madison's proposal with all other earlier versions of proposed language abandoned by the delegates.

The action of the Founders clearly shows that in regards to a fiduciary relationship allowing the states control of a convention, on at least two occasions during the convention where such a relation clearly existed, the convention delegates chose each time to abandon such language. Instead, the delegates voted in favor of proposals which did not contain such a fiduciary relationship. The delegates then moved forward on this new proposal rather than returning to the original fiduciary proposal. The final language and intent of Article V traces its lineage, not in proposals containing a fiduciary relationship, but in proposals that do not.

Article V, The Final Form: September 12, 1787-September 17, 1787

The convention assigned the Committee of Style (also known as the Committee of Revision) the task of putting the proposed Constitution into a cohesive draft.¹²⁸ The committee consisted of William Johnson of Connecticut, Alexander Hamilton of New York, Gouverneur Morris of Pennsylvania, James Madison of Virginia and Rufus King of Massachusetts.¹²⁹ On September 12, 1787, the Committee of Style delivered its Report of the Constitution as revised and arranged.¹³⁰ The amendatory provision was renumbered Article V.¹³¹

The revised article read as follows, "V. The Congress, whenever two thirds of both houses shall deem necessary, or on the application of two-thirds of the legislatures of the several states, shall propose amendments to this constitution, which shall be valid to all intents and purposes, as part thereof, when the same shall have been ratified by three-fourths at least of the legislatures 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; Provided, that no amendment which may be made prior to the year 1808 shall in any manner affect the and sections of article ..."¹³²

¹²⁷ 2 Farrand, pp. 555-56.

¹²⁸ 2 Farrand, p. 582.

¹²⁹ *Id.*, p. 547.

¹³⁰ *Id.*, p. 582.

¹³¹ *Id.*, p. 602.

¹³² *Id.*

The committee made minor stylistic changes but otherwise had followed the last version (Madison's) approved by the delegates.¹³³ This new version required Congress to propose all amendments.

On September 15, 1787, after discussing the first four articles,¹³⁴ the convention began discussion on Article V. Roger Sherman began the discussion by Elbridge Gerry's fear¹³⁵ that a majority of states might use Article V to the detriment of other states objecting to the amendment. "Mr. Sherman expressed his fears that three-fourths of the States might be brought to do things fatal to particular States, as abolishing them altogether or depriving them of their equality in the Senate. He thought it reasonable that the proviso in favor of the State importing slaves should be extended so as to provide that no States should be affected in its internal police, or deprived of its equality in the Senate."¹³⁶

Colonel Mason also spoke against the amendatory article as presently written. Mason focused his concerns that Congress could prevent the proposing of amendments. On the back of his copy of the draft Constitution, Mason wrote, "Article 5th. By this Article Congress only have the Power of proposing Amendments at any future time to this constitution, & shou'd it prove ever so oppressive, the whole people of America can't make, or even propose Alterations to it; a Doctrine utterly subversive to the fundamental Principles of the Rights & Liberties of the people [.]"¹³⁷

Mason's notes served as the basis for comments he gave on the convention floor. Madison recorded the comments. "Col. Mason thought the plan of amending the Constitution exceptiona-

¹³³ Compare note 120 to note 132. The fact the Committee of Style modified Madison's proposal toward final form rather than any other earlier version which contain language supporting a principal/agent relationship between the states and the convention clearly demonstrates the Founders deliberately intended no such relationship should exist in Article V. As will be demonstrated in this article, there was no discussion or concern expressed by the Founders regarding this change. Also, others involved with ratification of the Constitution, expressed no concern a principal/agent relationship regarding state control of convention agenda was not included in Article V. Thus, by deliberate action the Founders eliminated any proposal in which language specifying a fiduciary relationship would exist. This included the revised version coming from the Committee of Style which in its present form only allowed Congress to propose amendments to the Constitution either by its own initiation or on application of the states. Subsequent events prove the Founders did not believe such a relationship existed. The Founders took immediate steps to change the procedure allowing for such relationship in the Article. They did this precisely because they believed no such relationship should exist. By making Congress (and later a convention) a fiduciary dependent body, the Founders feared either Congress or the states might take advantage of this relationship to the detriment of the rest of the states. They therefore removed it.

¹³⁴ 2 Farrand, p. 629.

¹³⁵ *Id.*, p. 557-58. See also note 107.

¹³⁶ *Id.*, p. 629.

¹³⁷ 4 Farrand, p. 59 n.1, 61; 2 Farrand, p. 637, n. 21 (stating that the quoted language "was written by Mason on the blank pages of his copy of the draft of September 12").

ble & dangerous. As the proposing of amendments is in both the modes to depend, the first immediately, and in the second, ultimately, on Congress, no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive, as he verily believed would be the case.”¹³⁸

Because of these concerns, Gouverneur Morris of Pennsylvania and Elbridge Gerry of Massachusetts “moved to amend the article so as to “require a Convention on application of 2/3 of the Sts....”¹³⁹

James Madison addressed the motion, “Mr. Madison did not see why Congress would not be as much bound to propose amendments applied for by two-thirds of the States as to call a Convention on the like application. He saw no objection however against providing for a Convention for the purpose of amendments, except only that difficulties might arise as to the form, the quorum &c. which in Constitutional regulations ought to be as much as possible avoided.”¹⁴⁰

¹³⁸ 2 Farrand, p. 629.

¹³⁹ *Id.* [Emphasis added].

¹⁴⁰ 2 Farrand, pp. 629-30. In his comments, Madison and ultimately the rest of the convention unanimously understood (*see infra*, note 141) there was a distinct difference before the Morris-Gerry motion and afterwards as to the effect of any principal/agent relationship that may have existed previously and also as to intent and meaning of any state application sent to Congress. Before the Gerry-Morris amendment, Madison interpreted Article V to mean that Congress was bound to propose amendments when applied for by two-thirds of the states. In short, a principal/agent relationship existed between the states and Congress. (“Congress would be as much bound to propose amendments applied for by two-thirds of the States”) [Emphasis added]. However, after the Gerry-Morris amendment Congress was bound to call a convention on two-thirds applications by the states. (“[A]s to call a Convention on the like application.”). Clearly, if a principal/agent relationship existed, it was now limited in scope to expressly requiring Congress call a convention on the application of the states and gave no further authority beyond this instruction to the states for any principal/agent relationship whatsoever. Madison, by his comments, obviously realized the intent and purpose of the applications by the states had been altered from the states having the power to propose amendments to applying for a convention call which, when issued, caused a convention which in turn possessed the authority to propose amendments. The Morris-Gerry amendment removed the authority of the states to propose amendments. Further, Madison realized “Congress [was] bound...” to call a convention upon two-thirds applications of the states. Clearly, by these comments, Madison, and by its vote, the rest of the convention unanimously understood there was a distinct difference before the Morris-Gerry motion and afterwards. (*See infra*, note 141). This difference directly affected any principal/agent relationship that existed in previous versions of what was to become Article V by removing such relationship from Article V permanently. The Gerry-Morris amendment was the final major alteration to Article V and public record demonstrates from that point forward the delegates concentrated on polishing the language (through the Committee of Style) rather than address the function and intent of Article V.

As to any change in language to the Gerry-Morris amendment made by the Committee of Style being used to suggest a change in intent or meaning, the Supreme Court addressed this matter in *Powell v McCormack*, 395 U.S. 486, 538-539 (1969). The court stated, “[R]espondents’ argument misrepresents the function of the committee of Style. It was appointed only ‘to revise the stile of and arrange the articles which had been agreed ... 2 Farrand 553.’

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Following these comments, the convention unanimously agreed to the Morris-Gerry motion.¹⁴¹ The convention thus acceded to Mason's request to re-insert the convention method of amending the Constitution into Article V.

Mason's concerns are critical to understanding why the Founders did not intend a principal/agent relationship in Article V permitting the state legislatures to control the agenda of a convention or control appointment of delegates to such a convention. While such a relationship may, on the surface, appear to present a more safe convention, on deeper inspection, the Founders realized the dangers of such control posed more a threat than a freely elected, open, public Article V Convention.

Mason's comments and notes show he believed Congress had the right to ignore applications from the states instructing Congress to propose amendment[s] to the Constitution¹⁴² "shou'd it [Congress] prove ever so oppressive" as the proposed article was written.¹⁴³ Obviously, Mason

'[T]he Committee...had no authority from the Convention to make alterations of substance in the Constitution as voted by the Convention, nor did it purport to do so, and certainly the Convention had no belief...that any important change was, in fact, made....'" See also *supra*, note 133.

¹⁴¹ 2 Farrand, p. 630.

¹⁴² See *supra*, note 137.

¹⁴³ Events have proven Mason concerns correct. Congress has ignored the applications of the states for a convention call. As demonstrated by photographic copies of the Congressional Record the states have submitted over 700 applications for a convention call. (See *infra*, note 240). Despite the Article V mandate and subsequent statements by the Founders (See *supra*, note 4, *infra* notes 211-225) and other scholars including Professor Natelson (See *supra*, note 18), Congress has refused to call a convention. Congress has not even compiled the submitted state applications into a single document available for public review. Despite actions taken in Congress in May, 1789, Congress still has no procedure in place to properly record state applications, that is record them in a single public record. There is not even a parliamentary procedure in place for Congress to deal with the states satisfying Article V and thus causing a convention call. See *generally* submission of article by Jim Stasny into Congressional Record by Senator McGovern discussing problems associated with submission of applications and lack of procedure to handle thereof, November 2, 1977, 123 Congressional Record, pp.36534-36539. See also *generally* June 20, 1984 parliamentary inquiry by Representative Craig to Speaker Pro Tempore asking the Speaker Pro Tempore to "respond in saying at this time there is no procedure, there is no rule by which this body would conduct itself with the application of the 34th state? The Speaker pro tempore. There is no House rule." 130 Congressional Record pp. 17361-62.

This malfeasance of office has led to most of the public being unaware a sufficient number of applications to cause a convention call already exists. This lack of knowledge has led to an endless series of calls by political groups and figures to submit new rounds of applications for a specific amendment issues based on the false assumptions the states have not submitted sufficient applications to cause a convention call and that applications must be for the same subject issue to cause a convention call. The effect of this false assumption allows Congress to skirt its constitutional responsibility since public record shows the states achieved the necessary numeric count of applying states to cause a convention decades ago. In sum, state political leaders seeking a convention call are so ignorant of the public record they fail to realize that which they spend so much effort on, gathering sufficient applications to cause a convention call, already has occurred. Meanwhile the false assumption causes misdirected state political

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effort, toward gathering even more unneeded applications instead of forcing Congress to obey the Constitution. Congress continues to ignore these new applications. It buries them in the Congressional Record alongside the hundreds of already submitted applications. The cycle appears endless.

The irony is these new applications inevitably are for issues already submitted by the states. Indeed the ultimate irony is that all current political efforts directed to gather new applications for amendment issues already have in the public record sufficient applications to cause a convention call. In short, even though the basis of a convention call is a numeric count of applying states with no terms or conditions, if the basis were “same subject” enough applications exist on this basis to cause a convention call on at least three different issues. Thus, the states battle repeatedly for new applications, which Article V does not require. (*See also infra*, notes 241,242,248,256,274,286,287,290.

However, the fact the states have submitted sufficient applications on at least three single issues does not mean this is the correct way to “count” applications. The public record presented in this article and admitted to by the government in federal court shows the basis of a convention call is a simple numeric count of applying states with no terms or conditions. The numeric count determines whether two-thirds of the state legislatures have submitted applications for a convention call. Article V does not permit terms or conditions such as rescission, same subject issue, contemporaneousness or any other issue to determine if the states have satisfied Article V. (*See infra*, note 139 and text below.)

There is no question the decision to veto the Constitution is a deliberate and willful act on the part of Congress. It is unsupported by the acts of the Founders either at the convention or later in Congress itself. As demonstrated by Debates in Congress, House of Representatives, May 5, 1789, pp. 260-261, the Founders believed Congress has no choice regarding a convention call. The obligation of Congress to call a convention if the “proper number” of states applied can only mean the Founders intended and understood a convention call is based on the number of applying states rather than any subject content contained within the application as Professor Natelson asserts (*See Report*, pp. 15-18).

Following the submission of the first application for a convention call by the state of Virginia, a discussion between members of Congress ensued as to how to process the application and their effect on Congress. The discussion reveals in the 1789 decision by House of Representatives that it lacks authority to place an application into committee. Such action, the House determined, implies a right of debate on the application, which the House determined it does not have. The House determined further that it has no right to debate the matter at all. The House determined it had no right to vote to call a convention if the “proper number” of states applies for a convention call.

Congress has never repudiated this position in any subsequent court action. In *Walker v Members of Congress*, 06-244 S ct. (filed Aug. 16, 2006) (*See also* <http://www.foavc.org/file.php/1/Articles/FAQ.htm#Q9.1>) the attorney of record, the Solicitor General of the United States, representing both House and Senate members, reaffirmed this position. This historic decision and public admission by Congress puts a final nail in the coffin of same amendment issue being the basis of determination by Congress for a convention call. Thus, Professor Natelson’s reliance on founding-era documents is misplaced. These documents, when read in full, support a numeric count of states (with

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no terms or conditions) as the basis of a convention call. The fact the United States has asserted the same convention call policy of no interpolation, rules of construction or addition in *United States v Sprague* (*See supra*, note 307) and *Walker v Members of Congress* only proves the policy enunciated in 1789 remains as official government policy to this day. Summed up, that policy is the basis of a convention call is a simple numeric count of applying states with no terms or conditions; Congress has no authority whatsoever to debate the issue or even vote on it. It simply calls the convention.

If the basis of a convention call were same amendment issue, as Professor Natelson asserts (*See Report*, p.21-22) then Congress must have the power of committee, debate and vote. How else could it decide whether the submitted applications all addressed the same amendment issue? The obvious result of this authority would be Congress, having such authority, is the ultimate authority to decide whether the applications are or are not the same amendment issue. If they are not, Congress can refuse to call a convention on that basis. The Founders however, clearly did not intend such congressional authority giving Congress a veto of the entire convention process by determination of the content of the application rather than the intent of the application. The founding-era documents prove conclusively the Founders were concerned exclusively with intent of the applications, e.g., causing Congress to call a convention, rather than application content. In sum, so long as the application stated it was an application for a convention call, it counted toward to the two-thirds standard of Article V. The 1789 discussion is as follows:

“After the reading of this application, Mr. Bland moved to refer to the Committee of the whole on the state of the Union.

Mr. Boudinot. -According to the terms of the Constitution, the business cannot be taken up until a certain number of States have concurred in similar applications; certainly the House is disposed to pay a proper attention to the application of so respectable a State as Virginia, but if it is a business which we cannot interfere with in a constitutional manner, we had better let it remain on the files of the House until the proper number of applications come forward.

Mr. Bland thought there could be no impropriety in referring any subject to a committee, but surely this deserved the serious and solemn consideration of Congress. He hoped no gentleman would oppose the compliment of referring it to a Committee of the whole; beside, it would be a guide to the deliberation of the committee on the subject of amendments, which would shortly come before the House.

Mr. Madison said, he had no doubt but the House was inclined to treat the present application with respect, but he doubted the propriety of committing, because it would seem to imply that the House had a right to deliberate upon the subject. This he believed was not the case until two-thirds of the State legislatures concurred in such application, and then it is out of the power of Congress to decline complying, the words of the Constitution being express and positive relative to the agency Congress may have in case of applications of this nature. “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.” From hence it must appear, that Congress have no deliberative power on this occasion. The

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most respectful and constitutional mode of performing our duty will be, to let it be entered on the minutes, and remain upon the files of the House until similar applications come to hand from two-thirds of the States.

Mr. Boudinot hoped the gentleman who desired the commitment of the application would not suppose him wanting in respect to the State of Virginia. He entertained the most profound respect for her—but it was on a principle of respect to order and propriety that he opposed the commitment; enough had been said to convince gentlemen that it was improper to commit—for what purpose can it be done? What can the committee report? The application is to call a new convention. Now, in this case there is nothing left for us to do, but to call one when two-thirds of the State Legislatures apply for that purpose. He hoped the gentleman would withdraw his motion for commitment.

Mr. Bland, -- The application now before the committee contains a number of reasons why it is necessary to call a convention [same subject]. Bu the fifth article of the Constitution, Congress are obligation to order this convention when two-thirds of the Legislatures apply for it; but how can these reasons be properly weighed, unless it be done in committee? Therefore, I hope the House will agree to refer it.

Mr. Huntington thought it proper to let the application remain on the table, it can be called up with others when enough are presented to make two-thirds of the whole States. There would be an evident impropriety in committing, because it would argue a right in the House to deliberate, and, consequently, a power to procrastinate the measure applied for.

Mr. Tucker thought it not right to disregard the application of any State, and inferred, that the House had a right to consider every application that was made; if two-thirds had not applied, the subject might be taken into consideration, but if two-thirds had applied, it precluded deliberation on the part of the House. He hoped the present application would be properly noticed.

Mr. Gerry—[author of the Morris-Gerry amendment] The gentleman from Virginia (Mr. Madison) told us yesterday, that he meant to move the consideration of amendments [Bill of Rights] on the fourth Monday of this month; he did not make such motion then, and may be prevented by accident, or some other cause, from carrying his intention into execution when the time he mentioned shall arrive. I think the subject however is introduced to the House, and, perhaps, it may consist with order to let the present application lie on the table until the business is taken up generally.

Mr. Page thought it the best to enter the application at large upon the Journals, and do the same by all that came in, until sufficient were made to obtain their object, and let the original be deposited in the archives of Congress. He deemed this the proper mode of disposing of it, and what is in itself proper can never be construed into disrespect.

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did not believe allowing amendment control in the hands of a single political body advisable be it states or Congress. He thus proposed two methods of amendment proposal exist in Article V. Given Mason's misgivings regarding Congress ignoring specific state amendment applications, he did not believe fiduciary law was sufficient to cause obedience. The conclusion is obvious. Unless the Constitution expressly stated fiduciary instructions Mason obviously believed fiduciary law, a law of lower level than the supreme law of the Constitution was insufficient to accomplish the matter.¹⁴⁴ His concern most likely centered on the principle of agent refusal found

Mr. Bland acquiesced in this disposal of the application. Whereupon, it was ordered to be entered at length on the Journals, and the original to be placed on the files of Congress." Gales & Seaton's History Of Debates In Congress, pp. 260-262, May 5, 1789. [Emphasis added].

In summary, employing excerpts from the above passage, one, the basis of a convention call is a numeric count of applying states ("certain number of states", "two-thirds"). Two, Congress has no authority to commit ("would be an evident impropriety in committing, because it would argue a right in the House to deliberate"). Three, Congress has no right to debate the applications ("From hence it must appear, that Congress have no deliberative power on this occasion"). Four, Congress has no right to even vote on the applications submitted by the states ("it is out of the power of Congress to decline complying").

It is significant the passage uses the word "similar" rather than "identical." "Identical" would have indicated the applications needed to be of the same issue, wordage and so forth. The relative portion of definition of the word "similar" means "characteristics in common." (See Webster's Dictionary 2120). These members of Congress most of whom either wrote or voted in convention or ratification of Article V, clearly the only common characteristic an application need share was a request for a convention call. As observed by the Supreme Court, had they intended more "characteristics in common" they would have used such "apt phraseology" to so express such characteristics thus determining what was to be "similar." See *supra*, note 30.

¹⁴⁴ Mason was obviously aware of the principle of fiduciary law that an agent can refuse the commission of a principal. While fiduciary law permits such option, the Constitution, as supreme law of the land, does not. Obedience is obligatory. In the case of an Article V Convention, it is also "peremptory." (See *supra*, note 143,276). Clearly, therefore constitutional law is not fiduciary law, which does permit such disobedience. Therefore, fiduciary law principles, unless expressly placed in the Constitution, are not applicable to the Constitution in order to justify an action, such as control of a convention. In sum, constitutional law and fiduciary are two separate, distinct forms of law with fiduciary being the inferior law to the law of the Constitution. For this reason fiduciary law experts have stated their belief attempting to patch such fiduciary law onto the operations of the Constitution is "farfetched." (See *supra*, note 25).

Professor Natelson's bases his assertion that state legislatures, utilizing the principles of principal/agent law, can control the agenda and delegate selection of an Article V Convention on the historic fact the Founders believed in a concept of a fiduciary trust by government officials to obey the law. (See Report, p. 4 "Central to Founding-era political theory was that rightful government was (in John Locke's phrase) a "fiduciary trust." The Founders frequently described public officials by names of different kinds of fiduciaries, such as "trustees" and "agents." The Founders believed that public officials were, or should be, bound, always morally but often legally, to meet fiduciary standards.").

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in fiduciary but not constitutional law.¹⁴⁵ Mason therefore understood fiduciary instructions in the Constitution are expressed not implied. The current language in the proposed article did not expressly preclude Congress ignoring applications. Thus, Congress could ignore them. Mason's concerns caused amendment to the article that redressed this defect. The redress did not expressly grant the states control of convention neither agenda nor delegate selection. Instead, the redress removed any implication of amendment control (outside of ratification) from the states by expressly mandating Congress must call an Article V Convention. Beyond this, the expressed instructions terminated. Therefore, there are no instructions as to amendment proposal vis-à-vis the states. Thus, both Congress and convention are independent, constitutional proposing bodies. Neither is an agent of the states. The only principal/agent relationship that exists in Article V is the expressed instructions that Congress must act as an agent of the states and call an Article V convention call when the states so apply. The instructions are limited to that expressed purpose and none other.

There is no doubt regarding the conclusion of a limited, exclusive principal/agent relationship of Article V exclusively relating of a convention call. The Gerry-Morris amendment re-

However, a reasonable postulation is the Founders believed all people were equally obligated to obey the law. Therefore, in their minds, such fiduciary trust was not unique to government officials. It was a philosophy of conduct rather than government policy. The Founders constructed the Constitution to ensure government officials would be fiduciary as to trust by requiring oaths of office, for example. However, such philosophy of trust does not immediately mean principles of fiduciary law were placed in the Constitution by the Founders.

Professor Natelson skips a step of logic in his conclusion fiduciary trust is the basis of political control for an Article V Convention. Fiduciary trust and fiduciary law are not identical or necessarily interchangeable terms. The doctrine of separation of powers and the clear intent of the Founders to use the doctrine throughout the entire Constitution is clear proof while they may have had such philosophy in mind, they did not rely upon it to run a government. Thus, employing fiduciary law to override the doctrine of separation of powers was unsupported by the Founders. To assume otherwise misconstrues best evidence.

Simply because the Founders believed in a generalized political theory of "fiduciary trust" vis-à-vis government officials obedience to the law, does not translate into specific political proof granting state legislatures dictatorial control over the agenda and delegate selection of an Article V Convention. This is especially true when, best evidence, that is the words and actions of the Founders, directly contradicts the assertion they intended such principles of fiduciary law be in the Constitution except under expressed and limited conditions. Such expressed and limited conditions prevent inference or extension beyond these expressed limits.

¹⁴⁵ Professor Natelson concedes amendatory proposal bodies can ignore instructions from the states. It is reasonable to assume Mason came to the same conclusion as Professor Natelson. See Report, p. 24. "...the obligation of an agent to submit to the principal's instructions may be altered by governing law. In this instance, the Constitution is the governing law. The Constitution assigns to the convention, not the states, the task of "proposing" amendments. This implies that the convention has discretion over drafting." See also notes 257,334.

moved the fiduciary relationship described in an earlier version of Article V. No convention delegate resubmitted language to further amend the proposed Article V in order to reestablish control of the convention agenda previously in place in earlier proposals.¹⁴⁶ In sum, when presented the opportunity to insert a principal/agent relationship beyond the convention call obligation of Congress, the Founders, and later the states themselves during the ratification process and still later in demands for amendments (i.e., the Bill of Rights) did not demand such a change in Article V. The Founders on two separate occasions in earlier drafts of Article V first included a principal/agent relationship in Article V to control convention agenda, and then removed such relationship by rejecting any proposal containing such language. The only possible conclusion is such decision by the Founders was deliberate and intentional. The convention record therefore refutes Professor Natelson's assertions in his Report.

Madison and others expressed the reason for the Founders rejecting such a principal/agent relationship during the convention.¹⁴⁷ In sum, the Founders feared that if the states controlled convention agenda, a majority of states (two-thirds) could use the convention to control the other states and remove them or otherwise alter their form of government. The same logic applies in that such a group of states could inflict grievous harm to the national government. For this reason, the Founders wisely created an independent convention, free of any control by the states, so it acted as check to balance the will of states. To further prevent such an event the 1787 convention included an additional proviso of ratification by a higher number of states than is required to cause amendment proposal. Thus, two simple procedures established a series of checks and balances in Article V designed to prevent fiduciary control by the states. The smaller number of applying states required for a convention call versus the larger number of states required for ratification guaranteed no convention could control either the states, the national government or the people. Thus, without the additional consent of more states after the convention had acted, disbanded and made public its intentions, other states could check such intentions by simply refusing to ratify that which the convention proposed. Thus, expressed language within Article V checked any action by a convention to control the states, the people or the national government. The expressed language requires "no resort to rules of construction."¹⁴⁸

Following adoption of the Gerry-Morris amendment, the convention discussed other changes to Article V not affecting the convention process. On September 15, 1787, Roger Sherman of Connecticut tried to change Article V to require unanimous consent of all states to any amend-

¹⁴⁶ Compare notes 98 to 99; 100 to 101,102,112; 114 to 120.

¹⁴⁷ See *supra*, notes 98,99,107,108,136.

¹⁴⁸ See *supra* note, 26, *infra* note 307.

ments.¹⁴⁹ The convention defeated the motion.¹⁵⁰ Elbridge Gerry then moved to strike the language that allowed ratification to occur by the convention method, which also failed.¹⁵¹

Sherman then moved to prohibit any amendment that would affect the internal police of a state or would deprive a state “its equal suffrage in the Senate.”¹⁵² The motion was opposed by James Madison who stated, “Begin with these special provisos, and every State will insist on them, for their boundaries, exports & c.”¹⁵³ The membership agreed with Madison and defeated the motion, three states to eight.¹⁵⁴ Sherman then moved to strike Article V altogether but this motion also failed.¹⁵⁵ However Sherman’s point on the need to keep the suffrage of the Senate equal gathered support from delegates representing the small states. Gouverneur Morris of Pennsylvania then moved to “annex a further proviso---‘that no State, without its consent shall be deprived of its equal suffrage in the Senate.’”¹⁵⁶ According to Madison’s note, the motion had been “dictated by the circulating murmurs of the small States...”¹⁵⁷ As a result, the motion “was agreed to without debate, no one opposing it, or in the question, saying no.”¹⁵⁸

While it may appear these final additions and debates of Article V have no direct bearing on the question of fiduciary/agency law in Article V, the author maintains otherwise. There was no such discussion or motion by any delegate regarding this aspect of Article V.¹⁵⁹ The proposed

¹⁴⁹ 2 Farrand, p. 555.

