

Correcting Robert Natelson Yet Again

By Bill Walker

Recent events cause me to write yet another article correcting the factual errors of Robert Natelson, so called “Article V scholar.” If Robert Natelson was, in fact, a scholar instead of a factual charlatan my life would be much simpler. Robert Natelson is consistently factually inaccurate. He ignores relevant facts, twists them to suit his own purpose or misstates them.

Webster’s Dictionary describes a “scholar” as “one who has engaged in advanced study and acquired the minutiae of knowledge in some special field along with accuracy and skill in investigation and powers of critical analysis in interpretation of such knowledge...” Accuracy is defined as “freedom from mistake or error.” Hence, in order for a person to be scholar, they must be accurate, that is, free of mistake or error.

Since he is factually inaccurate Mr. Natelson is not a scholar—at least not as far as the information he provides regarding an Article V Convention is concerned. His fiduciary master/slave theory about an Article V Convention reeks with inaccurate information. Nearly every column he writes about an Article V Convention contains factual errors. I believe Webster’s first definition of a “scholar” describes Mr. Natelson: “one under the training of a particular master.” I do not claim to be Mr. Natelson’s master. However, he reminds me of a bombastic student spouting inaccuracies to impress the class exposed by the simplest of fact check.

These latest corrections deal with an assertion made in a Natelson column published over a year ago as well those in a more recent column. First up is the old column. Accuracy has no time limit. So the fact I somehow missed publication of the column at that time is irrelevant. More to the point, current events make the subject entirely relevant today. The issue: whether the Supreme Court decision, Coleman v Miller, 307 U.S. 433 (1939) explicitly means what it explicitly states or despite this explicit language means something else entirely because Robert Natelson says so. Natelson’s asserts a Supreme Court decision which explicitly states Congress absolutely controls the amendment process, doesn’t actually say that and even if it does say that no federal judge today would support such a proposition. Apparently Natelson believes his version is correct because: (1) today’s judges (and apparently the public in general) can’t read or; (2) when the Supreme Court writes an opinion in plain, unequivocal English this somehow means the Court doesn’t really mean it so all federal judges will therefore ignore the ruling.

Before discussing Coleman there is a fact about Supreme Court opinions that requires explanation. Under Supreme Court procedures an “opinion of the court” requires a majority of five or more justices for that opinion to be a binding ruling. In many cases justices will agree with the basic overall conclusion of the “opinion of the court” but for different reasons and issue what is called a “concurring” opinion. Together the “opinion of the court” and any “concurring” opinions are consolidated to form the complete “opinion of the court.” Justices that do not agree with the conclusion of the “opinion of the court” or the “concurring” opinions write what are called “dissenting opinions.” These are not considered part of the binding ruling of the case.

In *Coleman*, three justices agreed with the “opinion of the court” written by Chief Justice Hughes. Four justices agreed with the concurring opinion written by Justice Black. Two justices dissented from the “opinion of the court” thus making *Coleman* a 7-2 decision meaning all reasons given in either the opinion or the concurring opinion is the binding “opinion of the court.”

Two questions need answering; whether the Court actually stated in *Coleman* Congress absolutely controls the amendment process and whether any federal judges today have in agreed with this decision in a court ruling. Borrowing a quote from Thomas Jefferson “To prove this, let Facts be submitted to a candid world.” The “opinion of the court” in *Coleman* states (in part):

“Third.—The effect of the previous rejection of the amendment and of the lapse of time since its submission.

1. The state court adopted the view expressed by text-writers that a state legislature which has rejected an amendment proposed by the Congress may later ratify.¹³ The argument in support of that view is that Article V says nothing of rejection but speaks only of ratification and provides that a proposed amendment shall be valid as part of the Constitution when ratified by three-fourths of the States; that the power to ratify is thus conferred upon the State by the Constitution and, as a ratifying power, persists despite a previous rejection. The opposing view proceeds on an assumption that if ratification by 'Conventions' were prescribed by the Congress, a convention could not reject and, having adjourned sine die, be reassembled and ratify. It is also premised, in accordance with views expressed by text-writers,¹⁴ that ratification if once given cannot afterwards be rescinded and the amendment rejected, and it is urged that the same effect in the exhaustion of the State's power to act should be ascribed to rejection; that a State can act 'but once, either by convention or through its legislature'.

