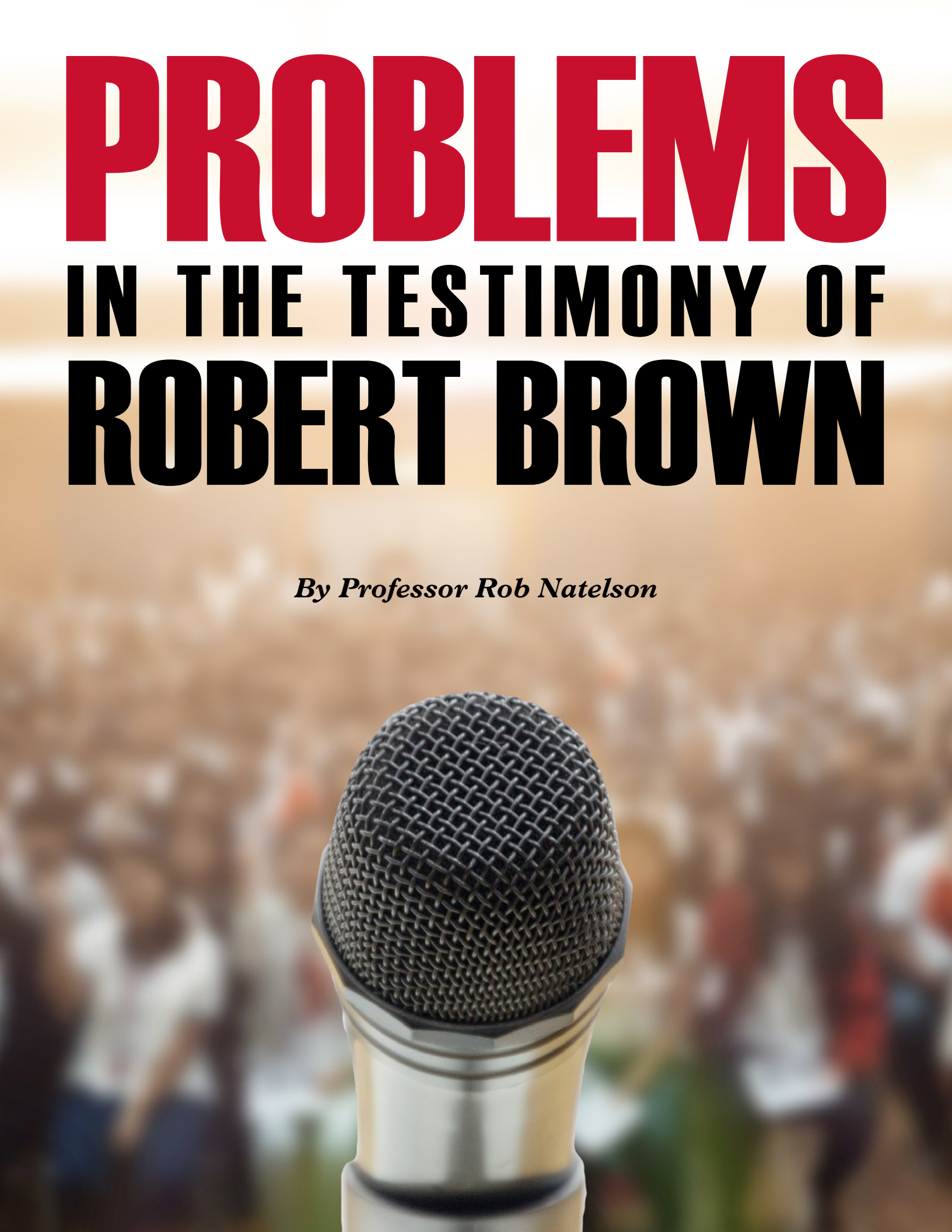
PROBLEMS IN THE TESTIMONY OF ROBERT BROWN

By Professor Rob Natelson



Problems in the Testimony of Robert Brown

By Robert G. Natelson[1]

[1]About the Author: *Professor Natelson is the director of the Article V Information Center at the Independence Institute in Denver and has published widely on many parts of the U.S. Constitution for the scholarly and popular markets. He is the most-published active scholar on the Constitution's amendment process, and the author of* The Law Of Article V, *a legal treatise. His research studies have been relied on by the highest courts of 16 states, by federal appeals courts in five cases, and by U.S. Supreme Court Justices in seven cases.*

Professor Natelson has degrees in history and law, the latter from Cornell University (J.D. 1973), where he was elected to both the Cornell Law Review *and the University Senate. (He chose the latter.) After practicing law (1974-85), he served as a tenure-track and tenured professor of law (1985-2010).*

Professor Natelson has split his professional experience between the public and private sectors. He also has extensive political experience: In Montana, he led several successful statewide ballot campaigns to restrain taxes and spending, and he placed second in a five-candidate field in the open party primaries for governor (2000). A more complete biography is at https://i2i.org/about/our-people/rob-natelson/.

"It is much easier to alarm people than to inform them."

—William Davie
Constitutional Convention Delegate

Early in my 25-year career as a legal academic I had an experience both humiliating and invaluable.

I was enjoying success placing research articles in academic journals on common legal topics. Then I researched and composed an article on the more exotic subject of classical Roman law, and I submitted it to a peer-reviewed legal history journal.