¹⁵⁰ 2 *Id.*, p. 630.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*, p. 630-31.

¹⁵⁶ *Id.*, p. 631.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ In his Report Professor Natelson states, “Given the prevalence of limited conventions and recognized prerogative of restricting delegates’ authority, the evidentiary burden should be placed on those arguing that a convention to propose amendments was somehow different. In reviewing the historical record for this report, the author found little indication of such a difference.” (See Report, p. 15). Professor Natelson’s Report contains no references to the actual record of the 1787 Federal Convention. The Report especially ignores references in that record showing the development of Article V and how the delegates deliberately decided not to include the principal/agent relationship of fiduciary law he asserts exists to the extent he asserts in Article V. Such record is clearly best evidence in regards to whether such a relationship was ever intended. Of course, there is a sole principal/agent instruction between the states and Congress vis-à-vis a convention call—Congress must call if the states apply. This instruction, however, is limited, expressed and absent any implication. Its expressed limit prevents its extension. Best evidence, actions undertaken at the 1787 convention show no such intent except for the convention call. The preponderance of best evidence, that is, the actual words and decisions of the Founders satisfies the “evidentiary

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alterations clearly demonstrate the delegates had no interest whatsoever in attempting to reinsert for a third time any language expressly creating principal/agent relationship in Article V vis-à-vis the states and the convention agenda.

Constitution debate ended September 15, 1787. The convention unanimously agreed to the Constitution as amended.¹⁶⁰ The convention ordered the Constitution engrossed. On September 17, 1787, the engrossed Constitution containing the final version of Article V¹⁶¹ was read¹⁶² and signed.¹⁶³

Post-Convention Discussion of Article V

The actual proceedings of the 1787 Federal Convention is best evidence proving the Founders never intended a principal/agent relationship vis-à-vis the states and an Article V Convention described by Professor Natelson in his Report. That record proves convention delegates took every opportunity to eliminate such a relationship. Therefore, there was no intent to do so. However, the professor asserts post-convention discussion, that is, comments made by colonial era political figures, prove such a relationship exists. Professor Natelson avoided using any quotes or references to statements made about a fiduciary relationship during the 1787 Convention in his Report. That evidence proves his theory incorrect. This fact explains why he avoids using best evidence. Professor Natelson cites statements made by political figures, many of which did not actually attend the convention. Their comments are therefore second hand and contradicted by best evidence of events at the convention. By exclusive use of these second hand comments, the professor attempts to prove his theory based on a form of hearsay evidence.

To examine this premise requires examination of the historic record. This begins with how the proposed Constitution was required to become the new law of the land. Under the terms of the Articles of Confederation, the existing law of the land, the proposed Constitution was first required to be submitted to Congress for its approbation¹⁶⁴ before that body, in turn, submitted

burden." This best evidence presents not only irrefutable proof of no intent for state control of convention agenda and delegate selection, but also absolute proof as to why the Founders did not intend such control. (*See supra*, note 147).

¹⁶⁰ 2 Farrand., p., 633.

¹⁶¹ *See supra*, note 2.

¹⁶² *Id.*, p. 641.

¹⁶³ *Id.*, pp. 648-49.

¹⁶⁴ As previously stated, any doubt a principal/agent relationship regarding the resolution of the Articles of Confederation Congress vis-à-vis the 1787 Federal Convention is ultimately removed that Congress, accepting and sending

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the proposal to the various states for their unanimous consent.¹⁶⁵ It is important to note nothing in the text of the proposed Constitution altered this unanimous consent mandate of the Ar-

to the states, the proposed Constitution for ratification. Even if Congress had issued fiduciary instructions, which it did not (*See supra*, note 44) these instructions were clearly overridden by Congress accepting the recommendation of the 1787 Federal Convention. By this action, the Congress nullified whatever instructions had previously existed (if they had existed in the first place) and accepted instead the action of the 1787 Federal Convention as those instructions. (*See supra*, note 43). The principle of fiduciary law regarding this action is well settled. If a principal accepts the action of an agent, without objection, assuming such a relationship exists, such acceptance nullifies any previous instructions. The Articles of Confederation mandated Congress must accept any alteration proposal to the Articles before submitting such proposed alteration to the states for their agreement. Thus, based on the law of the land at that time, the convention acted in compliance with that law. It submitted the proposed constitution to Congress. It did so, not because of any fiduciary relationship, but as a requirement of the law. In sum, the law of the land in existence then trumped any fiduciary relationship alleged to exist.

In its resolution of September 17, 1787, the Federal Convention stated, “ In convention Monday September 17th 1787. ... Resolved. That the proceeding Constitution be laid before the United States in Congress assembled, and that it is the Opinion of the Convention, that it should afterwards be submitted to a Convention of delegates, chosen in each State by the People thereof, under the Recommendation of its Legislature, for their Assent and Ratification; and that each Convention assenting to, and ratifying the Same, should give Notice thereof to the United States in Congress assembled.

Resolved. That it is the Opinion of this Convention, that as soon as the Conventions of nine States shall have ratified this Constitution, the United States in Congress assembled should fix a Day on which Electors should be appointed by the states which shall have ratified the same, and a Day on which the Electors should assemble to vote for the President, and the Time and Place for commencing Proceedings under this Constitution. That after such Publication the Electors should be appointed, and the Senators and Representatives elected: That the Electors should meet on the Day fixed for the Election of the President, and should transmit their Votes certified, signed, sealed and directed, as the Constitution requires, to the Secretary of the United States in Congress assembled, that the Senators and Representatives should convene at the Time and place assigned; that the Senators should appoint a President of the Senate, for the sole Purpose of receiving, opining and counting the Votes for President; and that after he shall be chosen, the Congress, together with the President , should, without Delay, proceed to execute this Constitution.” The Documentary History of the Constitution, Vol. 11 (1894) pp.20, 21.

Congress’ response was even more succinct: “Friday, September 28, 1787. Congress assembled present New Hampshire, Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Virginia, North Carolina, South Carolina and Georgia and from Maryland Mr. Ross. Congress having received the report of the Convention lately assembled in Philadelphia Resolved Unanimously that the said Report with the resolutions and letter accompanying the same be transmitted to the several legislatures in Order to be submitted to a convention of Delegates chosen in each state by the people thereof in conformity to the resolves of the Convention made and provided in that case.” Documentary History of the Constitution, p.22, Vol. II, 1894.

¹⁶⁵ Many people overlook the fact that until the Constitution actually took effect, the Articles of Confederation was the law of the land. That document mandated a unanimous consent by the states to affect any “alteration” to the Articles of Confederation. Any proposal contained within the proposed Constitution did not change or alter this

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titles of Confederation meaning that transition from confederation to constitution was actually a two-step process.¹⁶⁶ Congress read the proposed Constitution on September 20, 1787.¹⁶⁷ On September 26, 1787, Congress took up debate on the proposed Constitution.¹⁶⁸ On September 28, 1787, Congress referred the proposed Constitution to the states for ratification consideration.¹⁶⁹ Under the terms of the Constitution, “[T]he ratification of the Conventions of nine States shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.”¹⁷⁰ From a strict legal point of view, despite the fact, nine states ratified the Constitution as of June 21, 1788 with the ratification of New Hampshire;¹⁷¹ this did not make the Constitution law of land. Indeed, not until Rhode Island ratified the Constitution on May 29, 1790 did the Constitution actually replace the Articles of Confederation as law of land.¹⁷² How-

fact. Such proposal was simply that, a proposal without any effect whatsoever until ratification occurred. (*See supra*, note 12.)

¹⁶⁶ *See infra*, notes 170,172.

¹⁶⁷ The Documentary History of the Ratification of the Constitution. Vol. XIII-XIV. Ed. John P. Kaminski and Gaspare J. Saladino. Madison: State Historical Society of Wisconsin, 1981. pp. xl-xlii in vol. XIII.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ U.S. Const., Art. VII. The language of Article VII is frequently misinterpreted. Nowhere does the ratifying language state the Constitution replaces the Articles of Confederation. The ratification language only applies to those states that had ratified the Constitution. Such ratification had no legal effect on those states that had not ratified the Constitution. (*See infra*, note 172). Article VII merely states that among the states so ratifying the Constitution, if nine states ratified the Constitution, it would be sufficient to establish that form of government among those states, not all states, that belonged to the Articles of Confederation. Thus, the June 21, 1788, ratification by New Hampshire created a unique, if brief, form of government rarely, if ever, seen. Technically, from the period of June 21, 1788 until May 29, 1790, nearly two years in length, two laws of the land held sovereign authority in America depending on whether or not the state in question had or had not ratified the Constitution.

¹⁷¹ The Documentary History of the Ratification of the Constitution. Vol. XIII-XIV. Ed. John P. Kaminski and Gaspare J. Saladino. Madison: State Historical Society of Wisconsin, 1981. pp. xl-xlii in vol. XIII.

¹⁷² The author bases his assertion on language in the Constitution: ““No State shall enter into any Treaty, Alliance, or Confederation...” U.S. Const., Art. I, §10, Clause 1. Obviously, for the states to form a new form of union required them to not only “join” that union, by means of ratification, but also simultaneously “leave” the old union. They accomplished this by agreeing to a term in the Constitution forbidding membership in a “Confederation.” This reduction in membership may have reduced the Confederation’s political influence but it did not terminate its existence until the last member, Rhode Island, terminated its membership. Technically, therefore, with Rhode Island’s ratification, the Confederation ceased entirely as it no longer contained any member-states. While it may appear odd today, had these legal steps not been followed, the possibility existed that two distinct “laws of the land” could have co-existed in the United States. Some states would be members of the Confederation acting under the authority of the Articles of Confederation. Other states would be members of the Constitutional union acting under authority of the Constitution. The untold potential confusion, problems and conflicts are obvious. To avoid this, the Founders took great care not only to have a positive affirmation by each state in the form of ratification to the new Constitution, but an agreement as well not to remain a member of any previous confederation.

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ever, from a purely political and practical point of view, New Hampshire's ratification date is for all intents and purposes the legitimate date of political transition from the Articles of Confederation to the Constitution as law of the land for America. Within a week of Virginia's ratification on June 25, 1788, the Congress of the Articles of Confederation created a committee on July 2, 1788 to put the new government authorized by the Constitution into operation.¹⁷³ Historic record shows a tremendous debate ensued within this nation in the relatively brief time of ratification of the Constitution. This debate ranged among all levels of citizenry. The large amount of debate at each state ratification convention called for by the Constitution reflected this fact.¹⁷⁴

For the purposes of this article, therefore, it is noteworthy that during all the discussion on the proposed Constitution and Article V, there was no complaint made regarding a lack of a principal/agent control over the agenda of the Article V Convention. The record demonstrates concerns regarding Article V, centered not on the states controlling convention agenda, but whether a sufficient number of states could agree to cause a convention call at all.¹⁷⁵

Of course, those charged with ratification of the Constitution at the state conventions lacked one important piece of information now available to us today—the record of proceedings of the 1787 Federal Convention.¹⁷⁶ Those debating ratification of the Constitution only had the

For those who suggest the 1787 Federal Convention usurped the Articles of Confederation by some nefarious means these facts prove them incorrect. These naysayers excitedly point to the nine state clause of ratification of Article VII always failing to note all states eventually ratified the Constitution. None ever cite the fact the Constitution also mandated these states give up membership in the Confederation. Thus, there is no doubt whatsoever the states knew exactly what they were doing. The states were fully aware of the transition from Confederation to Constitution that ratification would cause. Thus, such assertions of usurpation are preposterous.

¹⁷³ The Documentary History of the Ratification of the Constitution. Vol. XIII-XIV. Ed. John P. Kaminski and Gaspare J. Saladino. Madison: State Historical Society of Wisconsin, 1981. pp. xl-xlii in vol. XIII.

¹⁷⁴ The sheer volume of the record of these debates amply proves the point. Unlike the 1787 Federal Convention, each state convention made careful records of the proceedings. Unlike the 1787 convention, the conventions were public. This is not surprising, as the conventions were all comprised of citizens elected by the people of each state. Elections of various citizens as state convention delegates began with election of delegates in Pennsylvania on November 6, 1787 and continued throughout the states until February 8, 1790. One of the most complete records of the debates at these conventions is Elliot's Debates, published in 1830 was later updated and revised in 1836. The Debates comprise four volumes in the original edition. They ultimately included a fifth volume with no volume containing less than 500 pages.

¹⁷⁵ As demonstrated by the FOAVC record of applications, (*see supra*, note 143) such concerns are misplaced. The states have amply demonstrated their ability to request an Article V Convention call by Congress. Indeed, based on the author's personal research, the states have submitted enough applications to cause at least ten Article V Convention calls.

¹⁷⁶ In time, of course, the notes taken by various convention delegates became public, but only after ratification occurred. For example, in 1818, Congress ordered the "official" records of the 1787 Federal Convention by convention secretary William Jackson published. "Secret Proceedings and Debates of the Convention Assembled at Phila-

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final version of the proposed Constitution and such statements by former convention delegates attending the secret convention choose to state. Thus, the arguments, positions, assertions, compromises and so forth comprising the four months of intense debate and deliberation that was the 1787 convention were hidden from public view. Best evidence must be those public figures that attended the 1787 convention as delegates were privy to its proceedings and later chose to comment during the ratification debates. Others of the time making comments cited by Professor Natelson cannot be viewed as best evidence. They lacked the full information (and therefore the basis of intent) of the convention delegates when making their comments. The consequence of this fact is significant. As Professor Natelson does in his Report, those so commenting made assumptions as to the meaning and intent of the Constitution.¹⁷⁷ Ratification was a political, not legal, debate. Thus, those commenting were prone to read more into the Constitution than was actually intended for the purpose of political agenda.

In his Report,¹⁷⁸ Professor Natelson presents three “points” as to why post-ratification statements show “states may apply for a convention limited to particular subject matter. The Founding-era record suggests strongly that they can.”¹⁷⁹ The first point is the “purpose of the state-application-and-convention procedure was to serve as an effect congressional bypass...” cannot be disputed but is an incorrect statement. Historic record proves it was the congressional method of amendment proposal, created an alternative to the state method of amendment proposal.¹⁸⁰ Historic record shows expressed instructions for the agent based on granting the states such authority¹⁸¹ limiting convention delegates to discussion of specific amendment sub-

delphia, in the year 1787, for the purpose of forming the Constitution of the United States of America From Notes taken by the late Robert Yates, Esq. Chief Justice of New York, and copied by John Lansing, Jun, Esq. etc.” was published in 1821. In 1828, William Pierce of Georgia published his notes describing the first few days of the convention. The Papers of James Madison, published in 1840, included the most detailed notes of convention proceedings. Miss K.M. Rowland in her “Life of George Mason” published George Mason’s notes in 1892. The notes of Rufus King (Vol. 1 of the Life and Correspondence of Rufus King) remained unpublished until 1894. Alexander Hamilton’s notes were published in 1904. James McHenry’s notes were published in 1906. William Paterson’s notes remained unpublished, so far as can be determined, until they appeared in The Records of the Federal Convention of 1787 (1911) by Max Farrand.

¹⁷⁷ See Report, p.15, “The “Native” of course erred in saying that congressional action would provoke a convention, but his core message was the same as Madison’s...” p.15. “Still, the Federalist representations of equality suggest that in construing Article V, preference should be given to interpretations that raise the states...” p. 16. (“The amendments” here presumably means the amendments proposed in advance of the convention.)” [Emphasis added].

¹⁷⁸ See Report, pp.15-16.

¹⁷⁹ See Report, p. 15.

¹⁸⁰ See generally, notes 43-161.

¹⁸¹ The principle of instructions existing is so necessary for a principal/agent relationship to exist, is such well settled law, and so central to the theme of such relationship, it is only necessary to state that without such instructions there can be no relationship.

jects based on state applications was removed by the Founders during the convention.¹⁸² Without such provision, there is no relationship. At the convention, the Founders intentionally removed the relationship. Such act is best evidence. It entirely refutes Professor Natelson's first point.

Professor Natelson then continues in his Report, "Without the power to specify the kinds of amendments they wanted, the states could apply for a convention only if they wished to open the entire Constitution for reconsideration." Article V language refutes this proposition.¹⁸³

¹⁸² See *supra*, notes 98,99,107,108,136.

¹⁸³ See Report, p.15. Professor Natelson makes a subtle but deliberate mistake here. He begins on page 15 of his Report writing of "the question of whether states may apply for a convention limited to particular subject matter." (Singular—particular subject matter, indicating one subject matter presumably based on the rules of grammar limiting a convention to one solitary subject matter thus excluding all other subject matters). On the same page he then writes, "[W]ithout the power to specify the kinds of amendments they wanted, the states could apply for a convention only if they wished to open the entire Constitution for reconsideration." (Plural—kinds of amendments though it is more grammatically correct to write, "kind of amendments" indicating several subject matters could be proposed).

The conflicts between these two phrases is significant as to meaning and intent regarding Article V and demonstrate a clear lack of knowledge in this regard. First, it is indisputable the purpose of the application is for causing a convention call, not proposing an amendment (See *supra*, notes 139,140). Second, the language of Article V makes it clear "the entire Constitution" is not open for reconsideration (See *supra*, note 2). Both Congress and convention are limited to proposing amendments to the present Constitution not revising the entire Constitution. Thus, while an amendment can address a specific portion of the Constitution, it cannot address the entire Constitution. Even if this were true, the terms of Article V and historic precedent prove any original language amended in the Constitution remains in the Constitution. Thus, it is impossible to write by amendment process a "new" Constitution, that is, a constitution that does not contain in its entirety the language of the original Constitution.

Professor Natelson does a grave disservice implying anything other than this. Attempting to suggest in any manner a convention has the authority to write an entire new constitution devoid of all language now present in the Constitution, is patently false. If the professor believes otherwise, he fails to present best evidence to prove it. He also fails to explain, as Congress has the same authority as a convention, why it is not as much a danger, if not more, than a convention. Congress can act any time it desires. Any argument, to be valid, suggesting such power by a convention must explain why Congress cannot or will not act in this fashion. After doing this, it then must explain why the same reasoning does not apply to a convention. See *supra*, note 1.

Third, Professor Natelson's phraseology appears to indicate he is unsure as to the exact power of the states. In the one instance, he refers to a single amendment subject ("limited to particular subject matter") being the only issue on a convention agenda. In another instance, he refers to multiple amendment subjects ("the kinds of amendments they wanted") (Emphasis added.) obviously referring to multiple amendments addressing various subject issues on a convention agenda. The question is, which is it—single or multiple? Either the states can limit a convention to one subject or each state may propose amendment issues all of which a convention is obligated to consid-

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Professor Natelson's second point is, "[C]omments from Federalists promoting the Constitution during the ratification debates emphasized the essential equality of Congress and the states in proposing amendments." To prove his point, Professor Natelson quotes two sources, a partial quote taken from James Madison in Federalist 43, and a person only described as "A Native of Virginia."¹⁸⁴ Professor Natelson states, "'Native'" wrote that "whenever two-thirds of both Houses of Congress, or two-thirds of the State legislatures, shall concur in deeming amendments necessary, a general Convention shall be appointed, the result of which, when ratified by three-fourths of the Legislatures, shall become part of the Federal Government." Professor Natelson then postulated, "The "'Native'" of course erred in saying that congressional action would provoke a convention, but his core message was the same as Madison's: As far as amendments were concerned, Congress and the states were on equal ground."¹⁸⁵

er. However, in either case, "the states cannot require the convention to adopt a particular amendment or dictate its language." (See Report, p.26). Such ambiguity makes the professor's proposition unreliable at best. Its author cannot even define which state authority he intends, singular or plural. He cannot emphatically state whether such authority affects a convention whatsoever. That is, the authority limits a convention agenda to discussion of a single amendment issue with no others considered. Further, such authority carries with it the obligation of the convention to propose such subject for ratification consideration. Alternatively, such authority permits each state to propose any amendment issue it wishes thus resulting in consideration of multiple amendment issues at the convention. This authority eliminates the concept of single amendment issue agenda unless the convention itself so determines such an agenda. The authority also places the convention in the position of rejection of any amendment issue, whether singular or plural in nature. (See *infra*, notes 334-336). Professor Natelson muddies the waters of his Report by apparently proposing both. Ultimately it results in him proposing nothing.

¹⁸⁴ See Report, p.15.

¹⁸⁵ Professor Natelson concludes his second point by stating, "Technically, of course, Congress and the states were not, and are not, on completely equal ground as far as amendments are concerned. Congress may propose directly, while the states must operate through a convention. Still, the Federalist representations of equality [referring to the quotes used by Professor Natelson of Madison and "A Native of Virginia"] suggest that in construing Article V, preference should be given to interpretations that raise the states toward the congressional level and treat the convention as their joint assembly. This, in turn, suggests that if Congress may specify a subject when it proposes amendments, the states may do so as well."

This conclusion has two problems. First, the Supreme Court has ruled Article V is not open to rules of construction, interpolation or addition. (See *supra*, notes 25,307). Secondly, Professor Natelson misconstrues and misstates Article V. He ignores the fact it is Congress or a convention, which propose amendments, not the states. As such, there can be no "equality" in amendment proposal between Congress and the states, as Article V does not permit amendment proposal by the states. Hence, any "equality" or "equal ground" must be between the convention and Congress rather than Congress and the states. (See *supra*, note 20). Professor Natelson seeks equality where the Constitution nor the Founders ever intended such equality (amendment proposal) to exist.

Finally, Professor Natelson attempts to justify this unconstitutional and non-existent "equality" on the basis that Congress "may," specify a subject when it proposes amendments..." so therefore the states may do so as well. The

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To rely on an unnamed source¹⁸⁶ as prima facie evidence¹⁸⁷ regarding equality of Congress and states in amendment proposal hardly satisfies the legal definition of prima facie nor presents anything close to best evidence. This reference therefore is irrelevant in proving Professor Natelson's assertion. This leaves James Madison's comment taken from Federalist 43. Federalist 43 concerned "The Powers Conferred by the Constitution Further Considered" and discussed "The Fourth Class compris[ing]... miscellaneous powers." The titles indicate Madison was engaged in discussion of various powers conferred by the Constitution. Madison's writing indicates he considered amendment to be a "miscellaneous" power.¹⁸⁸ Professor Natelson's Feder-

proposition is utterly meaningless and without merit. Naturally, Congress specifies a subject when proposing an amendment. It has to. How can it be otherwise? An amendment must amend something and that something in some manner or another is an amendment subject. If challenged, could Professor Natelson prove otherwise, citing one example of any amendment proposal (either in the Constitution or in the records of Congress wherein resides over 10,000 un-proposed amendments) that does not address an amendment subject? The nexus of an amendment being required to address some subject therefore inexorably links the two, amendment and subject of the amendment. This fact is so blatant it is self-evident. The fact Congress must deal with some subject in proposing an amendment has no relevance whatsoever to suggest just because Congress must do the obvious, that this somehow translates into an equal power for the states especially as they lack proposal authority in the first place.

¹⁸⁶ Professor Natelson's reliance on an unnamed, unauthenticated source of unknown origin to reinforce James Madison is, in an intellectual article, unreliable at best. If the best "evidence" Professor Natelson can produce to reinforce James Madison is an unnamed source, given all the reference material of the time available, clearly he stretches to make his point. Serious reliance of a reference source that is so ignorant of the process described in his quote, that requires correction and reinterpretation by the professor in order to be relevant is misplaced. How can a viable conclusion come from a pseudonym whose integrity is unknown? This is particularly important as the comments occurred during the colonial era. Integrity was sacrosanct in that society. Lack of that integrity makes any comments suspect. Thus, reliance on an unknown pseudonym as reference can be given no more weight than if Professor Natelson copied a comment from an Internet blog post where the commentator also hid behind a pseudonym.

¹⁸⁷ "Evidence good and sufficient on its face. Such evidence as, in the judgment of the law, is sufficient to establish a given fact, or the group or chain of facts constituting the party's claim or defense, and which if not rebutted or contradicted, will remain sufficient. Evidence which, if unexplained or uncontradicted, is sufficient to sustain a judgment in favor of the issue which its support, but which may be contradicted by other evidence. *State v. Har-emza*, 213 Kan. 21, 515 P.2d 1217, 1222." *Black's Law Dictionary* 1190.

¹⁸⁸ The full paragraph of Federalist 43 addressing amendment reads as follows: "8. "To provide for amendments to be ratified by three fourths of the states under two exceptions only." That useful alterations will be suggested by experience, could not but be foreseen. It was requisite, therefore, that a mode for introducing them should be provided. The mode preferred by the convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults. It, moreover, equally enables the general and the State governments to originate the amendment of errors, as they may be pointed out by the experience on one side, or on the other. The exception in favor of the equality of suffrage in the Senate, was probably meant as a palladium to the residuary sovereignty of the States, implied and secured by that principle of representation in one branch of the legislature, and was probably insisted on by the States particularly attached to the equality. The other exception must have been admitted on the same considerations which produced the privilege defended by it." [Portion quoted by Professor Natelson underlined].

alist 43 excerpt is unrepresentative of Madison's meaning or intent regarding the amendment process. Madison, as the title of the paragraph concerning amendment proves, was not discussing amendment proposal, but amendment ratification. Proper interpretation of his words mandate acceptance of this fact.

At the time of writing the Federalist papers, Madison was engaged in a bitter political debate over ratification of the proposed Constitution. This political reality caused Madison to write material intended for general political consumption rather than scholarly research.¹⁸⁹ Hence, he wrote in what can be termed political shorthand, or as known today "sound bites." Thus, while he wrote in precise language, as was the custom of the day, Madison made certain assumptions in his writing. One of those assumptions was his readers had also read the text of the proposed Constitution and therefore understood the words within that text.¹⁹⁰ When read in, rather than out, of context the words Professor Natelson quotes assume a completely different meaning. A simple reading of the full text shows Madison is actually addressing the quality of the mode of amendment process in the proposed constitution rather than equality of amendment proposal between the states and Congress.¹⁹¹ Madison uses two points to substantiate his assertion that such mode was "stamped with every mark of propriety."¹⁹² First, Madison states the mode of amendment guards equally "against that extreme facility"¹⁹³ or "that extreme difficulty."¹⁹⁴ The former extreme "would render the Constitution too mutable" that is, too easy to amend making it susceptible to political whims. The latter extreme prevented alteration even when required. Thus, Madison was assuring everyone that, unlike the Articles of Confederation, the Constitution was amendable without extreme difficulty (i.e., unanimous consent of the states) or insufficient safeguards to prevent disparaging amendments.

¹⁸⁹ A careful reading of the last two sentences of point 8 (*See supra*, note 188) shows Madison attempted to write these as if he were an outsider commenting on the actions of the convention rather than being one of the primary delegates at the convention. Obviously, Madison did so in order to deny political opponents who might object to the two exemptions any basis to attack Madison on them. In short, using today's vernacular, Madison attempted to "play dumb."

