

Answers to the 16 toughest Article V questions

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You won't find a tougher set of Article V questions than the ones posed below by the John Birch Society. Fortunately, as Michael Farris explains, there are great answers to even the most difficult questions.

Michael Farris, JD, LL.M.

The John Birch Society describes itself as a constitutionalist organization, yet it is highly critical of a very important component of the Constitution. The JBS does not like Article V's provision that allows the States to unilaterally propose and ratify amendments to the Constitution.

George Mason demanded that this provision be included in Article V because he correctly forecast the situation we face today. He predicted that Washington, D.C. would violate its constitutional limitations and the States would need to make adjustments to the constitutional text in order to rein in the abuse of power by the federal government.

Current conservative solutions to the problems of federal abuse of power fall into one of two general strategies: (1) try to elect more conservatives to federal office; or (2) promote theories like "nullification" that are not grounded in the text of the Constitution and have no realistic chance of success.

Our plan is to use the Constitution's own formula—a Convention of States under Article V—to give us real solutions that are as big as the problems.

Here are our answers to the sixteen JBS questions:

1. What ails America? Is it our Constitution or our Congressional, Presidential, and bureaucratic non-compliance with the Constitution?

The central problem with American government is the belief that the purpose of government is to provide for our needs. Washington, D.C. carefully nurtures this belief because it serves its own prime purpose—the aggregation of federal power. Accordingly, Washington, D.C. has gradually amassed overwhelming power that is clearly outside of the boundaries that the Framers intended when they wrote the Constitution.

This improper aggregation of power crisis, in fact, arises indirectly from the Constitution itself. The Constitution permits the federal judiciary to be the final interpreter of the Constitution (1). Because the Framers did not have any meaningful experience with the practice of judicial review, they did not construct adequate checks and balances vis-à-vis the judiciary.

Accordingly, the Constitution, as interpreted by the Supreme Court today, is in fact the problem. This interpreted Constitution allows runaway spending, undeclared wars, government agencies spying on the citizens, massive debt that will impose economic slavery on our children, rule by executive order, coercive medical insurance, and the rise of a dominating bureaucracy.

All of these things are constitutional according to the Supreme Court or lower federal courts. Moreover, the two most abused provisions of the Constitution have been amenable to abuse because they were not

written tightly enough to effectively implement the drafters' intentions. The Interstate Commerce Clause was intended to allow Congress to set the rules for interstate shipping. As interpreted, it allows Congress to regulate virtually any part of our lives that has a dollar sign attached to it.

The General Welfare Clause as interpreted allows Congress to tax and spend for any fool thing that Congress desires. Madison's view of the General Welfare Clause (which was shared by a majority of the Framers) was that the General Welfare Clause was not a grant of spending power at all. It was a limitation on spending. Madison believed that when Congress used its other enumerated powers to spend, it had to do so in a manner that truly promoted the welfare of the nation ("the general welfare"), as opposed to the welfare of a specific locality or a small group of individuals.

The Hamilton view of the General Welfare Clause was famously adopted and explained by Joseph Story in his seminal work on the Constitution. It was Story's version of this Clause that caused the Supreme Court to initially adopt this approach in *United States v. Butler*, 297 U.S. 1 (1936). Story explained that while the General Welfare Clause did contain an additional grant of power to tax and spend, it was subject to two important limitations. First, expenditures should be for the national interest, not local or personal interests. Second, this Clause was subject to the first resolution adopted in the Constitutional Convention—that this Constitution was adopted solely for areas where the States possessed no jurisdiction. In other words, if the States could spend money on a particular subject, Hamilton and Story thought that Congress could not spend money for that purpose under the General Welfare Clause. States can, if their State constitutions permit, spend money on education, welfare programs, medical programs, and retirement programs. Accordingly, Congress has no jurisdiction under the General Welfare Clause to spend money for any of these purposes.

All of the entitlement spending that is bankrupting this country would be unconstitutional if we faithfully followed either Madison's or Hamilton's view. All federal mandates imposed by Congress on the States would likewise be unconstitutional.