A "peer reviewed" journal is called that because other scholars anonymously examine and report on your article before the journal agrees to publish it. This ensures the contribution is well-grounded and adds to human knowledge.

Based on peer review of my submission, the journal's editor rejected it and provided me with a copy of the review to explain why.

The reviewer's assessment was devastating. He said it was obvious that I was writing without prior education in Roman law—that I knew little about scholarship in the field, and, frankly, I was clueless as to how much I didn't know.

I was emotionally crushed, but I also recognized that the reviewer was correct. And although the reviewer could have remained anonymous, he kindly disclosed his identity to me. He helped me work through my disappointment. He outlined what I needed to do before I could contribute to the very specialized realm of Roman law. I don't remember all his recommendations, but I do recall that one of them was to acquire some formal education on the subject.[2]

The experience taught me that I had fallen into the common error of undervaluing other people's specialties. (Think of all the disasters wrought by overconfident husbands who imagine they can do their own plumbing!) The experience also taught me that when researching a subject, you should gather as much information about it as possible: Never limit your universe of sources.

The experience had some implications for the reviewer as well. He told me he had a hard time writing his assessment, precisely because my paper lacked the foundation of basic knowledge of the field. If he were responding to a scholar who had some foundational knowledge, the review could have simply pointed out the mistakes, and perhaps suggest ways to correct them. But to respond effectively to a beginner, he also had to outline and explain many of the fundamentals.

Later I learned how time consuming this is. For example, when a lawyer has to thoroughly explain a legal conclusion to a non-lawyer, the lawyer first must outline basic concepts taught in law school before proceeding to the issue at hand. The difficulty increases exponentially when the non-lawyer thinks he's already an "expert" in the subject, and has reached a different conclusion. Such people never want to believe the truth, so the lawyer has to pile up sources to support the most elementary propositions.

This is one reason lawyers tell each other, "Never argue law with a non-lawyer." Much the same is said in other specialties as well, and often less politely.

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[2] *After additional research over several years, I was able to publish a related article that did not require as much specialized knowledge: Robert G. Natelson, The Government as Fiduciary: Lessons from the Reign of the Emperor Trajan, 35 Richmond L. Rev. 191 (2001).*

This is such a case: Robert Brown is a novice who promotes himself as an expert. So to explain why his conclusions are incorrect, you often have to review the basics understood by all true experts. That is why this paper is so long.

Background

Robert Brown is an employee of the John Birch Society (JBS). Videos of his performances before legislative committees show that he holds himself out as a "nationally known constitutional scholar."[3] He or JBS apparently used like representations of expertise to obtain an interview with Joshua Philipp of the *Epoch Times*, an international newspaper.

However, Brown's biography shows none of the background or hard work necessary to make one a constitutional scholar, much less a "nationally known" one.[4] There is no evidence of formal, or

Brown's biography shows none of the background or hard work necessary to make one a constitutional scholar, much less a "nationally known" one. There is no evidence of formal, or even informal, training in law, history, or language. A search of an academic database revealed no evidence that he has published any scholarship on the Constitution or on anything else.

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[3] https://youtu.be/aeaAfCdQk18. *The video shows Mr. Brown representing himself as a "nationally known constitutional scholar" at legislative hearings in North Dakota, South Dakota, and South Carolina.*

[4] *Mr. Brown's official JBS biography is sketchy. It tells us only that "he and some buddies started a bicycle design company for a few years," that he has worked for JBS since 2009 and that he raises chickens and goats on two acres of land.*

Suppose John Q. Quacker regularly influenced government health policy by holding himself out as a "nationally known cardiac surgeon"—but had never gone to medical school . . . We should be equally concerned when a person offers constitutional and other legal advice and affects legislative policy without any reasonable basis for doing so.

even informal, training in law, history, or language. A search of an academic database revealed no evidence that he has published any scholarship on the Constitution or on anything else.[5]

I recognize, of course, that everyone has a First Amendment right to express his or her opinion, expert or not. But no one has the right to mislead legislators on important matters of law and policy under the cover of false credentials.

To use an analogy: Suppose John Q. Quacker regularly influenced government health policy by holding himself out as a "nationally known cardiac surgeon"—but had never gone to medical school, never served a residency, and never performed an operation. We would be justifiably concerned. We should be equally concerned when a person offers constitutional and other legal advice and affects legislative policy without any reasonable basis for doing so.

Yet Brown has repeatedly purveyed constitutional and legal advice, frequently on the very important issue of whether state lawmakers should apply for a convention for proposing amendments to the United States Constitution. Brown's statements are based on citations, sometimes out of context, from only a narrow sliver of the sources constitutional scholars employ in their work.[6]

The Interview

To illustrate the problems in Brown's approach, I have chosen his *Epoch Times* interview with Joshua Philipp. The interview is 30 minutes long. This paper quotes relevant excerpts, and then

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[5] *Publishing in scholarly journals subjects one's work to review and critique from others knowledgeable in the subject.*

[6] *Constitutional scholars work with 18th century law books, cases and statutes; the 18th century educational canon (including the Greco-Roman classics); British parliamentary records; political and philosophical works influential with the Founders, such as those by Aristotle, Cicero, Locke, Montesquieu and DeLolme; colonial charters and instructions to colonial governors;*

responds to each. The footnote below provides a link to the entire interview.[7]

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Joshua Philipp: *"Hey, welcome back everyone. . . . Robert Brown. He's a constitutional expert with the John Birch Society. And Robert, it's a real pleasure to have you on Crossroads. . . . Now, I'm curious from your standpoint, what is the Convention of States? How would you describe it?"*

Robert Brown: *"Convention of States is an organization pushing to use the second method in Article V for obtaining changes or amendments to the Constitution. . . . . Yeah, in Article V it talks about two different ways of amending or changing the Constitution."*

Correction: Mr. Brown's response is inaccurate in two respects. First, he fails to distinguish between a "convention of states" as a constitutional mechanism and the Convention of States Project, which is one of several organizations trying to bring about such a convention.