¹⁹⁰ The arrangement of words in Federalist 43 proves this assumption. Madison quotes parts of the Constitution without any reference to article, section or clause of the Constitution. Madison obviously assumes by his lack of reference the reader was familiar with the text he quoted.

¹⁹¹ Proof of this assertion lies in the third sentence of the text where Madison assures his readers the "mode preferred by the convention," i.e., proposed by the 1787 convention contained in Article V, is "stamped with every mark of propriety."

¹⁹² "Peculiar, proper, or true nature, character, or condition" Webster's Dictionary 1819.

¹⁹³ "The quality of being easily performed." Webster's Dictionary 812.

¹⁹⁴ "The quality or state of being difficult or hard to do or to overcome; difficulty, the most widely applicable of the terms, applies to any condition, situation, experience, or task which presents a problem hard to solve." Webster's Dictionary 630.

Madison's second assurance concerns the two methods of amendment proposal, convention and Congress. As part of the "mark of propriety" of the mode of amendment, Madison notes both states and national government have within their means the ability to "originate"¹⁹⁵

¹⁹⁵ The Founders careful choice of language is well known. (See *supra*, notes 30,143 Supreme Court's discussion of "apt phraseology" used by the Founders. As one of the foremost Founders, it is reasonable to postulate Madison was one who used such "apt phraseology." It is equally logical to assume he would continue such practice in all his writing). Madison uses the word "originate" describing the equal ability of the general and state governments. Does this mean, as Professor Natelson contends, by Madison's use of the word he believed states could, through application, limit a convention to a specific subject and none other? Madison does not use the word "propose" which might be expected, if he believed the states could propose amendments or control the amendment process by "proposing" amendments within an application. Had Madison wanted to convey the meaning that states could control the convention agenda, nothing would be simpler than to use the word "propose."

Instead, he chooses "originate" amendments of errors. "Originate" is defined as "to cause the beginning of; give rise to" ... "to begin or set going; make a beginning of; to perform or facilitate the first actions, steps, or states of..." Webster's Dictionary 1592. When defined, then viewed in combination with the amendment process of Article V, the word "originate" Madison's "apt phraseology" becomes clear. Article V allows the states to "facilitate the first actions" regarding an amendment of error. The first step is applying for a convention call. Only the states can undertake this action—thus, only the states can "originate" an amendment of errors.

Madison could not possibly believe the states had the power Professor Natelson suggests on his (Natelson's) out of context excerpt from Federalist 43. Madison, after all, placed before the convention not more than five months before publication of Federalist 43, the proposal that made such powers impossible. (See *supra*, note 120). He certainly was aware of the content of Article V as his proposal served as the basis for the final version of that article. Naturally, this would include any changes made to his proposal until the convention completed work on the article. The basis of any interpretation of Federalist 43 must be on Madison's actions at the convention especially as he proposed the matter himself.

From this correct point of view, the word "originate" does not mean the states and Congress have equal power of proposal, that is, the power to directly propose amendments. Madison was obviously saying that within the confines of Article V, both state and general governments had within their means the ability to begin, or originate, the amendment proposal process. However, as the states also had sole power of ratification, in order to preserve separation of powers, the states could not directly propose amendments to the Constitution. Thus, the general government (Congress) could directly propose amendments to the states for consideration but could not ratify any proposal. The states could request a convention call, which Congress was mandated to call if a sufficient number of states applied and could present amendment proposals to the convention for consideration. The convention, acting an independent body, could accept or refuse the states' requests for amendments. The states, under their ratification power, could consider amendments proposed by either mode of amendment proposal. Thus, the general government (Congress) and the states could "originate amendments of errors" but not complete the amendment process without involving in some manner a politically independent body with the power of veto over the proposal. Hence, the "mark of propriety" preserving balance between the Constitution amendment process being too difficult or too mutable was preserved. To allow the states to propose and ratify would clearly violate the principle of being "too mutable" expressed by Madison in Federalist 43.

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amendments of error thus allowing amendments to be proposed without approval of either the general government in the case of convention proposal or by the states in case of congressional proposal.

In sum, Professor Natelson attempts to read into an excerpt of Federalist 43 a meaning a more thorough examination does not support. Madison addressed his remarks within, and based on, the confines of Article V. His comment regarding equality clearly refers not to states having control of convention agenda, indeed the opposite. It refers to a system whereby both general and states government can begin the process of amendment but cannot complete it without consent of outside political bodies.

Professor Natelson bases his theory of state controlled convention agenda on the erroneous assumption of a single amendment issue before a convention at any one time. History repeatedly demonstrates this nation can have before it a multitude of unrelated issues all requiring simultaneous solution. Given these circumstances, there is nothing to say some states might desire one amendment issue, while another set of states desires a completely unrelated second, third or even fourth issue. Professor Natelson acknowledges the states be treated equally.¹⁹⁶ Clearly, this equity must extend to the Article V Convention. Further, such equity demands equal access to that convention in all respects. If the states are equal, how can a group of states have privilege of agenda control denied to all other states? Clearly, there can be no equity between the states under these circumstances. For this reason as convention record show, the Founders deliberately and willfully removed such control from the Constitution.¹⁹⁷ Professor Natelson asserts founding-era records support this inequity.¹⁹⁸ Direct examination of these records refutes his claim.

Professor Natelson's third point that, "ratification-era records reveal a prevailing understanding that states could – in fact, usually would – specify particular subject matter at the beginning of the process." Professor Natelson writes his sentence inferring an unproven supposition rather than proven statement. To be valid, his evidence should contain factual statements irrefutably proving his assertion. Suppositions and inferences have no place in proving assertions. It is one thing to say the states can control convention agenda in their submitted applications. It is quite another to use inference to attempt prove the assertion rather than factual evidence. The states possess the right to include anything they wish within their applications. This right of in-

¹⁹⁶ See Report, p. 26.

¹⁹⁷ See *supra*, note 135.

¹⁹⁸ See Report, p. 15.

clusion within an application does not however translate into a right to regulate a convention's agenda. The Constitution limits the purpose of an application; anything else in the application is dictum.¹⁹⁹ As has been shown by best evidence of convention records, the Founders did not intend such control and indeed, deliberately rejected such plans during the convention. Therefore, such an assumption as stated by Professor Natelson of being "prevailing understanding" by the Founders simply is not true.

A detailed examination of the "evidence" employed by Professor Natelson is, however, still in order. The professor cites several "sources" he claims buttress his assertion that states can control the convention's agenda preventing all but that is approved from consideration or submission. He quotes both Federalist (Washington²⁰⁰, Madison, Hamilton and Tench Coxe) and Anti-Federalist in his Report to support his assertion. Accurate examination of his citations reveals a completely different picture. Most of these citations are either misquoted or misinterpreted.

For example, Professor Natelson cites an April 25, 1788, letter written by George Washington to John Armstrong, a delegate to the Continental Congress from Pennsylvania. Citing only part of a single sentence from the letter²⁰¹ in his Report, Professor Natelson uses the excerpt to argue, "George Washington understood that applying states would specify the convention subject matter" i.e., control the agenda of a convention.²⁰² However, the full paragraph of the letter in which the partial sentence is contained, shows a different context than Professor Natelson implies.²⁰³ Clearly, Washington was discussing the fact several states demanded amendments to

¹⁹⁹ See *infra*, note 62.

²⁰⁰ Professor Natelson makes a factual error stating George Washington belonged to the Federalist Party. While Washington's political sympathies aligned with the Federalist Party, he was never a member of any political party at any time. Thus, he is the only independent politician to have ever held the presidency.

²⁰¹ "...a constitutional door is open for such amendments as shall be thought necessary by nine States." See Report, p. 16.

²⁰² *Id.*

²⁰³ "That the proposed Constitution will admit of amendments is acknowledged by its warmest advocates but to make such amendments as may be proposed by the several States the condition of its adoption would, in my opinion amount to a compleat [sic] rejection of it; for upon examination of the objections which are made by the opponents in different States and the amendments which have been proposed, it will be found that what would be a favourite object with one State is the very thing which is strenuously [sic] opposed by another; the truth is, men are too apt to be swayed by local prejudices, and those who are so fond of amendments which have the particular interest of their own State in view cannot extend their ideas to the general welfare of the Union—they do not consider that for every sacrifice which they make they receive an ample compensation by the sacrifices which are made by other States for their benefit—and that those very things which they give up will operate to their advantage through the medium of the general interest. In addition to these considerations it should be remembered that a constitutional door is open for such amendments as shall be thought necessary by nine States. When I reflect upon these circumstances I am surpris'd [sic] to find that any person who is acquainted with the critical state of our public affairs, and knows the variety of views, interests, feelings and prejudices which must be con-

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the proposed Constitution as the price for their ratification of that document. Washington was not discussing control of a convention agenda in this quote. Instead, the full paragraph indicates his concern the states would seek different amendments based on local politics rather than amendments that advanced the nation as a whole. In this regard, Washington was reflecting the concerns expressed at the convention, which served as the basis for not including language in Article V that allowed the states control of the convention agenda.²⁰⁴ True, Washington writes of “amendments as shall be thought necessary by nine States.” However, taken in the context of his letter, it is clear Washington is referring to the authority of the states to apply for a convention call rather than control of a convention agenda. If Washington were thinking otherwise, he would have referred to “ten” rather than “nine” states, as it requires ten of the original thirteen states to ratify any proposed amendment. When viewed in actual context of Washington’s letter, Washington was not supporting or even addressing the concept of the states controlling the agenda of a convention.

Moreover, it makes no sense whatsoever that Washington, in one sentence of the same paragraph of the same letter, would complain against the states controlling the amendment proposal process (“...for upon examination of the objections which are made by the opponents in different States and the amendments which have been proposed...”). Then later, as Professor Natelson contends, support the states controlling the amendment proposal process.

Any suggestions Washington’s use of the words “have been proposed” prove Professor Natelson correct only prove ignorance. At the time of the writing of the letter, the Articles of Confederation were still in force in the United States as law of the land. The Articles did not provide for amendments, or any specific means of proposing them.²⁰⁵ Therefore, any “proposed amendments” were part of the political discussion regarding ratification of the proposed Constitution, which did provide for amendments.

Amendment proposals are part of the political discussion concerning alteration of the content of the Constitution. Article V forbids the states from proposing amendments. It specifically assigns that task to either Congress or a convention. While the states certainly can request in their applications the convention consider amendment issues, it is indisputable the proposing

sulted and conciliated in framing a general Government for these States, and how little propositions in themselves so opposite to each other, will tend to promote that desirable [sic] an end, can wish to make amendments the ultimatum for adopting the offered system.”

Letter to John Armstrong, April 25, 1788.

<http://gwpapers.virginia.edu/documents/constitution/1788/armstrong.html> Reprinted The Papers of George Washington www.gwpapers.virginia.edu Alderman Library, University of Virginia.

²⁰⁴ See *supra*, notes 98,99,107,108,136.

²⁰⁵ See *supra*, notes 43-45.

body is not obligated to follow such instructions.²⁰⁶ As Washington observed, states favor different political objections meaning they may present conflicting instructions. For this reason, if no other, to prevent conflicting instructions, states can issue agenda instructions to a convention. In short, Washington could not have been referring to the states controlling the agenda of a convention even in this part of his letter. There is, however a partial quote in the letter that taken out of context supports Professor Natelson's theory. However, when the actual language Professor Natelson seeks from founding-era documents presents itself, the professor avoids the quote.²⁰⁷ The reason is obvious. Closer examination of even just the single sentence from which the excerpt derives, disproves his assertion.

Professor Natelson then quotes Tench Coxe, an American political economist and another Pennsylvanian delegate to the Continental Congress.²⁰⁸ The professor states by evidence of this quote that "Coxe thereby revealed an understanding that states would make application explicitly to promote particular amendments." Again, the professor uses a form of doublespeak in his choice of words. Unquestionably, proposed amendments to the national Constitution represent political positions or agendas. Individuals, groups, and political parties or, in some cases, entire states can hold these political agendas. State legislatures demonstrate their support by submitting Article V Convention applications to Congress favoring the proposal. However, as observed by Washington, "what would be a favourite object with one State is the very thing which is strenuously opposed by another..." For this reason the Founders created an amendment system in which a desire for a convention by the states to discuss various political proposals could occur without requiring advance agreement among the states as to content of amendment proposal. Such arrangement prevented destroying the carefully planned checks and balance system placed in the Constitution.²⁰⁹

Professor Natelson ignores the important use of the word "general" in Coxe's comment describing a convention. The word "general" reveals Coxe understood a convention could discuss several amendment subjects. Otherwise, Coxe would employ a word such as "specific" or "single" to describe a convention. It implies a single-issue convention. Such a word would support Professor Natelson's theory. Its absence disproves the professor's assertion.

Professor Natelson failed to realize Coxe actually is discussing the obligation of Congress to call a convention and its (Congress) inability to prevent or interfere with proposed amendments

²⁰⁶ See *supra*, note 145, *infra* notes, 257,334.

²⁰⁷ "...different States and the amendments which have been proposed..."

²⁰⁸ "If two thirds of those legislatures require it, Congress *must* call a general convention, even though they dislike the proposed amendments, and if three fourths of the states legislatures or convention approve such proposed amendments, they become *an actual and binding part of the constitution*, without any possible interference of Congress." Report, p. 16 [Emphasis in original text].

²⁰⁹ See *infra*, note 336.

from a convention. As Washington observed in his Armstrong letter, a “general” convention implies a convention considering proposals originating from several political factions each having “a favourite object.” Moreover, Coxe was clearly discussing a convention call by the use of the term “require it” rather than convention agenda control.²¹⁰ Indeed, Coxe’s reference to “if three fourths of the state legislatures or convention approve such proposed amendments,” indicates he realized any convention control lies in ratification, not in convention agenda. Thus, the professor is incorrect in his assumptions regarding Coxe.

Finally, Professor Natelson refers to Federalist 85 written by Alexander Hamilton, published August 16, 1788. Hamilton advanced his own amendment proposal at the 1787 convention, which contained no fiduciary principles.²¹¹ A reading of the entire essay shows that Hamilton was writing to oppose the idea of holding a second federal convention before ratification of the already proposed Constitution. Hamilton said he believed numerous problems would result from attempts to amend the proposed Constitution before its adoption. He preferred therefore to correct the faults in the Constitution through the amendment process already provided for within the document.

As noted by Professor Natelson in his Report, Hamilton stated:

“[E]very amendment to the constitution, if one established, would be a single proposition, and might be brought forward singly. There would then be no necessity for management or compromise, in relation to any other point, no giving nor taking. The will of the requisite number would at once bring the matter to a decisive issue. And consequently whenever nine, or rather ten states,²¹² were united in the desire of a particular amendment, that amendment must infallibly take place. There can therefore be no comparison between the facility of effect-

²¹⁰ “[i]f two thirds of those legislatures require it Congress *must* call a general convention...” [Emphasis added].

²¹¹ *See supra*, notes 60-61.

²¹² Hamilton added a footnote in his text that clearly explained his intent regarding the phrase “nine, or rather ten, states”. He wrote, “It may rather be said TEN, for though two-thirds may set on foot the measure, three fourths must ratify.” The only provision in the Constitution that allows “two-thirds” [of the states] to “set on foot the measure” is the application for a convention call permitted by Article V. Thus Hamilton was saying, “two thirds” may apply for a convention call, but three fourths must ratify.”

As with other Founders, Hamilton was careful in use of “apt phraseology.” Like Madison, presumably Hamilton was equally careful in his choice of words in all his correspondence. *See supra*, notes 30,143,195. Therefore, use of “apt phraseology” for the words chosen in his footnote implies Hamilton intended a specific purpose by the choice. Given there were only 13 states at the time of his writing, his intent is clear. He was illustrating, relative to the number of states then in the union, the number of states necessary to cause each action required in Article V, “nine” to make application, “ten” to ratify a proposed amendment.

ing an amendment, and that of establishing the first instance a complete constitution.”²¹³

Limited agenda proponents, such as Professor Natelson, often refer to this passage to support their position. These proponents read more into this passage than is actually there, to the point of blatant misconstruement. They fall on the phrase “might be brought forward singly” as “irrefutable” proof an Article V Convention can be limited to proposal of a single amendment. Others, outside of convention delegations, determine what this proposal is. No one disputes a convention can limit itself to a single amendment proposal if so disposed.²¹⁴

Hamilton’s text does not offer the support these proponents seek. First, Hamilton was addressing ratification at this point in his essay. Only when three-quarters of the states (ten states) are “united in the desire of a particular amendment, [must] that amendment must infallibly take place.” Two-thirds of the states (nine) will not accomplish the matter, whether the Congress or a convention brings the issue, because it does not reflect “the will of the requisite number.”²¹⁵ Until ratified a proposal has no effect and thus cannot “infallibly take place”. Therefore, the only logical conclusion to the meaning of this passage is Hamilton was speaking of amendment ratification, not proposal.

Second, Hamilton’s text does not attempt to refute the language of Article V, which authorizes a convention to propose “amendments”.²¹⁶ The terms of the Tenth Amendment assign this power to the convention and prohibit state interference with it.²¹⁷ Thus, the convention determines how many amendments it will propose. Hence, the term “singly” cannot refer to amendment proposal. Both Congress and convention may propose multiply if they choose.

Third, history refutes the assumption of single amendment proposal.²¹⁸ Properly understanding the passage in Federalist 85 requires understanding the history surrounding it. When written,

²¹³ The Federalist No. 85, at 425 (Alexander Hamilton) (Gideon ed.,1818).

²¹⁴ See *supra*, note 145, *infra* notes 257,334.

²¹⁵ This phrase “requisite number” is significant and usually overlooked. Hamilton does not state, “requisite issue” or any phrase indicating agreement on an issue by the states in order to obtain “the will” needed. Instead, he refers to the numeric ratio often referred to in the convention itself as the basis of determination. See *supra*, note 143.

²¹⁶ “... or, on the application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments...” [Emphasis added]. U.S. Const. art. V.

²¹⁷ See *supra*, note 29.

²¹⁸ Any doubt the passage referred to amendments “be[ing] a single proposition, and might be brought forward singly” means limiting a proposing body to proposal of only a single amendment at any one time is refuted by historic record. On September 25, 1789, Congress proposed twelve amendments to the Constitution now known as the Bill of Rights. By December 15, 1791, the states ratified ten of the original twelve proposals. The eleventh pro-

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this nation existed under a different form of government, one without amendment in its design. As Hamilton noted if an alteration was necessary, under that form of government a unanimous vote on entire form of government was required.²¹⁹ The new concept of amendments offered a means of alteration to the form of government without subjecting that form of government to full review or alteration each time an alteration was desired. Consequently, the entire question of amendment in today's Constitution centers on the proposition of whether or not a proposed amendment becomes part of the form of government—at no time in the amendment process is language already in the Constitution removed. Nowhere did Hamilton state the extent of subjects considered by a convention is limited to a single issue in Federalist 85. Rather, he just summarized the amendment process. Once Congress or a convention proposes amendment[s], Congress chooses a mode of ratification for each proposal. Article V mandates ratification of each amendment by three-fourths vote of the states. Thus, every proposed amendment “would be a single proposition, and might be brought forward singly.” By

posals failed to receive sufficient ratification support until May 5, 1992 when it became the 27th Amendment to the Constitution.

As demonstrated in the texts of the ratification documents received in Congress from the states, each state determined which amendments it chose to ratify. Some states, such as New Hampshire, ratified all twelve amendments but itemized ratification of each amendment proposal. Others, such as New York, chose to ratify all except for the second amendment (later to become the 27th Amendment). Still others, such as Pennsylvania, chose to ratify ten out of the twelve amendments. The principle used by the states is abundantly clear. Each state considered each amendment individually or “singly” as it was “brought forward” for ratification consideration. Each state assumed the authority to ratify, or not to ratify, on that basis. Thus, the states approved some amendment proposals and did not approve other proposals. *Annals of Congress*, 1st Session, March 4, 1789-March 3, 1791, Appendix pp. 2034-2040.

²¹⁹ Prefacing the quoted remarks in body text, Hamilton stated, “It appears to me susceptible of absolute demonstration, that it will be far more easy to obtain subsequent than previous amendments to the Constitution. The moment an alteration is made in the present plan, it becomes, to the purpose of adoption, a new one, and must undergo a new decision of each State. To its complete establishment throughout the Union, it will therefore require the concurrence of thirteen States. If, on the contrary, the Constitution proposed should once be ratified by all the States as it stands, alterations in it may at any time be effected by nine States. Here, then, the chances are as thirteen to nine in favor of subsequent amendment, rather than of the original adoption of an entire system.”

This is not all. Every Constitution of the United States must inevitably consist of a great variety of particulars, in which thirteen independent States are to be accommodated in their interests or opinions of interest. We may of course expect to see, in any body of men charged with its original formation, very different combinations of the parts upon different points. Many of those who form a majority on one question, may become the minority on a second, and an association dissimilar to either may constitute the majority on a third. Hence the necessity of moulding and arranging all the particulars which are to compose the whole, in such a manner as to satisfy all the parties to the compact, and to a final act. The degree of that multiplication must evidently be in a ratio to the number of particulars and the number of parties.” [Emphasis added].

such requirement, the states consider each amendment singly for ratification, judging each on its own merits.

Hamilton's overall goal in writing Federalist 85 was to deliver a "Sunday punch" to concerns the states were giving away too much authority in the proposed Constitution. His political argument attempted to assure people if the states desired changes to the national government, the national government could not block them. His argument also attacked the current government system requiring unanimous consent to alter its provisions in the Confederation.²²⁰ Technically, under the terms of the Articles of Confederation, each of the hundreds of different changes in the form of government the 1787 Federal Convention proposed required individual, unanimous vote of all states. Hamilton showed an advantage of the new system—it only required ten states to effect change as opposed to the unanimous consent required under the Confederation.²²¹

When viewed in proper context Hamilton's remarks, an interpretation that any convention is limited to a single issue based on those remarks is clearly incorrect. Hamilton's comments do not even address the question of whether a convention would be limited to a single subject. Instead, his language focuses on his opposition to calling a second convention before the adoption of the proposed Constitution. Such a convention would rewrite the proposed document from scratch and begin the entire process again. He argued post-ratification amendments targeting specific problems would repair defects in the proposed Constitution. The states could then review and ratify one amendment at a time, yet still allow Congress (or a convention) to propose as many amendments as needed in a single block of proposals. In all of this, Hamilton was presenting the advantages of the system for the states, not the national government.

Hamilton's arguments demonstrated the advantage of the proposed amendment system for the states in the proposed Constitution. As such, it is illogical to assume Hamilton argues for the proposition the states' application power is limited to a single subject or veto ultimately decided by Congress.²²² Such limitations render the states impotent to amend the Constitution. The

²²⁰ See *supra*, note 12.

²²¹ Hamilton was reminding people of the political situation of the day. The state of Rhode Island opposed any changes whatsoever in the Articles of Confederation. The Articles required unanimous consent by all states to alter the Articles in any way. Thus, this single state stymied the efforts of the rest of the states in their desire to alter the Articles of Confederation. The new proposed system of amendment offered a solution to this issue by not allowing a single state this power.

²²² "Because of its agency role, Congress may – in fact, *must* – limit the subject matter of the convention to the extent specified by the applying states. ... In order to carry out its agency responsibility, Congress has no choice, when counting applications toward the two-thirds needed for convention, but to group them according to subject matter. Whenever two-thirds of the states have applied for a convention based on the same general subject matter, Congress must issue the call for a convention for proposing amendments related to that subject matter. ... Of course, this is one area where "ministerial" duties necessarily require a certain amount of discretion, since Con-

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text cited by Professor Natelson reveals Hamilton was discussing ratification of proposed amendments, not amendment proposal. He cites text that under the powers of ratification the states have authority to consider each proposed amendment singly on its own merits. This authority remains constant regardless of how many amendments a proposing body puts forth. In sum, Federalist 85 does not support Professor Natelson's assertions.

Any remaining doubt that Hamilton's words do not support Professor Natelson are resolved by Hamilton's next subject in his essay, which actually discusses amendment applications by the states and the ability of Congress to block them. Hamilton states:

"In opposition to the probability of subsequent amendments, it has been urged, that the persons delegated to the administration of the national government, will always be disinclined to yield up any portion of the authority of which they were once possessed. For my own part I acknowledge a thorough conviction that any amendments which may, upon mature consideration, be thought useful, will be applicable to the organization of the government, not the mass of its powers; and on this account alone, I think there is no weight in the observation just stated. I also think there is little weight in it on another account. The intrinsic difficulty of governing THIRTEEN STATES at any rate, independent of calculations upon an ordinary degree of public spirit and integrity, will, in my opinion, constantly impose on the national rulers the necessity of a spirit of accommodation to the reasonable expectations of their constituents. But there is yet a further consideration, which proves beyond the possibility of doubt, that the observation is futile. It is this, that the national rulers, whenever nine states concur, will have no option upon the subject. By the fifth article of the plan the Congress will be obliged 'on the application of the legislatures of two-thirds of the states, (which at present amounts to nine) to call a convention for proposing amendments,

gress may have to decide whether differently worded applications actually address the same subject." See Report, p. 21, 22.

Such "discretion" advocated by Professor Natelson obviously allows Congress to "determine" "differently worded applications" do not address the same subject or amendment issue. Such "discretion" provides Congress a means not to call a convention when the intent of the Founders was clearly that Congress has no option on the matter. (See *supra*, notes 137,141, *infra*, note 223). Professor Natelson's Report asserts it is Congress, not the states, that ultimately decides what subject, if any, goes to a convention. Consequently, Congress decides whether to convene a convention regardless of state applications. Thus, it is a misnomer to assert, as Professor Natelson does, that the states determine the convention agenda. By his own admission, under his theory, that power is assigned Congress. Professor Natelson bases his assumption of "discretion" on the already disproved premise of agenda control through state applications. As to congressional discretion referred to by Professor Natelson, Hamilton addressed this matter in Federalist 85. He refuted it in a quote Professor Natelson did not use in his Report. See *infra*, note 224.

which shall be valid to all intents and purposes, as part of the constitution, when ratified by the legislatures of three-fourths of the states, or by conventions in three-fourths thereof.’ The words of this article are peremptory.²²³ The Congress ‘shall call a convention.’ Nothing in this particular is left to the discretion of that body. And of consequence all the declamation about their disinclination to a change, vanishes in air. Nor however difficult it may be supposed to unite two-thirds or three-fourths of the states legislatures, in amendments which may affect local interest, can there be any room to apprehend any such difficulty in a union on points which are merely relative to the general liberty or security of the people. We may safely rely on the disposition of the state legislatures to erect barriers against the encroachments of the national authority.”²²⁴

Hamilton describes the obligation of a convention call as “[T]he national rulers [have] no option upon the subject ... The words of this article is peremptory. [The Congress] “shall call a convention. ... Nothing in this particular is left to the discretion of that body.” It is illogical to assume, in the face of such words as Professor Natelson does in his Report, that Hamilton intended to convey a convention is limited to a single subject ultimately decided by Congress. Professor Natelson declares in order for Congress to count submitted applications, it must exercise some “discretion.”²²⁵ Hamilton’s statements that “[n]othing in this particular is left to the discretion of that body” specifically refutes Professor Natelson. Giving Congress “discretion” as to whether or not based on its judgment of state applications a convention call shall occur at all obviously is not what Hamilton had in mind in stating Congress shall have no discretion to prevent a convention call. The idea of using Hamilton’s words to argue for a single subject convention simply collapses in the face of Hamilton’s own words.

