The Fallacies of Anti-Article V Advocates

libertydefenseleague.com/Articles/tabid/524/ID/436/The-Fallacies-of-Anti-Article-V-Advocates.aspx

by Tim Baldwin

I am honored that Dr. Edwin Vieira took time to respond to my latest article, I Want a Real Liberty Movement.

Introduction

The arguments used against Article V are simply these:

1. Article V permits a "runaway" convention; and
2. All we need to do to restore the Constitution is enforce it.

Both of these conclusions are wrong and should be rejected as a basis not to use Article V to limit federal power.

Under the first argument, opponents of Article V attempt to scare patriots into believing that if we use Article V to limit the federal government's power, we will get a worse constitution. They even argue that we would get an entirely different constitution (but do not explain how the states would ratify one.)

They begin by incorrectly using the term "constitutional convention" or "Con Con" to describe Article V. This not accurate but is meant to lead people into fear. As constitutional scholars have rightly stated, "the term 'constitutional convention' is misleading; it would be more accurate…to call it an 'amendment-proposing convention'."[1] In fact, one of the purposes of the Article V convention is precisely to avoid any need for a constitutional convention.

As Hamilton explained:

There can, therefore, be no comparison between the facility of affecting an amendment, and that of establishing in the first instance a complete Constitution.

Under the second argument, opponents of Article V point to other remedies they claim will "restore" the Constitution, such as nullification and the militia. However, **no other remedy can change our federal jurisprudence and none will have nearly the same impact on restoring liberty as Article V.**

Publius Huldah (PH) exemplifies mostly the first argument, and Dr. Vieira and JB Williams mostly exemplify the second.(But each expresses both in one form or another.). I will address their articles in that order.

Publius Huldah

PH misstates history, ignores constitutional law and scholarship and uses logical fallacies to oppose Article V. Plus, PH's article is full of sensationalism and fear-mongering. PH mostly feeds the hype of those who are already predisposed to opposing Article V.

I need not go into the errors of law and scholarship about Article V because other constitutional scholars have done this. Most notably, Rob Natelson has devoted much to Article V scholarship and has shown how PH and others are wrong to claim that (1) Article V allows for a "runaway" convention and (2) would result

in a “runaway.” PH article cannot be compared to Rob’s work on Article V and is not entitled to the same weight of consideration. (Go to Rob’s website here.)

When one studies constitutional scholarship on the matter, he will find this conclusion stated similarly:

The framers did not intend the article V convention to deal exclusively with circumstances like those that confronted the republic in 1787. On the contrary, the concerns that led to the insertion of the convention alternative were far simpler and narrower.

They were, in short, that Congress could not always be trusted to do what was best for the country, and that when it was a practice of Congress itself that gave rise to the need for amendments, some other body should be made available to the people to initiate changes to the Constitution. Subsequent practice under article V also supports this interpretation of the purposes of the convention alternative.[2]

PH’s conclusion to the contrary is certainly not the prevailing view of Article V among scholars.

Next, PH pushes the common fallacy that Article V opponents use. PH says,

Yes, they tell us, the only way to deal with a federal government which consistently ignores and tramples over the Constitution is …. to amend the Constitution! Do you see how silly that is?

So, which amendment is PH saying Congress does not follow? What original constitutional provision is PH saying Congress does not follow? PH does not say; nor could she, because this would require her to prepare a legal opinion on a particular issue given a certain fact scenario—just like the judicial opinions are rendered in each and every case that have explained congressional power. Her attempt would only confirm and show how judicial decisions create constitutional jurisprudence—the body of law applying the Constitution.

The reality is, the federal judiciary puts flesh on the bones of the Constitution created in 1787. James Madison explained how this works in the Federalist Papers. He showed that the Constitution would not be definite in terms of “what is constitutional” except through the test of time and experience. It was “particular discussions and adjudications” that decisively established what the Constitution would mean over time. The Constitution’s meaning did not somehow self-evidently appear to the minds of all people, as if the constitutional term “regulate commerce among the several states” is as clear as the “Age of thirty five years.”

One important role of the amendment process is to correct judicial errors, just as the Eleventh Amendment corrected the Supreme Court’s decision in *Chisholm v. Georgia* and the Fourteenth Amendment correct *Dred Scott v. Sandford*. **Nullification cannot do this; only Article V can** . Specifically, it can correct the modern line of Supreme Court decisions that had ceded nearly-unlimited power to federal officials.