Historic instances are cited. In 1865, the Thirteenth Amendment was rejected by the legislature of New Jersey which subsequently ratified it, but the question did not become important as ratification by the requisite number of States had already been proclaimed.¹⁵ The question did arise in connection with the adoption of the Fourteenth Amendment. The legislatures of Georgia, North Carolina and South Carolina had rejected the amendment in November and December, 1866.¹⁶ New governments were erected in those States (and in others) under the direction of Congress.¹⁷ The new legislatures ratified the amendment, that of North Carolina on July 4, 1868, that of South Carolina on July 9, 1868, and that of Georgia on July 21, 1868.¹⁸ Ohio and New Jersey first ratified and then passed resolutions withdrawing their consent.¹⁹ As there were then thirty-seven States, twenty-eight were needed to constitute the requisite three-fourths. On July 9, 1868, the Congress adopted a resolution requesting the Secretary of State to communicate 'a list of the States of the Union whose legislatures have ratified the fourteenth article of amendment',²⁰ and in Secretary Seward's report attention was called to the action of Ohio and New Jersey.²¹ On July 20th Secretary Seward issued a proclamation reciting the ratification by twenty-eight States, including North

Carolina, South Carolina, Ohio and New Jersey, and stating that it appeared that Ohio and New Jersey had since passed resolutions withdrawing their consent and that 'it is deemed a matter of doubt and uncertainty whether such resolutions are not irregular, invalid and therefore ineffectual'. The Secretary certified that if the ratifying resolutions of Ohio and New Jersey were still in full force and effect, notwithstanding the attempted withdrawal, the amendment had become a part of the Constitution.²² On the following day the Congress adopted a concurrent resolution which, reciting that three-fourths of the States having ratified (the list including North Carolina, South Carolina, Ohio and New Jersey),²³ declared the Fourteenth Amendment to be a part of the Constitution and that it should be duly promulgated as such by the Secretary of State. Accordingly, Secretary Seward, on July 28th, issued his proclamation embracing the States mentioned in the congressional resolution and adding Georgia.²⁴

Thus the political departments of the Government dealt with the effect both of previous rejection and of attempted withdrawal and determined that both were ineffectual in the presence of an actual ratification.²⁵ While there were special circumstances, because of the action of the Congress in relation to the governments of the rejecting States (North Carolina, South Carolina and Georgia), these circumstances were not recited in proclaiming ratification and the previous action taken in these States was set forth in the proclamation as actual previous rejections by the respective legislatures. This decision by the political departments of the Government as to the validity of the adoption of the Fourteenth Amendment has been accepted.

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].

Quoting the concurring opinion of Justice Black:

“Concurring opinion by Mr. Justice BLACK, in which Mr. Justice ROBERTS, Mr. Justice FRANKFURTER and Mr. Justice DOUGLAS join.

Although, for reasons to be stated by Mr. Justice FRANKFURTER, we believe this cause should be dismissed, the ruling of the Court just announced removes from the case the question of petitioners' standing to sue. Under the compulsion of that ruling,¹ Mr. Justice ROBERTS, Mr. Justice FRANKFURTER, Mr. Justice DOUGLAS and I have participated in the discussion of other questions considered by the Court and we concur in the result reached, but for somewhat different reasons.