Accordingly, our task is to do two things to fix these constitutional problems. We need to write very specific language that clarifies and adjusts the Commerce Clause and the General Welfare Clause according to their original meanings. Moreover, we need to put proper checks and balances in place to ensure that the federal judiciary no longer has the ability to legislate from the bench.

We should make other course corrections as well, because the Constitution as interpreted contains other serious flaws. The Framers made all treaties the supreme law of the land. However, the Framers understood the treaty power to reach only the subject of how nations treat other nations—not how our own nation interacts with and governs our citizens. Today, however, treaties are viewed as capable of controlling the internal law of the United States. This error must be definitively corrected.

Likewise, the taxing power in the Sixteenth Amendment is dangerous and needs to be changed.

Executive orders and administrative regulations have been allowed to become law even though Article I, Section 1 declares that all federal laws must be passed by Congress. The current interpretation is unacceptable and must be corrected.

Experience has taught us that the Constitution as interpreted has allowed the abuse of both federal power and the rights of the people. We need to correct these erroneous interpretations and constrain the power of the federal judiciary to make activist interpretations in the future.

George Mason knew that it would take constitutional changes to return the government in practice to the government the Framers intended to give us. And he knew that Washington, D.C. would never propose such changes. He was right on all counts.

2. If our Constitution is the problem, what exactly do we need to change in it and why can't that be

done by the method that all 27 amendments have undergone to change the Constitution?

I have already explained the basic changes needed in the Constitution as interpreted.

It should be self-evident why it is impossible to get necessary amendments via the usual congressional process: Congress will never propose any amendments that reduce federal power. George Mason correctly understood this reality. Washington, D.C. will never voluntarily relinquish power. Anyone who thinks otherwise is deluding himself.

3. If the problem isn't the Constitution, but rather unfaithfulness to the Constitution, how will changing the Constitution remedy the problem?

The answer is simple: We must curtail the power of the Supreme Court to approve federal power grabs by the other branches. When we address the whole problem and not just pieces, a solution becomes apparent.

4. Who is in charge of calling the convention according to Article V? If Congress calls the convention, as Article V says it does, who decides how many delegates each state gets? Will the number of voting delegates be population-based or will each state get one vote or will another method be used? Are these questions that state legislatures are charged with deciding or does Article V say that Congress decides?

Article V and the settled historical practices give us all of the necessary rules. The following questions and answers explain each step in the process:

- a. What is the subject matter of the Convention?
- b. Where will the Convention be held?
- c. When will the Convention start?
- d. Who will appoint the delegates (and how many)?
- e. What amendments will be proposed?
- f. How are the amendments to be ratified?

a. Subject matter

The subject matter of the Convention is settled by the States. There have been over 400 applications for a Convention of States in the history of the Republic. We have never had a Convention because we have never had two-thirds of the States agree on the subject matter. State legislatures control the subject matter. Just as the calling of the Convention is subject to the subject matter limitation, all stages of the Article V process are likewise prohibited from going outside of this limitation.

b. Where will the Convention be held?

Congress gets to decide this question. Any place other than Washington, D.C. is appropriate in our view.

c. When will the Convention start?

Congress also gets to decide this question. Congress must pick a reasonable time and place. If it fails to do so, the States have the residual sovereignty that would permit them to agree to a time and place. Litigation to mandate a time and place would be almost certainly successful. Congress has a mandatory, non-discretionary duty to call the Convention and choose a reasonable time and location.

d. Who will appoint the delegates and how many will each State get?

In the very first application filed by Virginia in 1789, the Virginia General Assembly properly called this

process a “Convention of States.” It is not a Convention of delegates from States. It is a Convention of sovereign units of government.

Every stage of the proceeding requires the States to act as singular sovereign entities. Thirty-four States must enact applications. There is no proportionality rule. One State, one vote. In the ratification process, thirty-eight States must ratify. There is no proportionality rule. One State, one vote. This same principle holds true for the Convention itself. There is no other way to vote other than one State, one vote when sovereign entities meet to transact mutual business.