In fact, Madison’s description of constitutional law shows that Article V is the only way to correct federal jurisprudence and the “just enforce the Constitution” argument is fallacious and distractive. Madison said in FP 37,

All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications. Besides the obscurity arising from the complexity of objects, and the imperfection of the human faculties, the medium through which the conceptions of men are conveyed to each other adds a fresh embarrassment. The use of words is to express ideas….

But no language is so copious as to supply words and phrases for every complex idea, or so correct as not

to include many equivocally denoting different ideas. Hence it must happen that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered.

The Founders explained that the federal judiciary was going to be the arbiters of the "lines of sovereignty" between the States and federal government. Madison explained this further in FP 39, saying, "It is true that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide, is to be established under the general government." Madison also explained that this role of the federal judiciary "is clearly essential to prevent an appeal to the sword and a dissolution of the compact." (FP 39.)

This meant that the judiciary's decision was designed NOT to invoke the States to resistance but to keep them from appealing to arms and dissolving the union. In other words, the States should not take up arms against the federal government when the federal judiciary is the constitutional process by which the States object to congressional power. By their nature, judicial decisions are permanent until changed by a higher court—or by the people, through Article V.

As the federal judiciary was to prevent the States from appealing to the sword, so too Article V was to prevent an appeal to the sword. The only time arms were purported to be necessary was when Congress uses military force to destroy the States. In that case, Hamilton raises the natural right of self-defense in FP 28, saying,

If the representatives of the people betray their constituents, there is then no resource left but in the exertion of that original right of self-defense which is paramount to all positive forms of government.

Certainly this remedy was considered the last remedy, not the first. It especially was not to be highlighted as a means of defense before trying to remedy the problems through Article V.

Too, in such a dire situation of having to use force (i.e. self-defense, Militia), the union would be dissolved anyway and the States would be forced to a constitutional convention for the purposes of (1) dissolving the political bands they have with the States causing their demise and (2) reestablishing the constitutional terms that govern their (new) union. Such would be inevitable and necessary for the survival of those States. **Who would prefer this dire event take place before the States have an opportunity to limit federal power through Article V and an opportunity to keep the union intact?**

Thus, **nullification is not the ticket to fixing federal jurisprudence.** How can this correct jurisprudence? It cannot. Moreover, conservatives do not even agree as to the constitutionality of "nullification." Given our nation's history on the subject, **nullification will never be the complete answer to federal encroachment**. Plus, if nullification were the answer to constitutional problems, there would be no need for Article V. Looking at the Federal Convention Debates of 1787, the **Founders highlighted Article V, not nullification, as the States' method of correcting federal actions**.[3]

Using PH's own description of a "disobedient" federal government, she should embrace Article V because the Founders created Article V for that reason. Under PH's logic, the Founders should have never included Article V. But they did, for precisely the reasons we seek to invoke it now. Yet, PH calls using Article V "idiotic." In doing so, she condemns the Founders as "idiotic." **If the States follow the logic of PH, we will be our own worst enemies of a true liberty movement** that will have the effect of permanently limiting Congress' ability to regulate in all cases whatsoever and will prevent an "appeal to the sword," which Madison expected we do.

Dr. Edwin Vieira

Dr. Vieira uses similar reasoning as PH. To save the reader expense, Dr. Vieira—essentially—uses the argument that "there is nothing wrong with the Constitution; the federal government is simply disobedient." He says,

if this [federal] jurisprudence is actually a false jurisprudence, then it has nothing to do with the Constitution ab initio, except to violate it; and therefore some remedy other than amendment of the Constitution would be called for.

All my responses to PH's similar statements apply here.

Additionally, Dr. Vieira merely states a truism—that whatever is unconstitutional is null and void. Thus, he concludes that any federal judiciary decision that is unconstitutional is "false jurisprudence" and no amendment is needed. However, he completely leaves out the fact that the federal judiciary is charged with that duty and overlooks the nature of our constitutional system: that federal jurisprudence makes up our constitutional law. **Once the jurisprudence (on a particular issue) is cemented, the States' primary recourse to correct that is through Article V.**

Next, Dr. Vieira turns to the "practicalities of the process of amendment" to oppose Article V. Dr. Vieira creates scenarios for which there is no end, remedy and answer—as if America and even the world have no history or experience of how to run an interstate convention. **This ignores the reality of our own experiences—successful ones!** There were numerous federal conventions before and during the Founding Era, and several in the 19th century as well. This is a process we know how to use.