Second, he erroneously states that there are two ways of amending the Constitution. In fact, there are four: (1) proposal by Congress, ratification by state legislatures, (2) proposal by interstate convention, ratification by state legislatures, (3) proposal by Congress, ratification by state conventions, and (4) proposal by interstate convention, ratification by state conventions.

It would have been correct to say that there are only two ways of *proposing* amendments. However, Brown and other convention critics often fudge the difference between proposal and ratification to suggest, falsely, that a convention alone, without state ratification, could impose constitutional change. The Constitution and many other sources (see *Notes*) make it absolutely clear this is not so.

Brown also conflates proposal and ratification elsewhere in the interview, as explained below.

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Brown: *"So, the second method has never been used before. We've been well over 200 years under the current constitution, and it has been brought up a number of times throughout our nation's history."*

Correction: This is a half-truth, because it understates the role the Constitution's application-and-convention process has played in American history. Although the process has not been used to *completion*, states have adopted hundreds of "applications" for a convention, and on several occasions America has been quite close to one. On several occasions as well, application campaigns have forced Congress to propose amendments or take other action. Without the convention process, it is very likely neither the Bill of Rights nor the 17th nor 22nd Amendments would have been adopted.

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pre-1787 state constitutions; debates in the state legislatures and state ratifying conventions; newspaper articles and speeches; and the records of the Continental, Confederation, and First Federal Congresses. These materials sprawl over hundreds of volumes. Practicing constitutional lawyers increasingly use the full range of this material as well.

Fully competent constitutional scholarship also requires some background in the Latin language. See Forrest McDonald, Novus Ordo Seclorum xi *(1985) (Professor McDonald was arguably our greatest 20th century constitutional historian).*

[7] *https://m.theepochtimes.com/video-arguments-against-the-convention-of-states-interview-with-robert-brown_3754686.html*

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Brown: *"James Madison in particular. . . strongly pushed against achieving the Bill of Rights through an Article V Convention, saying it was a more dangerous mode than Congress. He uh- in fact, a letter to George Turberville, November 2, 1788, he says he would* tremble *at the results of a convention. . . . ."*

Correction: JBS borrows many of its arguments from liberal sources opposed to a convention, and this is one example.

The myth that Madison—the principal author of Article V—opposed its provision for conventions apparently was invented by liberal lawyer Arthur J. Goldberg in 1983.[8] Madison's full correspondence on this subject includes at least twelve other letters, and it tells quite a different story.

Madison's full correspondence tells us that he did not oppose Article V conventions in general; he opposed only a specific proposal for a convention to re-write the entire Constitution. In that correspondence, moreover, Madison also wrote he would be fully agreeable to holding a convention in a year or two, after some experience under the new government. In a letter written later in life, Madison endorsed an amendments convention over the favorite JBS "solution" of nullification.[9]

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Philipp: *"Now, on the Convention of States, you mentioned that you—you kind of see the same problems but you—you don't think that—that the model of using it to amend the Constitution is a good model. Why not? What is the argument against it? What would you say?"*

Brown: *". . . Given today's political environment, if we were to pull up the anchor of the U.S. Constitution and drift to the* center *of political thought today, do you feel that would move us closer to the views of Marx or Madison? And obviously, our nation has moved far more towards the socialist mentality than we were in 1787 when the Constitution was originally written . . . ."*

Correction: Convention advocates explicitly rule out "pull[ing] up the anchor of the U.S. Constitution." They seek only (in the Constitution's words) *"a convention for proposing amendments" "to this Constitution."*

JBS claims it is a bad time for a convention, and it has been making that claim for decades, no matter what the political conditions. It is clear that JBS does not consider any time to be good.

Practically speaking, right now probably *is* a good time for a convention to propose conservative-leaning amendments: Thirty-one state legislatures are Republican. Congress is deeply unpopular, and its narrow Democratic majority is widely viewed as overreaching. The present justices on the Supreme Court and other federal courts are the most favorable in years.