To additionally support his position, Professor Natelson cites other historic quotes. In order to make the quote fit his theory; Professor Natelson relies on assumptions in his Report “interpreting” the quotes. For example, following a quote by George Nicholas²²⁶ Professor Natelson attempts to lead the reader by defining what the word “natural” as used by Nicholas in his

²²³ See *infra*, note 276.

²²⁴ The Federalist No. 85, at 425 (Alexander Hamilton) (Gideon ed.,1818).

²²⁵ See *supra*, note 222.

²²⁶ The quote, as presented in the Report states, “On the application of the legislatures of two thirds of the several states, a convention is to be called to propose amendments, which shall be a part of the Constitution when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof. It is natural to conclude that those states who will apply for calling the convention will concur in the ratification of the proposed amendments.” See Report, p. 17.

quote must mean.²²⁷ Professor Natelson inserts brackets into the quote, containing words the professor assumes clarify Nicholas's intent.²²⁸ Finally, the professor leaves out several sentences in Nicholas' quote, when examined in full without these "modifications," show Nicholas was addressing a completely different issue than Professor Natelson would have his readers believe. In fact, Nicholas was simply observing those states which might submit applications for a convention, would more likely support amendments from the convention than those states, which did not apply. Moreover, Nichols was responding to a charge by another delegate that the mode of amendment was unsatisfactory.²²⁹

²²⁷ The report then states, "Of course, such a conclusion would be "natural" only if the convention was expected to stick to the agenda of the states that "apply for calling the convention." That there would be such an agenda was confirmed by what Nicholas said next:" See Report, p. 17.

²²⁸ Professor Natelson then continues the Nicholas quote. "There are strong and cogent reasons operating on my mind, *that the amendments, which shall be agreed to by those states, will be sooner ratified by the rest than any other that can be proposed* [i.e., by a future plenary convention]. The [ratifying] convention which shall be so called will have their deliberations confined to a few points; no local interest to divert their attention; nothing but the necessary alterations. They will have many advantages of the last [plenary] Convention. No experiments to devise; the general and fundamental regulations being already laid down." [Italics and brackets in Report]. See Report, p. 17.

²²⁹ The full quote of George Nicholas presents a different picture than that of the excerpts Professor Natelson uses in his Report. George Nicholas said, "The worthy member has exclaimed, with uncommon vehemence, against the mode provided for securing amendments. He thinks amendments can never be obtained, because so great a number is required to concur. Had it rest solely with Congress, there might have been danger. The committee will see that there is another mode provided, besides that which originates with Congress. On the application of the legislatures of two thirds of the several states, a convention is to be called to propose amendments, which shall be a part of the Constitution when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof. It is natural to conclude that those states who will apply for calling the convention will concur in the ratification of the proposed amendments.

There are strong and cogent reasons operating on my mind, that the amendments, which shall be agreed to by those states, will be sooner ratified by the rest than any other that can be proposed. The conventions which shall be so called will have their deliberations confined to a few points; no local interest to divert their attention; nothing but the necessary alterations. They will have many advantages over the last Convention. No experiments to devise; the general and fundamental regulations being already laid down." [Emphasis added]. Elliot's Debates, Vol. III, pp. 101-102, (1936)

The few lines of text prior to the portion of the quote cited by Professor Natelson is key to understanding Nicholas' true intent in his address. They show Nicholas is addressing the fact the alternative method of amendment proposal makes it possible to obtain amendments by circumventing Congress. Nicholas, as his comments show, was responding to a criticism from another ratification delegate about the proposed amendment article. That criticism concerned whether any proposed amendment could garner sufficient ratification support by the states.

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In sum, when properly read the historic record does not support Professor Natelson's theory of fiduciary control of the convention agenda by the states.²³⁰ Instead, the Founders repeatedly spoke of state ratification as the key method of amendment regulation.

Nicholas responds to the criticism by stating it is "natural" to conclude "those states who apply for calling the convention will concur in the ratification of the proposed amendments." Nicholas makes the obvious presumption those states that apply for a convention call desire to see the amendment process occur. Thus, it is "natural" these states will therefore support, or "concur" in the ratification of the proposed amendments. He also observes that since two-thirds have already involved themselves in the process by application, the larger number of states necessary for ratification becomes easier. The lesser number of two-thirds, in order to get a convention call, will have reached thus requiring a smaller number of states for ratification. Nicholas' following sentence ("There are strong and cogent reasons...") does not support Professor Natelson's theory of state control of a convention agenda. The sentence refers back to the previous sentence (... "that states who will for calling a convention..."). Nicholas states the politically obvious. However supported, the more support an issue has, the more likely it is to be successful. Therefore, if an issue caused applications for a convention to occur, Nicholas realized such support made getting the rest of the support necessary easier. However, nowhere does Nicholas state that states would control the agenda. Indeed, he implies the opposite by observing, "...will sooner ratified by the rest than any other that can be proposed." The only possible way he could make this statement is realizing a convention might propose amendments not in the applications submitted by the states. In short, Nicholas was not talking about state control of convention agenda. Nicholas was stating ratification was possible despite the high number of states required for it but easier if states that applied for a convention call as they had already expressed support for amendment. History, of course, has proved Nicholas correct twenty-seven times.

²³⁰ Professor Natelson concedes in his Report, "If the agent does exceed his authority ... without pre-approval, the principal still may decide to accept the deal. If he accepts it while on notice of all relevant facts, then the action becomes valid, and the principal is bound – as if the agent's authority were expanded retroactively." (See Report, p.5).

In sum, Professor Natelson's theory is state legislatures, through fiduciary law, can control convention agenda and appoints convention delegates. As shown in this article, the 1787 Federal Convention rejected this theory by removing such fiduciary control from Article V. (See *supra*, notes 106-120). Thus, the historic record does not support his assertion or theory. Another related, but equally incorrect theory, based on fiduciary principles, relates to the creation of the Constitution by the Founders at the 1787 Convention. Modern day Article V Convention critics maintain the 1787 convention was a "runaway" convention. That is, the convention delegates exceeded their authority granted them by Congress in its legally non-binding resolution calling the convention. This assertion is incorrect. (See *supra*, notes 12,43).

As already shown, fiduciary law is inapplicable in Article V unless expressly stated. The sole example of fiduciary law in Article V is the convention call mandate on Congress. However, the legally similar but not identical principle of ratification found in both constitutional and fiduciary law is applicable. Assent (or ratification) by the states to amendment proposals by Congress or a convention exists in constitutional law. The historic record is clear. The proposed Constitution required ratification by the states (and Congress) before it became law of the land. The states ratified the proposed Constitution by means of ratification conventions composed of elected delegates. In doing so, the states ratified, and therefore retroactively approved, the acts and decisions made by the 1787 Federal Convention leading to the creation of the Constitution. Even if the convention had exceeded the resolution in-

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The States Equality Issue

Professor Natelson makes several assertions in his Report based on his theory of state fiduciary control of the amendment process. Some of these assertions are erroneous and corrected as necessary in the following pages.

Professor Natelson makes the following assertion in his Report: “As the agent of the state legislatures, Congress must call a convention for proposing amendments if two-thirds of the states apply for one, must treat all states equally during the process, and must obey any common restrictions imposed by the states in their applications. The states, not Congress, are to determine how delegates are selected.”²³¹

structions by Congress, the states, and Congress, by their ratification, made any charge of a “runaway” convention impossible to apply. Notably, however, that “ratification” was under the authority of the Articles of Confederation. Those articles expressly required the states, as well as Congress, to “agree” rather than “ratify ... an alteration” to the Articles of Confederation.

The difference in terms between “agree” and “ratify” or “ratification” clarifies why the Founders using “apt phraseology” establishing “ratification” of the proposed Constitution. The word “agree” is defined as, “To concur, come into harmony; give mutual assent; unite in mental action; exchange promises; make an agreement; arrange; to settle. Concur or acquiesce in; approve or adopt.” Black’s Law Dictionary 66-67 [Emphasis added]. “Ratification” is defined as, “In a broad sense, the confirmation of a previous act done either by the party himself or by another; as, confirmation of a voidable act. The affirmance by a person of a prior act which did not bind him, but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him. *Askew v Joachim Memorial Home, N.D., 234 N.W.2d 226, 237.* ... Approval, as by legislatures or convention, of a constitutional amendment proposed by two-thirds of both houses of Congress. Approval by the electorate of a proposed State constitutional amendment.” Black’s Law Dictionary 1261-1262.

By their use of the word “ratification” rather than “agree” in the Constitution, the Founders took advantage of the close legal definition and meaning of the word “ratification” as it relates to fiduciary law. The word ensured a “voidable act” (any suggestion the convention was a runaway) the states retroactively approved and therefore legitimized. However, the choice of word did not absolve or nullify the requirement of the Articles of Confederation that the states must all “agree” to any alteration. In obeying the Articles of Confederation, the states, by reporting to the Articles of Confederation Congress, (as required by the Articles) that they had “agreed” to the new Constitution, satisfied both the Constitution and the Articles of Confederation. By both ratification and agreement, (one term required by the new Constitution, the other required by the Articles of Confederation) the states therefore “agreed” and “ratified” to the terms specified in the Constitution and the Constitution itself under the authority granted them in the Articles of Confederation. (*See supra*, notes 12,13).

²³¹ See Report, p. 26.

Professor Natelson jams several somewhat unrelated issues into a single point thus making a response difficult. He is correct Congress must call a convention if two-thirds of the states apply for one.²³² He correctly states the process requires equal treatment of all states.²³³ This process of equality is known as state equality.²³⁴ As states must be treated equally, it follows Congress

²³² See generally, Federalist 85, A. Hamilton (1788); *Dodge v Woolsey*, 59 U.S. 331 (1855); *Hawke v Smith*, 253 U.S. 221 (1920); *United States v Sprague*, 282 U.S. 716 (1931).

²³³ Unless demonstrable reason exists to treat states differently in the amendment process, under the 14th Amendment principle of equal protection, states are equal. As the Constitution gives identical powers in regards to amendment of the Constitution to each state, there is no basis on which to discriminate one state over another. This principle is especially obvious in regards to submitting applications for an Article V Convention call. The Constitution makes no differentiation as to subject matter or the number of states applying for any particular amendment issue. It merely requires two-thirds of the states apply for a convention call. As the applications are equal in authority and affect for all states, thus any combination of states may trigger a convention call; it follows under the same principle of equal protection, states must have equal access to the convention. (*See supra*, note 20).

²³⁴ The Constitution does not state that all states “shall” be treated equally. That mandate derives from the obvious requirements granting the people of the states equality. Equality is defined as “The condition of possessing substantially the same rights, privileges, and immunities, and being liable to substantially the same duties. “Equality” guaranteed under equal protection clause is equality under the same conditions and among person similarly situated; classifications must not be arbitrary and must be based upon some difference in classes having substantial relation to legitimate objects to be accomplished. *Boyne v. State ex rel. Dickerson*, 80 Nev. 160, 390 P.2d 225, 227.” *Black’s Law Dictionary* 536.

There is no question the states form a legal class. Moreover, even if this were not true, the Constitution’s demand of equal protection, both in the original text of the Constitution as well as in the 14th Amendment, and full faith and credit clause would lead the same inevitable conclusion. (“The citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the several States.” U.S. Const. art. IV, § 2, cl. 1. “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV § 1. “Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State.” U.S. Const. art. IV, § 1.

Granting certain citizens the ability to propose amendments to the Constitution under specified conditions clearly qualifies as “privilege.” While an application for a convention call is not an “act” of the legislature (*See generally*, *Hollingsworth v Virginia*, *supra*, notes 19,30) it clearly is a “record” of the state. Therefore it is mandatory such record receive full faith and credit. Denial of the contents of the state application to become part of the agenda of a convention clearly violates the principle of full faith and credit. Moreover, such denial violates the immunities and privileges clause of the Constitution cited above. The citizens of each state have the inherent right to alter their form of government and such right is equal among all citizens. Therefore, any action, which denies them such right of access when they have acted through their legal representatives as specified by the Constitution, is a violation of the equal protection clauses of the Constitution. *See supra*, notes 20,94.

cannot obey “any common²³⁵ restrictions²³⁶” imposed by the states in their applications, i.e., so-called “instructions” informing Congress what issues shall be contained in the convention call.²³⁷ The reason is obvious. The Constitution mandates two-thirds of the states need apply to cause a convention call. Any more applications submitted by the states are constitutionally immaterial. The constitutional standard is met.²³⁸ Once met, additional applications have no constitutional effect on the obligation of Congress to call a convention under the terms of Article V. Once two-thirds of the states apply for a convention, Congress has “no option” but to call.²³⁹ The Constitution requires no further state applications to cause a convention call. Thus, the

²³⁵ “Of or relating to a community at large (as a family unit, social group, tribe, political organization, or alliance): generally shared or participated in by individuals of a community: not limited to one person or special group “we, the people of the U.S., in order to ... provide for the common defense U.S. Constitution” Webster’s Dictionary 458. [Emphasis added].

Clearly, the Constitution uses the word “common” in reference to all of the United States meaning all states (and all the people) rather than to a specific state or group of states. Therefore, Professor Natelson, in using the word, is bound to mean that the word must mean the same as is used and intended in the Constitution when he describes a constitutional function, i.e., an action described within the Constitution.

²³⁶ “A limitation that is imposed upon a class or ethnic group and that excludes its members from a fairly competitive use and enjoyment of the facilities of a community (as housing, employment, or education) Webster’s Dictionary 1937.

As noted earlier in this article (*See supra*, note 20) members of Congress and convention delegates form a legal class. This legal class must receive equal treatment under the law in regards to their constitutional authority for proposing amendments. As they perform the identical constitutional function, there is no basis for discrimination of one part of the class over the other. Hence, any “restrictions” imposed on one part of the class must be imposed on the other. Professor Natelson presents no assertion whatsoever supporting those restrictions he supports for a convention also applies to Congress. He fails to provide therefore any proof whatsoever, outside of his own unsupported opinion, that states may impose “common restrictions” on a convention. Such assertion violates the full faith and credit clause and the equal protection clauses. Under his assertion, not all states possess equal access to the convention agenda. He fails to provide evidence proving such restrictions apply equally to the entire class, i.e., Congress.

²³⁷ *See infra*, notes 288-296.

²³⁸ Additional applications submitted by the states beyond the minimum of two-thirds however may have political significance. The greater number of applying states translates into greater political pressure on Congress. Any recalcitrance on its part is therefore less likely. However, this author firmly believes the states, in order to take advantage of this political pressure, must make the issue of Congress’ refusal to call as public as possible. This primarily involves the states, as well as members of the general public, publicly demanding Congress explain why it has not already called an Article V Convention based on already submitted applications. *See supra*, note 5, *infra* notes 240,241,287.

²³⁹ *See supra*, note 224.

convention call requirement of Article V closes, as the states have satisfied its requirement. As additional applications are not needful to cause the convention call, they have no bearing whatsoever on issuance of such call, the matter decided by the original two-thirds submission of state applications. Consequently, this constitutional cutoff denies one-third the states access to give “common instructions” in their applications. Given the mandate of state equality, there is no way the word “common” as employed in the Constitution can be applied in this instance. The two-thirds cutoff prevents all the states having equal access to give such instructions. Thus, the states cannot impose “common restrictions” on Congress; such restrictions can never be “common” as coming from all states. Hence, any such instructions violate the principle of state equality.

The principle of state equality raises other issues in light of current public record of state applications already submitted to Congress together with admissions made by the government in federal court.²⁴⁰ The facts in turn reveal other problems with Professor Natelson’s fiduciary control theory. He does not address these problems caused by these public facts in his Report.

According to public record, the states have submitted applications addressing at least twenty different amendment issues. The problem; with over twenty issues submitted by the states for a convention call, which shall be the “single issue” called for in Professor Natelson’s theory? In short, which state’s instruction shall be the basis on which Congress calls a convention and by what legal means shall Congress be empowered to ignore the rest of the submitted applications and not base its call on those instructions?

The public record presents even more problems for Professor Natelson’s Report. This record shows at least three separate, distinct, amendment issues have received at least two-thirds applications from the states.²⁴¹ Based on Professor Natelson’s theory, this means the states have instructed Congress at least three times Congress must call a convention.²⁴² Congress has not called a convention.

²⁴⁰ See <http://www.article-5.org/file.php/1/Amendments/index.htm> to read the over 700 applications from the states for an Article V Convention. The applications are in the form of photographic copies of pages from the Congressional Record. This compilation of applications submitted by the states to Congress for an Article V Convention call is the only such record of its kind currently in existence. The Congress, nor any branch or agency thereof, has ever compiled the applications into a single record available for public inspection. Discussion of the referred to federal lawsuits follows later in this article. See *infra*, note 248.

²⁴¹ Public record shows repeal of federal income tax (repeal of the 16th Amendment), Apportionment (control of apportionment by state legislatures and the basis of that apportionment), and a balanced federal budget amendment each have received more than two-thirds applications from the states.

²⁴² The Morris-Gerry amendment of the 1787 Federal Convention established the basis of a convention call is a simple numeric count of applying states with no terms or conditions. This fact alone defeats Professor Natelson’s theory of “single issue” convention. However, this author’s purpose at this time is to show even if Professor Natelson’s theory were correct regarding the conditions under which Congress must call an Article V Convention, sufficient applications already exist to cause a convention call under such conditions. In short, the states have applied

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Even if the professor were correct as to his theory of instructions, the fact remains that at the minimum, three amendment issues must be discussed at any convention as the states have submitted the necessary two-thirds applications to cause a convention call, each on their own individual merits. The problem is in his Report; Professor Natelson does not discuss, nor allow for, the possibility of two-thirds of the states submitting applications for more than one amendment issue at any one time. Thus, under his theory, Congress must ignore at least two sets of instructions sent from the states regarding the content of a convention call, as a convention is limited to a single issue and hence, a single set of instructions.

The act of decision conflicts with the principle of state equality. Based on its sovereign right of submission, a state submits an application with a reasonable expectation its application will at least receive a minimum of consideration from the convention.²⁴³ That minimum means the

for not one, but three same subject issues, in sufficient numbers to cause a call on each of those issues. Congress has refused to call a convention under such conditions or any conditions. In short, Congress' own actions concerning calling an Article V Convention prove it does not accept Professor Natelson's theory as a basis on which it must issue a convention call. Indeed, its present actions indicate it accepts there is no basis on which it must issue a convention call. *See supra*, notes 139,143, *infra* note 248.

²⁴³ The principle of the right of a state to apply for a convention call and the right of the people to petition the government are identical in constitutional authority, intent and purpose. Therefore, the terms are interchangeable as to meaning but not as to constitutional function. The people may not petition directly for an Article V Convention call. Congress has a right to refuse to call a convention unless the states so apply. The Constitution guarantees both the right of petition and application. Both intend the government respond to the redress submitted at some minimum level. The least level humanly possible is the government, or officials within it, at least read the petition. This in turns means to satisfy the right of petition, the government is, at the minimum, bound to read the request. If that portion of government connected with the request consents, it must then act on the request. Here, however, the function of petition and application diverge. Under the terms of the Constitution, a petition does not bind the government to a pre-determined act. However, in the case of an application, the Constitution does bind the government to a pre-determined act.

A petition is defined as, "A written address, embodying an application or prayer from the person or persons preferring it, to the power, body, or person to whom it is presented, for the exercise of his or their authority in the redress of some wrong, or the grant of some favor, privilege, or license. A formal written request addressed to some governmental authority. The right of the people to petition for redress of grievances is guaranteed by the First Amendment, U.S. Constitution." Black's Law Dictionary 1145-1146.

While Black's Law Dictionary refers to "the exercise of ... their authority... or the grant of some favor, privilege, or license" in referencing a petition, thus inferring a choice of refusal on the part of the authority, it also refers to a "formal written request addressed to some governmental authority." The Constitution removes any such option on the part of Congress vis-à-vis a convention call application. However, the convention is also a constitutional body addressed by the applications. As such, it is clearly part of our form of government and therefore subject to the same limitations imposed by the Constitution as the rest of our form of government. Therefore, the mandate of petition imposed by the Constitution applies as much to a convention as it does the remainder of the government. It is clear therefore; a convention has the same obligation of redress, as does Congress. The Constitution

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amendment issue sought receives resolution by convention delegates. It in turn means deliberation on the proposal's merits and a vote on the proposal by convention delegates. In short, the application issue, once submitted by a state, regardless of the number of similar submissions, becomes an issue on the convention agenda.²⁴⁴ Indeed, as members of Congress observed, if a convention does not discuss a state application, it disrespects that state or states.²⁴⁵ Such disrespect can mean the convention has not discharged the application leaving it valid and still in effect. This does not mandate the convention approve all applications in the form of proposed amendments. It merely means it is conclusive on a convention to take some positive action on all applications such that it is irrefutable the convention has given due consideration on the amendment issue presented by the state.

The sovereign right of all states to equally submit applications to the convention for consideration defeats the professor's argument that only those applications, which receive two-thirds support by actual submission of identical amendment issues, are valid applications.²⁴⁶ Neither omission nor concession can compromise this state's sovereign right. Thus, a convention cannot ignore a state's application. A state cannot be shut out of the convention process of amendments proposal simply because it wishes to discuss one subject while two-thirds of the other

mandates the application's purpose is to cause a convention call. Once that is accomplished, Congress has satisfied the right of application in that it has called a convention.

This act by Congress however does not relieve the convention of its constitutionally mandated redress-application duty. The states, like the people, have a right to request action by a convention on particular amendment issues. The states do not have the authority to dictate what action a convention will take on a particular amendment issue or confine a convention to a particular amendment issue. Like everyone else, the states can only ask for consideration. The convention cannot constitutionally refuse consideration of all submitted to it in the form of amendment issue proposals contained with petitions, be they from the states or the people as such refusal is a violation of the right of redress. In short, the content of the applications, which previously caused Congress to call a convention, now become a petition presented to the convention. In this form, the contents are no longer dictum but become a legitimate constitutional petition to which the convention is constitutionally obligated to give due consideration. Hence, in order for the convention to satisfy the minimum standard of application, the convention must at least read the application/petition and consider the material therein as it relates to proposed amendments as part of its overall agenda. As with Congress, however, the convention is under no constitutional obligation to take the matter any further than that.

²⁴⁴ This simple principle maintains the right of state equality. Each state is permitted equal access to the convention's agenda and unlike Professor Natelson's theory is not shut out of the process by a group of states as was feared by the Founders. *See supra*, notes 107,113,118,147.

²⁴⁵ *See supra*, note 143.

²⁴⁶ "In order to carry out its agency responsibility, Congress has no choice, when counting applications toward the two-thirds needed for convention, but to group them according to subject matter. Whenever two-thirds of the states have applied for a convention based on the same general subject matter, Congress must issue the call for a convention for proposing amendments related to that subject matter." Report, p.21.

states wish to discuss another subject. The constitutional fact is a convention is empowered to propose amendments. A convention is thus empowered to discuss as many issues as the states (or others) may choose to bring to its attention. Should a minority view of one state convince the convention of the need of amendment proposal, the convention may propose such amendment. Equally, it may propose an amendment based on two thirds request or even a greater ratio of applying states if the convention is so disposed.²⁴⁷

A second public record further refutes Professor Natelson's theory. This public record is the record of the federal lawsuits filed by this author. In brief sum, the author filed two lawsuits, the second, Walker v Members of Congress, was appealed to the Supreme Court. Under the rules of the Supreme Court, the government made several key acknowledgements as to the circumstances of a convention call by Congress. In this instance, the defendant/appellee in the case was the individual members of Congress. Thus, when responding, the attorney of record for such defendants/appellees acted under instructions from Congress. In relation to Professor Natelson's theory that "[Congress] ... must obey any common restrictions imposed by the states in their applications" the government disagreed, stating a convention call was "peremptory" and "based on a simple numeric count of applying states with no terms or conditions."²⁴⁸

²⁴⁷ Amendment consideration does not reside exclusively with state proposals. Just as with Congress, which receives memorials containing amendment requests from various civic groups, local governments and even the president, a convention must, under the terms of the First Amendment, receive such memorials from all citizens and groups interested in submitting such proposals during its term of existence. Naturally, as admitted by Professor Natelson, (*See Report*, p. 26) the convention, like Congress, is under no obligation to pass any amendment proposal however submitted. The terms of the First Amendment ("... to petition the Government for a redress of grievances") mandate the convention must at least receive and consider such suggestions, petitions and grievances advanced by the general population with the aim of redress of those grievances. *See supra*, note 243.

²⁴⁸ Such "terms or conditions" include, but are not limited to, same subject issue, rescission of applications, contemporaneous of applications, restrictions by one state on other states, specific language of a proposed amendment written by a state, withdrawal of a proposed amendment or application after a specific time period or any other term or condition contained within an application. As a convention call is peremptory, "no terms or conditions" refers to any objection, act, action or undertaking by anyone or any political body which alters or attempts to alter a convention call such that it is no longer a peremptory act on the part of Congress, but an optional act on its part allowing it to refuse, thwart, obstruct or otherwise fail to call a convention when the terms of Article V otherwise dictate a convention call. (*See infra*, note 276). In short, "no terms or conditions" refer to any action refuting the expressed command of Article V regarding a convention call and the obligation of Congress thereof.

In Walker v Members of Congress, the Solicitor General of the United States, acting in his official capacity and as attorney of record for all members of Congress agreed under Supreme Court Rule 15.2 the author in his role as plaintiff in the suit, was correct as to fact and law.

Supreme Court Rules 15.2 states: "A brief in opposition should be stated briefly and in plain terms and may not exceed the page limitations specified in Rule 33. In addition to presenting other arguments for denying petition,
(Footnote Continued Next Page)

Professor Natelson's final contention that "[T]he states, not Congress, are to determine how delegates are selected" does not satisfy the principle equal protection under the law guaranteed by the 14th Amendment.²⁴⁹ Members of Congress and convention delegates are, under the authority of the Constitution, the only groups of citizens that have the authority to propose amendments. They form a clearly defined legal class.²⁵⁰

The principle of equal protection affords all citizens within a legal class, equal treatment under the law. The Constitution mandates election of all members of Congress. The courts have ruled all conventions must be "deliberative assemblages representative of the people which it [is] as-

the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition." [Emphasis added].