There have been over thirty multistate conventions held in the history of the Republic. They have been sanctioned by a wide variety of sources of authority. The one rule that has been scrupulously followed in all these conventions is this—voting is always on the basis of one State, one vote. One convention proposed to change the voting to a proportional representation basis.

However, the vote on that motion was conducted on a one-State, one-vote basis and the motion was rejected.

The very fact that Article V does not specify a formula for the number of delegates indicates that the Framers understood that the States were not sending representatives who act in their individual capacities. The Framers knew that it would be one-State, one-vote, and that each State had the unfettered authority to determine the number and characteristics of their deputies. It would have been unacceptable to the Founders to say, for example, that each State gets three representatives. This would mean that representatives from State A could cast two votes for a proposition and one vote against it. This would be voting by individuals. The Framers wanted voting by States just as they did at the Constitutional Convention and every other convention that preceded it.

Accordingly, the number of delegates each State chooses to send is a non-issue. If State A sends 11 delegates and State B sends 7 delegates, both States only get one vote. Delegates must caucus and cast the vote for their State on each issue by a majority within that State.

e. What amendments will be proposed?

The subject matter of the Convention is settled in advance by the State applications. For our model application, the subject matter is limited to imposing fiscal restraints on the federal government, limiting the jurisdiction of the federal government, and imposing term limits on federal officials.

The final text of any amendments on these subjects (and only these subjects) will be approved only when twenty-six or more States approve.

If more than one amendment is proposed, which is likely, they will be sent as a package—just like the Bill of Rights—where each amendment would be ratified (or rejected) individually.

f. How will the amendments be ratified?

Congress gets to choose whether ratification is directly by the State legislatures or by ratification conventions within the States.

5. At the convention how many amendments can be proposed?

There is not a specific limit under our application. It is relatively certain that there would be at least a few amendments proposed, perhaps as many as ten to twelve.

6. Where are the amendments proposed according to Article V? Are the amendments proposed before the convention of the states or are they drafted and deliberated upon at the convention by

the delegates? Are those who support the convention under the assurance that it won't be a runaway convention contradicted by their own statements (not to mention Article V) which support the idea that the amendments are proposed, deliberated, and drafted at the convention itself?

The final version of the amendments will be drafted at the Convention. The scope of the subject matter of the amendments is set by the States in the applications. The wisest path is for the States to work together to find language that is the most likely to accomplish the purpose of the Framers and be politically viable in the ratification stage.

There is a huge difference between a Convention that fine tunes the language of an amendment as compared to a Convention that gets to change the subject matter for the meeting. Consider the example of a Convention trying to draft term limits for federal judges. If it became apparent that having one term of ten years was going to be more acceptable than two terms of six years, then sensible people would want the delegates to be able to choose the final wording most likely to be ratified in 38 states. Delegates need to have the flexibility to negotiate final language while being strictly limited on the subject matter. This is exactly what happens under our Convention of States application process.

The two real controls on the possibility of a runaway Convention are: 1. The States adopt the subject matter of the Convention in advance, and it is binding. 2. Thirty-eight states must approve the proposed amendments coming from the Convention.

It takes an incredibly wild imagination to believe that delegates appointed by the State legislators would defy their given agenda, and then, after an open rebellion, the State legislators in both houses of thirty-eight states would ratify an errant amendment (2).

Congress is a permanent constitutional convention. It can propose amendments on any subject it wants, any day of the week. It is virtually impossible to imagine a Convention of States (appointed by State legislatures) composed of delegates more irresponsible than the governing majorities in Congress. Yet, Congress doesn't ever send out crazy amendments. Why not? Its members are constrained by the political realities posed by ratification—and nothing else.

A runaway Convention is no more likely to occur than President Obama appointing me to the next vacancy on the Supreme Court. It is theoretically possible—but with just a sniff of realism, common sense tells us it is impossible.

7. If we aren't following the Constitution now, would it be logical to assume that once we pass amendments to the Constitution, then the new amendments and the Constitution will be followed?