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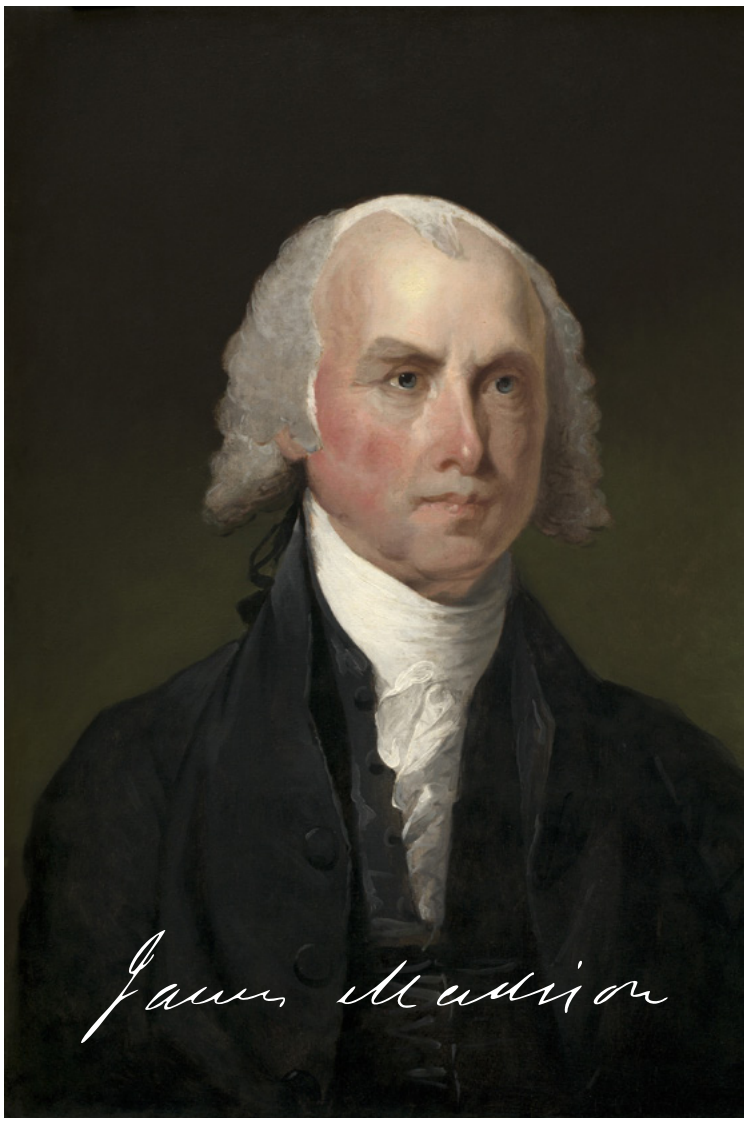
[8] *Arthur J. Goldberg,* Commentary: The Proposed Constitutional Convention, *11 Hastings Const. L.Q. 1 (1983).*

[9] *I have collected Madison's correspondence on the subject at the Article V Information Center webpage at https://articlevinfocenter.com/what-madison-really-said-in-1788-and-1789-about-holding-a-second-convention/. On a Montana radio show several years ago, I informed Mr. Brown of this correspondence, what it said, and where to find it.*

Madison's full correspondence tells us that he did not oppose Article V conventions in general; he opposed only a specific proposal for a convention to re-write the entire Constitution. In that correspondence, moreover, Madison also wrote he would be fully agreeable to holding a convention in a year or two, after some experience under the new government.



Philipp: *"Now, I know proponents of it, they argue that—y'know, they can preven- they can propose amendments, but they're saying that you can't* undo *current rights within the Constitution. Is this accurate? What do you—what do you think on this?"*

Brown: *"It's really not [accurate] . . . . The problem is,* historical precedent *does say otherwise. And this is probably* the *number one most important argument between the two sides, is* what *does the historical precedent say?"*

Correction: There is no "important argument between the two sides" about historical precedent, because opponents really don't cite any.

Historical precedents include (1) about forty conventions of states and colonies since 1677, (2) hundreds of convention applications, and (3) a line of reported Article V court decisions dating back to 1798. (The case law is discussed in my treatise, *The Law of Article V*.) Out of all this material, Mr. Brown selects only one incident occurring more than 200 years ago—and as we shall see, even his understanding of that incident is wrong.

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Brown: *"The 1787 Convention, where our constitution was written, is really the* only *national constitution amending convention we've ever had."*

Correction: That's not true. A national amending convention was held in Washington, D.C. in 1861. More states participated in that convention than at any convention of states before or since.[10] In addition, the Albany Congress of 1754 and the First Continental Congress of 1774 were national conventions that proposed what were then basic constitutional changes.

Even if Brown's comment were technically true, it would be deceptive. This is because regional and national conventions of states operate under much the same protocols, including (1) limited and defined powers and (2) equal voting power for each state. The Article V Information Center provides a complete list of these conventions.[11]

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Brown: *"And in that case we have the existing constitution as the Articles of Confederation."*

Correction: The Articles of Confederation were not a constitution as we think of one, and the Confederation Congress was not a government. The Articles were a multilateral treaty something like NATO. The Confederation Congress was a limited coordinating body much like NATO's North Atlantic Council.

In thinking of the Articles as a "constitution" in the modern sense, Mr. Brown commits a common error in historical method called *anachronism*.

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Brown: *"States sent delegates to the 1787 Convention and gave them* specific delegate

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[10] *For a summary, see* It's Been Done Before: A Convention of the States to Propose Constitutional Amendments, https://articlevinfocenter.com/its-been-done-before-a-convention-of-the-states-to-propose-constitutional-amendments/.

[11] List of Conventions of States and Colonies in American History, https://articlevinfocenter.com/list-conventions-states-colonies-american-history/.

commissions, *or authority."*

Correction: As noted above, the 1787 convention is the sole precedent opponents cite. Their fundamental argument is that the 1787 conclave exceeded its authority ("ran away"). From that, we are supposed to fear a more limited convention held under very different conditions over 230 years later.