The author stated in his certiorari to the Supreme Court "sufficient applications existed to cause an Article V Convention; that a convention call was preemptory upon Congress; that a convention call is based on a simple numeric count of applying states with no terms or conditions." (See *infra*, note 276 Rule 15.2 required the government to state whether the plaintiff was correct in his statements. It required the government to contradict them if they were not correct as to fact and law. The government did not refute the statements as being incorrect as to fact or law. Therefore, the government believed the statements were correct as to fact and law. As the government did not believe any terms or conditions (such as "same subject matter") attached to a convention call, they agreed a convention call contained "no terms or conditions" except for the two-thirds requirement of Article V. For a complete discussion of the lawsuit, See <http://www.foavc.org/file.php/1/Articles/FAQ.htm#Q9.1>.

The record is irrefutable. While many in and out of the legal profession have proposed "same subject" as the basis of a convention call in legal articles or other publications, none have ever officially proved it as a matter of public record. In short, no such advocate has ever taken the issue either to Congress or more importantly, the courts and proved their assertion. None have received a verdict or decision from the courts affirming their opinion. The courts have repeatedly ruled Article V is without interpretation, addition or interpolation. Neither the government nor the courts have ever supported that "same subject" is basis of a convention call by Congress. The basis of the premise of a "same subject" convention call is the Constitution requires two-thirds states submit applications addressing the same amendment issue as a condition for such a convention call. As the courts have had many cases before them in which they could make this interpretation, it is significant they have not.

²⁴⁹ See *supra*, note 20.

²⁵⁰ This fact means when Professor Natelson concedes "In this instance, the Constitution is the governing law. The Constitution assigns to the convention, not the states, the task of "proposing" amendments. This implies that the convention has discretion over drafting. If two-thirds of the states could dictate the precise language of an amendment, there would be no need for a convention. Additionally, a power to "propose" an amendment implies a power *not* to propose if the convention, upon deliberation, decides that the subject matter of the state applications requires no action." By conceding the states cannot dictate "the precise language of an amendment" and that a convention has "a power *not* to propose" Professor Natelson automatically concedes the states are equally prevented from regulating Congress. (See Report, p. 24).

sumed would voice the will of the people.”²⁵¹ Moreover, the courts have ruled “the function of a state Legislature in ratifying a proposed amendment to the federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the federal Constitution; and it transcends any limitations sought to be imposed by the people of a state.”²⁵² Under the principle of equal protection, if a portion of members in a legal class in this case, Congress, suffers election, the rest of class, in this case, convention delegates, suffer election. The courts have ruled no single state may impose “limitations” on the amendment process. Such amendment process clearly includes the citizens who will actually participate in that process, i.e., the members of Congress and convention delegates and later members of state legislatures and/or state ratification delegates. These groups share a common trait: election to office, which in turn permits participation in the amendment process. Based on court rulings of equal protection and prohibition against any one state “limiting” the convention process, it is reasonable to postulate a reasonable conclusion as to election. As federal election laws apply equally to election of members of Congress, they must equally apply to convention delegates. Moreover, as the Constitution permits the states to impose state laws regarding election of members of Congress, these laws equally apply to delegate election.²⁵³ In sum, whether state or federal, those election laws that elect members of Congress also elect convention delegates. Equality mandates both members of Congress and delegates are subject to criminal and oath of office laws. Both must satisfy terms of office set in the Constitution, which are age, citizenship and residency. As there are two sets of terms, one house, one senate, equal protection de-

²⁵¹ *Hawke v. Smith*, 253 U.S. 221, 226-227 (1920).

²⁵² *Leser v. Garnett*, 258 U.S. 130, 137 (1922). Obviously, the professor did not consider Garnett when making his assertion as clearly the ruling contradicts him. If the people of a state, the sovereign source of authority of that state, are denied the right to undertake an act, in this case impose “limitations” on the amendment process, then obviously that state’s (or states’) legislature[s] cannot act. The legislature can possess no more authority than the sovereign people granting such authority. If the people lack such authority, the legislature cannot assume it. Thus, if the Constitution denies the people the right to act in a specific manner, unless otherwise expressed, it also denies the legislature the same right to act. The Leser Doctrine not only applies to elections, i.e., each state determining individually the manner of selection of delegates (which may be by appointment or other means) as opposed to a nationwide standard of election as exists for Congress. The doctrine also defeats Professor Natelson’s major theme and premise of principal/agent control of a convention agenda. Unquestionably, Professor Natelson’s goal is to provide “limitations” on the convention vis-à-vis state “instructions” contained within the applications for an Article V Convention call. Leser makes it clear the people of any individual state do not possess such authority to place any “limitations” on the amendment process. Hence, neither can their state legislatures.

²⁵³ “The Times, Places and Manner of hold Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as the Places of choosing Senators.” U.S. Const. art. I, § 4, cl. 1.

mands the least standard, the house, for delegates to satisfy.²⁵⁴ Moreover, Article V mandates there be “A” convention for proposing amendments, rather than conventions. Equal protection of representation in Congress mandates a delegate number equal to that of the house, 435 delegates, elected within already established congressional districts.

Thus, by use of already long settled laws and decisions, rather throwing a convention into complete contradiction and confusion by the possibility of fifty different sets of laws being applied to convention delegate selection, answers to most fundamental questions regarding a convention can easily be answered and resolved. There is no reason to resort contrived law or Gerry-rigged solutions. The Founders’ clear words and an objective eye toward solving the problems is all that is required to do so.

The Exclusive Proposal Conundrum

Professor Natelson presents a major conundrum in his theory of fiduciary control effectively eliminating any validity to his theory. He asserts the states can determine what issues a convention discusses, but the convention can refuse to propose what the states set out in their applications to discuss.²⁵⁵ Thus, a convention can veto instructions contained in the applications. The principle of fiduciary law is clear. If such a relationship exists, the agent does not have the right to veto the instructions of the principal. If such a veto exists, in whatever form that may be, then by no stretch of imagination can the relationship between convention and states be described as fiduciary.

The public record is clear. Despite Professor Natelson’s assertion, the fact is no application submitted by the states fails to request a particular amendment outcome. All applications, where an amendment issued is discussed, contain language reflecting a clear presumption the convention will, in fact, write an amendment as described in the application. None of the applications contains language suggesting the states want a convention not to write the language contained within the application. Thus, the applications of the states desire a particular action, e.g., passage of a proposed amendment by the convention to repeal of federal income tax, passage of a proposed amendment by the convention for an amendment to require a balanced

²⁵⁴ “No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.” U.S. Const. art. I, § 2, cl. 2.

²⁵⁵ Professor Natelson states, “Because the Constitution grants the convention, not the states, power to “propose amendments,” the states cannot require the convention to adopt a particular amendment or dictate its language. The convention is required to stay within any state-specified subject matter, but the actual drafting is the convention’s prerogative.” See Report, p. 26.

federal budget and so forth.²⁵⁶ In sum, the states in their applications, not only request specific amendment issues be discussed at a convention, but require the convention reach a particular amendment outcome or result in proposal of such amendment issues.

Professor Natelson's admission the convention can refuse to write an amendment issue sought by the states completely refutes his fiduciary theory. Clearly, what a convention proposes as to actual amendments, its outcome, is the ultimate agenda of a convention. If the states cannot control that agenda, the states control nothing.²⁵⁷ If the states lack authority to set the agenda

²⁵⁶ See generally, <http://foavc.org/file.php/1/Amendments>.

²⁵⁷ Professor Natelson and the author agree on this point made in his Report. "[T]he obligation of an agent to submit to the principal's instructions may be altered by governing law. In this instance, the Constitution is the governing law. The Constitution assigns to the convention, and not the states, the task of 'proposing' amendments. This implies that the convention has discretion over drafting. If two-thirds of the states could dictate the precise language of an amendment, there would be no need for a convention. Additionally, a power to 'propose' an amendment implies a power *not* to propose if the convention, upon deliberation, decides that the subject matter of the state applications requires no action." See Report, p.24.

Professor Natelson brushes over the fact a convention has the power of drafting as well as the power not to propose amendments. These facts put another nail in the coffin of his Report. First, the power of drafting an amendment carries with it the obvious authority to write an amendment contrary to that expressed as to outcome in the state's applications e.g., proposing two federal income taxes when the applications in question request repeal of the single income tax found in the 16th Amendment. Professor Natelson concedes the convention has the sole authority of "drafting" amendments meaning the convention can write whatever it pleases regardless of any application language to the contrary. Of course, the states are equally free to reject any proposal in the ratification process meaning if a convention acts entirely contrary to the wishes of the states, its efforts are doomed from the start. There is, however, a great deal of difference between the states controlling a convention's agenda through subject matter regulation and using the ratification procedure to effect such regulation. In his theory, Professor Natelson concedes the agent (convention) can ignore instructions of the principal (the states). (See Report, p.24). Hence, at the most fundamental level in fiduciary law, obedience of an agent to instructions of a principal as far as the convention/state relationship is concerned vis-à-vis fiduciary law; the professor admits the relationship does not exist. Thus, as to actual action of drafting a proposed amendment, the very crux of the amendment process, Professor Natelson admits a convention can disregard the "instructions" of the states.

Second, Professor Natelson concedes the convention has the authority not to propose amendments if it so chooses. Again, this relates to the power of the supposed agent (the convention) having the authority to ignore the instructions of the supposed principal (the states) in the actual act of execution of the instructions from the principal. In this instance, the actual concerns the actual drafting of an amendment proposal. Based on Professor Natelson's own words the only possible conclusion is that even if the states instruct a convention to write a proposed amendment on a single amendment issue, the convention has the right to refuse to do so. The terms of such refusal are exclusively proprietary to the convention. Therefore, a convention has no fiduciary relationship with the states.

of a convention as to outcome, it is reasonable to presume the states lack authority to control convention discussion agenda, at least by the fiduciary method proposed by Professor Natelson.²⁵⁸

The Rescission Problem

Unlike many who discuss an Article V Convention, Professor Natelson only briefly mentions rescissions of applications by the states in his Report.²⁵⁹ His assumption of course is the states have such authority. Such assumption falls in line with his theory of state fiduciary control of a convention.²⁶⁰ Despite the efforts of some political groups²⁶¹ to have some state legislatures

While it is true fiduciary law does recognize the right of a principal to retroactively ratify the actions of an agent where such agent has exceeded or otherwise altered instructions from a principal and the principal is knowingly aware of such alteration, such principle of law cannot apply in this instance. In this instance, the fiduciary instructions in question relate to instructions given by a specific number of states, i.e., two-thirds of the states in their applications for an Article V Convention call. However, under the terms of Article V ratification by three fourths of the states is obligatory. Thus, at least 25 percent of the states involved in ratification cannot be considered principals or parties to a fiduciary relationship, as these states were not, in any fashion, original participants in the original relationship involving the original two-thirds applying states. Therefore, ratification, as described by fiduciary law, cannot apply in this matter of constitutional law as at least 25 percent of the participants never gave original instructions nor consented in any fashion or manner to be agents of the other two-thirds of the states and therefore were not principals in the first place. See *supra*, notes 12,13,230.

²⁵⁸ This does not mean state control of discussion and agenda outcome cannot occur. It simply means control as suggested by Professor Natelson is not possible. The author presents a workable, alternative solution later in this article.

²⁵⁹ "If the state legislatures believes its application to be stale, that legislature may rescind it." See Report, p.21 [Footnote omitted].

²⁶⁰ One of the tenants of fiduciary law holds a principal may alter or even rescind his instructions to his agent. These new instructions create a new principal/agent relationship which, assuming the agent consents, he is duly bound to obey. This author has already shown no fiduciary relationship exists or was to exist vis-à-vis the states and the convention delegates or its agenda. The problem with attempting to use fiduciary law regarding rescissions is two-fold. First, the lack of response by Congress in recognizing these rescissions and thus removing the applications from the official record where they reside shows clearly Congress does not consent to the instructions given by the states and therefore rejects any principal/agent relationship those instructions might create. This fact alone indicates Professor Natelson's faith in fiduciary law is misplaced. Second, the Constitution does not permit so-called rescissions. As admitted by Professor Natelson in his Report (See Report, p.24) "...the obligation of an agent to submit to the principal's instructions may be altered by governing law. In this instance, the Constitution is the governing law." The Supreme Court has clearly interpreted Article V as containing no implication or rules of construction. This specifically means that unless expressly stated, Article V has no other instructions. Thus, the "governing law" alters any "rescission" instructions by nullifying them therefore making such instructions unconstitutional. See *infra*, note 264.

“rescind” their applications, public record shows Congress has never acted on a single so-called rescission.²⁶² As with state applications, Congress has ignored these so-called rescissions. Moreover, no rescission proponent has ever produced a single court ruling supporting their view that states have the right to rescind their applications once submitted to Congress.

Professor Natelson concedes the Constitution controls the acts of a principal.²⁶³ Article V expressly limits states to submission of “applications.” In *Hawke v Smith* and *United States v Sprague*, the Supreme Court stated the words of Article V were “plain” in meaning and required “no rules of construction.”²⁶⁴ Further, the court added in *Hawke*, “It is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed.” Without rules of construction, interpolation or addition there are no implied powers as the court denies the means of establishing such powers. Therefore, unless Article V expresses a power, authority or acts it is not part of Article V. Hence, it is unconstitutional. Article V does not grant the states authority to submit rescissions of applications for a convention call. Article V only expressly grants the states authority to submit applications for a convention call. Article V does not grant Congress authority or power to rescind applications. Article V, in relation to a

²⁶¹ In fact, a single political extremist group, the John Birch Society, is behind the so-called rescission movement. As demonstrated on the FOAVC website (www.foavc.org), the JBS has used nothing but lies to convince state legislatures of the “dangers” of an Article V Convention. The scope of the lies range from providing false information as to the statements of public officials on the subject of an Article V Convention to outright lying concerning the number of applications submitted by the states. (JBS always states there are 32 applications for a convention when, in fact, there are literally hundreds submitted by the state legislatures). In all of this Congress has been a willing participant by refusing to tabulate the applications of the states in a single public document so that it, Congress, could call a convention under the terms of Article V. In short, Congress has used the political cover of JBS lies to avoid its mandated constitutional responsibility to call a convention.

²⁶² As Congress had adamantly refused to obey the Constitution and call a convention or even bothered to tabulate the applications and, as a collective body, as well as individuals, joined against the lawsuits brought by this author this is significant. Obviously, such rescissions would give Congress a political “out” if it wished to take it. However, as the author will shortly explain, even Congress has a rudimentary respect for the Constitution and therefore understands rescissions are entirely unconstitutional.

²⁶³ See Report, p. 24.

²⁶⁴ “The language of the article is plain, and admits of no doubt in its interpretation.” *Hawke v Smith*, 253 U.S. 221, 227 (1920); “The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention is clear there is no room for construction and no excuse for interpolation or addition.” [Footnotes in text omitted]; “The United states asserts that article 5 is clear in statement and in meaning, contains no ambiguity, and calls for no resort to rules of construction. A mere reading demonstrates that this is true. ... The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention is clear there is no room for construction and no excuse for interpolation or addition. [Footnotes in text omitted].” *United States v Sprague*, 282 U.S. 716, 730,731 (1931). See *supra*, notes 26,37, *infra*, note 286.

convention call, only expressly mandates Congress must call a convention. Article V does not describe or recognize application rescissions; as such they are unconstitutional.²⁶⁵

²⁶⁵ Both Webster's and Black's Law Dictionaries expressly define the word "rescission" as an action associated specifically with contract law. The two sources do not even have a second definition related to constitutional law, or the authority of states to withdraw Article V Convention applications. Thus, so-called "rescissions" are so invalid, there is not even a dictionary definition for them. One reference defines rescission as "an act of rescinding, annulling, or vacating or of canceling or abrogating (as by restoring to another party to a contract or transaction what one has received from him)" Webster's Dictionary 1930.

"Rescission" is defined as "Rescission of contract. To abrogate, annul, avoid, or cancel a contract; particularly, nullifying a contract by the act of a party. The right of rescission is the right to cancel (rescind) a contract upon the occurrence of certain kinds of default by the other contracting party. To declare a contract void in its inception and to put an end to it as though it never were. *Russell v. Stephens*, 191 Wash. 314, 71 P.2d 30, 31. A "Rescission" amounts to the unmaking of a contract, or an undoing of it from the beginning, and not merely a termination, and it may be effected by mutual agreement of parties, or by one of the parties declaring rescission of contract without consent of other if a legally sufficient ground therefore exists, or by applying to courts for a decree of rescission. *Abdallah, Inc. v Martin*, 242 Minn. 416, 65 N.W.2d 641, 644. It necessarily involves a repudiation of the contract and a refusal of the moving party to be further bound by it. Nonetheless, not every default in a contract will rise to a right of rescission. An action of an equitable nature in which a party seeks to be relieved of his obligations under a contract on the grounds of mutual mistake, fraud, impossibility, etc." Black's Law Dictionary 1306-1307 [Emphasis added].

A contract is defined as, "An agreement between two or more persons which creates an obligation to do or not to do a particular thing. As defined in Restatement, Second, Contracts § 3: "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." A legal relationship consisting of the rights and duties of the contracting parties; a promise or set of promises constituting an agreement between the parties that gives each a legal duty to the other and also the right to seek a remedy for the breach of those duties. Its essentials are competent parties, subject matter, a legal consideration, mutuality of agreement, and mutuality of obligation. *Lamoureux v. Burrillville Racing Ass'n*, 91 R.I. 94, 161 A.2d 213, 215." Black's Law Dictionary 322-325.

A convention call application by a state is not a contract. (*See supra*, note 14). It is a constitutional obligation. While such obligation may have analogous description in terms of contractual or fiduciary law, it is not identical. The Constitution is supreme law of the land. Hence, any instruction contained within it, supreme law. It is a unique law which may be patterned after lower levels of law but which has within it unique characteristics, form and effect. As it is supreme law, it effects the principles of what can be termed lower law. The lower law cannot prevail over the supreme law. Only those principles within the supreme law can limit the supreme law. To have otherwise would render the supreme law subservient rather than supreme law. This supreme law contains within it a multitude of instructions as what the government can and cannot do. One of these instructions has to do with the submission of applications by the states for a convention call by Congress.

(Footnote Continued Next Page)

Few rescission advocates comprehend the constitutional implications of this so-called authority. If such constitutional authority did exist, it would have to reside with Congress, not the states with Congress agreeing or disagreeing whether to rescind an application. If Congress did

This instruction is expressly limited by the terms of the Constitution within Article V. (*See supra*, notes 145,263 *infra*, note 334). The expressed limits are for the performance of a single action by the agent, Congress, in service for the principals, the states. The single action, of course, is for Congress to call an Article V Convention. After Congress has satisfied this obligation, its fiduciary obligation terminates until the states resubmit new applications. As Congress has no other fiduciary obligation expressed in Article V and as there are no implied powers in Article V, (*See generally* *Hawke v Smith et al.*, this article) Congress is not obligated to rescind any application. Indeed, it has no authority to do so. To suggest it may act without constitutional authority is to suggest Congress is supreme to the Constitution or that the states are. This can never be. The fact a principal in a fiduciary relationship may change or alter his instructions to his agent, in this instance, is irrelevant as the Constitution is supreme law. The supreme law does not recognize recessions. How could it exist when neither dictionary, general or legal, even defines the word with such authority? The Constitution, as admitted by Professor Natelson, alters the usual options of the principal, in this case, the states, to a single, expressed relationship such that the agent, in this case, Congress, is bound only to obey a set of instructions causing it to take a specified action. The principals, once they have issued such instructions, have no authority to withdraw them. The reason is obvious. The states also are agents to the Constitution and have, by oath, agreed to be bound to the terms and conditions of the Constitution, which in this instance means being bound expressly to an amendment process that does not allow them authority to rescind applications once submitted.

The Founders feared a group of states might use a convention against other states if a fiduciary relationship existed in the Constitution. This explains why they twice rejected such a relationship in Article V. (*See supra*, notes 107,135-138). This same fear explains why rescissions were not included in Article V. A major reason the 1787 Federal Convention occurred was due to a single state, Rhode Island. Under the terms of the Articles of Confederation, the states had to unanimously approve all proposed alterations to the Articles. Rhode Island had vetoed all attempts by the other states to make such alterations, thus preventing them. If rescissions were valid, the purpose is clear—to serve as veto of already submitted applications; applications, according to the Constitution, Congress must obey. If two-thirds of the states desired a convention, then each state, possessing a veto power within that set of states, means any state could veto, not only the actions of the other states but Congress as well. By rescinding an application thus lowering the number of applications below the two-thirds mark before Congress acts on them, a single state would control the convention call process. Thus, the actions of a single state or, at most, a small group of states, prevent alterations to the Constitution. As the Founders feared any such veto of state power vis-à-vis constitutional amendment, and had witnessed its paralyzing effects first hand, it is obvious they did not intend to put such power in Article V.

Finally, if the principle of rescissions existed in the Constitution, or, if by court interpretation became part of the Constitution as part of the constitutional procedure (regardless of where in the Constitution such recognition occurred), the threat to the order and process of our form of government is enormous. The specter of courts altering rulings without cause, legislative members altering votes on already established law, voters altering or changing votes after elections have taken affect presents a scenario, a chaos and threat to due process of law so extreme as to require no more than example to justify total rejection. Such violation of our form of government easily explains why the Founders never intended it nor even conceived a definition for the word where such a process occurs.

not agree, the application remains unaffected and in full force. Congress must perform the actual act of rescission of the state application in question. The proof of this statement lies in a fact already noted; Congress has never officially rescinded any state application based on any state rescission request whatsoever. Thus, it has never agreed to any request by the states to rescind applications. Hence, all applications remain in full force and constitutional effect. Instead, Congress has simply recorded the rescissions then ignored them.

The Congressional Record is the official repository for all state applications for a convention calls. In various forms, it has served in this capacity since the submission of the first application in 1789.²⁶⁶ The Constitution mandates both houses of Congress maintain this federal record.²⁶⁷ Only Congress has the constitutional authority to alter this federal record. The terms of the Tenth Amendment prohibit alteration of the Congressional Record by either an individual or state or states.²⁶⁸ Therefore, unless Congress consents, states cannot affect rescissions.

Article V does not give Congress the authority to rescind applications, only to call a convention once two-thirds of the states have applied for a convention call. Given the fact of public record, that currently sufficient states have submitted sufficient number of applications to cause a convention call, Congress has “no option” as to any rescission by the states but to ignore it.²⁶⁹ Congress can take no action until that point and once reached can take no other action but to call.²⁷⁰ Thus, if Congress attempts application rescission, based on a state request, it would first have to acknowledge the existence of the application in question. More importantly, Congress would have to determine whether sufficient applications exist to cause a convention call.²⁷¹ Article V mandates Congress must call “on the application” of two-thirds of the states. The convention call is preemptory. This constitutional mandate nullifies any rescission submitted by the states. The call is constitutional. The Constitution does not recognize rescissions. Rescissions are

²⁶⁶ See *supra*, note 143.

²⁶⁷ “Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may be in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the desire of one fifth of those Present, be entered on the Journal.” U.S. Const. art. I, §4, cl. 3.

²⁶⁸ See *supra*, note 29.

²⁶⁹ See *supra*, notes 224,240.

²⁷⁰ See *supra*, note 143.

²⁷¹ “Acknowledge” is defined as: “(1) to show by word or act that one has knowledge of and agrees to (a fact or truth); concede to be real or true; (2) to show by word or act that one has knowledge of and respect for the rights, claims, authority, or status of; (3) to show by word or act that one has knowledge of and regard for (a duty, obligation, or indebtedness); (4) to recognize as genuine; assent to (as a legal instrument) so as to give validity: avow or admit in legal form (acknowledge a deed).” Webster’s Dictionary 17. [Emphasis added].

therefore unconstitutional.²⁷² In all circumstances, the constitutional trumps the unconstitutional. The purpose of Article V is to cause an amendment convention assuming the states apply in sufficient number to cause such an action. Therefore, any interpretation which defeats this purpose cannot be preferred.²⁷³

Any definition of the word “acknowledge” mandates Congress first recognize the applications, then (if it had the authority, which it does not) rescind those applications. Obviously, Congress cannot rescind an application if it cannot verify it exists in the first place. Given the sorry state of records regarding applications in the Congressional Record, that there is no single set of records to refer to, such a requirement is not only logical but also obligatory.²⁷⁴ Public record proves the states had applied in sufficient numbers to cause a convention call before any state submitted any rescission of any submitted application.²⁷⁵

As Congress is peremptorily required to call a convention, implied powers permitting Congress not to call cannot exist.²⁷⁶ Such powers grant Congress a veto over the application process, something clearly not intended by the Founders.²⁷⁷ Even Professor Natelson states Congress must call a convention if the states apply; indeed, he bases his entire Report on this premise.²⁷⁸

²⁷² As stated in Federalist 85, “the national rulers shall have no option. ... The words of this article are peremptory. The Congress “*shall call a convention.*” Nothing in this particular is left to the discretion of that body.” The Federalist No. 85, at 425 (Alexander Hamilton) (Gideon ed.,1818). [Emphasis added] (*See infra*, note 276).

²⁷³ “If we remember that ‘it is a Constitution we are expounding’, we cannot rightly prefer, of the possible meanings of its words, that which will defeat rather than effectuate the Constitutional purpose.” *United States v. Classic*, 313 U.S. 299, 316 (1941).

²⁷⁴ *See* <http://foavc.org/file.php/1/Amendments>. *See supra*, notes 143,240,256 *infra* note 286.

²⁷⁵ *Id.*

²⁷⁶ The definition of the word “peremptory” allows no powers to exist. “Imperative; final; decisive; absolute; conclusive; positive; not admitting of question, delay, reconsideration or of any alternative. Self-determined; arbitrary; not requiring any cause to be shown. *Wolfe v. State*, 147 Tex.CR.R 62 178 S.W .2d 274, 279. *Black’s Law Dictionary* 1136. *See supra*, note 223.

²⁷⁷ *See infra*, note 138.

²⁷⁸ “Copious evidence supports the conclusion that Congress may not refuse to call a convention for proposing amendments upon receiving the required number of applications.” Report, p. 20. This evidence, in the form of historic record and scholarly opinion, is nearly universal in this opinion. However, the central premise of Professor Natelson’s is entirely defeated if Congress can refuse to call a convention for proposing amendments. As rescissions permit, if not outright, instruct Congress to refuse to call a convention, their acceptance as part of the constitutional process defeats Professor Natelson’s central premise of a peremptory call on the part of Congress. Thus, either Congress must call “upon receiving the required number of applications” or Congress does not have to call “upon receiving the required number of applications” as rescissions can lower the number of applications even after Congress has received the required number. Both premises cannot be true and are therefore mutually exclusive. As the professor (as well as most of the legal and academic community) believes a convention call is obligatory, this means he, or anyone else, cannot advocate a means whereby Congress, “upon receiving the required number of applications” does not have to call a convention.

This power, being implied, can be “interpreted” by Congress as giving it authority to “rescind” applications whether or not the states even request it. The constitutional effect of rescission of applications increases Congress’ power to block the convention process. Consequently, it removes the states’ power to cause a convention call.²⁷⁹ As stated in *Marbury v Madison*, a legislature cannot act in repugnance to the Constitution.²⁸⁰ In an Article V Convention call where Congress “shall have no option” but to call, any action giving them an option not to call is repugnant to the Constitution. Therefore, Congress cannot rescind any application submitted to it by the states. Such act is “repugnant to the Constitution” and constitutionally invalid.

