

(from <http://www.redstate.com/diary/roguepolitics/2013/10/11/a-response-to-publius-hildahs-critique-of-mark-levin-and-the-article-v-convention-process/>)

# A Response to Publius Hildah's Critique of Mark Levin and The Article V Convention Process

By: [RoguePolitics \(Diary\)](#) | October 11th, 2013 at 04:27 PM | [30](#)

While I respect PH's work and she is no doubt fighting the good fight, on this issue she is simply incorrect on many levels.

**First** she is a strong advocate of nullification and interposition. I support both of these options in theory but the fact is neither have any practical application in the real world. There is simply no way state law enforcement personnel are going to successfully go up against federal law enforcement personnel. Even if state legislatures pass laws authorizing or requiring it. It is ridiculous to assume it would happen. If they tried they would wind up in a federal prison.

Look at the function of this for a moment. Say for example a state outlaws ObamaCare. South Carolina is working on that now. Clearly nullification is legitimate in this instance, the law *is* unconstitutional and SC is exercising a valid right. Here is a perfect example of when and how to use nullification. It is not going to work.

As we know there is a fine for failing to buy ObamaCare insurance. This fine is collected by the IRS. So let's say you don't buy insurance and SC has nullified ObamaCare's mandatory purchase requirement. You are good, right? Well the IRS is going to differ. And they are going to attach your assets. When they file a lien against your bank account, which bank is going to refuse to turn over the balance? OK, maybe you don't keep money in banks. Which employer is going to fail to garnish your wages when they receive the IRS order? Right, you always work under the table for cash. Now let's look at your house. If the IRS files a lien against your house we finally get to a point where our new state law kicks in and shows its teeth. A county clerk gets a letter from the IRS ordering that a tax lien be placed on your real estate. It is doubtful this letter will be as specific as stating your unpaid penalty from ObamaCare is the reason for the lien. So the lien is applied. Shortly they sell your house at public auction when the IRS forecloses the lien. Despite SC's action, you still have no house.

Let us say instead, this letter does state it is for the unpaid ObamaCare penalty. What does our county clerk do at this point? Does she obey state law and risk federal prison? Does she obey federal law and risk state prison or fines? She is going to ask herself a simple question, "Who can make it stick?" The state or the feds? You can put in whatever answer you want but only one answer is realistic. Yes, it could go to court. If it does it will go directly to federal court where a federal magistrate will order the lien to be placed. He will hold her in contempt if she refuses and she will be fined or jailed. Now this is where nullification meets its end. Right or wrong, at this point a state can choose to knuckle under or go to war.

Refuse to knuckle under and the feds will murder as many as needed to achieve the necessary compliance. We have history to prove this, it is not supposition or speculation.

Nullification may be legitimate but it assumes the federal government will respect the constitution which as PH points out quite eloquently they refuse to do.

**Second** PH is taking on Mark Levin's proposed amendments as much as she is taking on an Article V Convention of the States. This is acceptable given the stated topic of her piece but using it in the way she is, is a straw man argument. Or to be clear she is essentially saying if Mark Levin's proposals are wrong then ALL such proposals and even the Article V Convention process itself must also be wrong. This is a logical fallacy. It also ignores the fact that Levin himself notes his proposals are suggestions and unlikely to be ratified as written. The purpose of a convention is to PROPOSE amendments not rubber-stamp proposed amendments. Given that, I agree with many but not all of Levin's proposals myself. It is however pointless for me to defend the specifics in this context.