Even if it were true that the 1787 convention had exceeded its authority (and, as explained below, it is not true) that is not very good evidence of what would happen in a convention of states today.

First: There have been about forty conventions of states, many after 1787.[12] They were governed by procedures that have become standardized, including rules limiting their authority. Everyone concedes that the other conventions remained within their authority. Certainly thirty-nine offer much more precedential weight than just one.

Second: The 1787 convention was not called under the Articles of Confederation. It operated outside of any legal restraint other than the delegates' commissions. By contrast, a convention for proposing amendments is called under the Constitution and is subject to the rules of the Constitution. Over a century of decided case law affirms that.

Third: On the modern convention floor, any commissioner raising issues outside the prescribed agenda can be reined in with a simple point of order.

Fourth: Modern technology enables the state legislatures commissioning delegates to use video oversight to track them 24/7. If a straying delegate somehow were not brought back to order, a supervising state legislative committee would see the incident in real time and could immediately re-instruct or recall.

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Brown: *"States sent delegates to the 1787 Convention and gave them* specific delegate commissions, *or authority. You're authorized to make these types of changes; you're not authorized to change these things . . . Mark Meckler, Convention of States, organizations like that, will repeatedly claim those convention delegates were given* full *authority to make* any *changes they felt were necessary to the Articles of Confederation. Now,* if *that were true, do you think that delegates would have known that? And the reason I say that is because, as you look through Madison's notes from the federal convention, you see this issue came up* repeatedly *throughout the Convention: do we actually have the authority to be creating a* new *constitution, instead of just amending the Articles of Confederation? . . . .*

"First side said things like, 'We really don't have the authority and we should not proceed with changing the Constitution this drastically without first going back to the States and getting further authority.' That was the argument of William Patterson, uh Charles Pinckney, Elbridge Gerry[13], John Lansing.

"The other side of the argument was not *what Mr. Meckler says, 'They have full authority.' The*

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[12] *See the previous footnote.*

[13] *In this interview Brown makes an error no genuine constitutional scholar would make: He pronounced Elbridge Gerry's last name with a soft "g" (like "Jerry") rather than how Gerry actually pronounced it (with a hard "g"). It seems like a small mistake, but such mistakes are clues to whether the speaker knows what he or she is talking about.*

Madison points out in Federalist No. 40 that the state-issued commissions (or "credentials") defined the scope of the convention's authority. Founding-era law books confirm this rule.

other side of the argument represented by people like Edmund Randolph, Alexander Hamilton, even James Madison, was, 'You're right, we really don't *have the authorization to be doing this, but we need to do it anyways. This is an* urgent *need of our nation. . . . We must proceed.'*

"Nobody stood up in the 1787 Convention and claimed, 'Look at our commissions, we're fully authorized to make any changes we feel are necessary.'"

Correction: These comments depart from the traditional JBS line, which is that *Congress* called the 1787 convention and limited it to proposing only amendments to the Articles. However, modern research has made that position untenable, so I am glad to see Mr. Brown abandon it.

Madison points out in Federalist No. 40 that the state-issued commissions (or "credentials") defined the scope of the convention's authority. Founding-era law books confirm this rule. Now, among the 12 states participating in the 1787 convention, all but two (Massachusetts and New York) issued commissions conveying full power to propose a new form of government. The general public overwhelmingly shared the expectation that the convention would propose a new form of government—some imagined it might be a monarchy!

Brown points to statements by commissioners questioning the extent of their authority. *But what determines whether the 1787 convention "ran away" is what the commissioners' credentials said, not what anyone said they said!*

There were several reasons why commissioners might rhetorically question their authority. Some represented one of the two states granting narrower powers, such as New York's John Lansing and Massachusetts' Elbridge Gerry. Virginia's

Edmund Randolph clearly did not buy the "no-authority" argument, but like the good advocate he was, he conceded it *arguendo* (for sake of argument) and built his case on practical rather than technical legal grounds. William Paterson of New Jersey denigrated his authority for strategic reasons—to strengthen his case for equal state representation in the Senate. Once Paterson achieved his goal, he dropped the argument and urged creation of a strong government.

Brown's restriction to a narrow range of sources prevented him from learning that during the ratification debates the Constitution's advocates addressed the issue. They vigorously defended the delegates' actions as authorized by their commissions.[14]

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Brown: *"In fact, one of the challenges I* repeatedly *put out to the other side, they never want to answer this: show me the delegate. Show me the delegate who made that claim, 'We have full authority.'"*

Correction: Mr. Brown has never put the challenge to me. I would have responded by naming James Wilson, who told the Convention, "Relative to the powers of this convention—We have powers to conclude nothing; *we have power to propose anything."* [15]

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Brown: *"Instead, what they did was, and this comes directly from James Madison, I'm going to read it to you directly. They said that* people *were in fact, the fountain of all power, and by resorting to them, all difficulties were got over."*

Correction: This is another example of opponents conflating proposal with ratification. As Madison (in Federalist No. 40) and other Founders made clear, the power to propose came from the states via their commissions to

"We have powers to conclude nothing; we have power to propose anything."
- James Wilson

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[14] *See, e.g.*, Carlisle Gazette, *Mar. 12, 1788, in* 34 Documentary History of the Ratification of the Constitution 1014, 1016.

