

The ALEC Article V Convention Report, The CATO Proposal—Examining The Errors

By Bill Walker

When in the course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another, a decent respect to the opinions of mankind demands such dissolution be based on accurate information least mankind come to the conclusion the people are idiots.

With apologies for my literary license of Thomas Jefferson, nevertheless I believe if he were alive, he would express a similar sentiment to the above paragraph if he read the ALEC Report entitled "[Proposing Constitutional Amendments by a Convention of the States: A Handbook for State Lawmakers](#)." The Constitution and its amendments form the political bands of the nation. A new amendment establishes new political bands and "dissolves" old ones. Such bands are not dissolved, as Jefferson says, "for light and transient causes." One transient cause is inaccurate information. To that charge, this report must plead guilty. Accurate information results in accurate decisions. Accurate decisions preclude failure in the future. This report asks the American people to stand under a huge steel beam supported by a single rusted bolt and pull on the beam. In short, it asks the people to be idiots.

ALEC refers to the American Legislative Exchange Council, a conservative organization of state legislators. Its stated goal [in part] is to "discuss, develop and *disseminate public policies* which expand free markets, promote economic growth, limit the size of government and *preserve individual liberty*." I emphasize some of the text from this quote for what will be obvious reasons.

First, this report is secret. If you go to the [ALEC](#) website you will not be able to download a copy of the report. Indeed, ALEC is so secret an entire website has been created to "expose" all ALEC's proposals. I only have a copy of the report because someone else sent it to me. Some of these proposals concern [proposed amendments](#) to the Constitution. Most deal with proposed "model" legislation intended to turn a political agenda into public law. As a special website is needed to "expose" ALEC reports, obviously the phrase "disseminate public policies" in ALEC's world does not include informing the general public of ALEC proposals. Not that ALEC is so obligated. Clearly, it has the right to confine its reports solely to its members. However, when an organization claims to have "2000 state legislators" as its membership and when that membership makes decisions of public policy and money they may enact into public law I feel a lot better if such proposals are available to the general public from that organization rather than from a website set up to "expose" them.

Let me state at the outset I have no issue whatsoever if ALEC proposes one or thousand proposals dealing with public policy. However, as a citizen I demand their basis of proposal be accurate information. If the report I am discussing is any indication of the

quality of ALEC's proposals then outright rejection is the only response until ALEC gets their facts straight. Only then should they be thoughtfully deliberated in public forums, a privilege, as I will show, ALEC is not willing to permit if it has its way.

Rob Natelson authored this report. In 2010, he wrote "[Amending the Constitution by Convention: A Complete View of the Founders' Plan](#)". Primarily because he wrote his entire 2010 paper without once referencing the actual 1787 Convention proceeding vis-à-vis the amendment process and his paper contained repeated inaccurate statements, assumptions and omissions, I responded with an extensive [rebuttal](#) correcting these errors of fact.

This latest report is equally poor regarding accurate facts. If basic public record refutes or corrects statements made in a report, its value is non-existent. Not only should the public reject the proposals within it but so too should its ALEC membership. You should not expect support if your basic information is inaccurate. Nor should the public support any convention proposal, which advocates as its principle means of accomplishment complete exclusion of the American public from that process. Not only is such a concept unconstitutional but un-American as well. The report is guilty of both of these political sins. To quote Jefferson exactly, "To prove this, let Facts be submitted to a candid world."

On page 2 of the Introduction of the report, states, "Although State lawmakers have initiated the state application and convention process many times, they never have carried it to completion." This statement is incorrect as it indicates the states have failed to submit sufficient applications to Congress to cause a convention call. To quote Article V, "...on the application of the legislatures of two thirds of the several states, [Congress] shall call a convention for proposing amendments..." Rephrased for purposes of absolute clarity Article V reads, "Congress shall call a convention for proposing amendments on the application of the legislatures of two thirds of the several states..."

The Supreme Court has ruled several times on Article V. Most relevant to this discussion of this part of the report is its ruling in *United States v Sprague*, 282 U.S. 716, 730,732 (1931) "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 court then continued, "where the intention in clear there is no room for construction and no excuse for interpolation or addition."