We agree completely with the sentiment that, on the whole, our country is not following the original meaning of the Constitution. However, there are certain subjects where the Constitution has been interpreted accurately in light of original intent. For example, the Second Amendment has been on good footing lately. The Full Faith and Credit Clause is functioning well. Term limits on the President are being obeyed.

The core answer to this question relates back to the answer to the first question. Our government is operating in substantial compliance with the Constitution as interpreted by the Supreme Court. Thus, the government has a plausible claim that it is currently obeying the Constitution.

Conservatives generally believe that the Supreme Court was wrong in saying that Obamacare was constitutionally authorized by the General Welfare Clause, but a Supreme Court majority held it to be so. This decision was horrible if we use originalism as our standard, but was only a slight extension of past Supreme Court precedent. Thus, it is not outlandish for the government to claim that Obamacare is indeed

constitutional under the Constitution as interpreted by the Supreme Court.

So, if we are going to really fix the problems with our government, we must restrain all branches of federal power. In fact, the most important checks of all may well be those related to constraints on judicial power.

With properly written amendments, we can move the country to the point where our government would be in substantial compliance with the Constitution as written rather than as interpreted by the Supreme Court. This can be done by proper limitations on the power of the federal judiciary as well as a new methodology of appointing justices. Moreover, replacing broadly worded phrases like “the General Welfare Clause” with precise language that puts clear and proper limits on such powers will make a difference.

But let’s suppose that even with new safeguards, the left succeeds in overriding these new amendments with new federal usurpations. It will be a pyrrhic victory for them if they thwart the intent of newly adopted amendments. The political coalition necessary to win ratification in 38 States is more than big enough to completely throw Washington, DC office holders out on their ear. No politician could then legitimately claim that they were following the true meaning of the Constitution. The public would know better. And the public would throw the rascals out.

8. Do the proponents of the Article V Convention assume that the progressives, globalists, socialists, and liberal Democrats will sit out this convention? Or will they vie and struggle for the delegate seats? What political theories will dominate the Article V Convention?

Since the delegates are appointed by the State legislatures, the most reasonable assumption (bordering on virtual certainty) is that the delegates will generally reflect the political philosophy of the State legislatures.

Republican legislatures dominate. There are twenty-seven States (if Nebraska is counted) that are fully controlled by Republicans. There are six States where the Republicans control one chamber. Even some Democratic States cannot be fairly described as dominated by leftist progressives—(West Virginia and Nevada, for example).

The clear answer is that Republicans from southern, mountain, and central States will dominate the Convention. California, New York, and Massachusetts will send liberal delegates. They all get one vote per State. These three States, then, will be consistently outvoted by Idaho, Wyoming, Mississippi, and Louisiana.

The left will send out their own fear-mongering material claiming that people like me will become delegates. And indeed I hope that I will be selected. The reality is the same for all sides. Delegates will generally reflect the political philosophy of each of the fifty State legislatures.

9. Do the proponents of an Article V Convention truly consider the risks associated with the congressional right to decide upon the method of ratification of the proposed amendments? What if Congress chooses the state ratification conventions as the method of ratification, won’t the legislatures then be cut out of the ratification process altogether?

Congress, of course, has this option. But the State legislatures control the process for selecting the delegates to a ratification convention. There is every reason to believe that the delegates to a State ratification convention would be chosen by a popular vote of the people. But the final decision on this would be in the hands of each State legislature.

We would look forward to a grassroots election on the question of whether Washington, D.C. has too much power. We will win that battle handily.

There is one really important reason that Congress will be reluctant to choose ratification conventions. This is revealed by a lesson from history. The original Constitution was not originally ratified by the State ratification conventions in North Carolina and Rhode Island. Both States held a second ratification convention to consider the issue a second time. On the second attempt, the Constitution was ratified in both States.

Accordingly, if a State fails to ratify in its first convention, the State legislature could continue to call additional ratification conventions until thirty-eight States have ratified; it can keep calling conventions until it gets the result it wants. So the State legislatures play an important role in both methods of ratification. The States really do have the power here.