**Third** is the idea that congress will control the convention. PH states Congress "calls" it and will choose the delegates to it. False. Congress WILL choose the method of ratification for any proposed amendments and certainly they may make guesses as to the best way to kill an amendment that threatens their power. But it will be just that, a guess, and would likely have little or no effect on ratification. There is no historical basis to support the argument that congress would control or appoint the delegates. There is much history to refute it. Congress has never appointed delegates to any regional or national convention of the states. Obviously an Article V Convention has never been called but numerous conventions were called by the states and by congress and congress was never in charge of selecting delegates. The Federal Convention itself was "called" by congress and yet it was the states that selected the delegates. Finally, the debates surrounding Article V make it clear this is a states based convention. This is unquestionably true because there was extensive discussion first of a regular method for proposing amendments, which was added. Then, the discussion moved on to the need for states to have a method for calling a convention in those instances where congress refused to put forth needed amendments. This is all contained within Madison's Notes that PH references. She says Randolph and Mason held minority views but if that were true why is the state application process included at all? It was added at their behest. Was it exactly as Randolph or Mason wanted? No. It wasn't as strong as they wanted. BUT it was added to provide a state based method for amendment. In addition the reasons they remained opposed to the overall constitution were not limited to this issue.

This argument simply has no basis. It is an example of slinging crap at a wall and seeing what sticks.

**Fourth** PH says the problem with our constitution is one of obedience rather than defect. If those guys would obey the constitution everything would be fine. I agree, if they would obey everything would be fine. And that statement has no meaning in the current environment.

Is it defective? If I went down to the Ford dealership and bought a truck and found that my new truck often would not obey my command. For example, sometimes it steered well and sometimes

the steering wheel had no effect. Sometimes the brake worked and sometimes it didn't. I would assume these were defects. I suspect Ford would agree. If it were Government Motors they would call it a design feature.

My point is this. If the constitution has no functional way to force obedience, which it doesn't, then it has a defect. Now, many would take this as an attack on the founding fathers and they would be incorrect. They wrote a constitution that was pretty good.

**WE DO NOT HAVE THAT CONSTITUTION ANY MORE.**

If Ford looked at my truck and noted the tie-rods were disconnected and the brake lines had cuts in them. If they could conclusively demonstrate the truck was not that way when I took delivery, they would rightly say the original product was not defective but changes I had made rendered it defective.

Our constitution, not counting the Bill of Rights, has been amended 17 times. Every single time we amend the constitution we are in fact replacing the old constitution with a new one. Every provision of the old constitution is reinterpreted through the lens of the new amendment. That means, if we presume the original constitution inclusive of the Bill of Rights is a single document, we have had 18 different constitutions since the original was ratified.

It is impossible to look at each amendment without finding enormous defects in at least a few. And those defects ALWAYS equal a defective constitution. We could each generate a list no doubt of the ones we like and the ones we don't like. But I doubt anybody thinks they were all good, necessary, efficacious, etc.

Our current constitution includes every amendment except the 18<sup>th</sup> on Prohibition.

The constitution AS AMENDED is clearly defective.

There is a clear defect, perhaps foundational, that returns us to my truck. Lack of effective means of control. This issue immediately forks into two points. First, is the Original Constitution the source of the problem? And Second, is one of the 17 amendments the culprit? I'll take the second part first and point to several amendments which I believe are causal.

A. The 14<sup>th</sup> amendment in large part turns the constitution on its head. Prior to the 14<sup>th</sup> the constitution created and then constrained the federal government. Very few of its provisions were ever designed to be applied to the states but the SCOTUS has, by gradual incorporation, done just that. What used to be a guard against federal tyranny, the constitution, has now been transformed into a weapon of the federal tyrant.

B. The 16<sup>th</sup> amendment. The founders were very deliberate in keeping the citizenry at arms length from the federal government. Washington had no reason to know your name unless you were a federal employee, in the military, involved in international travel or trade, etc. The 16<sup>th</sup> broke this barrier completely and started the process of making Washington very real and relevant in the lives of ordinary Americans. The perversion of the tax code from the beginning

through ObamaCare has been used to punish political enemies and reward friends. Obviously the 16<sup>th</sup> also gave Washington tremendous resources with which to expand. All by itself this amendment gave Washington the power to muscle in to every facet of modern life. The truth is money DOES equal power. Our truck begins to accelerate.

C. The 17<sup>th</sup> amendment removed the steering wheel. If ever there was an outside force that could demand obedience from Washington it was when states had control over one half of congress. Control over SCOTUS appointments, treaty ratification, cabinet appointments and more.