Therefore, the clear language of Article V establishes what is required to complete "the state application and convention process" which is expressly and solely that two thirds of the several state legislatures shall apply for a convention call. As stated by the Supreme Court Article V contains no ambiguity and hence no implied meaning or powers. Article V only requires the application of 34 states for a convention call—no more. Therefore, if the public record regarding the state applications *exceeds* the constitutional requirement then the statement in the report is inaccurate and incorrect. The public record is blatantly clear: [49 states--over 700 applications](#), far in excess of the 34 applications from 34 states the Constitution requires.

Beginning with page 8 of the report, Natelson attempts to rewrite the Constitution. First, he ignores major parts of the Constitution in his presentation, specifically the effect of the 14th Amendment and its equal protection clause and the Tenth Amendment and its separation of power between the federal government and the states. While many in ALEC are supportive of the Tenth Amendment vis-à-vis it precluding the federal government from interference in state matters, these same people usually ignore the fact the Tenth Amendment precludes the states from interference in federal government matters. It is important also to note the Supreme Court has held states operate under the *federal* constitution rather than their state constitutions when involved in the amendment process. Thus, only what is stated in the federal constitution has any bearing on an Article V Convention. As noted by the Supreme Court in *Hawke v Smith*, 253 U.S. 221, 230 (1920) “...the state derives its authority from the federal Constitution to which the state and its people have alike assented.”

As Article V contains no “ambiguity”, there are no implied powers for either Congress or the states in the amendment process. Natelson’s futile efforts to justify his position based on pre-constitutional actions of the states or what the Founders did before writing Article V vis-à-vis colonial era state conventions are irrelevant. Those actions have no bearing whatsoever on the expressed language of our present Constitution. The courts have correctly and repeatedly interpreted this language without a single dissent over the entire course of our nation’s history. At no time did the court refer to actions taken before the Constitution even existed as the basis for decision.

Natelson is correct on one point, which he takes great pains to discuss. An Article V Convention *is not* a “constitutional convention.” As he notes, “[I]t is not an assembly with very wide authority, such as one charged with drafting or adopting a Constitution. *Thus, it is simply incorrect to refer to a convention for proposing amendments as a ‘constitutional convention.’* They are different creatures entirely.” While he is correct as to the limited nature of a convention, Natelson apparently fails to actually read the expressed purpose of the Article V Convention clearly stated in the Constitution—the purpose of a convention for proposing amendments is for *proposing amendments*. This is the *exact same power of Congress—to propose amendments*.

The duties of Congress and convention clearly expressed, the Tenth Amendment then takes effect. It is worth repeating the words of that amendment, “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.” Without question, the Constitution assigns (or delegates) the power of amendment proposal to Congress and to a convention for proposing amendments. Thus, by the terms of the Tenth Amendment, as such power is delegated to these two bodies; it is *automatically* precluded from the states. This explains why the states cannot propose amendments by any means, *including inclusion in an application for a convention call*.

What Natelson ignores is the states, when they include a proposed amendment, however written, in an application they are in fact petitioning *a convention* to propose that

amendment. He states on page 11 of the report, “[A convention’s] power to propose is limited by the subject matter specified in state applications—*but by no other authority whatsoever*. The convention is a deliberative body whose members answer to the state legislatures they represent.”

Not to put too fine a point here but this sentence lies at the crux of the entire issue of an Article V Convention. ALEC believes the state legislatures, which the Constitution expressly limits to applying for a convention call, derive from that language control authority of what they describe in their report as a “deliberative” body. To accomplish this goal, which no doubt the legislatures would fervently resist if applied to their deliberative bodies, Natelson ignores the 14th Amendment of the Constitution. In sum, that amendment dictates citizens within various legal classes *must* be treated equally. A complete explanation including legal citations is in my [rebuttal](#).