10. If this is just a “convention of states” and not a constitutional convention are you content with the political atmosphere and morality of the current representatives in your state government? Does it give you comfort to know that those public servants at your state level of government will be able to make changes to the Constitution?

This question is based on a theological proposition that is demonstrably false. Lurking behind the question is the implication that people of the Founding Fathers’ generation were basically good while today’s politicians are basically evil. From both a theological and historical viewpoint, this implication is false.

Theologically, the Framers correctly believed that men were born with a sin nature. That is why they created the form of government that we have. We have checks and balances, enumerated powers, and federalism all because the Framers knew that all men were sinful.

They also knew that their own generation was sinful. The way that Virginia’s Baptists were treated by the political establishment in the 1770s was utterly shameful. Baptists were jailed, beaten, and driven from church services by officials—or by thugs protected by officials.

The Alien and Sedition Acts were passed by the Framers’ generation—and the voters threw out the supporters of this horrible legislation in the next election. Both theology and history demonstrate that it is wrong to assume that that the Founders’ generation was composed of angels while ours is composed of devils.

The fact that over 90% of Americans distrust Congress tells us something very good about the wisdom of the current generation.

To those who counter this observation with the fact that the American public elected Obama twice, one response is this: Who can blame the voters for foolish choices in elections when the Republicans who want to go to Washington are usually no different from the Democrats who want to go to Washington?

Moreover, there is no political plan of any kind that doesn’t ultimately rely on the voters being willing to do the right thing. Those who promote nullification hope to get enough citizens to pressure State legislatures to do the right thing. Those who want to change Washington, D.C. by electing good conservatives are planning to rely on voters willing to do the right thing.

If the voters are crazy and incapable of doing the right thing, then they are crazy and incapable for all purposes. We believe that when voters are given a real plan that is based on the actual text of the Constitution and is accompanied by a viable strategy, enough voters will arise to require the requisite number of States to do the right thing.

Conservatives shouldn’t be fomenting fear of common people. That is an elitist strategy.

The correct analytical approach is a simple comparison. The Constitution gives us two different ways to

pass amendments to stop the abuse of power in Washington, D.C. One process requires Congress to propose the amendments. The other process allows the States to propose the amendments. Which group can we trust to propose amendments that will curtail the power of Washington, D.C.?

11. One proposed “Liberty Amendment” allows 3/5 of the U.S. House and Senate to overturn any Supreme Court ruling. But Article III, Section 2, Clause 2 grants Congress the power, with only a simple majority of both houses of Congress, to overturn Supreme Court rulings by limiting the appellate jurisdiction of the Supreme Court. Does the proposed “Liberty Amendment” strengthen or weaken this congressional check on the Supreme Court?

This question demonstrates a lack of knowledge of constitutional law and litigation.

It is quite true that Congress can pass laws which can restrict the appellate jurisdiction of the Supreme Court. It is not quite as simple a process as this question suggests. Such a law requires not only a simple majority of both Houses of Congress (or perhaps sixty votes in the Senate depending on the vagaries of the new filibuster rule), but also the signature of the President.

In the entire history of our nation, the power cabal in Washington, D.C. has never placed any meaningful limits on the appellate jurisdiction of the Supreme Court. It is fanciful to think that Washington, D.C. will do so within our lifetimes.

Moreover, the question doesn't comprehend the legal implication of removing the Supreme Court's appellate jurisdiction. Such a law, if passed, would not reverse a single Supreme Court decision. In fact, if passed, it would make it impossible to ever get a future Supreme Court to reverse a previous bad decision.

Let's consider the example of *Roe v. Wade* to demonstrate how it works. If Congress had removed the jurisdiction of the Supreme Court to decide abortion cases prior to its decision in *Roe v. Wade*, that would have been wonderful. That decision would have never been issued.

But, what happens if Congress removes the Supreme Court's appellate jurisdiction while *Roe v. Wade* is still the controlling precedent?