The Constitution grants Congress exclusive power to control submission of constitutional amendments. Final determination by Congress that ratification by

three-fourths of the States has taken place 'is conclusive upon the courts.'² In the exercise of that power, Congress, of course, is governed by the Constitution. However, whether submission, intervening procedure or Congressional determination of ratification conforms to the commands of the Constitution, call for decisions by a 'political department' of questions of a type which this Court has frequently designated 'political.' And decision of a 'political question' by the 'political department' to which the Constitution has committed it 'conclusively binds the judges, as well as all other officers, citizens, and subjects of * * * government.'³ Proclamation under authority of Congress that an amendment has been ratified will carry with it a solemn insurance by the Congress that ratification has taken place as the Constitution commands. Upon this assurance a proclaimed amendment must be accepted as a part of the Constitution, leaving to the judiciary its traditional authority of interpretation.⁴ To the extent that the Court's opinion in the present case even impliedly assumes a power to make judicial interpretation of the exclusive constitutional authority of Congress over submission and ratification of amendments, we are unable to agree.

The State court below assumed jurisdiction to determine whether the proper procedure is being followed between submission and final adoption. However, it is apparent that judicial review of or pronouncements upon a supposed limitation of a 'reasonable time' within which Congress may accept ratification; as to whether duly authorized State officials have proceeded properly in ratifying or voting for ratification; or whether a State may reverse its action once taken upon a proposed amendment; and kindred questions, are all consistent only with an ultimate control over the amending process in the courts. And this must inevitably embarrass the course of amendment by subjecting to judicial interference matters that we believe were intrusted by the Constitution solely to the political branch of government.

The Court here treats the amending process of the Constitution in some respects as subject to judicial construction, in others as subject to the final authority of the Congress. There is no disapproval of the conclusion arrived at in *Dillon v. Gloss*,⁵ that the Constitution impliedly requires that a properly submitted amendment must die unless ratified within a 'reasonable time.' Nor does the Court now disapprove its prior assumption of power to make such a pronouncement. And it is not made clear that only Congress has constitutional power to determine if there is any such implication in Article V of the Constitution. On the other hand, the Court's opinion declares that Congress has the exclusive power to decide the 'political questions' of whether a State whose legislature has once acted upon a proposed amendment may subsequently reverse its position, and whether, in the circumstances of such a case as this, an amendment is dead because an 'unreasonable' time has elapsed. Such division between the political and judicial branches of the government is made by Article V which grants power over the amending of the Constitution to Congress alone. Undivided control of that process has been given by the Article exclusively and completely to Congress. The process itself is 'political' in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point.

Since Congress has sole and complete control over the amending process, subject to no judicial review, the views of any court upon this process cannot be binding upon Congress, and insofar as Dillon v. Gloss, supra, attempts judicially to impose a limitation upon the right of Congress to determine final adoption of an amendment, it should be disapproved. If Congressional determination that an amendment has been completed and become a part of the Constitution is final and removed from examination by the courts, as the Court's present opinion recognizes, surely the steps leading to that condition must be subject to the scrutiny, control and appraisal of none save the Congress, the body having exclusive power to make that final determination.

Congress, possessing exclusive power over the amending process, cannot be bound by and is under no duty to accept the pronouncements upon that exclusive power by this Court or by the Kansas courts. Neither State nor Federal courts can review that power. Therefore, any judicial expression amounting to more than mere acknowledgment of exclusive Congressional power over the political process of amendment is a mere admonition to the Congress in the nature of an advisory opinion, given wholly without constitutional authority.” [Emphasis added].

It is worth repeating a portion of the decision: “Such division between the political and judicial branches of the government is made by Article V which grants power over the amending of the Constitution to Congress alone. Undivided control of that process has been given by the Article exclusively and completely to Congress. The process itself is 'political' in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point.

Since Congress has sole and complete control over the amending process, subject to no judicial review, the views of any court upon this process cannot be binding upon Congress...”

Therefore the first question has been emphatically answered by the text of Coleman: undivided control of the amendment process is reserved exclusively and completely to Congress. (For those prone to panic about this I point out the Court provided one caveat: “In the exercise of that power, Congress, of course, is governed by the Constitution.” However [as I've stated before](#) as the Court clearly endorsed removal of state legislatures by military force for refusing to ratify a proposed amendment it must be concluded the Court believed such action constitutional. Thus Congress is authorized by the Coleman ruling in the future to repeat these actions—removal of state legislatures by military force to achieve whatever ratification vote Congress desires.