As members of Congress or convention delegates, these citizens have identical power of amendment proposal under the Constitution; they therefore are legally entitled to equal protection under the law; meaning what applies to one equally applies to the other. In several clauses the Constitution forbids the states from controlling Congress vis-à-vis the amendment process—that is instruct Congress as to manner and type of amendment that body will propose or, more importantly, instruct that body that it will, in fact, actually *propose* an amendment. Despite what Natelson states on page 11 of the report that “[t]he convention for proposing amendments is basically a drafting committee or task force, convened to reduce one or more general ideas to specific language” the fact is Congress is not such a body. It has a constitutionally mandated independence and is not subject to state instruction. The states may defeat the amendment proposal by refusing to ratify it. However, this is not the same thing as instructing Congress what amendment it will propose. Thus, Congress’ right of amendment proposal is not regulated or controlled by the states thru any instructions whatsoever, save by ratification vote. Under the terms of the 14th Amendment therefore, this prohibition against state interference equally applies to the convention.

How can a body be “deliberative” when its deliberation is pre-determined? What will it deliberate? Despite Natelson’s claim to the contrary, if the states control the convention agenda and vote how can they not control the actual wordage of amendment proposal. The term “deliberative body” implies the right to deliberate. Webster’s Dictionary defines this as “to ponder or think about with measured careful consideration and often with formal discussion before reaching a decision or conclusion.” As Webster’s demonstrates the meaning of “predetermination”, “a decision made beforehand especially without due consideration” obviously conflicts with the word “deliberative.” Obviously, ALEC opposes a convention being a deliberative body, the very opposite of what the Supreme Court in *Hawke v Smith* prescribes when it referred to conventions as “deliberative assemblages representative of the people [that will] voice the will of the people.” Natelson fails to justify or explain how the controls he proposes already rejected by the Supreme Court are constitutional. Indeed, the entire report ignores Supreme Court rulings entirely and fails in almost all cases to cite a single legal reference as proof of the assertion.

Page 13 of the report advocates state authority of application rescission though Natelson states saying, “[t]he power to rescind continues until the two-thirds threshold is reached, or perhaps shortly thereafter.” Natelson provides a footnote, which asserts, “The courts, including the Supreme Court, have affirmed this repeatedly.” The facts speak differently.

First, the provisions of the Tenth Amendment raise an issue. The Constitution requires states submit applications to Congress, which, in turn, compiles these until a sufficient number causes a convention call. Public record proves long before Congress received any so-called “rescission”, the two-thirds requirement was satisfied. Congress, with the first state applications submitted shortly after the Constitution was ratified, recorded them in what today is the Congressional Record. The Constitution requires that Congress keep that record. The terms of the Tenth Amendment are clear—if the Constitution assigns a duty to the federal government, the states cannot in way effect it. Beyond the fact, Article V does not authorize rescissions; the Tenth Amendment precludes the states from altering the Congressional Record. Only Congress can do that and the peremptory requirement of Article V forbids this. Therefore, if rescissions were constitutional (and they are not) it would be *Congress* that has the authority to affect them.

For the record, there are no Supreme Court rulings as Natelson asserts; if there were, he would have cited them. The courts have never ruled or even discussed rescission in any ruling. Indeed as I show in my [rebuttal](#), there is not even a legal dictionary definition of rescission as Natelson uses the word. Finally, despite the states submitting these rescissions, the fact is Congress has never honored even one by removing a single application from its record. In other words, Congress does not recognize the authority of the states to “rescind” any application to Congress but instead respects the intent and wordage of the Tenth Amendment. The reason should be obvious. If Congress concedes the states have a right to revise its actions, this authority can extend *ad infinitum* to all congressional acts.

On page 14 of the report Natelson states, “...the Constitution requires Congress to call a convention for proposing amendments. Both the historical and legal background of Article V and modern commentary clarify that the congressional role at this point is merely “ministerial” rather than “discretionary.” In other words, the Constitution assigns Congress a routine duty it must perform. It is important to note, however, that congressional receipt of 34 applications is not sufficient; those applications must relate to the same subject matter.”

There is no requirement in the Constitution that applications “relate” to the same subject matter as the Constitution expressly assigns all applications exactly one subject—the calling of an Article V Convention. Anything else contained within the application by the state is intended as a petition for the convention, not Congress, to consider and therefore so far as the constitutional requirement of calling is concerned, dicta. Natelson suggests the states can not only dictate to the convention what issues it may consider but instruct Congress as to how it will interpret the applications. A convention call is peremptory. Peremptory is a legal term, meaning there is no option or excuse that can prevent a

required action on the part of a person or other body, in this case, Congress. Allowing Congress (or the states) such an option as deciding how applications will be “aggregated” provides the means whereby the call is no longer peremptory. Therefore it becomes optional or as Natelson phrases it, “discretionary.”