In *Hawke v Smith* the Supreme Court stated when state legislatures perform a function in Article V; they operate under the authority of the United States Constitution and not under the authority of their own state constitutions.²⁸¹ Thus, the federal Constitution equally regulates state legislatures and Congress. As the federal Constitution is supreme and the amendment procedure is federal, no state constitution applies in authority. Therefore, the states have no state authority whatsoever to rescind any application previously submitted to Congress. In sum, under no circumstances do the states possess the authority to rescind an application once submitted to Congress.

The Congressional “Pocket Veto” Problem

Professor Natelson presents a novel approach regarding Congress and its relationship to the states. On the one hand, the professor states correctly when the states apply, Congress must call a convention and bases this obligation on there being a fiduciary relationship between the states and Congress vis-à-vis a convention call.²⁸² However, as part of his theory he states, “In

²⁷⁹ Once understood rescission is a federal power, not a state power, this proposition is entirely logical. *See supra*, notes 266-268.

²⁸⁰ “It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act. Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable. Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature repugnant to the constitution is void.” *Marbury v Madison*, 5 U.S. 137, 180 (1803) [emphasis added].

²⁸¹ *See supra*, notes 30,83.

²⁸² *See Report*, pp. 20-21.

order to carry out its agency responsibility, Congress has no choice when counting applications toward the two-thirds needed for a convention, but to group them according to subject matter. Whenever two-thirds of the states have applied for a convention based on the same general subject matter, Congress must issue the call for a convention for proposing amendments related to that subject matter [Footnote omitted]”²⁸³

Evidence presented in this article refutes Professor Natelson’s assertion.²⁸⁴ If his interpretation were correct, the Founders would place applications in committee to “deliberate.” The Founders opposed this. As James Madison stated in Congress, “he doubted the propriety of committing, because it would seem to imply that the House had a right to deliberate upon the subject.”²⁸⁵ For Congress to “group those [state applications] according to subject matter” Congress must decide the subject matter of the applications. It then must decide which applications match vis-à-vis subject matter. This presents numerous opportunities for Congress to avoid calling a convention if it is so disposed effectively giving Congress a “pocket veto” of the amendment process. All that is required is for Congress to use this “pocket veto” is to determine the applications are not the same “general subject matter.”²⁸⁶ The Founders did not intend this op-

²⁸³ *Id.*

²⁸⁴ *See supra*, note 143.

²⁸⁵ *Id.*

²⁸⁶ Even Professor Natelson admits to the danger of giving Congress such authority saying, “Of course, this is one area where “ministerial” duties necessarily require a certain amount of discretion, since Congress may have to decide whether differently worded applications actually address the same subject. (See Report, p. 22). In an accompanying footnote, the professor wrote, “A reviewer of this paper expressed the fear that Congress, strongly motivated to avoid a convention may abuse this discretion. State legislatures apply for a convention and sharing this concern may wish to consider inserting protective devices in their applications, preferably in consultation with other states.”

The professor fails to describe what these “protective devices” are or how, as the states cannot even submit an application with any force of law, (*see supra*, notes 27-30) would go about enforcing such “devices.” The record is clear. To date, the states have submitted at least 700 applications for an Article V Convention call (*see* <http://foavc.org/file.php/1/Amendments>) none of which Congress has even bothered to catalog into a single public record. As admitted by the government, a sufficient number of applications already exist to cause a convention call by Congress. (*See supra*, note 143; *infra*, note 287). What greater “protective device” can the professor offer than the “peremptory” language of the Constitution itself? (*See supra*, note 276). Moreover, by his comment regarding “protective devices” Professor Natelson implies, in complete contradiction of public record, that the states have yet to submit a sufficient number of applications to cause a convention call. This implication presents its own danger in that, if accepted, it automatically means Congress has the authority to ignore, or veto, already submitted applications. If so, then there is nothing to say Congress cannot also ignore future applications with whatever “protective devices” are in them.

(Footnote Continued Next Page)

portunity. Colonial-era records do not support it. Modern day court decisions do not support it. Government policy does not support it.²⁸⁷

Separation of Powers Doctrine Problem

Professor Natelson fails to account for the doctrine of separation of powers in his theory. The consequences of this failure are illustrated in the following few paragraphs. The professor admits in his Report only Congress and a convention can propose amendments.²⁸⁸ This admission means he recognizes the doctrine of separation of powers contained in the Constitution and Article V. For example, only states can apply for a convention call. Only states can ratify a proposed amendment. Only Congress can write and issue a convention call.

The recognition by Professor Natelson as to the doctrine of separation of powers can only mean the professor chose to ignore that doctrine in reaching his conclusions where such doctrine interfered in the conclusions he wished to present. It is the true the states may submit any lan-

The basis of “same subject” applications as the means of determining whether Congress shall call a convention is incorrect. Acceptance of this premise presents numerous constitutional issues demonstrated in this article and requires useless contrivances (such as Professor Natelson’s “protective devices”) to function. A numeric count of applying states without terms or conditions (such as “same subject”) is the only means whereby Congress has no option in a convention call as described by Hamilton and Congress during the founding era are such dangers avoided. (See *supra*, notes 4,143,213,224). Thus, no constitutional issues exist nor is resort to contrivances required.

²⁸⁷ The United States in *United States v Sprague*, 282 U.S. 716, 730 (1931) asserted “...that article 5 is clear in statement and in meaning, contains no ambiguity, and calls for no resort to rules of construction. A mere reading demonstrates that this is true.” Recently, in *Walker v Members of Congress*, 06-244 S ct. (filed Aug. 16, 2006), the Solicitor General of the United States, acting in both official capacity and attorney of record for all members of Congress agreed under Supreme Court Rule 15.2 the plaintiff (the author) was correct as to fact and law. The plaintiff stated in his court certiorari “sufficient applications existed to cause an Article V Convention; that a convention call was preemptory upon Congress; that a convention call was based on a simple numeric count of applying states with no terms or conditions.” The rule required the government to state whether the plaintiff was correct in his statements as to fact and law and to contradict them if they were not. The government did not. As the government did not attach any terms of conditions to a convention call, such as “same general subject matter,” it is clear the government knew no such standards exist. See *supra*, note 248,276.

The public record is conclusive on this issue. While some in the academic world have proposed “same subject” as the basis of a convention call, none have ever proved it legally. Neither the government nor the courts have ever supported “same subject” as the basis of a convention call. As the courts have had many cases before them in which to do so, this point is significant.

²⁸⁸ See Report, p. 24 “The Constitution assigns to the convention, not the states, the task of “proposing” amendments. This implies that the convention has discretion over drafting. [Footnote omitted]. If two-thirds of the states could dictate the precise language of an amendment, there would be no need for a convention.”

guage in their applications for a convention call.²⁸⁹ However, as noted, only Congress can write and issue a convention call. Recognition of the principle of separation of powers leads to an inevitable conclusion. While the states may submit whatever “instructions” they wish in an application, such “instructions” must be ratified by Congress in the form of placing such instructions in the actual convention call.²⁹⁰ Like the convention, which is free to propose any amendment it wishes, Congress is also free to compose the convention call with whatever content it wishes.²⁹¹ Therefore, if so disposed, Congress can ignore all “instructions” contained in the applications from the states.

Professor Natelson fails to explain, how, according to his theory; Congress cannot take advantage of this “loophole” created by his theory and assume dictatorial control of the convention by becoming sole principal in the fiduciary relationship vis-à-vis a convention call. Because

²⁸⁹ Naturally, at the minimum, the application must contain language which clearly indicates its purpose and function. This means the application must clearly identify it is an application to cause Congress to call an Article V Convention. Beyond this minimum however, the state is free to place any language it wishes in its application.

²⁹⁰ This entire issue, of course, relates to Professor Natelson’s theory. It has no bearing whatsoever regarding a convention call under the terms acknowledged by the government and set forth by the Founders. *See supra*, note 248. As the basis of a convention call is a “simple numeric count of applying states with no terms or conditions” there are no “instructions” contained within an application for Congress to consider. Congress simply counts the number of states that have submitted applications for a convention call and by simple arithmetic arrives at whether a sufficient number of states have applied. There is nothing for Congress to ratify as, regardless of any other content in an application such language is dictum and therefore has no constitutional effect. Hence, there is no decision as described regarding the content of a convention call as the only relevant authority Congress has is to set the time and place for the convention to occur. *See supra*, note 62.

²⁹¹ Professor Natelson acknowledges the convention’s right of proposal. (*See* p. 24). “The Constitution assigns to the convention, not the states, the task of “proposing” amendments. This implies that the convention has discretion over drafting. ... Additionally, a power to “propose” an amendment implies a power *not* to propose if the convention, upon deliberation, decides that the subject matter of the state applications requires no action.” In sum, Professor Natelson recognizes the convention (and Congress) have the right of composition of text inherent in the right of amendment proposal.

Thus, Professor Natelson recognizes the separation of power doctrine assigns to the designated political body not only the duty to carry out the powers described in the Constitution but the means to do so. In this case, the Constitution expressly and exclusively assigns Congress the duty and right of composition of text a convention call.

However, a convention “call” is very limited. The right to “call” a convention does not include the right of regulation. As with the rest of Article V, there are no implied powers. Thus the “call” cannot be construed beyond its narrowest intent and meaning. Black’s Dictionary demonstrates the narrow intent of a call, “A request or command to come or assemble.” The narrowest meaning of a “call” therefore is to establish a time and place for a convention to take place. This act accomplishes the obvious intent of Article V—to cause the convention to occur by establishing when and where such an event will occur.

of his accepting the principle of separation of powers, as noted, Congress could shut the states out entirely from the amendment process if it chooses.²⁹² Unquestionably, Congress must call when the states apply. If, however, Professor Natelson accepts Article V designates specific constitutional tasks to specific political bodies, he then has no choice but to accept Congress completely controls the writing of a convention call. As such, Congress is under no obligation to heed any language (other than the actual act of application for a convention call) contained within any state application.

As Congress has sole propriety of authorship, Professor Natelson fails to explain how, under his theory; it is Congress, not the states, that is sole principal in a fiduciary relationship with a convention. Congress has the sole authority to issue a convention call together with whatever “instructions” it wishes to include in that convention call. Thus, under Professor Natelson’s fiduciary theory, Congress moves from miniscule participant in the constitutional amendment proposal process of Article V envisioned by the Founders to dominate fiduciary principal. This change removes the states entirely from the amendment equation. It results in Congress controlling both amendment proposal processes, something clearly not intended by the Founders.

The answer to the argument lies in the carefully crafted words of Article V. Despite the assertions of Professor Natelson, the historic record proves the Founders did not intend any fiduciary relationship except the sole expressed relationship mandating Congress must call a convention if the proper number of states applies. The reason for this rejection, beyond that given by the historic record that a group of states might act against other states, is that such relationship also permits Congress to act in a similar manner. This the Founders also feared.²⁹³ For this reason, there is no such relationship in Article V. Thus, the ability to Congress to take advantage of such relationship simply does not exist.

Article V expressly permits Congress to propose amendments only by consent of two-thirds of both houses of Congress. Article V denies Congress any other means of amendment proposal. Thus, only by this expressed means may Congress propose an amendment to the Constitution. Article V does not express Congress may use a convention call to propose amendments. Such action occurs if Congress can issue a call containing “instructions” intended to regulate a convention’s agenda. By instructing what amendments a convention may propose and limiting a convention to discussion only of those specific issues, Congress exclusively controls a conven-

²⁹² As Congress has unconstitutionally refused to call the convention despite the fact the states have submitted a sufficient number of applications to cause it to do so, shutting out the states entirely from the amendment process is, in fact, not a theory but a political as well as a constitutional fact.

²⁹³ See *supra*, notes 107-114.

tion.²⁹⁴ This exclusive control means the convention becomes an amendment surrogate to Congress rather than a constitutional equal. Clearly, this is unconstitutional.²⁹⁵

Thus, Congress using a convention call as a fiduciary instrument to dictate convention agenda is as unconstitutional as the states attempting the same purpose through their applications. Neither is it permitted by the expressed language of Article V. This is why the courts have ruled, as intended by the Founders; there are “no rules of construction” and no implied powers.

An application is simply a petition to cause Congress to call a convention. It is not an amendment proposal. A “call” is merely an instrument whereby Congress acts to notify the states that a sufficient number of them have applied such that a convention must be convened under the terms of Article V.²⁹⁶ It is not an instrument intended to grant Congress control of the entire

²⁹⁴ “Exclusive agency” is defined as “Grant to agent of exclusive right to sell within a particular market or area. A contract to give an “exclusive agency” to deal with property is ordinarily interpreted as not precluding competition by the principal generally, but only as precluding him from appointing another agent to accomplish the result. The grant of an “exclusive agency to sell,” that is, the exclusive right to sell the products of a wholesaler in a specified territory, ordinarily is interpreted as precluding competition in any form within designated area. *Navy Gas & Supply Co. v. Schoech*, 105 Colo. 374, 98 P.2d 860, 861.” *Black’s Law Dictionary* 564.

Put in terms used by Professor Natelson, the convention becomes the exclusive agent of Congress. The principle of exclusive agency is clearly defined. Ordinarily the term only relates to commercial law. However, for the purposes of illustration, the term is perfectly applicable vis-à-vis Professor Natelson’s theory. By this fiduciary theory, the principal precludes any “competition” in any form within a “designated area.” In this instance the “designated area” is the authority to propose amendments. The “competition” is the states and the people, which, the principle of exclusive agency, exclude from the amendment process.

The principles expressed in the definition fit perfectly with Professor Natelson’s theory of fiduciary control of the amendment process but, as the Founders realized, create constitutional disaster. As Mason feared, such power would allow only Congress, acting either on its own or through its constitutional surrogate, to completely control the Constitution. *See supra*, note 138.

²⁹⁵ A few examples drive the point home as to why such acts are unconstitutional. The president may not issue an executive order instructing a federal judge how he shall rule in a court case. A judge cannot order Congress to pass a piece of legislation the judge has written. The Congress cannot instruct the president that he shall not veto proposed legislation (The Constitution does permit Congress to overturn the decision afterwards. Nevertheless Congress cannot instruct the president prior to his decision as to the outcome of that decision). This prohibition against various political bodies assuming the duties and powers of other political bodies within the Constitution lies at the heart of the separation of powers doctrine. Nullification of this doctrine is not possible for what should be obvious reasons.

²⁹⁶ *See supra*, note 291 (definition of word “call”).

amendatory proposal process. In sum, Professor Natelson's failure to address issues raised regarding the separation of powers doctrine causes serious doubts in his Report's validity.

The Misconstrued Ratification Procedure

Professor Natelson next attempts to extend his fiduciary theory to the ratification process of Article V.²⁹⁷ His misinterpretation of the ratification process of Article V is, to say the least, unique. It completely misconstrues the plain language and intent of Article V. Well settled law, historic record, and other similar resources refute his several assertions.

The Recommendation Misconstruement Problem

The professor begins his interpretation in his Report with a correct statement recognizing it is "Congress, not the state legislatures, [that] will decide on whether ratification is by state legislatures or by state conventions."²⁹⁸ Basing his presumptions on earlier assumptions made in his report (already disproved in this article) that a convention is an agent bound to the instructions of the states contained in their Article V applications, Professor Natelson states such agent is "free to make recommendations in addition to its formal proposals. Those recommendations may be taken up by Congress or by the state legislatures at a different time. Congress should not designate a ratification process for, nor transmit to the states, any recommended amendments outside the convention's call."²⁹⁹

²⁹⁷ See generally, Report, pp. 24-25.

²⁹⁸ See Report, p. 24.

²⁹⁹ Professor Natelson's use of the word "recommendation" describing the constitutional action of a convention proposing amendment is entirely self-serving. While, for the purposes of illustration, comparison of a convention to a committee making a "recommendation" to a board of directors within a company may be used, such allegory is by no means viable. The illustration serves only to demonstrate the principle of proposal/ ratification embodied within Article V. The illustration thus recognizes the two-step amendatory process of the Constitution. However, there the illustration must end. A company committee is entirely subservient to the board of directors who can entirely control the committee in all respects. No such similar conditions exist for a convention. While the process between business committee and convention, board of directors and states may be similar in principle, the laws and principles under which each operate is distinctly different. Thus, the professor's use of the word "recommendation" and his subsequent dependence on it to justify other assumptions is incorrect. The word does not properly reflect the constitutional intent expressed in Article V. See Report, p. 25.

Professor Natelson entirely misreads Article V as to the function and purpose of an Article V Convention. By the expressed terms of Article V, a convention is limited solely and exclusively to the proposal of amendments to the Constitution. It has no other constitutional duty or function. Therefore, it is not empowered to make “recommendations” of any kind whatsoever.³⁰⁰

The “necessary and proper” clause of Article I grants Congress latitude to execute the “foregoing” legislative powers of Article I. No such similar clause exists in Article V. The courts have stated repeatedly the amendment process is a “substantive act, unconnected with the ordinary business of legislation.”³⁰¹ Therefore, as the “necessary and proper” clause constitutionally deals “with the ordinary business of legislation,” it is clear the authority of Article I does not extend to Article V.³⁰² Under the “necessary and proper” clause, Congress does possess the constitutional power to make recommendations or resolutions regarding issues of legislation. Article V contains no “necessary and proper” clause for Congress, a convention or the states.

³⁰⁰ See *United States v Sprague*, 282 U.S. 716, 731 (1931), “Thus, however, clear the phraseology of article 5, they [appellees] urge we ought to insert into it a limitation on the discretion conferred on the Congress, so that it will read ““as the one or the other mode of ratification may be proposed by the Congress, as may be appropriate in view of the purpose of the proposed amendment.”” This cannot be done.”

³⁰¹ *Hollingsworth v Virginia*, 3 U.S. 378, 381 (1798); “[R]atification by a state of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the state to a proposed amendment.” *Hawke v Smith*, 253 U.S. 221, 229 (1920). There is little doubt but that the “necessary and proper” clause refers to either actions Congress may take in regards to powers specified in Article 1 of the Constitution or to similar expressed language found in different amendments to the Constitution. See *supra*, note 19; See *generally* Amendments to the Constitution, XIII, XIV, XV, XVIII, XIX, XXIII, XXIV, XXVI, “The Congress shall have power to enforce this article by appropriate legislation” or similar words. The principle is clear. Unless so specified, Congress has no “leeway” in regards to the amendment process, as there is no such language in Article V.

³⁰² If there is any doubt as to the assertion of the author, the terms of the clause itself make it irrefutable. “To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” U.S. Const. art I §9, cl. 18.[Emphasis added].

Often overlooked by those advocating unlimited legislative access to all parts of the Constitution, is the word “foregoing” in the necessary and proper clause. This word clearly indicates such power is limited to anything expressed (or implied) in the Constitution before the clause itself. The Constitution then allows anything “vested” by the Constitution (anything in the Constitution follow the necessary and proper clause) to suffer congressional legislation. However, Congress, in proposing amendments to the Constitution, by its own actions, has made it clear any further legislative power “vested” in Congress, must be expressed rather than implied in the text of such amendments. Article V contains no such expressed expression of vesting Congress with such legislative powers. Therefore, under the terms of the original necessary and proper clause written by the 1787 Federal Convention Congress is prohibited from legislatively interfering in the amendatory process as such interference is not authorized by the necessary and proper clause nor designated in any of the powers itemized in Article I, § 8. Nor does any other portion of the Constitution express such authority or power. See *supra*, note 301.

Therefore neither a convention nor Congress can “recommend” amendments “that Congress or ... the state legislature [can take up] at a different time.”

A convention proposes an amendment or it does not propose an amendment. It is not a “recommendation” allowing Congress (or the states) the ability to ignore the question of ratification placed before them by the creation of the proposed amendment by simply “tabling” the matter for future consideration.³⁰³ Under the terms of Article V, any proposed amendments advanced by a convention must go before the states for ratification consideration. There is no option in this in Article V. Therefore, Professor Natelson’s assertion proposed amendments from a convention are “recommendations” which can be deferred is totally without merit.

The Deferral Misconstruement Problem

Professor Natelson states “Congress should not designate a ratification process for, nor transmit to the states, any recommended amendments outside the convention’s call.”³⁰⁴ By this assertion, the professor seeks to grant Congress a second pocket veto power vis-à-vis a convention and its functions.³⁰⁵

Professor Natelson’s theory of congressional refusal vis-à-vis submission of proposed amendments unconstitutionally ignores the direct language of Article V in two ways. First, the professor in his Report suggests Congress possesses a “pocket veto” of proposed amendments by a convention. Such a veto is permitted to the President under Article I § 7, Clause 2 of the Constitution.³⁰⁶ However, Article V does not grant such authority to Congress. Thus, a “pocket veto” such as Professor Natelson describes is clearly unconstitutional.

Second, Professor Natelson advocates Congress have ratification powers in regards to amendment proposals. By advocating Congress is authorized to refuse to send a proposed amendment

³⁰³ “Ratification might have been left to a vote of the people, or to some authority of government other than that selected. The language of the article is plain, and admits of no doubt in its interpretation. It is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed.” *Hawke v Smith*, 253 U.S. 221, 227 (1920).

³⁰⁴ *See Report*, p. 25.

³⁰⁵ *See supra*, notes 282-287.

³⁰⁶ The pertinent portion of the clause reads, “If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return in which Case it shall not be a Law.”

to the states for ratification Professor Natelson grants to Congress sole ratification authority over the proposed amendment vis-à-vis its single act of denial. Thus, completely without constitutional support and in contradiction of court rulings, Professor Natelson invests Congress with the authority on its own to decide whether a proposed amendment is ratified by the simple act of denying the states the opportunity to do so.³⁰⁷ Thus, the congressional action becomes a sin-

³⁰⁷ Article V does not contain any language supporting Professor Natelson's theory of congressional ratification veto. As far as can be determined, there is no historic record supporting his theory. Professor Natelson fails to account for Supreme Court decisions in direct contradiction of his conclusion. In short, he fails to present best evidence supporting his theory. Consequently, it is incumbent on Professor Natelson in his Report to explain, and if possible, resolve these contradictions. As he does not even mention contradictory court rulings in his Report, he has failed to do this.

"The fifth article is a grant of authority by the people to Congress. The determination of the method of ratification is the exercise of a national power specifically granted by the Constitution; that power is conferred upon Congress, and is limited to two methods, by action of the Legislatures of three-fourths of the states, or conventions in a like number of states. [Citation omitted]. The framers of the Constitution might have adopted a different method. Ratification might have been left to a vote of the people, or to some authority of government other than that selected. The language of the article is plain, and admits of no doubt in its interpretation. It is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed. Hawke v Smith, 253 U.S. 221, 226,227 (1920) [Emphasis added].

"The United States asserts that article 5 is clear in statement and in meaning, contains no ambiguity, and calls for no resort to rules of construction. A mere reading demonstrates that this is true. It provides two methods for proposing amendments. Congress may propose them by a vote of two-thirds of both houses; or, on the application of the legislatures of two-thirds of the States, must call a convention to propose them. Amendments proposed in either way become a part of the 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 choice, therefore, of the mode of ratification, lies in the sole discretion of Congress. ... Thus, however, clear the phraseology of article 5, they [Appellees] urge we ought to insert into it a limitation on the discretion conferred on the Congress, so that it will read, 'as the one or the other mode of ratification may be proposed by the Congress, as may be appropriate in view of the purpose of the proposed amendment. This can not be done. ... The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention is clear there is no room for construction and no excuse for interpolation or addition. [Citations omitted]. ... If the framers of the instrument had any thought that amendments differing purpose should be ratified in different ways, nothing would have been simpler that so to phrase article 5 as to exclude implication or speculation. The fact that an instrument drawn with such meticulous care and by men who so well understood how to make language fit their thought does not contain any such limiting phrase affecting the exercise of discretion by the Congress in choosing one or the other alternative mode of ratification is persuasive evidence that no qualification was intended. ... Unless and until that Article [5] is changed by amendment, Congress must function as the delegated agent of the people in the choice of the method of ratification." United States v Sprague, 282 U.S. 716, 731, 732 (1931) [Emphasis added].

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gle dictatorial “ratification” of a proposed amendment. This is unquestionably unconstitutional. Most certainly, colonial-era (or any era for that matter) documents do not support it. The Founders, at the 1787 Federal Convention, never even discussed Congress possessing both proposal and ratification authority.

Article V limits Congress to choosing one of two modes of ratification of a proposed amendment—state legislatures or state ratification conventions.³⁰⁸ The Constitution does not grant Congress a third choice—veto. Professor Natelson’s amendment deferral assumption depends on his presumption of principal/agent control of convention agenda. This article has conclusively disproved his theory and therefore his assumption. There is no principal/agent control of a convention agenda.³⁰⁹ Congress cannot control the agenda through its call.³¹⁰ Therefore, Congress cannot refuse to send a proposed amendment “outside [a] convention’s call” if the convention chooses to do so.³¹¹

The conclusion of the court is obvious. The rulings direct contradict Professor Natelson. Article V instructs Congress to choose one of two modes of ratification: by state legislatures or state conventions. It does not permit Congress a veto over this choice or grant authority to refuse to submit a proposed amendment from a convention. A convention is empowered strictly to “propose amendments” not make “recommendations.” Congress has exclusive authority as to choice of mode of ratification employed by the states regarding consideration of any proposed amendment. However, this choice is limited exclusively and solely to one of two methods of ratification and does not include any third alternative, such as refusing to send a proposed amendment to the states for ratification consideration. In short, contrary to what Professor Natelson asserts, Congress does not have the right to withhold a proposed amendment sent by a convention for any reason whatsoever including proposing an amendment not covered in any so-called instructions submitted by the states. In sum, the states cannot dictate what Congress may propose in an amendment, only dispose of it via ratification vote as they see fit. This identical constitutional principle applies to the convention and its amendment proposals.

³⁰⁸ “The proposed change can only become effective by the ratification of the Legislatures of three-fourths of the states, or by conventions in a like number of states. The method of ratification is left to the choice of Congress.” *Hawke v Smith*, 253 U.S. 221, 226 (1920). “The fact that an instrument drawn with such meticulous care and by men who so well understood how to make language fit their thought does not contain any such limiting phrase affecting the exercise of discretion by the Congress in choosing one or the other alternative mode of ratification is persuasive evidence that no qualification was intended.” *United States v Sprague*, 282 U.S. 716 732 (1931). [Emphasis added].

³⁰⁹ *See supra*, notes 107-123.

³¹⁰ *See supra*, notes 135-139; 286-296.

³¹¹ As a convention call is based on a “simple numeric count of applying states” it clear nothing proposed by a convention can be considered to be “outside” a convention’s call as the only conditions “within” the call is the meeting time and location of the convention and the fact two-thirds of the states have applied for a convention call. Such information would have no bearing on any amendment proposed by the convention. *See supra*, notes 62,143,248,287,290.