[15] *1 Farrand's Records 266 (Jun. 16, 1787) (as reported by Rufus King).*

the delegates. The power to *ratify* came from the people, who elected delegates to their state ratifying conventions.

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Brown: *"They were also given a constitutionally defined ratification process, they threw it out, retroactively created a much lower bar . . . ."*

Correction: Mr. Brown's claim is that (1) the Constitutional Convention provided for ratification by nine states rather than the thirteen required by the Articles, so therefore (2) a modern amendments convention might alter the ratification process as well.

Constitutional scholars consider this as one of the "runaway" alarmists' loonier ideas. It is based on utter ignorance of governing law, both in 1787 and now. Specifically:

- As noted before, the 1787 convention was not held under the Articles of Confederation. It was held under reserved state powers retained by signatories of treaties and recognized explicitly by the Articles. The convention could, therefore, propose any method of ratification it chose. Incidentally, the Confederation Congress approved the convention's actions when it forwarded the Constitution to the states and urged them to hold ratifying conventions.[15]

- A convention for proposing amendments, by contrast, receives its power from the Constitution and is subject to its rules, including ratification rules. One of the clearest principles from 223 years of Article V court decisions is that no participant in the amendment process may change the Constitution's amendment rules. But Mr. Brown never mentions case law. From listening to him you'd think the courts never issued an Article V ruling and all we have to go on is what allegedly happened in 1787. Yet there are hundreds of cases defining general constitutional principles and dozens more interpreting Article V.

- Nor do alarmists tell us how, if a convention purported to change the ratification rules, it could enforce its decision. Call out the army?

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Brown: *"[T]he precedent they set was, these types of conventions represent, not the States, not the legislatures, but they represent the people* themselves . . . ."

Correction: It is unclear what Mr. Brown means by "these types of conventions." If he is referring to conventions that deal with constitutional issues, then his statement is only a half-truth.

Conventions elected directly by the people within a particular state—sometimes called constituent conventions—represent the people. Constituent conventions were used to ratify the U.S. Constitution and the 21st amendment. They also are employed to propose and ratify state constitutions.

Interstate conventions whose commissioners are selected as directed by state legislatures are called *conventions of states* or *conventions of the states*. They answer to the states or state legislatures directly, so they represent the people

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[15] *Did Congress Approve the Constitution? A Member's Letter Says "Yes"*, https://articlevinfocenter.com/did-congress-approve-the-constitution-a-members-letter-says-yes/.

only in a remote sense. When called under states' reserved powers, conventions of states meet to propose solutions to common problems—such as coordinating state laws or negotiating water compacts. When called under Article V of the Constitution, they may propose amendments to the states for ratification. My treatise, *The Law of Article V*, discusses the legal differences among conventions.

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Brown: *". . . and as such their power cannot be limited. Now, we've seen that same precedent upheld* repeatedly *in state conventions ever since. I mentioned the Montana one, for example."*

Correction: This is legal nonsense. Conventions—even those that represent the people directly—usually *are* limited. Brown cites the 1972 Montana constitutional convention as an unlimited body. But the Montana Supreme Court specifically held that its powers were limited. *State of Montana ex rel. Kvaalen v. Graybill*, 496 P.2d 1127 (Mont. 1972).

Unless a convention is acting in absence of an established government (as in some states at the opening of the American Revolution), it is always limited to some extent. For example, a state convention called under an existing constitution may not be subject to the legislature, but it is limited by the terms of the existing constitution. When state conventions were being considered to ratify the 21st Amendment, some people argued they would be unlimited—but court adjudication determined otherwise. As noted earlier, the courts have ruled repeatedly that all assemblies operating under Article V are bound by the rules laid out in the Constitution.

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Brown: *"In fact, if you look to the—the law journal that's called* Corpus Juris Secundum, *that's a collection of various Supreme Court rulings from*

If a convention purported to change the ratification rules, how could it enforce its decision? Call out the army?

Every first-year law student learns that Corpus Juris Secundum's text is not fully trustworthy and should never be cited as authority. It is used principally as a case finder.

the States all across the country, and we've seen consistently *the same thing."*

Correction: Where do we begin with this one? There is so much error from which to choose!

First: Contrary to Mr. Brown's description, *Corpus Juris Secundum* (CJS) is not a "law journal." It is a legal encyclopedia that attempts to summarize law on all topics.

Second: CJS is not a "collection of various Supreme Court rulings." It is principally a legal text with supporting citations from federal and states appellate courts at all levels.

Third: Every first-year law student learns that CJS's text is not fully trustworthy and should never be cited as authority. It is used principally as a case finder. You have to read the cases it cites to find out what the law is, then expand your research to find other cases on the same topic.

Fourth: Mr. Brown apparently didn't read the cases referenced in the part of CJS he mentions. If he did, he'd know they have nothing to do with Article V conventions. He would also learn that those cases are all very old. They were decided long before most Article V court rulings were issued. Thus:

- In *Cox v. Robison*, 105 Tex. 426, 150 S.W. 1149 (1912), the facts were that in 1866, the former Confederate state of Texas was under federal military occupation. As commander-in-chief of the U.S. armed forces, President Andrew Johnson called for a Texas state constitutional convention. The court held that the state constitution did not have to be ratified by the people *because the president had not required it*. (Presumably he could have limited the convention by requiring it.)