16 and 17 mean our truck has a lot of power and no steering wheel or brakes.

Are there other problem amendments? Sure. But none that create such an overwhelming tendency to abuse.

Did the original constitution contain a defect that contributed to our control problem? If it did, it is the failure to specifically provide for state action to restrain federal overreach. First is PH's favored methods. I agree with nullification and interposition but they are not explicitly contained within the constitution. I think the founders also should have included a final appeal, above SCOTUS, to a court of judges appointed by the states. SCOTUS can not possibly be appointed by presidents, ratified by the senate and paid by congress while remaining impartial in their rulings and they haven't. This is not to say state appointed judges would be totally impartial but I would rather see a court inclined to lean away from consolidation and control by Washington than toward it. Now I started this paragraph by saying congress didn't specifically provide a method for states to restrain the federal government but that was not true. **They provided Article V.**

We are never surprised when a train rolls down the track as intended. If it doesn't take us where we want to go we are either on the wrong train or there is a defect in the track or routing system. There are structural reasons why Washington doesn't follow the constitution and there are structural reasons why Washington is never held accountable.

PH suggests there is nothing wrong with the constitution. She is simply wrong.

**Fifth** PH raises the threat of a runaway convention. She says it is a "Real Possibility and Grave Danger." What is a "Real Possibility?" This is an important question because her writing goes on to imply it is highly likely so much so as to seem more likely than not. I raise this because a part of her contention is almost entirely impossible and a part is possible and a further part is possible but extremely unlikely. Think of it like winning the lottery. What if you were told winning the lottery was a "Real Possibility." If you never bought a ticket it could be consigned to the almost entirely impossible category. If you did buy a ticket you might win but in fact, if we speak of

winning millions it is not really a “Real Possibility.” If on the other hand you mean winning \$3 in a scratch-off that is indeed a “Real Possibility.”

I will first touch on the almost entirely impossible. The idea that a runaway convention will create and force a new method of ratification. This should be easily dismissed but I have seen it repeated so I will address it. The constitution provides for two methods of ratification. The first is by state conventions and the second by state legislatures. Both of these options require agreement by 3/4ths of the states. Given the plain language it would be hard to see any other method as being afforded legitimacy by anybody. PH’s position is based on her misunderstanding of the original Federal Convention and the fact that it DID change the method of ratification but NOT unilaterally. Her position ignores the activities that surround that change. The Articles of Confederation required unanimous consent by the legislatures of the states to amend the Articles. The change in ratification method suggested was agreed to by the legislatures in every state and therefore met this requirement. Using this standard any change in the method of ratification suggested by a runaway convention would have to be agreed to by 3/4ths of the states as required by Article V. If they had enough to achieve the change in ratification, they could just ratify the amendment. Which is essentially what happened with the constitution.

Now we have the possible. There is some disagreement over whether or not a convention could be constrained to remain on topic. That is a convention called to address taxes might also address immigration. Many people don’t think a convention can wander like this. I believe they can. This puts me in part on PH’s side in this issue. Except, knowing that the method of ratification cannot be changed unless by 3/4ths of the states consent I am also not particularly concerned. If they wander and produce amendments that 38 states agree to, they are probably acceptable. Not absolutely perfect but given the current climate and dissatisfaction with Washington, they are unlikely to send more power to Washington. The idea that a convention might address off topic amendments is a “Real Possibility.” Just not as scary as PH makes it out to be.

Finally we address the extremely unlikely. Will the convention pass amendments that radically alter our constitution in a way that destroys our liberties? This might be an amendment, it might be a complete rewrite. The answer is no. Not because it just can not happen. But because it is extremely unlikely. Let’s look at the national feeling when the 16<sup>th</sup> and 17<sup>th</sup> were adopted. Socialism/Progressivism was sweeping the world. The 16<sup>th</sup> reads like a page torn out of the Communist Manifesto. These movements were very popular and as a result the amendments that passed during this time reflected very heavily the national sentiment. What is the current national sentiment? Is there a great desire anywhere outside of a few far left states to grant more power to the federal government? The answer to that is no. Many of the political activities in the late 1800’s and early 1900’s centered around the corruption and dysfunction in the states. As a result states found themselves saddled with the 17<sup>th</sup> amendment. Today that corruption and dysfunction is in Washington and the people know it.