As usual in any Robert Natelson presentation his supporting evidence is razor thin or non-existent. Natelson states the courts have since refuted the absolute control portion of Coleman. However he provides no legal evidence in the form links to these supposed rulings. Like the king in [The Emperor's New Clothes](#) by Hans Christian Anderson Natelson parades in front of the crowd naked of evidence. Instead of providing it he presents irrelevant discussion of Justice Black's relationship with President Franklin Roosevelt. Facts are stubborn things. Thus, like the child in the Emperor's New Clothes who at the end of the story blurts out the truth about the

emperor and says, “He isn’t wearing anything at all,” lack of facts prove Natelson bare. When it comes to Supreme Court rulings, it doesn’t matter what relationship a justice had with FDR. What matters are what Black wrote and what the majority of the Court agreed with.

What matters is the 7-2 Supreme Court decision saying Congress has absolute control of the amendment process. What matters is Natelson’s presentation lacks evidence in the form of later Supreme Court decisions which either refutes or outright overturns the Coleman ruling. What matters is Natelson lacks a ruling which says (in as direct language as Coleman), “No, Congress does not absolutely control the entire amendment process. No, Congress can’t use the military to remove state legislatures and replace them with people of their own choosing so Congress can get a desired ratification vote under the guise the political question doctrine. Such action is tyranny pure and simple and is rejected by this Court.” The reason Natelson provides no such evidence is because the Supreme Court has never explicitly refuted Coleman and therefore no such evidence exists.

The problem is Coleman does say all the things I’ve described either directly or in footnoted references. Indeed, in the case of “absolute” amendatory control the Supreme Court uncharacteristically repeats itself several times using different synonyms to describe the same intent—absolute control of the amendment process by Congress. The Court goes so far it to even close the door on it ever reconsidering its “absolute” position when it emphatically states any opinion of the Court regarding the amendment process is an “advisory” opinion given “totally without constitutional authority.” Therein is the only argument (yet to be presented in a court of law) that can defeat Coleman; the fact Coleman declares itself an advisory opinion. In law, an advisory opinion is not binding. Therefore it can be argued Coleman is not a binding opinion meaning Congress does not have the tyrannical powers described in the advisory opinion. Thus Congress does not have absolute control of the amendment process. But Natelson ignores this argument and instead ends his column with an assumption based on a factual error.

He concludes his column by saying, “Such notions of extreme judicial deference to Congress are long gone. I doubt that the Black opinion would garner the support of even one Supreme Court justice today.” Given the public record of the Walker lawsuits, the first two lawsuits expressly dealing with the issue of the mandate of an Article V Convention call by Congress such assertion is laughable. “To prove this, let Facts be submitted to a candid world.”

District Court Judge John C. Coughenour ruled in my first case Walker v United States (2000) that “Plaintiff[’s]...complaint raises political questions that are more properly the province of Congress.” Coughenour cites three cases as the basis for his ruling. The first two deal with standing, the last deals with political question—Coleman v Miller. That’s one federal judge. Later in Walker v Members of Congress District Court Judge Ricardo Martinez later reiterated this statement. That’s two federal judges. A three judge panel at the 9th Circuit Court of Appeals affirmed the Martinez decision (which of course meant affirming Coughenour’s decision which meant affirming Coleman). That’s five federal judges. Finally, in appeal to the Supreme Court, the Court denied certiorari meaning under Court rules at least six of the nine justices agreed with the Coughenour ruling. Under Court rules it requires four judges to grant certiorari. Therefore it can be concluded at least six justices had no issue with Coughenour. Most people assume when the Court denies certiorari it has failed to rule on the case. This is incorrect. A denial of certiorari

by the Court means the Court has affirmed without comment the lower court ruling on the case. So in point of fact five federal judges and six Supreme Court justices have affirmed Coleman in the last decade and none have raised a single objection to any part of that decision—including giving Congress absolute control of the amendment process and permission to remove state legislatures with military force to achieve a desired ratification outcome.