Consequently, Natelson states a contradictory position. On one hand he states Congress must call a convention and the duty is “ministerial.” Webster’s defines “ministerial” as, “an act that a person after ascertaining the existence of a specified state of facts performs in obedience to a mandate of legal authority without the exercise of personal judgment upon the propriety of the act and usually without discretion in its performance.” On the other hand he states “differences exhibited by the applications [give Congress] more justification... in refusing to aggregate them.” If Congress has “justification” to refuse to “aggregate” applications, then their function cannot be consider ministerial or peremptory but is in fact optional and discretionary. Natelson cannot have it both ways—either Congress has no choice in the matter or it does have a choice in the matter. Between these two points, there is no middle ground.

Natelson’s position also attacks his own constituency—the state legislatures. His proposal discriminates the state legislatures and the citizens they represent into two unequal groups. On one hand is the state legislature whose one amendment issue is heard, discussed and resolved at a convention. On the other is the remainder of the state legislatures unheard and precluded from introducing any other issue they wish to discuss. Thus, Natelson envisions censorship of at least a third of the nation’s citizens at a convention. The political reality of such convention is obvious—to accomplish ratification, at least another twenty-five percent of this excluded third must lend support to the proposed amendment. What are the chances of increased political support from these repressed citizens when they have no input in the first place?

Natelson accepts the premise Congress has such a power to make a decision as to how applications are “aggregated.” Article V does not grant such a power and the Supreme Court has repeatedly stated Congress has no such authority. The reason is obvious—if such power existed, Congress could refuse to call a convention despite the mandate of the Constitution. As stated by Hamilton in [Federalist 85](#) “the national government will always be disinclined to yield up any portion of the authority of which they were once possessed.” This is why *any* method granting any discretion whatsoever is unconstitutional. *If the process is anything but peremptory, it will fail because Congress will always find a way to make it fail.* The 1787 convention wrote the Article V language so Congress cannot defeat the entire process. Thus, Natelson’s assertion to the contrary, the only power the “call” confers on Congress is to set the time and place of a convention once the proper number of applications is submitted by the states. All other authority he asserts is unconstitutional as it provides Congress a means to refuse to call in the first place.

On page 15 of the report, Natelson discusses the method of delegate selection for the convention. He excludes the American people completely from this process. He suggests one of four methods for choosing delegates, none of which involve citizen participation.

Two of the methods are choice by state legislature, the third by state executive and the fourth by a designated committee. Obviously “preserving individual liberty” does not come into play as the most important individual liberty, the right to vote, is ignored entirely. Natelson contradicts himself when he states, “Accordingly, a convention for proposing amendments has no authority to violate Article V or any other part of the Constitution” then suggests (1) that delegates will be chosen by the state legislatures, (2) are subject to recall by the state legislatures and (3) are “[l]ike other diplomatic personnel... subject to instruction from home—in this case from the legislature or the legislature’s designee. He continues, “The designee could be a committee, the executive, or another person or body. Although state applications cannot specify particular wording for an amendment, a state *could instruct its delegates to not agree to any amendment that did not include particular language.*”

If, as Natelson contends, a state can “instruct” its delegates not to agree on an amendment that does “not include particular language” obviously this also means the state legislatures have the power to instruct the delegates to vote for an amendment that *does* contain “particular language.” The implication is obvious. While Natelson asserts the convention controls amendment language he contradicts himself by allowing the state can instruct its delegates on what wordage is acceptable. Obviously, by this means the state becomes involved in the *editing* process of the amendment proposal. Just as obviously in order to “instruct” its delegates *the state has no choice but to write out the language of the proposed amendment in order to inform the delegates what language the state finds acceptable.* The independence Natelson asserts the convention has vis-à-vis amendment wordage is a mirage. The only conclusion possible of the report recommendations either is the states through their recall power over delegates Natelson asserts states have or by instructing the delegates what they will or will not accept in wordage, is blatant censorship. Even a wide eyed child would be hard pressed not to believe a state given these powers would take advantage of them to the utmost. Thus, the states, not the convention, will write the proposed amendment in Natelson’s world, a clear violation of Article V.