State appointed delegates at a convention called to restrain federal power are not going to turn around and grant greater power to Washington. If they try the amendments will be rejected by the states. It doesn’t take many states to kill it. Thirteen states out of Fifty put an end to any notion of this type of runaway convention. The barrier is higher yet than that. Either chamber in

a state's legislature can vote no and that states vote becomes a no vote. So in reality any combination of 13 state houses or state senates in 13 states will kill an amendment. OR if congress so designates, states will hold conventions where delegates to the convention will be selected by citizens fully aware of the contents of each proposed amendment. Which means candidates WILL have to have a position on each proposed amendment. So who votes for the guy supporting the repeal of the second amendment?

This doesn't make bad amendments impossible, but it makes them extremely unlikely.

**Sixth** PH puts forth an assertion, as a form of ridicule, related to federal obedience to new amendments.

*Publius Huldah "It is idiotic to assert that you can rein in a federal government which ignores the Constitution by amending the Constitution! Yet, that is "The Levin Plan".*

She has leveled that criticism far and wide. I frankly find it to be one of the most baffling assertions she makes. It is like saying, "Why do we have a constitution? It will only be disobeyed!"

PH has clearly read at least parts of Jefferson's Kentucky Resolutions. On this topic I'll start by letting Jefferson speak, "*let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution.*" Bind him down with the chains? How? Well, that is the question isn't it? Jefferson clearly believed it could be done and so do I.

In this, I will give a little history of myself. I am an IT guy. More particularly I have 20 years of experience troubleshooting failed IT systems. I am very good at it. When I encounter a malfunctioning system I break it down into component parts and examine each component so as to determine which one is the problem. It is a drill down process. Find the culprit and then troubleshoot it. Again, one part at a time. Sometimes it is necessary to study components as they function in a system, holistically, but you are still trying to pinpoint where the failure is. And it is not always one piece it can be many. Or it can simply be the interaction of components that cause failure even though each individually is performing as desired.

Our constitution IS broken. It is not really possible to rationally debate this point. We did not get where we are with a constitution functioning as it should.

It needs to be examine to find the flaws. It can be fixed.

Failure to obey the constitution is one of the major flaws. Notwithstanding PH's assertion, amendments can compel compliance.

Washington has too much power in the form of money. Money greases things, bad as much as good.

There is no functioning accountability mechanism to hold Washington accountable for its excesses.

What could fix it and FORCE the federal government to comply?

1. Create a Constitutional Court, with judges appointed by states, above SCOTUS. This would cause rulings to move toward states' rights.
2. Repeal the 16<sup>th</sup> amendment. Replace it with nothing. Washington has far too much money and changing the tax method on a "revenue neutral" basis solves nothing. Like a junky best to just cut them off.
3. An explicit taxation amendment. In addition to repealing 16 I would limit Washington to having only explicit taxation powers and require a super-majority to raise taxes. So tariffs, excise taxes on a few categories, user fees on a few items and that's it.
4. Repeal the 17<sup>th</sup> amendment. Thirty+ states have sued over ObamaCare. If the 17<sup>th</sup> amendment were repealed would senators vote for a bill they knew their legislatures didn't approve of? Repealing the 17<sup>th</sup> improves accountability where now there is none.
5. Require congress to vote on pending regulations. That would rein in out of control bureaucrats. I would NOT as Levin does restrict it to only big regulations. I would make it ALL regulations.
6. Give states explicit power to repeal any federal law, regulation or SCOTUS decision by a 3/5ths vote of the states. So 30 states could overturn a federal law, reg or ruling. (If my Constitutional Court were in place include their decisions as well.)
7. Require laws to sunset after a period of time. Expiration could be based on the size of majority voting for passage. Simply majority laws could expire in five years. A 3/5ths majority law would expire in 20 years.
8. Deny police powers to all federal law enforcement except on federal ground. If the IRS needs something, let them ask the local sheriff.