The Ultra Vires Misconstruement Problem

In his Report, Professor Natelson attempts to patch a principle of corporate law onto constitutional law. In referring to a convention proposing an amendment “outside” a convention call, he asserts “because the amendment was never properly “proposed” in the constitutional sense of the term used in Article V, because doing so was outside the convention call, as limited by the applications of the two-thirds of the states applying. It was merely an *ultra vires* recommendation, with no legal force offered for consideration at another day.”³¹²

Professor Natelson’s assertion a proposed amendment from an Article V Convention can be an “ultra vires recommendation with no legal force” is an oxymoron.³¹³ The Constitution does not recognize the principle of “ultra vires.” It is impossible for the Constitution to recognize such a principle. The courts have repeatedly ruled on the intent and meaning of the Constitution’s “supremacy clause.”³¹⁴ The Supreme Court held the Constitution was “made for the whole people ... and equally binding upon all the courts and all citizens.”³¹⁵ The court also ruled, “The

³¹² See Report, p. 25.

³¹³ Professor Natelson attempts to use a legal term clearly confined to corporation, rather than constitutional law. “Ultra vires” is defined as “An act performed without any authority to act on subject. *Haslund v City of Seattle*, 86 Wash.2d 607, 547 P.2d 1221, 1230. Acts beyond the scope of the powers of corporation, as defined by its charter or laws of state of incorporation. *State ex rel. v Holston Trust Co.*, 168 Tenn. 546, 79 S.W.2d 1012, 1016. The term has a broad application and includes not only acts prohibited by the charter, but acts which are in excess of powers granted and not prohibited, and generally applied either when a corporation has no power whatever to do an act, or when the corporation has the power but exercises it irregularly. *People ex rel. Barrett v. Bank of Peoria*, 295 Ill.App. 543, 15 N.E.2d 333, 335. Act is ultra vires when corporation is without authority to perform it under any circumstances or for any purpose. By doctrine of ultra vires a contract made by a corporation beyond the scope of its corporate powers is unlawful. *Community Federal Sav. & Loan Ass’n of Independence, Mo. v Fields*, C.C.A. Mo., 128 F.2d 705, 708.” *Black’s Law Dictionary* 1522.

As *ultra vires* deals with corporate, not constitutional law, the term has no place in discussion of an Article V Convention. By no stretch of the imagination are the terms convention and corporation synonymous or interchangeable. The convention derives its authority from the Constitution. A corporation is a legal creature created usually by state law. An Article V Convention is created expressly and exclusively by the Constitution. It has a single authorized function: proposal of amendments. Assuming it does not exceed its expressed authority, under no circumstances are actions “ultra vires.” The Constitution clearly grants the convention express authority to propose amendments. If it does so, it is always acting within that authority. Hence, the Constitution authorizes all proposed amendments. Thus, there can be no such thing as an *ultra vires* amendment proposal.

³¹⁴ “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every States shall be bound thereby, an Thing in the Constitution or Laws of any state to the Contrary notwithstanding.” U.S. Const. art. VI, § 2.

³¹⁵ *Farmers’ & Mechanics’ Bank of Pa. v. Smith*, 19 U.S. 131, 134 (1821).

United States Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts, and the people anything in the Constitution or laws of any state to the contrary notwithstanding.”³¹⁶ In sum, the Constitution, as ratified by the people of

³¹⁶ “The [Rhode Island] State Supreme Court rested its holding on its earlier decision in *Robinson v. Norato*, 71 R.I. 256, 43 A2d 467, 468, in which it had reasoned that a state need not enforce the penal laws of a government which is ‘foreign in the international sense,’ §205(e) is treated by Rhode Island as penal in that sense; the United States is “foreign” to the State in the “private international,” as distinguished from the “public international,” sense; hence, Rhode Island courts, though their jurisdiction is adequate to enforce similar Rhode Island “penal” statutes, need not enforce § 205(e). Whether state courts may decline to enforce federal laws on these grounds is a question of great importance.

For the purposes of this case, we assume, without deciding, that § 205(e) is a penal statute in the “public international,” “private international,” or any other sense. So far as the question of whether the Rhode Island courts properly declined to try this action, it makes no difference into which of these categories the Rhode Island court chose to place the statute which Congress has passed. For we cannot accept the basic premise on which the Rhode Island Supreme Court held that it has no more obligation to enforce a valid penal law of the United States than it has to enforce a penal law of another state or a foreign country. Such a broad assumption flies in the face of the fact that the States of the Union constitute a nation. It disregards the purpose and effect of Article VI, § 2 of the Constitution which provides: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.”

It cannot be assumed, the supremacy clause considered, that the responsibilities of a state to enforce the laws of a sister state are identical with its responsibilities to enforce federal laws. Such an assumption represents an erroneous evaluation of the statutes of Congress and the prior decisions of this Court in their historic setting. Those decisions establish that state courts do not bear the same relation to the United States that they do to foreign countries. The first Congress that convened after the Constitution was adopted conferred jurisdiction upon the state courts to enforce important federal civil laws, and succeeding Congresses conferred on the states jurisdiction over federal crimes and actions for penalties and forfeitures.

Enforcement of federal laws by state courts did not go unchallenged. Violent public controversies existed throughout the first part of the Nineteenth Century until the 1860’s concerning the extent of the constitutional supremacy of the Federal Government. During that period, there were instances in which this Court and state courts broadly questioned the power and duty of state courts to exercise their jurisdiction to enforce United States civil and penal statutes or the power of the Federal Government to require them to do so. But after the fundamental issues over the extent of federal supremacy had been resolved by war, this Court took occasion in 1876 to review the phase of the controversy concerning the relationship of state courts to the Federal Government. *Claffin v. Houseman*, 93 U.S. 130. The opinion of a unanimous Court in that case was strongly buttressed by historic references and persuasive reasoning. It repudiated the assumption that federal laws can be considered by the states as though they were laws emanating from a foreign sovereign. Its teaching is that the Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts and the people, “anything in the Constitution or Laws of any state to the contrary notwithstanding.” It asserted that the obligation of states to enforce these feder-

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the United States acting through their legal representatives, is the source of all legal authority or legal force in the United States. As such, it can never recognize the principle of “ultra vires” as such recognition establishes the Constitution itself has no legal force. The Constitution creates and authorizes an Article V Convention. If a convention acts within that authority, it acts with legal force by authority of the Constitution. The convention acts therefore have legal force. The professor’s suggestion that any amendment proposed by a convention is “ultra vires” is false.

The False Scenario Problem

Professor Natelson presents a scenario illustrating his theory of amendment ratification. He begins with the fundamentals, informing his readers, “the United States has 50 states.” For the purpose of his scenario, he numbers the states 1-50. In his example, “States 1-34 (amounting to two-thirds of the 50) make applications for a convention to propose amendments [Emphasis added] pertaining to term limits for Congress.” He continues, “Congress calls the convention which meets and recommends both a term limits amendment and an amendment requiring a balanced budget.” He finishes his example stating, “States 1-30 and States 41-48 (amounting to three-quarters of the 50) approve each of these.”³¹⁷ Referring to his scenario, Professor Natelson asserts “the term-limits amendment has been properly adopted, even though some of the states that applied for the convention found it unacceptable.”³¹⁸ He continues, “However the balanced-budget amendment was not properly adopted, and Congress should not have submitted it. This is because the amendment was never properly “proposed” in the constitutional sense of the term used in Article V, because doing so was outside the call, as limited by the applications of the two-thirds of the states applying.”³¹⁹ In conclusion, Professor Natelson offers a new theory of amendment ratification based on “agency law as opposed to constitutional doctrine.”³²⁰

al laws is not lessened by reason of the form in which they are cast or the remedy which they provide.” *Testa v. Katt*, 330 U.S. 386, 388-391 (1946). [Emphasis added].

³¹⁷ See Report, p. 25.

³¹⁸ *Id.* Professor Natelson concludes, “This is because by applying for a convention to consider term limits, a state triggers the process on that issue and thereby accepts the risk that the convention will draft, and 38 of its fellow states will approve, an amendment on the subject worded differently from what the state would prefer.”

³¹⁹ See Report, p. 25.

³²⁰ *Id.* The professor states, “One might argue if *all* the applying states ratified the balanced-budget amendment, then the amendment might become law under the agency law doctrine (as opposed to the constitutional doctrine) of ratification – that is, if a principal approves the unauthorized actions of his agent while on notice of the facts, the principal retroactively validates those actions. This author has not uncovered indications from the Founding-

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There are several errors in Professor Natelson's scenario, which require correction and response. To begin with, the professor's comment the term-limits amendment has been properly adopted, even though some of the states that applied for the convention found it unacceptable" misconstrues the ratification process. The Constitution is emphatic. Ratification by three-fourths of the states of a proposed amendment accomplishes ratification. Once they have so ratified, the terms of Article V specify an amendment proposal is part of the Constitution. There is no requirement in Article V stating that ratification requires the same set of states that requested a convention call all to be part of the set of states that ratifies a proposed amendment from that convention in order for ratification of a proposed amendment.

Amendment ratification and amendment proposal are two distinct constitutional functions and not transposable. The purpose of the application is for a convention call. The purpose of a ratification decision by the states is to assent to a proposed amendment becoming part of the Constitution. Congress must call once the states submit sufficient applications. Once a sufficient number of states ratify, the amendment becomes part of the Constitution.

Professor Natelson's assumption that "Congress should not have submitted it [the proposed balanced budget amendment] is incorrect. As already noted, Congress has no choice regarding submitting a proposed amendment to the states for ratification consideration. Of course, it does have a choice as to the mode of ratification used by the states, but no choice as to whether the states consider the proposed amendment.

In his scenario, the professor ignores the fact a convention may propose "amendments." By this means, he can advocate a convention cannot propose an amendment "outside" a convention call. The term "outside" as used by Professor Natelson means "not included or originating in a particular group or organization" as no other definition possibly applies.³²¹ Thus by use of a word not found in the Constitution, Professor Natelson attempts to support his theory the acts of a convention are dictated by the congressional convention call.³²² He is incorrect.

Article V expressly states the single purpose of a convention is "for proposing amendments." It is a misnomer for Professor Natelson to suggest otherwise by implying a convention is limited to proposing an amendment. The Constitution expressly states the single purpose of applications is to cause Congress to call the convention. As this article shows the courts have ruled Article V has no implied powers. Professor Natelson admits in his Report the Constitution is "gov-

era record as to whether this is true, but it is irrelevant as a practical matter because there are at least 34 principles (the applying states) and probably 50. Certainly non-approval by even one applying states (or perhaps by another states) prevents agency-law ratification."

³²¹ Webster's Dictionary 1604.

³²² This article has proved if Professor Natelson's theory were correct, it is Congress, rather than the states, which assume the role of principal in the fiduciary relationship the professor describes. However, this article has already shown this theory incorrect. See *supra*, notes 282-296;304-311.

erning law” which may alter a principal’s instructions. Despite Professor Natelson’s efforts to dismiss the Constitution by choice of words, that governing law limits the use of applications to a single, expressed purpose and no other. As applications have only one expressed constitutional purpose, governing law excludes all other purposes. This includes the purpose of limiting a convention’s agenda with application language. As no such purpose constitutionally exists, it is impossible to state a convention for proposing amendments acts “outside” a convention call. The sole purpose of a convention call is the creation of the convention. Therefore, if the convention exists, it is clearly operating “within” the expressed, single purpose of the convention call. Therefore, applications, or a convention call based on such applications, cannot limit a convention or its agenda as such use violates the Constitution and hence, are unconstitutional.

The Agency Law Bait and Switch Issue

Professor Natelson suggests under “agency” law, two-thirds of the states can ratify an amendment rather than needing three-fourths ratification required by the constitutional law of Article V.³²³ Thus, he proposes “agency” law and constitutional law are interchangeable. Referring to his scenario as proof of his assertions, Professor Natelson states he “has not uncovered indications from the Founding-era record as to whether this is true but it is irrelevant as a practical matter because there are at least 34 principals (the applying states) and probably 50. Certainly non-approval by even one applying state (or perhaps by another state) prevents agency-law ratification.”

His proposition ignores well-settled law expressing the numeric ratio of ratification. He ignores the irrefutable fact constitutional law is supreme law. Given the supremacy of constitutional law, it borders on the ludicrous to suggest if the Constitution expressly requires three-fourths of the states to ratify a proposed amendment, that ratification by two-thirds of the states suffices by substitution of a different category of “law.”³²⁴

His evidence that his assertion of ‘agency’ law ratification is “irrelevant” to his theory is based on no more than the evidence of his own scenario. In that scenario, four applying states do not ratify the proposed “balanced-budget amendment.” Therefore, based on this pre-determined outcome, the professor assumes he can dismiss an assertion as “irrelevant.” The obvious rebuttal to this “evidence” is to note the obvious. In other circumstances, all applying states for a

³²³ See *generally* Report, p. 25.

³²⁴ “If *all* the applying states [referring to those states that applied for a convention] ratified the balanced-budget amendment, then the amendment might become law under the agency law doctrine (as opposed to the constitutional doctrine) of “ratification” – that is, if a principal approves the unauthorized actions of his agent while on notice of the facts, the principal retroactively validates those actions.” See Report, p. 25.

convention call might be inclined to ratify such an amendment as he postulates—that is an amendment proposed “outside” a convention call. In short, he avoids, rather than answers the obvious question he raises in his Report: what if, under his theory, all applying states do ratify a proposed amendment? Has ratification occurred?

He states he finds no evidence supporting his “agency” law ratification assertion from the founding era suggesting all applying states will ratify an amendment requested in their applications. This is incorrect. In his own Report, he cites George Nicholas whom he states supports his contention the Founders intended a convention agenda be controlled by the states and that they would tend to ratify such amendments.³²⁵

Rebuttal of Professor Natelson’s ratification “theory” requires nothing more than stating what well-known, self-evident law is. The Supreme Court on countless occasions has made it clear the Constitution, and the law within it, is supreme law. Substitution of another category for the supreme law is, by definition, impossible. It cannot be supreme if it permissible to substitution. This is especially true if such substitution alters the meaning, intent and words of the Constitution. Therefore, “agency” law cannot substitute for constitutional law under any circumstances. Hence, the three-fourths numeric requirement is unalterable.

Finally, the professor’s comment that “probably 50” principals may exist in his principal/agent relationship shows a clear lack of understanding about the fundamentals of Article V. It also shows why the Founders wisely did not intend a principal/agent relationship in Article V except as expressed for a convention call.

First, the assumption of Professor Natelson that there are 50 principals in such a relationship clearly shows a misunderstanding of the amendment process. At no time, can there be 50 principals in the amendment process. Article V terms are expressed. When two thirds of the states apply for a convention call, Congress must call. Given the present number of states, this means at most there are only 34 “principals.” When submitted for ratification consideration, a proposed amendment approval is by three-fourths of the states. This means at most that there are only 38 “principals.” The terms of Article V exclude some states from the role of “principal” meaning the states are unequal in status. As discussed earlier and admitted by Professor Natelson, such a situation cannot exist. The professor’s statement of “probably 50” shows a complete misunderstanding of the clear language of Article V.

Second, the “probably 50” statement rather than just “50 principals” leads to the conclusion that a group of states could gain control of the amendment process via a fiduciary relationship. The Founders, as noted by Professor Natelson, were well aware of fiduciary law. They feared a group of states might use such a principle if it existed in the amendment process to control the rest of the states. The professor’s “probably 50” remark clearly shows that the Founders were correct in their assumption—that some might be tempted to interpret such an authority to as-

³²⁵ See *supra*, notes 227-229.

sume that a group of states, and not all states, had principal control of a convention and could use such authority to act against the rest of the states. For this reason, the Founders deliberately did not insert such a relationship in the Constitution.³²⁶

Professor Natelson's premise of amendment ratification, congressional pocket vetoes, and alteration of ratification language, ultra vires, and convention agenda control is spurious. It conflicts with the Constitution, Supreme Court rulings as well as historical record. Thus, the only possible course is rejection of the premise.

The Speech and Debate Problem

While Professor Natelson believes the states can control the convention agenda,³²⁷ a major problem with his theory heretofore not addressed, is what effect does this theory have on agenda control of the other Article V amendment proposing body i.e., Congress? Professor Natelson does not attempt to apply his theory of fiduciary state control of amendment agenda to Congress in his Report. By implication therefore, he believes while the states have the right to control a convention's agenda, they lack the same power to set Congress' amendment agenda. Otherwise, he would have stated this. Most likely, this differentiation stems from Professor Natelson's knowledge of Article I, Section 6, Clause 1 of the Constitution, otherwise known as the Speech and Debate Clause.³²⁸ Article V permits both Congress and convention to propose "amendments" rather "amendment." While people generally are familiar with the power and independence of Congress in regards to amendment proposal, they are not as familiar with the convention method of proposal. This lack of knowledge can lead them down the garden path of political control of the convention without realizing how many thorns lurk in the bushes.

In *Gravel v. United States*, 408 U.S. 606, 625 (1972) the Supreme Court said, "The heart of the clause is speech or debate in either House, and insofar as the clause is construed to reach other matters, they must be an integral part of the deliberative ... processes by which Members participate ... with respect to the consideration and passage or rejection of ... other matters which the Constitution places within the jurisdiction of either House." [Emphasis added]. Undeniably, creation and passage of proposed amendments by Congress clearly falls under the court's definition of congressional matters protected by the speech and debate clause. Debate over a proposed amendment is obviously an "integral part of the deliberative ... processes by which

³²⁶ See *supra*, note 107.

³²⁷ See Report, pp. 15-18.

³²⁸ "They [Senators and Representatives] shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place."

Members participate” and clearly “the Constitution places” such proposals “within the jurisdiction of either [in both] House[s].”

The court mandates conventions must be “deliberative assemblages representative of the people...”³²⁹ The court uses the same word, “deliberative” to describe, “other matters which the Constitution places within the jurisdiction of either House” such as debating and proposing amendments in discussing the speech and debate clause. As the court uses the identical word to describe convention debates over proposed amendments and congressional debates over proposed amendments. The 14th Amendment³³⁰ mandates use of the words be viewed equally unless there is “some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.”³³¹

The courts use the identical word “deliberative” describing Congress and convention. Both bodies perform an identical constitutional act, that is, propose amendments. Both bodies obtain constitutional authority to do this from the same source, Article V. If the convention is politically limited, that is, its agenda of amendment proposals, is controlled by political decisions of the states legislatures, it follows the convention is not limited just to specific issue, but specific political outcome. If so, why hold a convention at all? What would delegates deliberate? What would the voter decide given a predetermined agenda and amendment outcome? Such circumstances do not satisfy “deliberative assemblages representative of the people...”³³² In order to be “deliberative” elected delegates must debate and resolve amendment proposals independently as is done in Congress.³³³ The Founders, historic record, court rulings and most importantly, the words of the Constitution itself simply do not support proposals such as Professor Natelson’s that differentiate between Congress and the convention.

Given these facts, it is highly unlikely, indeed, almost incomprehensible, that any court could rule one body so constitutionally empowered cannot have its amendment agenda regulated by the states, yet another identical body equally constitutionally empowered, can be regulated by the states. The principle of equal protection under the law under the 14th amendment is clear. Either the states regulate both bodies and dictate amendment agenda or the states regulate neither body.

³²⁹ See *supra*, note 26.

³³⁰ See *supra*, note 20.

³³¹ *Id.*

³³² See *supra*, note 26.

³³³ The author, of course, is not so naive as to assume there is no political influence in Congress. It is one thing to have all sides present their political views to office holders. It is quite another where all sides are excluded except one. The former is political debate; the latter is dictatorship.

The admission of Professor Natelson in his Report,³³⁴ that only a convention can write an amendment and can therefore refuse to write a proposed amendment, clearly leads to the latter conclusion that the states cannot regulate either proposing body. The only “instructions” state legislatures have ever given a convention is in the form of applications containing specific instructions to pass specific amendment language regarding specific amendment proposals.³³⁵ Professor Natelson states such instructions be viewed as fiduciary, that is, the convention must obey them. Then he concedes the convention does not have to do so. Thus, his own admission defeats his own premise putting the final nail in the coffin of his argument. If the convention can refuse to pass an amendment and is the final judge of amendment passage, clearly the convention, not the states, controls its agenda. As such, the states cannot dictate what amendment issues a convention will discuss by any so-called “fiduciary” instructions. In sum, traditional fiduciary law allowing the state controlled convention agenda is inapplicable to an Article V Convention.³³⁶

However, as noted by Professor Frankel, as elected representatives of the people, convention delegates do have a fiduciary relationship between themselves and the people that elect them.³³⁷ The people, by election, give instructions to their elected representatives in the form of favoring the positions advanced during election over that of an opponent based on the as-

³³⁴ See Report, p. 24. “However, the obligation of an agent to submit to the principal’s instructions may be altered by governing law. In this instance, the Constitution is the governing law. The Constitution assigns to the convention, not the states, the task of “proposing” amendments. This implies that the convention has discretion over drafting. [Footnote omitted]. If two-thirds of the states could dictate the precise language of an amendment, there would be no need for a convention. Additionally, a power to “propose” an amendment implies a power *not* to propose if the convention, upon deliberation, decides that the subject matter of the state applications requires no action.” [Emphasis added].

³³⁵ See generally, <http://www.article-5.org/file.php/1/Amendments/index.htm> to read texts of state applications for a convention call.

³³⁶ The key element of principal/agent law is the obedience of the agent to the instructions of the principal. If the so-called agent (the convention) does not have to obey the principal, then by definition, a principal/agent relationship cannot exist. Professor Natelson cannot have it both ways. He cannot assert on the one hand states can set the agenda of a convention then on the other hand state a convention has the authority to reject such instructions and propose or not propose whatever amendments it feels are necessary. Professor Natelson’s concession settles the point. The convention, as with all other governmental bodies established in the Constitution, is independent. It is not subservient in its assigned authority to any other government body or bodies except as the Constitution provides in the form of checks and balances. Thus, unless the Constitution expresses it, the other political bodies have no authority over the convention or it, over them. If applied to a convention, principal/agent law would grant, as the Founders feared, control of the convention to the states. That political group could act without any check or balance upon them. This, in turn, would allow the possibility of complete dictatorial control of the Constitution by the states. For this reason the Founders rejected fiduciary control of the amendment process by the states over a convention. (See *supra*, note 135).

³³⁷ See *supra*, note 26.

sumption that elected representative will carry out such instructions once elected.³³⁸ Professor Natelson concedes convention independence. Therefore, just because state legislatures have authority to apply for a convention call and Congress must call when the terms of the Constitution is satisfied does not translate into state legislatures having exclusive control over the convention agenda or outcome.

In sum, it is not much of a leap to state any effort to “limit” a convention violates the speech and debate clause. To do so deny convention delegates the equal opportunity to debate proposed amendments afforded members of Congress by constitutional provision. Therefore, any attempt by the states to “limit” a convention agenda by use of instructions contained in an application for a convention call is clearly unconstitutional.

Ratification: The Real Solution to Convention Agenda Control

While it may be argued Professor Natelson’s theory of fiduciary control of an Article V Convention is needed in order to prevent a “runaway” convention and this fear is the fundamental reason no such convention has been held in this nation, the facts speak differently. As has been demonstrated in this article, it is more likely a “runaway” convention would result from such fiduciary control as it would tend to exclude all but the most narrow of political views, all unified in a single, pre-determined political outcome. Rather than protect us from a “runaway” convention, Professor Natelson’s theory would spawn it.

Nevertheless, this author does support the notion of control of convention agenda by the states. However, he favors a method favored by the Founders, historically, constitutionally and judicially supported and not requiring the contrivance, dangers or jury-rigging of Professor Natelson’s legal theory of fiduciary control.

The main reason the convention movement is politically stalled in the states is the mistaken belief by state political leaders that Congress, having not called a convention based on already submitted applications, requires a new set of applications to cause a call. In other words, the

³³⁸ While some might cynically suggest the American people are incapable of selecting delegates who will carry out their instructions, are few in number and voice. The American people have repeatedly shown over the years they are capable of selecting quality political leadership. The American people have also shown they are fully capable of understanding a political process and the issues surrounding it. Therefore there is no doubt the American people are capable of selecting delegates who have quality, integrity and innovation.

states blame themselves for the failure of a convention call rather than Congress.³³⁹ A related reason is the almost universal, if mistaken belief the applications submitted to Congress must be for the same amendment issue in order to “count” toward the two-thirds required by the Constitution.³⁴⁰ The sheer ignorance of state political leaders in regards to these two misunder-

³³⁹ The states have no basis for this assumption. The clear intent of the Founders at the 1787 Federal Convention is unmistakable. Congress has no option regarding a convention call. *See supra*, notes 139-140,143,224. Congress must call if the states apply. The states have applied. Congress must call a convention. The public record irrefutably demonstrates Congress has entirely shirked its constitutional duty. Congress has never compiled the applications submitted by the states into a single record allowing tabulation of the applications. It has never made any official attempt whatsoever to call a convention. It has merely filed the applications and ignored them. Thus, the fault of this nation never having a convention lies entirely with Congress, not the states.

³⁴⁰ The basis of this assumption is the incorrect presumption that the validity of an application has a time length—otherwise known as contemporaneousness. If the Founders intended timeliness Article V applications, they clearly were capable of expressing “apt phraseology” to so indicate. (*See supra*, notes 30,143,195,212,230,300,307). The Founders did not express such a time limit on applications. Obviously, they realized if applications had time limits, all Congress had to do to avoid calling a convention was wait out the time in question and thus not call. Given the distrust expressed by Mason, and unanimously confirmed by the convention, this was unacceptable. (*See supra*, notes 137-139). For this reason, Article V does not have a timeliness standard after which, an application is no longer valid. However, many state political leaders erroneously assume that after time (never specified) in order for Congress to be required to call a convention, the states must submit new applications in order to be “timely.” This is a fallacious conclusion.

As stated Frank E. Packard, “Such an argument would be based partly on the holding in the case of *Dillon v Gloss* [footnote: 256 U.S. 368, 41 S.Ct. 510, 65 L.Ed. 994 (1921)] that Article V of the Constitution impliedly requires amendments submitted to be ratified within a reasonable time after proposal; that the Congress may fix a reasonable time for ratification, and that the period of seven years fixed by the Congress was reasonable. However, the fallaciousness of this contention becomes apparent when we consider the following statement by Mr. Justice Van Devanter in the unanimous decision in the *Dillon* case: “... proposal and ratification are not treated as unrelated acts but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time.” [footnote: *Ibid.* at pp. 374, 375.]. Thus, the reasonable length of time necessary is the interval between proposal and ratification. The reasonable-length-of-time doctrine is inapplicable to the movement to secure the income tax rate-ceiling amendment as there has been no proposal as yet of such income tax rate-limitation amendment. There can be no proposal until the Congress calls a convention, the convention proposes amendments and the Congress directs the mode of ratification. ... [T]he reasonable-length-of-time doctrine is measured from the time of proposal; and until there is proposal, the doctrine inapplicable.” *Legal Aspects of a Constitutional Amendment Limiting Income Tax Rates*, Frank E. Packard, Attorney at Law, state of Illinois, *Marquette Law Review*, Vol. 35, pp. 231-232, (1952).