Moreover, there have been many conventions within individual States. They do not result in the annihilation of their constitutions, societies and liberty. In fact, one could argue that more—not less—individual liberties have been recognized and protected in updated state constitutions. **All of these experiences and scholarship—including our own normal legislative procedures—shed light on the reality that contradicts Dr. Vieira's chaotic presentation of a "black hole" amendment convention.**

What is more, if Dr. Vieira can propose that such a chaotic event results from Article V, how can he claim that the rest of the Constitution is so rigid and self-evident that it is not subject to divergences of order and absolutes? How is the commerce power so crystal clear, yet Article V so impervious to known factors and procedures?

If the commerce power can be so easily defined that any person (including those who do not have multiple degrees from Harvard) can interpret it without contention, how does Article V fall outside the realm of normal modes of interpretation and enter into the mysterious world of unknowns? In reality, Dr. Vieira's interpretation of Article V only confirms what James Madison said (above) about the judiciary's role in deciding the "particulars" to explain the Constitution. It is the particulars of "case law" that have brought us to our point today, which is remedied through Article V.

Ultimately, Dr. Vieira admits that an Article V convention would BENEFIT our situation considerably. He said, "if everything went according to plan (which raises an host of other questions) a set of good amendments could, in principle, go far towards saving this country."[4] INDEED IT COULD! But he argues against it because he claims "it would take five, ten, or even twenty years to see significant results." Is this a bad thing? What does he expect to take place in less than five years?—war, destruction, collapse, mushroom clouds? The reality is, those kinds of events force constitutional conventions faster than any other.

He may be unduly pessimistic anyway: The last state application campaign for a convention, early in the 20th century, successfully forced an amendment in 14 years. But that was before the days of the Internet and most other modern methods of communication and organization.

Personally speaking, the time frame he proposes is VERY exciting—to think that we could change our country's future in my lifetime! This fits nicely with Thomas Jefferson's proposal that our Constitution be sent to an Amendment Convention once every generation (approximately 20 years) so that each could correct any errors of previous generations. **Dr. Vieira only confirms the reality and hope that we could improve our country's condition in ONE generation!** Saying "we don't have time" is not a reason to reject the only fundamental and peaceful remedy we have to changing federal jurisprudence and our future.

Dr. Vieira then argues that our attention should focus on the Militia. The purpose of this article is not to rebut his position. Certainly the Second Amendment was intended to "secure a Free State." **But how can one claim that it is impossible to get people to use their MINDS to restore liberty and then claim that the people will (or should) use WEAPONS to restore liberty?** What is more likely? What is preferred? My view of human nature is that people prefer to use their brains before their blood to accomplish a goal. We should use, not oppose, this basic component of our existence.

Then there is the question that must follow the Militia-answer: THEN WHAT? **If the States were to use militia force (and yes, it is force[5]) against the federal government or other States, would this not ultimately lead to a constitutional convention? It absolutely would.** Even under Dr. Vieira's theory of what is to come, we must do what other constitutional scholars have pronounced regarding Article V:

the time has come for academic lawyers to stop carping and bemoaning the possibility of a constitutional convention to consider the federal deficit. It is time for legal scholars to begin to think seriously about how such a convention should be structured and what its agenda and substance should be.[6]

We should use Article V for the purpose George Mason stated in the Federal Convention Debates of 1787. "To Mason, it seemed clear that the Constitution would require amendments from time to time, 'and *it will be better to provide for them, in an easy, regular and Constitutional way than to trust to chance and violence*.'"[7]

JB Williams

JB Williams' reasoning for rejecting Article V is contradictory and illogical. He states,

[Mark] Levin's call for a Con-Con [in *The Liberty Amendments*] ignores the reality that our Founders placed everything needed to restore the Constitutional Republic in the U.S. Constitution and Bill of Rights and assumes that his ten new amendments will be an improvement upon the Founders work.

and

[Mark] Levin should realize that our Founders provided everything we need to restore our constitutional republic, if people would only stop trying to reinvent the wheel and stick to the basics.

These statements are particularly odd, because part of what the "Founders provided . . . to restore" our republic was Article V. They included it to allow the States to control an otherwise control-less federal government. **Williams not only misses the obvious, but he attacks convention advocates for doing exactly what he says they should be doing!** Williams also uses illogical formulas and misstated facts to argue against Article V. They follow.