When Walker v Members of Congress was appealed to the Supreme Court the issue of Coleman was discussed. Under Supreme Court Rule 15.2 the counsel for the government was “obliged” to discuss my interpretation regarding the absolute control of the amendment process by Congress (including the right to not call a convention when otherwise mandated by the Constitution to do so). The government waived its right to do so meaning under the terms of Rule 15.2 my interpretation was correct as to fact and law. The United States conceded several points in regards to Article V. Despite this fact however the government still supports the Coughenour ruling placing control of the convention under Congress by use of the Coleman ruling. In the past many have suggested my lawsuits had no legal value because they were dismissed for lack of standing and therefore are irrelevant. If there is any doubt the government believes Congress has absolute control of the amendatory process including the convention and bases that proposition on the Coughenour ruling in Walker I refer you to a recent filing (see pages 9, 11) in the on-going Sibley lawsuit and this government exhibit which clearly buries that idea.

Since the 1939 decision Congress has never used the powers granted it in Coleman. The reason is ironic. It is not constitutional interpretation that stops Congress, it is political reality—the political reality of massive reprisal at the ballot box (and elsewhere) should Congress attempt such a dangerous political stunt. The ironic part is Natelson advocates disenfranchisement of the American voter meaning if Congress (or the states) adopt his theory then the only political force strong enough to hold Congress in check is neutralized—in favor of Congress, thanks to Coleman. It is obvious Robert Natelson has never fully thought out his master/slave voter disenfranchisement theory in light of all the Constitution. It can be argued because all parties involved in the amendment process are elected (Congress, state legislatures, ratifying conventions) so must be the convention. However if state law (or the Coleman ruling) exempts the convention from balloting by placing it under absolute congressional control or under state law as Natelson advocates thus removing the people from their sovereign right of alter or abolish expressed by means of the election process then it can be postulated that under the terms of equal protection of the 14th Amendment all political bodies involved in the amendment process must be exempt from balloting review (Congress, state legislatures, ratifying conventions).

In sum Natelson doesn't know what he's talking about. Coleman does say Congress has absolute control of the amendment process and federal judges as well as the government today have agreed with the decision. Why am I bringing this year old column up now? With the advent of the Sibley lawsuit the issue of the federal courts ruling on the obligation of Congress to call an Article V Convention becomes contemporary. The federal government has already referred to Coleman in its briefs based on the Walker lawsuits. Ultimately, as in the Walker lawsuits, this ruling will become the battleground on which the question of constitutional obedience will be fought (not to mention the fact the centerpiece of the government's argument will be the Walker lawsuits and the Coughenour ruling as this is the only actual ruling by a federal court concerning congressional obligation to call a convention currently in existence).

I believe the fact the government raised the Walker lawsuits in Sibley proves beyond doubt Coughenour, in fact, made a ruling in Walker instead of a simple dismissal for lack of standing as many have asserted. Coughenour ignored the standing to sue doctrine to do this. First he stated I lacked standing meaning the court lacked jurisdiction to rule on the merits of the case. Under the rules of standing to sue Coughenour should have stopped when he found his court had no jurisdiction to rule. Instead he then ruled on the merits of the case by associating the political question doctrine in Coleman (together with everything else stated in Coleman) with the convention amendment process by extending that doctrine to include an Article V Convention something heretofore Walker the courts had never done and which historic record emphatically proves the Founders never intended. Given the fact this action created a new interpretation of the Constitution, there is no possible way Coughenour's ruling can be considered any but a ruling on his part. The hypocrisy of the doctrine of standing is clear. It is no more than a judicial sham which the federal judiciary will gladly ignore if they wish to make a ruling but don't want to be bothered with a court trial to do it. It happened in Walker and if the government has its way, will occur in [Sibley](#).