Natelson asserts convention delegates are “[l]ike diplomatic personnel...subject to instruction from home” meaning from the state legislature. There are several issues with this assertion. Natelson completely ignores the fact state legislatures are not the source of sovereignty in this nation. As discussed in my [rebuttal](#) the source of sovereignty in this nation is the people. This is not a symbolic statement. There are treaties and actual law making this a legal fact. Moreover, the Constitution forbids states from having “ambassadors or diplomatic personnel.” It expresses this in Article III of the Constitution where in two sections describing cases which can be heard by the courts—“all cases affecting ambassadors, other public ministers and consuls; —...controversies between two or more states...” Additionally, Article I forbids states from entering into any “treaty, alliance or confederation.” This not all. Article II expressly assigns the power to appoint ambassadors to the President of the United States stating, “He [the president]... shall appoint Ambassadors, other public Ministers and Consuls...” The Tenth Amendment as already noted prevents the states from assuming a power clearly designed as a power of

the federal government. Thus, considering delegates as state ambassadors is clearly unconstitutional. To assert otherwise shows a gross misunderstanding of the Constitution.

The report incorrectly states state legislatures can recall convention delegates. The speech and debate clause (Article I, Section 6, Clause 1) protects members of Congress from this state action. Equal protection extends the protection to convention delegates. As Natelson concedes, “a convention for proposing amendments has no authority to violate Article V or any other part of the Constitution.” If the convention cannot violate any part of the Constitution, it cannot participate in any action (including those of a state) that does violate the Constitution. Therefore, delegates can constitutionally ignore any such “recall” just as members of Congress can.

Next is the most objectionable report recommendation—the complete exclusion of the American people from the amendment process of *their* Constitution. The suggestion on pages 14-15 convention delegates be appointed by the state legislatures cutting the American people out of the process entirely is so obviously anti-American on its face that to mention it is a violation of the 14th Amendment and several other clauses of the Constitution is really not required. All members of Congress who propose amendments are elected. State legislators who vote on ratification of a proposed amendment are elected. The Supreme Court has ruled conventions are elected.

Natelson wants a convention ruled by smoke filled rooms setting up, not as he contends, a convention free of the worries of a runaway convention but an actual runaway convention. The Natelson convention delegates will have no obligation to the people. From its conception in the backrooms of the state legislatures, the convention will be nothing but graft and corruption totally immune from checks election by the people brings to the system. It will be a runaway convention from the start already having runaway from the American people and their Constitution—it is not even a baby step to assert such a runaway convention will beholden to no one but special interests. Natelson says he wants to avoid this result. He presents no proof of how cutting the American people out of the amendment process will accomplish this.

Another problem is Natelson’s suggestion that “[u]nless altered by convention rule, [amendment] proposal only requires a majority vote [of the delegates at the convention]. Some have argued that a formal proposal requires a two thirds convention vote—or that Congress may impose such a rule—but there is nothing in law or history to support this argument.” Again, this suggestion conflicts with the 14th Amendment rule of equal protection. Congress and a convention are equal. Obviously, this is not true if one body is bound to a two-thirds vote while the other only has a majority vote. As the Constitution mandates one part of the legal class be bound to a two-thirds standard that means the rest of the class is also so bound. So much for the statement there is “nothing in law” to support the argument that a formal vote to propose an amendment in a convention requires a two-thirds vote of the convention.

The final ridiculous point of this report is that Natelson states on page 16, “The Constitution does not require that a proposal be transmitted to Congress or to any other

particular entity...[but][b]ecause Congress must choose a mode of ratification, however, the convention should officially transmit the proposal to Congress.” True, the Constitution does not require that “a proposal be transmitted to Congress.” Natelson is condescending in his statement. Obviously, the entire purpose of the convention, as expressly stated in the Constitution, is to “propose amendments” which, when ratified, become part of the Constitution. To suggest convention delegates will be so ignorant of their part in the amendment process that they will fail to formally forward amendment proposals to Congress and therefore must be instructed by Natelson to do so in order to begin the ratification process is an insult not only to the delegates but the entire amendment process.