Removing the appellate jurisdiction of the Supreme Court on abortion would have the following effects:

1. It would leave the federal appeals courts in place to make whatever rulings they wanted on abortion without the possibility of Supreme Court review.
2. Even if the proponents were savvy enough to remove all federal court jurisdiction on the issue of abortion, *Roe v. Wade* would still be frozen in place as the controlling precedent.
3. If we succeeded in removing federal court jurisdiction over all abortion questions, State judges would have the final say on the issue of abortion in their States. But, State judges are still bound to follow the Constitution of the United States. That much is not debatable. And most State judges would consider themselves still bound to follow *Roe v. Wade*, because State judges consider themselves bound to follow U.S. Supreme Court interpretations of the United States Constitution until formally reversed. Thus, State courts would still follow *Roe v. Wade* in virtually all cases.
4. If conservatives had political success in the future and were able to get a prolife majority appointed to the Supreme Court, that Court would not have the jurisdiction to reverse *Roe v. Wade* because its appellate jurisdiction would have been removed.

This “fix” for judicial activism is popular in some circles and is certainly well-intentioned, but it is totally

misguided. It would not reverse the bad decision. Far worse, it would permanently freeze bad decisions in place as the binding precedent.

The best solutions for judicial activism include: term limits on federal judges, giving the States and Congress the ability to vacate Supreme Court decisions, and changing the appointment process for federal judges so that the States control the selection of Supreme Court Justices and perhaps the judges at other levels of the federal judiciary. All of these things can be done at a Convention of States.

12. One proposed “Liberty Amendment” requires 30 states to agree in order for the states to overturn federal law. As written, the Tenth Amendment of the Constitution clearly allows any one state to nullify federal law that exceeds its enumerated powers. Does this “Liberty Amendment strengthen or weaken the position of the states?

The Tenth Amendment contains no explicit power for any one State to nullify a federal law. Such a claim is wishful thinking at best and historically disingenuous.

The Supremacy Clause of the Constitution contains the correct view of nullification. Nullification is not the rule. Constitutional laws passed by Congress are the Supreme Law of the Land, and a single State does not have the power to determine a law of Congress to be unconstitutional.

The correct view of the Tenth Amendment is that it is a check on misuse of power by Congress. But nothing in that Amendment gives a single State the power to determine that Congress has abused its power.

13. Proponents of the convention say that one great security against a runaway convention is that only thirteen states have to choose not to ratify, thus guaranteeing that bad amendments won’t be ratified. Can you name those thirteen states you can count on to oppose such bad amendments? The Sixteenth and Seventeenth Amendments were passed with similar safeguards in place. Why didn’t enough states stand up against those amendments to prevent their ratification?

The Sixteenth and Seventeenth Amendments were popular in their day, and they passed. Sometimes we are successful in defeating amendments. The Equal Rights Amendment was defeated. Child Labor Amendments were defeated.

Amendments that are considered unwise by the generation in question go down to defeat. The ERA is a good example. It was supported by a simple majority of the public in many States. But a well-organized and substantial minority battled against it and it was defeated. We cannot amend the Constitution unless the vast majority of the American public supports the particular amendment.

If we are going to believe in a Republican form of government, we have to embrace the idea that each generation has the moral right to change the law however it wishes, provided that it follows the proper process for changing the law.

The amendments that are suggested for today will not pass unless they are sufficiently approved by the vast majority of the American public in order to gain ratification by thirty-eight States.

We can guarantee that no amendment that is crazy or outlandish by today’s standards can possibly pass today.

14. Proponents of a convention say that the Constitution can’t be destroyed because Article V only authorizes amendments to “this” constitution. By definition, amending the Constitution is

changing the Constitution, and in Article V there is no limit to the number of amendments. So is there any assurance that certain amendments will be off the table? Doesn't amending the Constitution create a new Constitution?

Most of the questions in this list are fair-minded and deserve a real answer. This particular question borders on being frivolous. Nonetheless, I will answer briefly.