Are all off these necessary to fix our problem child in Washington? No. The two most critical would be the simplest. Repeal 16 and 17. After that I would highly recommend a restructuring of the judicial review process. SCOTUS has shown they are essentially partisan hacks at this point. Would that happen in a Constitutional Court. Perhaps eventually.

Nothing lasts forever and certainly not something like liberty. It must be constantly guarded and re-balanced.

None of PH's declarations on Article V are correct. She is simply wrong.

**I will conclude by reiterating a few points.**

1. Nullification/interposition if followed through to its conclusion holds no hope. State officials will not arrest federal officials and if they do, they will do federal prison time. I don't agree with this but it is what will happen. The only alternative, if pressed by the states, is civil war. Look at this president. As I write this he is denying death benefits to soldiers killed in action and cancer treatment to children. Do you seriously believe he wouldn't murder you to get his way?

2. An Article V Convention WILL NOT be controlled by congress. The process for states to call a convention was expressly put there during the convention to provide an alternate method for the times when congress refused to make necessary changes. Any attempt by congress to control the convention would fail and the proof is simply this. They know it and have thus refused to even count applications so far.

3. The idea that people are going to vote for "good" candidates and all of our problems will go away magically or even over time is an idea without a basis in reality. For 100 years conservatives have been a majority or the largest self-identified group. We have voted. Even when we think we agree we still vote for outright crooks. Knowledge of the constitution would be helpful but in truth people simply don't vote like that. The progressives have cheated in elections anytime they felt it was necessary to keep themselves in power. Even in transformational elections like 1994 and 2010 we see an almost immediate betrayal of the voters. Case in point, in 2010 we elected about 80 "Tea Party" freshmen to congress and over 70% of those freshmen voted to increase spending and raise the debt ceiling without insisting on any significant concessions. John Boehner received almost all of their votes for speaker even though he clearly is working against the principles that got them elected. We are NOT voting our way out of this.

4. PH refers to Article V as a "Grave Danger." Presumably because radical amendments could change our constitution. Thanks to the "drug war" and the 16<sup>th</sup> Amendment we have lost our 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> amendments. Our 2<sup>nd</sup> amendment rights are trampled. The 1st was essentially nullified by 14<sup>th</sup> amendment incorporation. Clearly the spirit of the 3<sup>rd</sup> is crushed by NSA spying. It was after all designed to prevent government agents from taking up residence in our house as spies. The 9th and 10th? Well they are just jokes. I could go on but I think the point is clear. Washington has zero respect for any of our rights and has plenty of judicial precedence to make it stick. Given their utter disregard for the law, what amendment does PH think will pass that presents such a grave danger? If, as others have, she argues that it will "make" legitimate that which is already being done she completely misses the point of the Declaration of Independence. She dismisses the foundational truth of that document which in fact states that some truth is "self-evident", which means among other things that truth is objective, real, undeniable and can be discovered, and that among those self-evident truths men have certain "unalienable rights" which can never be taken away, only suppressed. For example, suppose an amendment to restrain free speech should be ratified, it can not possibly be legitimate. Free Speech is an

absolute. Yes, it can be suppressed and has been throughout history but that suppression is and always has been illegitimate. The same holds true with a right to bear arms or privacy. These rights exist independent of, and in supremacy to, any written constitution. When any government becomes an enemy to these rights it is the government that gets abolished not the right.

Is there “Grave Danger” yes. Danger is the brother of liberty. They cannot exist separately. When we consider an Article V, it contains an element of danger. Refusing to consider an Article V also presents danger. When we look at the current state of affairs. The complete refusal on the part of Washington to respect our rights, to perform its legitimate duties, its active role in undermining our constitution and the morals of our people, it should be clear the greater danger to our liberty and that of our children is in doing nothing or continuing with the failed “let’s vote them out” approach we have been pursuing.

Freedom isn’t free. It is not without danger. It can be painful and it is always scary.

**Now decide. Do you want to be free? Or will you be ruled by your fears?**