- *Frantz v. Autry*, 18 Okla. 561, 91 P. 13 (1907) dealt with a local constitutional convention Congress had authorized in what was then the Territory of Oklahoma. The case held that the convention had all the power Congress gave it, and that Congress had imposed only a few limits. The cases said the convention needed to respect only the limits Congress imposed.

- *Koehler & Lange v. Hill*, 60 Iowa 543, 14 N.W. 738 (1883) held that when any constitution prescribes an amendment procedure, that procedure must be followed. It added "The powers of a convention are, of course, unlimited. The members thereof are the representatives of the people, called together for that purpose." But the court was speaking of state constitutional conventions, not federal conventions, and this case is contradicted by later authority, such

as State of *Montana ex rel. Kvaalen v. Graybill*, 496 P.2d 1127 (Mont. 1972), mentioned above.

- *Loomis v. Jackson*, 6 W.Va. 613 (1873) says that "A [state] constitutional convention, lawfully convened, does not derive its powers from the legislature; but from the people. The powers of such a convention are in the nature of sovereign powers." But in this country, we frequently limit sovereignty, and a convention's authority can be limited by an existing constitution.[16]

- *Sproule v. Fredericks*, 69 Miss. 898, 11 So. 472 (1892) examined the power of a state constitutional convention called by the legislature. It ruled that the convention's power was very broad, but also acknowledged that its power could have been limited.

Again, nothing in these five decisions had anything to do with Article V.

So much for Mr. Brown's cases. I've taken some time to examine his misuse of CJS because it illustrates the conceptual chaos that ensues when someone ignorant of law starts interpreting legal texts and spouting legal advice.

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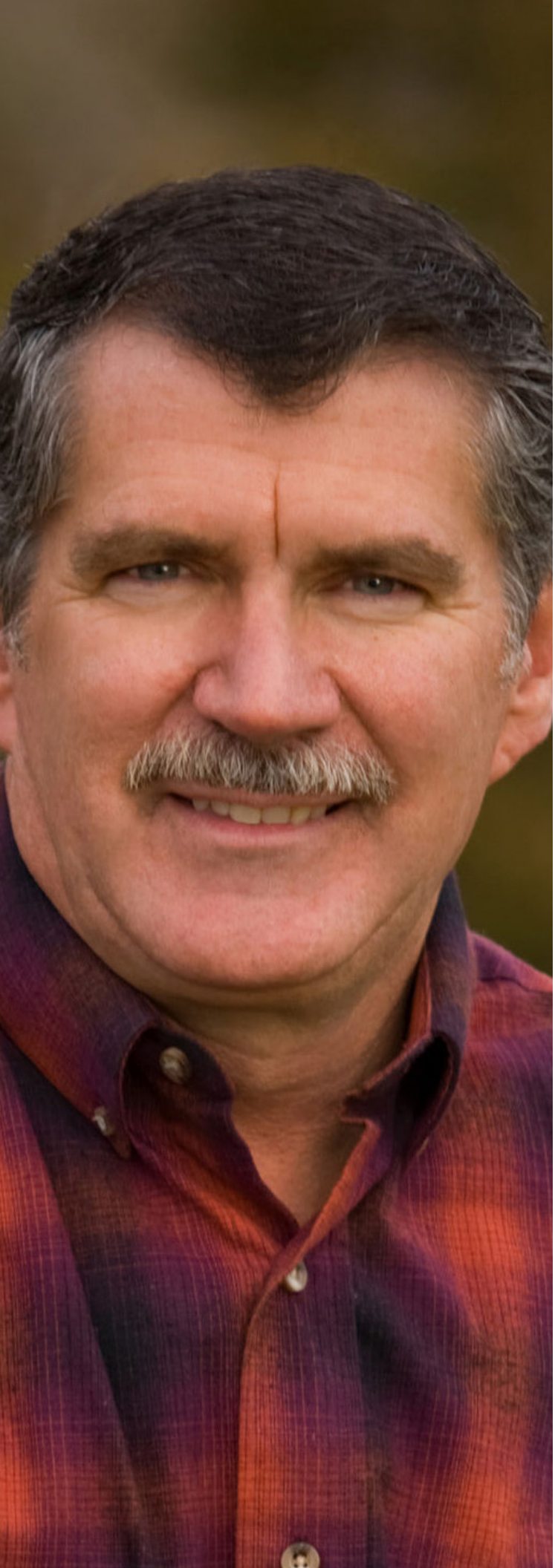
Brown: *"Congress is essentially—they often refer to it as a sitting constitutional convention themselves. Madison differentiated between them. Again, as I mentioned as he was putting out his opposition to an Article V Convention, he said that in his view, the* Convention *would feel much greater latitude in making sweeping changes to the Constitution than Congress would, which is why he said Congress is the safer mode."*

[16] *Incidentally, another line in the* Loomis *case contradicts the common JBS claim that Congress could control an amendments convention: "That the legislature can neither limit or restrict [conventions] in the exercise of these powers . . . ."*



MR. BROWN CLAIMS HE ORGANIZED A GROUP TO PRESSURE REP. DENNY REHBERG... BUT AFTER BROWN STARTED HARASSING HIM, REHBERG'S RATING DROPPED TO 80% IN 2011 AND 76% IN 2012—HIS LOWEST SCORES EVER.

Correction: As already discussed, Madison was not opposed to amendments conventions. The reason he opposed New York's 1788 proposal was because its scope was too wide and it came too early. But very few convention applications have been as broad as that. The applications being passed today are all quite focused.