In his numbers 1 – 4, Williams states that an amendments convention would be a matter of typical Republican-Democrat dynamic. He also states that the convention would be controlled by Congress. **He is wrong on both points.**

Of the States that have applied for the Balanced Budget Amendment, **nearly half of them are Democrat-**

controlled. Despite what some attempt to portray about the Democrat-Republic paradigm, **Republicans are not the only Americans who want less federal government**. One sees how Democrats are much quicker than Republicans to denounce federal spying, privacy intrusions, needless "drug wars" and the like. This proves the point, and Williams puts too much stock in the Republican Party relative to Article V. To be clear, Article V will not be about Republican and Democrat politics.

Additionally, Williams ignores the evidence showing that, legally, **Congress cannot control anything in the amendment convention**. Williams also discounts that people who are and have been disenfranchised with normal politics will be invigorated to participate in Article V (including a large number of libertarians), because **they will see it for what it is: a REAL way for the States to reign in federal power** . This is not usual politics, nor is it intended to be. Therefore, each point is wrong and should not be used to reject Article V.

In his number 5, he states, "Ratification of any amendments that survive that process is even more difficult, requiring three-fourths of the states or of congress to ratify." Williams actually shows why **Article V would NEVER be unlimited—it is WAY TOO DIFFICULT** to get a consensus of the delegates *and* the States to ratify any amendment that was not patently needful to correct our jurisprudence.

And what remedy of liberty is not difficult? (Have these "liberty leaders" changed their political strategy from *principles to pragmatics*?) That Article V is difficult shows how effective it can be to restore liberty. This means that the **rewards will be equal to or greater than the work it takes to accomplish the liberty amendments**. Williams' number 5 should likewise be rejected as a basis for rejecting Article V.

In his number 6, he states, "The process could very well take years, during which time the nation will be hoisted into Civil War over the convention as we sink deeper and deeper into a socio-economic abyss." **What does time have to do with attempting to make the kinds of changes needed to avoid "Civil War"?** And how can Williams predict such an Armageddon event? I have responded to the "time argument" of Dr. Vieira above, and it applies here.

Next, Williams claims that Americans are too dumb to know that we need less federal power. He points to the current Obamacare rivalry in Congress as his proof. **This isolated and incorrect view of the political condition of the States is no compass to follow.** Williams misses a fundamental point of political science—one that the Founders knew was inherent in the political system created by the Constitution. Political statesmen of 1787 knew that the **people would have a different relationship to the federal government than to their states, which produces different results in those governments.** Likewise, they knew the federal government would have a different relationship to the people than the state governments would have. All of this, of course, is based on human nature—psychology and sociology.

The way this distinction translates into political dynamics is simple: **the farther away and bigger the government is in relation to the people, (1) the more susceptible they are to corruption, and (2) the less control the people have over the government**. The Federalists explained the possibility of abuse this way, "The people can never wilfully betray their own interests; but they may possibly be betrayed by the representatives of the people." Couple this with the federal judiciary's "rubber stamping" Congress' commerce and tax power, and the effect is worsened and deepened. **This results: the federal government acts without regard to the people's will—all the voting notwithstanding.** As such, using federal laws to predict the content and results of Amendment Convention is unfounded.

Adding to the need of Article V, the Founders did not realize that the people's power (which is inherently disorganized and diverse) would become overshadowed by the power and influence of lobbyists and other powerful entities (which are inherently organized and unified and thus more effective on legislators). In this sense, **minority factions have more power over Congress than the whole of the people and States.**

If one brings into the equation the corruption of foreign influence, the people become even more remote in influencing Congress. **This is not the case with Article V, which is a direct, grass-roots action of the people for a specific and limited purpose.**

Williams then sets up a straw man to knock down by stating the following,

I agree that our government must be altered before abolishing it altogether is the only solution left. However, the Rights already belong to the people and their states*. If two-thirds of the state legislatures had the good sense and backbone to stop the runaway Federal Government from destroying the entire nation, they would simply pass and enforce The Balance of Powers Act in their state and begin to stop unconstitutional acts by the Federal Government without any need for a Con-Con. (emphasis added)*

Williams attempts to redefine 200-plus years of American history to judge the character of the States in reducing federal power. He states that if the States do not nullify federal law that they would not do so at an amendment convention. This mistakes a very large matter. This is like saying, if you do not marry a person of another ethnicity, you are racist. The truth is, **even the most conservative of us do not necessarily believe that nullification is the answer—or even constitutional—**just as people like Dr. Vieira do not believe secession is constitutional. Yet, those same people believe in (much) less federal power.[8]

That States have not passed "The Balance of Powers Act" does not mean they do not want to limit federal power. **The litmus test of the States preferring less federal government is not in nullification, interposition or secession.** The test is simply that they recognize the need to redefine certain federal powers. On this point, many liberals and conservatives alike agree. It cuts across party labels and ideologies. **This is the beauty of Article V** .