Natelson stands alone with his master/slave disenfranchisement theory. I've yet to find another legal scholar who has published any legal paper supporting his master/slave disenfranchisement theory. Plenty of legal scholars have debunked it since it first appeared in 2010. Yet on the basis of his statements an entire movement of wannabe despots disguised as patriots are trying to seize control of the Article V Convention for their own nefarious political purposes. Lead by conservative groups [Convention of the States](#) (COS) and [Compact for America](#) (CFA) these two groups have foisted this unproven theory of master/slave disenfranchisement on unsuspecting state legislators. Early on, some state legislatures bought into this bilge and passed state laws disenfranchising state voters entirely from the Article V Convention process thus leaving control of the amendment system in those states to these political groups. Fortunately, as people have looked into the details of this scam, surprise! Surprise! COS and CFA are running into opposition from people who want to keep their right to vote.

What has all this got to with Coleman? Everything. Right or wrong Coleman is the latest Supreme Court ruling regarding the amendment process. Therefore, in a federal court where ultimately a legal challenge from citizens who don't like being disenfranchised is certain to end up, the Coleman ruling will be the centerpiece of the legal argument of whether the federal government, the state governments or the people control the convention amendment process. (Given a good lawyer and the mountain of evidence available plus the political avalanche awaiting Congress or the states if either were to win such a decision, I'd still put my money on the people ultimately winning this one). Given the emphatic statements in Coleman there is little wonder Natelson is doing everything he can to convince people what Coleman says is not what is stated because the entire movement he started with his theory depends of the assumption of state (read that special interests in the pocket of COS and CFA) control of the amendment process. Coleman stands firmly in the way of Natelson's theory. Little wonder Natelson tries to convince people what Coleman says is not what is stated. Conclusion: Robert Natelson is factually inaccurate again. We move on to his second inaccurate column.

In [three recent articles](#) Robert Natelson argued against state delegations in an Article V Convention being required to pass a proposed amendment by a two thirds vote of the state delegations (each state delegation having one vote), otherwise referred to as a “supermajority.” The reason for this opposition stems from a recent report that a group of legislators known as the Assembly of State Legislatures (ASL) have assumed they have the right to set the rules for a convention instead of Congress as stipulated by the Coleman ruling. Natelson and ASL ignore Supreme Court rulings in reaching their state control conclusion. [Hawke v Smith](#) , 253 U.S. 221 (1920) for example, clearly says that states operate under the federal constitution when involved in the amendment process. Therefore ASL’s (and Natelson’s) basic proposition of state control of the convention has already been rejected by the Supreme Court. Meanwhile the Constitution recognizes the convention itself has authority to set its own rules (within the limits of the Constitution). Recently ASL came out in favor the supermajority standard for proposed amendment passage. Previously, according to reports, ASL had favored the simple majority vote of state delegations endorsed and according to my sources, originally proposed, by Natelson. To buttress his argument in his column against supermajority Natelson presents irrelevant evidence while ignoring factual information which refutes him.

The political difference in these two positions majority and supermajority can be stated succinctly: assuming a quorum at the convention (26 states), under Natelson’s plan a proposed amendment can be proposed by 13 out of the 50 state delegations. While some may accuse me of political hyperbole by suggesting only 26% of state delegations would be present at a vote on a proposed amendment, I point out if Natelson’s theory becomes prevailing law in the states (which both COS and CFA have announced is their goal), the entire convention will be prearranged prior to assembly meaning only the barest attention to parliamentary procedure will be paid. Thus it is possible under the Natelson plan that a proposed amendment may be advanced at convention with not even one state delegation present as everything, having already been prearranged, provides little incentive for a single person to attend the convention let alone entire state delegations. The political advantage is obvious; ultra conservatives need no one but themselves to pass their proposed amendments if the states adopt Natelson’s plan.

According to several sources conservatives control 30 state legislatures. It is presumed by many that the fact voters in these states having placed conservatives in charge of these legislatures naturally means voters will elect conservative delegates to a convention. Natelson simply offers a shortcut: why bother with the middle man (the voter); let’s just have the state legislatures make all the decisions. Remember Natelson’s theory totally excludes the American people from delegate selection and convention agenda making any assumption of political propensity of the state voter irrelevant. However, a national amendments convention is not a state legislature. Just because voters favor a conservative state legislature does not necessarily mean they will automatically favor delegates of the same political strip for a national convention. There are many examples in this country of conservative state legislatures but liberal national representatives. Amending the Constitution, the effects of which will last for the next millennium, and picking a state legislator, whose power may only last to the next election cycle, are two different political animals. Those who assume because conservatives control 30 states legislatures that this automatically means conservative state legislatures can “speak” for the people and therefore exclude them from the national amendment process when the issues

amendments to the Constitution address are national issues which inherently cross state borders are on shaky political ground at best.