The fact the states include amendment proposals within their applications is irrelevant. The states have no constitutional authority to propose an amendment. Historic record shows the Founders deliberately intended this as they discarded earlier versions of Article V, which provided such constitutional power to the states. (*See generally* discussion of 1787 Federal Convention, this article). Therefore, amendment proposals and convention applications are neither simultaneous nor interchangeable in meaning or intent as only Congress and a convention can propose

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standings is inexcusable. The primary function of any leadership mandates that leadership first entirely comprehend the problem in order to resolve it. Without proper understanding of how the amendment system works, solution is impossible.³⁴¹

amendments and only the states can submit convention applications. Thus, the principle of separation of powers expressed in the Tenth Amendment separates the two terms. (*See supra*, note 29). Until one or the other body proposes therefore, nothing is proposed. Congress has not constitutional authority to veto or ignore state applications under any circumstances whatsoever. Thus, all applications remain in full force and effect as applications, not amendment proposals (which are subject to the contemporaneous standards of Dillon) until acted upon by Congress, which has “no option”, but to call, meaning it cannot employ a spurious time limit on applications to refuse to do so. *See supra*, notes 60-161.

Until a convention actually proposes an amendment, it is not proposed. This obvious but necessary statement means the ratification “clock,” described in Dillon has not started. Proposal, as defined by Article V, means the proposed amendment, in its final form as it will appear in the Constitution is formally approved by two thirds vote of the convention then forwarded to Congress for its disposition as to mode of ratification. At this constitutional point, the states must submit any ratification vote to Congress. Such vote is legally binding and constitutionally final. Before the point of actual proposal, the amendment issue is no more than political discussion with all citizenry free to express their political position on the issue. This includes state legislatures who, as described, may express their position on the issue by means of formal vote. The legislature is simply using a novel means, expressly available to them, to express a political opinion. Thus, state legislatures can ratify or reject a proposed amendment thus affecting political control of convention agenda. This vote can occur at any time during the political discussion stage at a convention or even before a convention convenes.

³⁴¹ State political leaders are generally politically astute. However, with Article V they share a terrible habit—reading what want to see, rather than what is. Few leaders have studied the Article V amendatory process to understand its process. None of these leaders, for example, refer in public to the fact the states have already submitted sufficient applications to cause a convention call. Few are familiar with the terms described in *United States v Sprague* “no interpolation”, “no rules of construction” or “no addition” meaning these political leaders cannot do exactly what they are attempting to do—put their own spin on the amendment process for their own political gain. (*See supra* notes 143,241,242,243,248,256,261,274,286,287 and 290).

If these leaders are familiar with these terms and facts, they ignore them. Politically, this is mistake. It is a fundamental rule of American politics voters support winners, not losers. Currently, state political leaders are calling for even more applications for submission to Congress. Calling for new sets of applications, irrespective of amendment issue, ultimately loses the argument, which, in turn, affects political careers. As demonstrated in this article, submission of a new round of applications presents Congress the perfect opportunity to refuse to call a convention. It presents Congress the ability to claim the right to veto all applications. In this, the states will have no one to blame but themselves. (*See supra*, notes 143,340). Rather than referring to the already submitted applications and demand Congress call a convention, state leaders seem content to accept veto of all applications previously submitted applications without demanding Congress explain on what basis this presumption is true. There is no constitutional basis for such a presumption but state leaders seem unwilling to take advantage of the fact Congress has no choice in the calling of a convention. Only by forcing a convention call and thus advancing whatever amendment issue the particular politician favors, can he appear a political winner. Not to take full advantage of the public record therefore, is not only constitutionally inexplicable, but also politically foolhardy.

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Bluntly, as Congress has no real interest in relinquishing any real political power regarding the amendment process, it has every interest in fostering and nurturing the states into believing the only way a convention can be achieved is to accept that all previously submitted applications by the states did not satisfy Congress. Thus, the inevitable conclusion is Congress sets the standard of acceptance rather than the Constitution. This spurious standard results in an endless submission of applications with Congress simply ignoring all of them. In this way, Congress maintains the status quo, which is to say, Congress gets to continue as it has and thus nothing is resolved.

One possible answer to this political contradiction lies in the inherent weak actions of state political leaders. These leaders believe in a philosophy of using an Article V Convention to “scare” Congress into passing whatever amendment proposal they support—in short they do not want a convention but instead use it as a political tool to leverage Congress into giving them whatever political goal they desire. The concept of actually holding a convention to get the amendments they desire simply does not exist in their political minds. In this sense, therefore, these political leaders are insincere—that is they actually do not want an Article V Convention to occur. For this reason they do not publicly mention the public record of 49 states having already submitted over 700 applications for an Article V Convention. Emphatically, therefore, those who actually desire actual change to the system of government, which only amendments can affect, supporting those politicians who only want to “scare” Congress but never intend to actually change the system, is not effective. Ultimately, as in the past, such efforts will fade away with nothing actually done.

The problem with this approach is twofold. First, as evidenced by the fact of 49 states/700 applications already on public record, it is clear Congress does not “scare.” In short, the political strategy associated with “scaring” Congress into passing an amendment under the threat of the states forcing an Article V Convention does not work. The reason is obvious. Congress knows it has ignored already submitted applications. Therefore, it has no reason whatsoever to fear the submission of any new applications. Hence, attempting to garner new applications is politically misguided and unproductive. The only solution therefore is to bring political pressure on Congress to force it to obey the Constitution, as is, that is obey Article V as written which means calling a convention based on a simple numeric count of applying states with no terms or conditions.

The second problem with the Article V Convention “scare” tactic is constitutionality. This tactic presupposes that already submitted applications are, for whatever reasons, invalid. Thus, the tactic endorses the unconstitutional premise that Congress can ignore or veto the parameters of the Constitution. Given this premise, all the tactic accomplishes is enforcement of Congress’ ability to refuse to call a convention, rather than compelling it to call a convention. In sum, the tactic results in the destruction of the Constitution by establishing the government may veto its premises. Thus, the political figures that advocate a convention but do not attack Congress for not calling it based on the public record are in fact doing more damage than good. This is wrong. Support for leaders attacking Congress is the only viable solution.

It is worth mentioning no court has ever held applications from the states must contain the same amendment issue in order to count in regards to causing Congress to call a convention. Indeed the opposite is true. In all the Supreme Court rulings discussing Article V, the court has always simply quoted the text without resort to any special references or allowances. Further, as already noted in this text, the court has made it clear no “rules of construction”, “interpolation” or “addition” can be applied to Article V. The word “addition” is quite significant as this word alone prevents “addition” of terms or conditions other than those described in Article V. The only term mentioned by Article V is a numeric ratio of applying states. These facts neatly explain therefore why no court has ever mentioned applications must be of the same issue because the courts never intended to convey such a message.

Despite the efforts of Professor Natelson to “interpret” historic statements in his Report by comments surrounding his selected quotes, the fact remains not one comment exists that conclusively and emphatically states convention applications must be of the same amendment issue in order to count as applications for a convention call.

The reason for this is obvious. The Founders never intended this. A simple reading of the words of the motion at the time of the convention cause the convention call proves this. The intent was always and remains always, a simple numeric count of applying states with no terms or conditions whatsoever. This includes same amendment issue, rescission, contemporaneous linkage and so forth. The words of Article V if read grammatically correct are plain: “on the application... [Congress] shall call a convention proposing amendments...” leaves no doubt of purpose or intent of the applications. That purpose is to cause Congress to call a convention, not to propose an amendment. If same issue were true, and the states could write an amendment as earlier versions of Article V intended, then what would be the purpose of having a convention at all?

Only by the acceptance of the true intent of Article V can it then be understood how the states can properly, legally, constitutionally and unassailably regulate the agenda of any convention. The sole purpose of applications is to cause Congress to call the convention. This article has shown that any so-called fiduciary instructions within those applications seeking to regulate the convention agenda are unconstitutional. Clearly, fiduciary law or any theory thereof, which purports to achieve such regulation, is the wrong approach.

In sum, what is required is a politically acceptable method whereby the states can universally and easily apply to the convention, before, during or after convening which serves to regulate either what is discussed at a convention or more importantly, determines what proposed amendments will be proposed by that convention. The system in question should have political safeguards and flexibility meaning if the convention manages to satisfy the political objections of the states on a specific amendment issue before the convention, the states can change their political minds regarding their opposition. The system should leave the states free to change their political minds at any time during the entire amendment process but such change must be entirely within the control of the states. Finally, the ideal system must allow the convention the freedom to function as a constitutional think tank. Thus, a convention can consider debate and

perhaps propose new ideas, thoughts and proposals. Straitjacketing a convention into an already politically predetermined outcome is undesirable at best. Such action in all likelihood will not solve the problems in question. The predeterminations will be either inadequate or simply incorrect to solve the problems.

Fortunately, the Founders provided such a system. The states, simply taking advantage of it fully, can achieve their desire—regulation of convention agenda. The system is amendment ratification but employed by the states in the colonial era rather than what has become the traditional role assigned ratification—state decision submitted to Congress after amendment proposal. In sum, a proactive rather than reactive use of ratification during the amendment process by the states.

A simple review of the quotes provided in this article confirms the Founders placed great store in ratification, rather than proposal. The reason is obvious. Unlike the professor's fiduciary theory encumbered with its complexities and conundrums of "instructions" to "agents" who can veto them, ratification is elegantly simple in both political understanding and constitutional control. In sum, if an insufficient number of states ratify a proposed amendment, it will not become part of the Constitution. Thus, the proposal is defeated. It is important to note that a state must actually vote, that is declare by official action, its ratification position in order for there to be an insufficient number of ratifying states. In ratification, there are no vetoing agents of instructions. Neither is part of the process. The state operates entirely within its own boarders. It then sends its decision to Congress for tabulation. Until sent, Congress has no part in the process.

However, with any political solution, there are conditions that must be satisfied. In this instance, a single proposition, which should be obvious to all, must be satisfied. As the Constitution permits Congress the choice of two modes of ratification, the system of ratification control proposed by this author is impossible if the state legislature (one mode of ratification) and the people of the states (the other mode of ratification) are politically opposed on the issue. Thus, if the people of a state are of one mind regarding an issue of amendment the state legislature another, then the conflict makes unity impossible. However, such political states are rare given the republican form of government that exists in our states. Thus, the norm is the elected state representatives reflect the views of the people of a state. Hence, for all practical purposes, the presumption is the minds of both legislature and people are one.

Simply put, the Constitution does not declare when a state can reach a decision regarding ratification of a proposed amendment issue and when the state must declare its ratification determination.³⁴² Thus, a state may choose to declare its intention early in the process, during the

³⁴² Any reference to *Dillon v Gloss* in attempting objection to this proposal is misplaced. The court ruled ratification must occur within close proximity of proposal. The decision did not state which, ratification or proposal, has to come first. It does not express under what terms or state of development a state legislature may refuse to ratify a proposed amendment. Thus, the state is free to express its ratification vote at any time. It may express its vote in

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process, or after the process of amendment proposal. It may state the matter informally through public declarations of political leaders. If so, a convention could ignore them. It may present the matter formally by votes of the state legislature. Holding a state ratification convention to express a ratification position is politically impractical. The chance of that mode of ratification occurring is now one in 27. Formal votes of state legislatures are politically practical. Even if Congress chose the second mode of ratification, state conventions, over ratification by state legislature, politically, formal action by the state legislature is interpreted as the state's position. In all likelihood, such interpretation is reflected by a state ratification convention.

The Constitution is eminently clear. If an amendment proposal lacks consent of one-fourth the states plus one (currently 13 states), it can never become part of the Constitution of the United States. It lacks the requisite three-fourths support. Once a state has determined its position, none can cause it to reverse itself, except the state itself. As such political positions rarely change over time, it is reasonable to state a ratification decision by the legislature, regardless of when reached will remain steadfast unless the circumstances surrounding its vote, i.e., the terms and conditions of the amendment proposal upon which the decision was reached, alter. The political advantages of these constitutional facts specified above should be obvious to all regarding controlling a convention's agenda. Unlike Professor Natelson's theory, which is dependent upon the unified decision of two-thirds of the states (currently 34) consenting on a single matter; the use of ratification to regulate a convention agenda only requires the unity and consent of 13 states at present.

All that is required of the 13 states is that they declare their purpose regarding amendment proposal before a convention actually proposing such amendment that they oppose. Historically speaking, this method of convention control has proven to be the most effective method to regulate the agenda of a convention and influence the course of the Constitution. It is indisputable historic fact that the Bill of Rights came about because of the opposition to the Constitution. The states, by threatening not to ratify the proposed Constitution unless the supporters of the Constitution agreed to certain concessions, forced concessions in the proposal. In this instance, the concession was the immediate submission of twelve amendment proposals to the states—i.e., the Bill of Rights. The principle is no less true today.

Conversely, the matter of support for a proposed amendment need not be dependent, as Professor Natelson suggests, on the consent of 34 states. Such alignment of state legislatures toward a single mind is itself a Herculean task and unlikely to succeed. Politically speaking, the more states that are involved, the more likely that special political interests will become involved. The outcome of that fact will be to cause mutation of the original favored proposal in

the early political discussion stage, just after the writing of actual proposed language before convention affirmation or during convention debate over the proposal but before the convention votes on the proposal. Alternatively, it may withhold its ratification vote and express it after Congress chooses a mode of ratification. *See supra*, note 340.

order to satisfy the ever-growing circle of support. The result of that may be that those who originally supported it may be so repulsed at its latter form they reverse themselves and oppose the proposition. Avoiding the danger is simple. Only one state, one delegate or even one citizen is required to present a matter to a convention. This method maintains the purity of the proposal. Once presented, each state may lend support to a proposal during deliberation. As the cause now resides in the convention, will remain largely intact if the states again formally state they will ratify the proposal as it currently stands. By this simple act, a convention is unlikely to alter a proposal that gains sufficient support to ensure its passage in ratification.

In sum therefore by simply expressing by formal means the state's position on various amendment proposals prior or during the convention process, its agenda can be controlled with the states determining which proposals shall be rejected by the convention and which it shall pass for ratification consideration. As already noted however, the process does not bind the convention so as to prevent it from considering original ideas or proposals—it simply informs the convention of the political outcome of such proposals while the convention is still free to decide whether it is politically viable to pursue the proposal. Such effort is unlikely if ratification defeat is certain. Thus, the legislatures, by simple, formal votes, control convention agenda.

There is a final point of this proposal. Under no circumstances can the states send their official ratification votes to Congress until the convention has actually proposed the specific amendment in question and Congress has determined the mode of ratification. The state is “locked” into its expressed position if it does so earlier than this event. It simultaneously removes that state from any possibility of agenda control insofar as that specific amendment issue is concerned. Once sent, as with recessions, Congress decides whether or not to rescind any state ratification vote once it has received that state expression.³⁴³ Congress can do nothing until it ac-

³⁴³ In *Coleman v Miller*, 307 U.S. 433, 448-451 (1939) the court extensively discussed the issue the terms and conditions regarding a state's power to rescind previously submitted ratification votes on proposed amendments to the Constitution. [See generally pp. 447-452]. The court first discussed the ratification vote of the 14th Amendment of five states (Georgia, North Carolina, South Carolina, Ohio and New Jersey). The states either voted not to ratify the amendment then later changed their votes. Congress ordered, and the United States military carried out, the forcible removal from office the state legislatures of Georgia, North Carolina and South Carolina, which had voted against ratification. The federal government replaced these legislatures with legislators of their choosing. These new legislatures then voted for ratification. Two states (Ohio, New Jersey) originally voted in favor of ratification then later attempted to withdraw, or rescind, that ratification vote.

The Court noted that Secretary of State Seward was requested by Congress to communicate, “...[A] list of States of the United whose legislatures have ratified the fourteenth article of amendment.” Seward's list included the states of North Carolina, South Carolina, Ohio and New Jersey with Seward comment, “[I]t is deemed a matter of doubt and uncertainty whether such resolutions [to rescind previous affirmative ratification votes on the part Ohio and New Jersey] are not irregular, invalid and therefore ineffectual.” Based on the list Congress then declared the 14th Amendment ratified by the requisite three-fourths vote of the state legislatures.

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tually receives the vote. Thus the state is free to vote, rescind or alter its ratification position as many times as it pleases in order to control convention agenda. Therefore, while the state may officially vote repeatedly if it desires, such votes must not leave the state. Therefore, official

The court stated, “We think that in accordance with this historic precedent the question of the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment.” [Emphasis added].

The court then continued, “The precise question as now raised is whether, when the legislature of the State, as we have found, has actually ratified the proposed amendment, the Court should restrain the state officers from certifying the ratification to the Secretary of State, because of an earlier rejection, and thus prevent the question from coming before the political departments. We find no basis in either Constitution or statute for such judicial action. Article V, speaking solely of ratification, contains no provision as to rejection. Nor has the Congress enacted a statute relating to rejections. The statutory provision with respect to constitutional amendments is as follows:

“Whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of state shall forthwith cause the amendment to be published, with his certificate, specifying the states by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States.’ The statute presupposes official notice to the Secretary of State when a state legislature has adopted a resolution of ratification. We see no warrant for judicial interference with the performance of that duty.” [Emphasis added].

Since the Court ruled in *Coleman*, Congress has slightly altered the law to which the court referred. The current version reads, “Whenever official notice is received at the National Archives and Records Administration that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Archivist of the United States shall forthwith cause the amendment to be published, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States.” 1 USC § 106b (1951 amend. 1984). [Emphasis added].

Thus, while Congress has altered the designated official (the National Archivist versus the Secretary of State) the states notify as to ratification, the remainder of the statute is unchanged from the version ruled on by the Court in 1939. Hence, the Court ruling remains valid and in full force. The basis of that ruling is the “presupposition” the state legislature actually submits its vote to Congress or official designated to receive such votes. Hence, until the state submits its ratification vote to Congress or its designated official that ratification vote, however many times such vote is made by the states, however times such vote is altered by the states or when such vote is taken by the states remains exclusively in the control of the state legislatures. By the limit of presupposition established by the Court in *Coleman*, (based on the Tenth Amendment principle of separation of powers between the states and federal government) a state’s ratification vote is not subject to control by Congress until the state actually submits its vote to Congress.

votes must reside with the state's secretary of state or remain within the legislature itself should the legislature not "trust" that state official not to send its vote. The ratification vote must contain specific instructions informing the secretary of state not to transmit its decision to Congress until instructed by a vote of the state legislature. It must contain instructions which allow a state ratification convention to replace the vote should Congress choose that mode of ratification. The Constitution does not mandate when a state shall vote on an amendment proposal, nor does it mandate when the state must transmit such ratification vote to Congress. To regulate a convention's agenda as described therefore is simply for the states to take advantage of these two "loopholes" which permit a state to change its mind as many times as it pleases so long as its official action is not transmitted to Congress.

Finally, as has been noted by this author throughout this article, any proposal of regulation, such as Professor Natelson's fiduciary principle, must be equally applicable to both convention as well as Congress. If the proposed state regulation is not equally applicable to Congress, it is unconstitutional. In this instance, actions by the states as described can equally occur in congressional debates over amendment proposals at any time during that body's political process. The only difference is the states must use an informal method, i.e., a press release sent to all members of Congress to inform Congress of the state's decision so that in no manner can Congress later claim the state acted prematurely or has already cast its ratification vote. Therefore, the states cannot send formal notice of a ratification vote to Congress until that body elects a mode of ratification. However, as with a convention, Congress is astutely aware of the politics of pro-active state ratification votes. If 13 states vote "no" on a proposal in Congress, it will be as equally politically effective toward Congress as a convention.

At least two Supreme Court rulings directly addressing the issue of ratification support this author's premise. Professor Natelson's theory presents no judicial evidence supporting it. The states do not require the complex, convoluted, patched together, legally unsupported theory advanced by Professor Natelson in order to regulate the outcome of a convention. Simply by joining with no more than 12 other states, a state can regulate any item on a convention agenda. No convention, given the political certainty of defeat that the decision of 13 states not to support an amendment proposal renders, will continue to advance that proposal. Why bother? The fate of the amendment proposal is already sealed. Thus, a convention may seek, as the Founders did, a political compromise with those who object politically putting the states in the position of power broker—or it will abandon the proposition altogether. In either case, the states, not the convention, determine the outcome. Reading the Founders' quotes in full context and intent, proves this is what they intended. Control of a convention agenda therefore is a simple, easy to understand matter. Most solutions are.

Yet ratification predetermination does not preclude the convention from advancing any proposition it feels merits consideration by the states. The convention is still free to debate and discuss all matters before it. Most importantly, should the states feel a new proposed amendment

satisfies their objections; they can change their position, thus permitting passage of the revised proposal.³⁴⁴

The advantages of the plan are obvious. Unlike Professor Natelson's theory, no agent is involved. Thus, there is no chance of disobedience by that agent which Professor Natelson concedes can occur. The power of ratification is unassailable. Therefore, there is no possibility of opponents to a decision by either state legislature or state convention challenging the decision. There are less people involved to persuade in order to regulate a convention that called for under Professor Natelson's theory. It is easier to coordinate the efforts of 13 state legislatures than nearly three times that many. Frankly, if the opposition to an amendment proposal cannot garner enough opposition to unify 13 states, it does not deserve to regulate a convention's agenda.

The practical political effect of the author's proposal is obvious. It is against basic human nature to continue an effort when the certainty of failure is 100%. Given a minimum of states opposed to a specific amendment proposal have formally acted to so express such position even prior to such a proposal being formally advanced, the natural human action will be to abandon the project or attempt to modify it to satisfy the objections. The resulting consequence of seeking compromise or outright abandonment places the objecting states in command of the amendment, not the convention. Yet, the states can change their minds if objections are satisfied thus clearing the way for ratification.

The traditional method followed by the states has been for Congress to propose an amendment, then for the states to judge whether to ratify the amendment. In colonial times, during ratification of the original Constitution, the states acted proactively causing Congress to pro-

³⁴⁴ Some may presume the author's arguments are a basis for rescission of applications by the states. As usual, these rescission advocates miss the obvious. The author's arguments concern actions by the states regarding ratification votes taken prior to submission to Congress. Thus, the vote remains a state rather than federal issue and the state retains control.

Rescission of applications, however, address already submitted applications to Congress. Under the terms of Article V, unless a state submits an application to Congress, it is not a valid application for an Article V Convention. Thus, rescission of an application before submission to Congress simply means no submission whatsoever. As previously discussed, once submitted to Congress that application becomes a federal record, rather than a state action. The courts have repeatedly ruled that in the amendatory process the federal Constitution, not state constitutions, regulate the states. (*See supra*, notes 259-281). In sum, Article V does not permit rescissions of applications once submitted to Congress. The author's arguments are consistent but of no use to rescission advocates. He advocates the states take advantage of the fact that until submitted to Congress, the states can alter ratification votes without any influence on the part of Congress. Conversely, as the state has already submitted an application to Congress in order to have that application take effect, the submission removes the option of revision allowed the state before submission.

pose amendments to the original Constitution. The same principle applies in this proposal. Effectively, the states act politically proactively rather than constitutionally reactively to regulate convention agenda.

Summary

Professor Natelson's Report contains many presumptions based on incorrect information. Some of his presumptions directly conflict with existing Supreme Court rulings. They are therefore invalid.

His core presumption, that fiduciary law applies to state regulation of an Article V Convention and that this was the intent of the Framers of the Constitution is patently false. Professor Natelson avoids any reference in his Report to the actual record of the 1787 Federal Convention. Thus, he avoids using best evidence to prove his theory. That record conclusively proves the Framers rejected such a system of control as advanced by Professor Natelson twice during their debates on Article V. To paraphrase a Supreme Court ruling, "had the Founders desired to place such matter in the Constitution, nothing would have been simpler than to have remained with the versions of Article V that accomplished it."

While the goal of Professor Natelson, control of a convention by the states is commendable, his approach is simply wrong. As this author has demonstrated, the proper constitutional approach, one supported by the historic record and court ruling, is pro-active ratification by the states during the convention process.

Professor Natelson's approach runs the risk of creating the very thing he obviously most wants to avoid—a runaway convention. By limiting a convention to a single amendment issue, pre-determining the political outcome of that issue and leaving it to the states to select delegates rather than allowing the people to elect them, a perfect hothouse is built to grow the seed of a runaway convention. Indeed, as this author observed at the beginning of this article, such actions perfectly describe a "runaway" convention—a convention of single mind and purpose with no political obstacles of objection to get in its way.

Moreover, the professor's theory obscures the real issue—the refusal of Congress to obey the Constitution and call a convention when sufficient applications exist to cause that constitutional action. Instead, the professor urges submission of new rounds of applications by the states. He correctly states Congress is the agent of the states insofar as a convention call is concerned. The agent must call a convention. He avoids the fact that this agent has refused to obey the legitimate instructions to it by its principals.

The professor fails to realize, according to his theory, if the states submit new applications, they have endorsed the action of the agent to veto their instructions. By avoiding this primary issue, Professor Natelson fails to address or resolve the fundamental point, put in terms of his theory, that it is currently Congress which is the principal and the states which are now agents. In al-

lowing Congress to veto already submitted applications, the states have accepted the “instructions” of Congress—that is, Congress can veto the Constitution.

By acceptance of these so-called “instructions”, the states and Professor Natelson fail to truly appreciate a dangerous constitutional fact. If Congress has the right to veto all previous applications, Congress can veto any new applications as well. Thus, Congress establishes an endless cycle of submission and rejection with Congress empowered to veto provisions of the Constitution. Such constitutional danger is obvious. It requires no further comment save that Congress’ violation has not remained confined to Article V. Put in Professor Natelson’s terms, until the states assume the actual position of principal and Congress, agent, bound to the instructions of the Constitution, Congress will continue vetoing Article V.

This fact is the key issue of an Article V Convention. It is not whether a category of law never intended for such purpose is patched over constitutional law. The problem is not convention control; the problem is Congress. Congress refuses to obey the Constitution. Congress is the runaway here, not a convention. Any effort to bring about a convention that does not focus on this issue does great disservice to the nation. Such effort draws attention away from the fact that until Congress obeys the Constitution, no convention will occur.

Professor Natelson’s Report does not address this primary issue. His jury-rigged theory of law does not stand close inspection. For this reason, if no other, Professor Natelson’s Report is unacceptable. Instead, all political efforts by the states and the public should turn toward Congress and demand it call a convention immediately. Any other political course of action simply does not serve the best interests of this nation.

The states have applied for a convention. The Constitution mandates Congress call a convention. Beyond this, any theory which diverts attention from the refusal of Congress to call, serves no real purpose, especially when based on misinformation or assumption.

Endnotes