In sum, all Americans, whether conservative or liberal must ignore this report. If its proposals were adopted, the result will be the American people will be cut out of the amendment process entirely, something so repugnant to American way of life, it deserves no further consideration. For this reason alone, this report must be rejected.

In other matters—

— Michael B. Rappaport, professor of law at the University of San Diego, who also serves as director of the Center for the Study of Constitution Originalism, recently published [“Renewing Federalism by Reforming Article V--Defects in the Constitutional Amendment Process and a Reform Proposal.”](#)

The Center states [on its website](#) that “Originalism is the view that the Constitution should be interpreted in accordance with its original meaning—that is, the meaning it had at the time of its enactment.” If this is true, you certainly cannot tell this from Rappaport’s article. From the very beginning, the obvious lack of research on the subject is apparent. For example, on page 5 of the report, Rappaport states, “[S]tate legislatures are exceedingly unlikely to apply for a national convention in the numbers necessary to require Congress to call one. Consequently, the national convention process has never produced an amendment—or even a convention.”

Of course, the over [700 applications submitted by 49 states](#) disproves this statement entirely. Such a fundamental error as not knowing how many states have applied for a convention call clearly proves this report has little or no value. The report contains several problems, most of which are shared with the Natelson report. The most glaring is the assumption by the author, in light of his being director of a center that professes “originalism...the meaning it had at the time of its enactment” is the assumption Congress has any say in the convention process whatsoever. Rappaport repeatedly refers to congressional “discretion” and even accepts the principle of a “limited” subject convention with Congress in charge of such determination.

Had he bothered to actually read Farrand’s Records (Volume 2, pages [629](#), [30](#)) the recognized authority on the 1787 Federal Convention, he would discover the *original* intent of the Founders, *at the time of enactment* was that Congress would have no discretion in the calling of an Article V Convention. Indeed, as stated by Hamilton in

[Federalist 85](#), the calling of a convention is “peremptory.” As I have already pointed out, Congress cannot have “discretion” if the call is “peremptory.” Rappaport ignores the original intent of the Founders in his report. He accepts, without reference or proof, the proposition discretion on the part of Congress. He discusses these in great depths but fails to recognize the genius of the Founders and their original intent. All of his concerns fall to the ground if the original intent of the Founders and the original intent interpretations of the Supreme Court are obeyed.

Finally, Rappaport attempts to propose a “solution” to the problems he envisions in Article V. His “solution” is so complex that it falls to earth on its own unsubstantiated weight. Article V works just fine—provided Congress obeys the Constitution and actually calls a convention. His solution is not a solution. Indeed, if one studies the various proposals on amendment from delegates at the 1787 Convention, it is clear the Founders already considered, then rejected many suggested by Rappaport. We should rely on the wisdom of the Founders and do the same today and not alter Article V, at least until one convention is actually held as the Founders intended.

—Longtime convention opponent [Bob Schulz](#), in announcing his newest initiative in his WTP Congress has stated he supports “[*holding ALL elected officials accountable to ALL provisions of our state and federal constitutions.*](#)” Obviously, by this all-encompassing statement, Schulz includes an Article V Convention and its peremptory requirement on Congress and therefore holding members of Congress accountable to this constitutional provision. To do otherwise constitutes obvious constitutional hypocrisy.

—The Department of Justice received the John Guise federal criminal complaint against members of Congress for failure to obey their oaths of office and call and Article V Convention on January 17, 2012 at 8:48 a.m. local time. Under federal law Eric H. Holder, Jr. Attorney General of the United States has 30 days from the time of receipt of the complaint, January 17, to conduct a preliminary investigation and determine whether to act on the complaint or close it. This means he must decide the issue by February 21, 2012. (The 30th day is February 20, a national holiday). Under the law, the attorney general is limited in his preliminary determination solely to the creditability of the evidence of the complaint, which, in this case, is the official record of the Congress of the United States, the Congressional Record. According to federal law, Attorney General Holder must determine whether it is in “the public interest” to require members of Congress to obey the Constitution. If the attorney general decides it is not in the public interest that Congress obey the Constitution, his official decision will likely serve as an official model for future constitutional disobedience by the government.