Consider: if it is assumed all state delegations are present at the convention because they are elected by the people and therefore have every reason to be present at a convention as nothing will be pre-determined, a two-thirds vote (34 being necessary for passage of any proposed amendment) means some liberal state delegations will have to agree with any conservative amendment proposal for it to pass. By the same token any liberal amendment proposal will require conservative support for it to pass. Hence, a supermajority is an obvious political disadvantage for Natelson and his political cohorts as they cannot control the outcome of the convention by themselves. It means whatever amendment proposals are advanced will be entirely different in nature and thus produce an entirely different political outcome than those already pre-planned by Natelson and his COS, CFA cohorts.

As he is fond of doing, Natelson refers to several state conventions (more properly colonial conventions as inevitably his examples almost always come from the colonial age before the creation of the United States, the Constitution and so forth) for his “evidence” to support his position. Thus Natelson bases his theory on examples of British law when the colonies acted in accordance to instructions from the king. Rarely if ever does Natelson refer to the one convention that counts: the 1787 Convention held in Philadelphia that created our Constitution and the form of government we now employ. I keep saying this fact in many of my articles in hopes one day Robert Natelson will read one of my columns and at least correct this mistake in his evidence—that of referring to a form of government under which we no longer operate meaning any evidence of acts performed under that authority and control is irrelevant.

Besides using irrelevant evidence there is another reason Natelson avoids referring to the 1787 convention. In this instance its records refute his theory entirely. The convention had a modern approach in the creation of the Constitution. It began by allowing all delegates to submit proposals for improvement to the Articles of Confederation. The convention then became a committee of the whole and discussed what was wrong with the Articles. It then returned from a committee of the whole to that of the convention and proceeded to write up what can best be described as a checklist of goals for the new Constitution. The convention then created preliminary language based on that checklist for the Constitution. Finally, through a series of steps the convention refined this preliminary draft language into the final version we know today as the Constitution. Along the way numerous changes were made in the language—but not in regards to the position the Founders took regarding supermajority for amendment proposal and the amendment process.

We are fortunate to have the excellent work of Max Farrand who in 1911 compiled the various records, letters and other material of the convention into a day by day record of the convention proceedings. His seminal work is entitled, “The Records of the Federal Convention of 1787 and consists of four volumes of material.

The checklist for amendment proposal is found in [Volume II, p.133](#). The checklist shows two proposals. One proposal deals with amendment of the Articles, as they were called at that juncture, the other proposal show the convention favoring a convention chosen by the people,

“That Amendments...ought...to be submitted to an Assembly...to be expressly chosen by the people to consider and decide thereon.” Given this fact it appears had Robert Natelson proposed his master/slave disenfranchisement theory to the Founders in 1787 they would have immediately tossed it out.

The next relevant record is the first example of actual proposed working language for the amendment process that would be contained in the proposed Constitution. That reference is found in [Volume II, p.159](#) and clearly states any amendment process shall be a “two-thirds” action on the part of the states. This supermajority requirement for amendment proposal remained in place throughout all the rest of the versions of Article V right up to its final version. It was incorporated into the proposal requirement for Congress and later included in the ratification process where it was increased to three fourths supermajority. While the purpose of the state vote changed from amendment proposal on page 159 to application for a convention on [page 174](#) which was ultimately what the convention adopted for the purpose of a state vote, the supermajority standard never varied. This means at no time did the convention ever consider amendment proposal by a simple majority of states. Thus from the earliest working version of Article V the Founders intended that any action regarding amendment proposal by state delegations be accomplished by a supermajority of those delegations.