Did the adoption of the Bill of Rights make a new Constitution? Of course not.

By this argument, the Tenth Amendment resulted in a new Constitution rather than reinforcement of principles in the original document. Does the JBS really object to the adoption of the First, Second, and Tenth Amendments on the ground that they created a new Constitution? Really?

15. Could the method of ratification for these proposed amendments from the convention be changed? Didn't the original Constitutional Convention of 1787 create its own rules for ratification in contradiction to the requirements of the Articles of Confederation?

This question betrays a lack of historical knowledge. The original Constitutional Convention was not called under the authority of the Articles of Confederation. No provision existed in the Articles for any such process.

The States correctly understood that they possessed residual sovereignty to call a convention to reconsider their current national charter. Seven States had called the Convention and had appointed their delegates before Congress endorsed the Convention in 1787. The States told their delegates to "render the federal constitution adequate to the exigencies of the Union."

But the majority of the State calls for the Convention specified that the ratification process would be the same as under the Articles of Confederation; to wit, changes would need to be approved by Congress and ratified by all thirteen State legislatures.

In light of the directions given to them by their States, the delegates from the Constitutional Convention followed this path and sent two proposals to Congress.

One was to approve the Constitution itself. The other was to approve a new method for ratification—rather than thirteen legislatures, nine State conventions would be required to ratify.

Congress unanimously approved both recommendations. But Congress did not send the Constitution directly to the State conventions. Rather, it sent the Constitution and the recommendation for the new process to all thirteen State legislatures.

Thus, the first step in the process in every State was for the legislature to consider whether or not it would approve the change in the ratification process.

All thirteen State legislatures approved the new ratification process by calling ratification conventions in each State.

This includes both Rhode Island and North Carolina. Even though the conventions in those States rejected the Constitution itself, their State legislatures accepted and utilized the new process.

The JBS argument that the Founders did not follow the lawful process in ratifying and adopting the Constitution exposes the central fallacy of the JBS on this entire subject. The John Birch Society believes that our Constitution was illegally adopted. Thus, they cannot legitimately call themselves supporters of the Constitution. You cannot believe that our Constitution is the morally appropriate, supreme law of the land if you think it was illegally adopted.

It has always been enemies of the Constitution who have contended that the Constitution was illegally adopted. Claiming to be a constitutionalist, while rejecting the legitimacy of the Constitution's adoption process, is like claiming that George Washington was a great American hero, but he was also a British spy.

If one reads all the original documents, the correct history is clear. The States appointed the delegates and gave them their instructions. The Founders followed the correct process and got unanimous approval from Congress and all thirteen State legislatures in order to move to the new ratification process.

16. Is our federal government out of control? That is to ask, has it escaped the boundaries of the Constitution? Is Congress operating outside of the powers delegated to it under Article I? Has the concept of federalism been overthrown to a large degree by an oppressive central government? Of course, but what is the proper remedy? Do we have a constitutional problem or a problem following the Constitution?

Yes. Washington DC is truly out of control. And yes, the Constitution as interpreted by the Supreme Court is the problem. There is only one realistic approach on the table that has any possibility of fixing the problem.

There are only four alternatives.

1. Keep trying to fix Washington by sending better representatives to Washington.
2. Hope that some solution that is not found in the Constitution (like nullification) will be miraculously successful despite every realistic consideration to the contrary.
3. Do nothing.
4. Use the process the Framers gave us. Have the States call a Convention to limit the power of the federal government.

Trying harder with the same old tactics won't work. Extra-constitutional schemes won't work. Doing nothing will work—if your goal is to preserve the status quo and destroy liberty.

I believe in the Founding Fathers and their solution for today's problem. A true constitutionalist embraces the entire Constitution as intended—this includes Article V's Convention of States.

Only a Convention of States will give us effective solutions to the abuse of power in Washington, D.C. It is our moral obligation to protect liberty for ourselves and our posterity.

Every possible plan ultimately relies on motivating a number of loyal Americans to do the right thing to save the country. We are confident that the vast majority of people who love liberty will join us in supporting the Constitution's own solution to federal power abuses. We urge the JBS to reconsider its position and join with us.