Then, Williams makes a lot of unfounded statements that are really unworthy of lengthy comment, such as, "Why don't 'constitutional experts' follow the constitution instead of attempting to re-write it via a very dangerous and cumbersome amendment process, which they will never be able to control?" **Using Article V IS following the Constitution to control a control-less federal government!**

Williams continues his biased assessment by attacking Mark Levin, stating,

I'm afraid that the simple answer is that the advice offered is not intended to provide any realistic solutions, but rather to simply sell books to good people in desperate need of solutions.

Such a statement reveals that Williams is no statesman on this issue.

Lastly, Williams strangely concludes by stating Article V is not a power or act of the people. He says,

Too many "patriots" are searching for solutions from others like Levin, when it is the people themselves who are the only solution available. I'm starting to think that the purpose of such books is to keep the people in the bleachers awaiting the next book, while they could be taking appropriate actions on their own at the local level.

Williams fails or refuses to recognize that Article V is THE MOST fundamental movement of the people there can possibly be in our constitutional system. It would change the course of our constitutional history forever, just as Dr. Vieira admits. It would have the effect of undoing decades of federal judiciary decisions giving Congress seeming plenary power. **All of the other remedies under the sun cannot accomplish such a task in such a fundamental and peaceful way.**

Conclusion

In summary, those who use the two arguments stated above to oppose Article V have less ground to stand on than those who advocate its use to restore liberty. The time has come for patriots to embrace what our Founders gave us to remedy the kind of federal problems we are experiencing today.

If you appreciate Tim's article, "like" him on Facebook and sign up for his articles at www.libertydefenseleague.com.

---

[1] E. Donald Elliott , *Constitutional Conventions and the Deficit*, 1985 DUKELJ 1077, 1081-82, Duke Law Journal (December, 1985).

[2] Elliott , *Constitutional Conventions and the Deficit*, 1985 DUKELJ 1077 at1085.

[3] I recommend studying this book on the subject of nullification, interposition and secession. Cogan, Neil H., *Union & States' Rights: A History and Interpretation of Interposition, Nullification, and Secession 150 Years After Sumter*, (University of Akron , 2014). http://www.uakron.edu/uapress/browse-books/book-details/index.dot?id=c5834806-bb97-4479-a3e0-e3c2c008b1a0

[4] Dr. Vieria observes that the PRINCIPLE of Article V is correct but argues the PRACTICE is not a good idea. This begs the question of whether patriots in the liberty movement should put practice over principle. As many are aware, many leaders in the "liberty movement" state that we are to never vote for a "lesser evil" because of the principle, regardless of what results. According to Dr. Vieira's position on Article V, "liberty movement" patriots should begin using pragmatics and not principles to direct their decisions.

[5] That Dr. Vieira would say that using the Militia does not "require or entail violence" is meaningless because it ignores the very nature of a militia—"the right of the people to keep and bear arms." The use of arms is the use of violence to "secure a Free State." Militia's purpose is not political, legal or otherwise peaceful in nature. So, while a Militia may not actually use force in a given situation, its purpose is to use force when necessary, and under what circumstance can one imagine a Militia not using force in a "Titanic" situation of society as presented by Dr. Vieira? And what world experience can he point to show that the Militia's purpose does not require or entail violence?

[6] Elliott , *Constitutional Conventions and the Deficit*, 1985 DUKELJ at 1080.

[7] Elliott , *Constitutional Conventions and the Deficit*, 1985 DUKELJ at 1082-83, citing 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 121 (M. Farrand rev. ed. 1937).

[8] The book, *Union & States' Rights* ,[8] proves this point well.

Jason

Thursday, October 9, 2014 12:51 PM

That's a great perspective.
Kim Seo Joon
dts5000

Monday, January 5, 2015 10:28 AM

Thank you for this post. Thais all I are able to say. You most absolutely have built this blog website into something special. You clearly know what you are working on, you've insured so many corners.thanks.

girlsdoporn
blogcomment

Monday, January 5, 2015 11:59 PM

This is also a very good post which I really enjoyed reading. It is not everyday that I have the possibility to see something like this. Ainol Venus 7
blogcomment

Friday, January 9, 2015 7:38 AM

Thank you for this post. Thais all I are able to say. You most absolutely have built this blog website into something special. You clearly know what you are working on, you've insured so many corners.thanks. bubblegum casting
Only registered users may post comments.