Natelson tries to throw dust in people’s eyes with an absurd example of states with small populations proposing an amendment and apparently suggesting if states have small populations they shouldn’t have the right to propose an amendment. The fact is state population is not a consideration in the Constitution in so far as the amendment process is concerned. For example: in the ratification process how many more votes does the state of California, one of the most populous states, have versus the state of Rhode Island, one of the least populous? The answer is: none. Each state has one vote making them equal. How many more votes for a convention call does the state of California have versus the state of Rhode Island? Again the answer is: none. Each state has one vote (the submission of a single application) making them equal. Thus a vote from California in the form of an application or for ratification is exactly equal to that of the state of Rhode Island’s application or ratification vote. Hence, the equality of states can be expressed by simple numeric ratio in Article V as all states are equal which is impossible if the states were somehow considered unequal such as in the case of population and thus had some form of weighted vote.

More to the point, requiring Congress be restricted to proposal by supermajority while permitting a convention proposal by simple majority is inherently discriminatory not only against the members of Congress but more importantly against the citizens those members of Congress represent. Had the Founders intended amendment proposal be by simple majority of the states in the convention, they would have said stated this, most likely from the earliest proposed language. But the record of drafts of the amendment process shows undeniably the Founders always intended amendment proposal by the states, whether directly, as was ultimately rejected by the Founders, or convention application which was ultimately accepted by the convention, was a supermajority vote.

Given the requirements of equal protection under the law provided by the 14th Amendment it is difficult to sustain the proposition that as every other aspect of the amendment process requires

supermajority votes in order to advance an amendment proposition, this does not apply to a vote of state delegations in the convention. Such difference is blatant discrimination. The fact Robert Natelson says to the contrary does not change that fact or relevant Supreme Court rulings on the subject. As I wrote in the [Cooley Law Review](#) at page 25, footnote 11 quoting [Gulf, C.&S.F. Ry. Co. v. Ellis, 165 U.S. 150, 155 \(1897\)](#):

“[I]f the law deals alike with all of a certain class, it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true, yet it is 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. ... [A]rbitrary selection can never be justified by call it classification.”

My footnote then continued, “The function of both convention and Congress is constitutionally identical, 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 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.”

I then cited [Hawke v Smith, 253 U.S. 221, 227 \(1920\)](#) which states, “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.”

Robert Natelson has presented no reasonable evidence as to why an Article V Convention should be in any way legally classified separate of Congress and therefore treated differently under the law. Thus when the Supreme Law states amendment proposal shall be by two thirds vote, this rule of law applies to both convention and Congress. The historic record refutes Natelson. The shallow and obvious political advantage he is attempting to obtain clearly does not meet the legal standard set by the Supreme Court of “reasonable and just relation” to the discrimination he proposes. Whether ASL has the constitutional authority to formulate rules for a convention is open to question and most likely will be ultimately answered in the negative. However on this they got it right. Natelson is wrong; a supermajority two-thirds favorable vote by state delegations in a convention (assuming a quorum) is the only constitutional method of amendment proposal.

There is one more nail in the coffin. The Supreme Court has ruled on the question of supermajority vote and Article V. In [Missouri Pac. Ry. Co. v State of Kansas, 248 U.S. 276](#)

[\(1919\)](#) the Court specifically discussed the amendment proposal system of Article V. The Court unanimously ruled the Constitution mandates a two thirds vote (assuming a quorum) to pass a proposed amendment. Obviously the Court can read. Therefore it was fully aware two modes of amendment proposal exist. Hence it is reasonable to state if the Court intended its ruling not include an Article V Convention and its state delegations were free to propose an amendment by majority vote, the Court was required to stipulate such exemption in its ruling and to provide a “reasonable and just relation” for the discrimination. No such exemption exists. Therefore the supermajority rule applies to Congress and the convention.

In sum Robert Natelson doesn't know what he's talking about—again. The man would do everyone in the Article V movement a great big favor if, as he has said many times, actually left the movement and did something else. Perhaps all remaining could then start making decisions based on truth and facts rather than his misinformation.