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1. Some argue that the Founders never intended for the Supreme Court to have the power of judicial review. History does not support this assertion.

In the records of the Connecticut ratification convention we find a very clear statement on this issue from Oliver Ellsworth. Ellsworth was a delegate to the Constitutional Convention in Philadelphia, a delegate to the ratifying convention in his home state of Connecticut and was the Chief Justice of the Supreme Court from 1796 to 1800. Here is what he said in the Connecticut convention:

If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who to secure their impartiality, are to be made independent, will declare it to be void. On the other hand, if the states go beyond their limits, if they make a law which is a usurpation upon the federal government the law is void; and upright, independent judges will declare it to be so.

A very similar statement was made by James Wilson during the state ratifying convention for Pennsylvania. Wilson also possesses a tremendous resume. He was a delegate to the Constitutional Convention, the Pennsylvania ratifying convention, and was one of George Washington's initial appointees to the Supreme Court.

Wilson said:

If a law should be made inconsistent with those powers vested by this instrument in Congress, the judges, as a consequence of their independence, and the particular powers of government being defined, will declare such law to be null and void; for the power of the Constitution predominates. Any thing, therefore, that shall be enacted by Congress contrary thereto, will not have the force of law.

The Federalist No. 78 contains yet another declaration to this same effect:

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

There is nothing to the contrary which appears in any place in the drafting or ratifying conventions. The original meaning of the Supremacy Clause is quite clear. When Congress passes a law that is contrary to its power in the Constitution, it is the duty of the judges to declare it void.

2. Even if Congress chooses State ratification conventions as the method for ratification, the State legislatures choose the method of selecting the delegates for such conventions. If the States believe that the process has been abused, they will surely choose a method for naming the delegates that will follow their desires. For example, nothing would stop a State from saying that the ratifying convention would be composed of delegates appointed by each member of the house and senate, with each representative getting to choose one delegate.

Michael Farris

Michael Farris is the Chancellor of Patrick Henry College, the Chairman of the Home School Legal Defense Association, the President of Parentalrights.org, and is the Director of the Convention of States Project for Citizens for Self-Governance. Farris earned his law degree magna cum laude from Gonzaga University Law School. He was the Articles Editor for the Gonzaga Law Review and Moot Court Champion in the Linden Cup Competition. Farris recently completed his LLM, with honors, from the University of London in Public International Law.

At Patrick Henry College, Farris has taught Constitutional Law for 14 years and has coached the PHC Moot Court team. (Moot Court is a simulated argument before the Supreme Court on constitutional issues). His Moot Court team has won eight national championships, including the last six in a row.

Farris has litigated dozens of constitutional cases in the state and federal courts and has argued before the

United State Supreme Court, eight federal Circuit Courts of Appeal, and the appellate courts of thirteen States. His litigation history includes a case regarding Article V, in which he represented four Washington State legislators in a constitutional challenge to the act of Congress purporting to change the date for the ratification of the Equal Rights Amendment in the midst of the process.

Farris has written fifteen books, including a textbook on constitutional law and a scholarly 500-page history of religious liberty and the adoption of the Bill of Rights, and several law review and other scholarly journal articles. Mike Farris has been a committed conservative leader for over thirty years, with true expertise on the Constitution. He has successfully lobbied and litigated for homeschooling liberty and has been credited (or blamed) for successfully organizing the defeat of the United Nations Convention on the Rights of Persons with Disabilities. He is considered one of the nation's leading opponents of the UN Convention on the Rights of the Child. He has testified in Congress and state legislatures many times, including testimony in opposition to the appointment of Supreme Court justices and in the Senate Foreign Relations Committee in opposition to the UN CRPD.

Farris has been awarded the Salvatori Prize for American Citizenship by the Heritage Foundation, a Lifetime Achievement Award by The Family Foundation of Virginia, and was named one of the Top 100 Faces in Education of the 20th Century by Education Week magazine.

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