In this passage Mr. Brown does inadvertently allude to an inconvenient fact: An amendments convention may do only what Congress may do at any time — propose amendments. But unlike a convention, Congress has unlimited, unrestricted power to do so.

★ ★ ★ ★

Brown: *"Congress already pretty much does whatever they want to with regards to what the Constitution says, for the most part. And the only reason they get away with that, is we the people don't hold them to it . . . .*

"When I first moved to Montana about a decade ago, I organized a couple hundred people, and we started holding our congressman accountable to his voting as it squared with the Constitution. At the time, his "constitutional rating," so to say, was somewhere around 40-60%. He was always right in the middle. About half the time he'd follow the Constitution, half the time he wouldn't. Within four months, he was at 80% and thereafter he was stated at 90%, because we started pushing on him on . . . ."

Correction: This prescription for curing the federal government is terminally naïve. The majority of members of Congress, particularly the leadership, are long-time holders of "safe" seats and immune to popular, pro-Constitution lobbying. Indeed, they hold their seats largely by *violating* the Constitution.

The Congressman referred to is Rep. Denny Rehberg (R.-Mont.), who was in office from 2001 to early January 2013. Mr. Brown claims he organized a group to lobby Rehberg "about decade ago" — i.e., sometime between 2009 and 2011. Now, if anyone was amenable to "constitutionalist" lobbying, Congressman Rehberg should have been. He served a swing district, and I know from personal acquaintance that he has conservative values.

But did Brown's lobbying really have any effect? The American Conservative Union ranks members of Congress by their commitment to smaller, constitutional government. The ranking is on a scale of zero to 100.

Rehberg was rated for the years 2001 through 2012. His ACU voting record for each year was as follows:

2001 - 84%
2002 - 100%
2003 - 84%
2004 - 96%
2005 - 92%
2006 - 83%
2007 - 88%
2008 - 84%
2009 - 92%
2010 - 96%
2011 - 80%
2012 - 76%

If there is any pattern in their figures at all—and I'm not sure there is—it suggests Brown's efforts may have been counterproductive. In the years including and up to 2010, Rep. Rehberg's ACU score had ranged from 84% to 100%. But after Brown started harassing him, Rehberg's rating dropped to 80% in 2011 and 76% in 2012—his lowest scores ever.

In theory millions of Americans could pressure members of Congress to change. But as a matter of historical record, this does not happen: The organizational costs for conservative Americans are too high. Professional lobbyists concentrated in Washington, D.C., are paid big money to lobby, and they do it continuously. They offer concrete benefits beyond what the conservative grassroots can offer, such as connections to many large political donors. They enjoy the support of the national media, which has strong incentives to concentrate power at the federal level.

There are good people in Congress. But as they acknowledge, they need firm rules to restrain their behavior and enable them to justify voting against certain programs. Only constitutional amendments can provide those rules.

★ ★ ★ ★

Brown: *"We look at Federalist 16, 26, and 33: Alexander Hamilto-Hamilton talking about the power that we the people and we the States have to push back against federal tyranny. Madison picks it up in Federalist 44 and 46, 46 especially. And what's interesting is, in all of those documents where they're talking about what to do to push back against federal tyranny, they never mention Article V. In fact, when you go onto Federalist 48 and 49, Madison directly addresses that."*

Correction: Notice how Mr. Brown's sources for the ratification debates consist solely of *The Federalist*—a minuscule fraction of the ratification record. He never mentions the other founding-era commentators who spoke to the amendments convention process.[17] Even his use of *The Federalist* is clumsy. For example, at this point he overlooks references to the Article V convention process in Federalist No. 43 and No. 85.

★ ★ ★ ★

Brown: *"In 49, [Madison] asks, 'Is it appropriate to use a Convention to address breaches in the Constitution when the federal government ignores it?' And his answer is absolutely not . . . ."*

Correction: This is another example of Brown's inept use of *The Federalist*. Trying to convert one of its essays into an argument against the Constitution's amendment process makes no sense at all. *The Federalist* was written to support the Constitution, not trash it.

Here's the real scoop on Federalist No. 49: When Madison was writing, Pennsylvania and Vermont had constitutions that provided for a "council of censors" to meet every seven years. The censors could decide whether their state constitution was working well. The censors could call a constitutional convention to address any problems.

In 1783, Thomas Jefferson outlined his own ideas for a new Virginia constitution. In partial imitation of the Pennsylvania-Vermont approach, his draft would have permitted some state officials to call a convention for "altering this Constitution or correcting breaches of it." Strikingly, this new convention was to have all the powers enjoyed by a plenary constitutional convention—including power to write an entirely new document and impose all its changes without a ratification procedure.

Madison had four objections: (1) A rogue state legislature could block the process in various ways; (2) "frequent appeals" for constitutional revision could reduce public respect for government; (3) frequent referrals to the citizenry might cause constitutional turbulence; and (4) the legislature—the branch most likely responsible for the problems—might highjack the process.

Notice that *none* of these objections is relevant to calling a convention under Article V. The states, not federal officials, initiate and staff the convention, thereby preventing congressional obstruction or control. Article V is very difficult to trigger, eliminating the danger of "frequent appeals." A convention for proposing amendments has power only to propose specified amendments, not re-write

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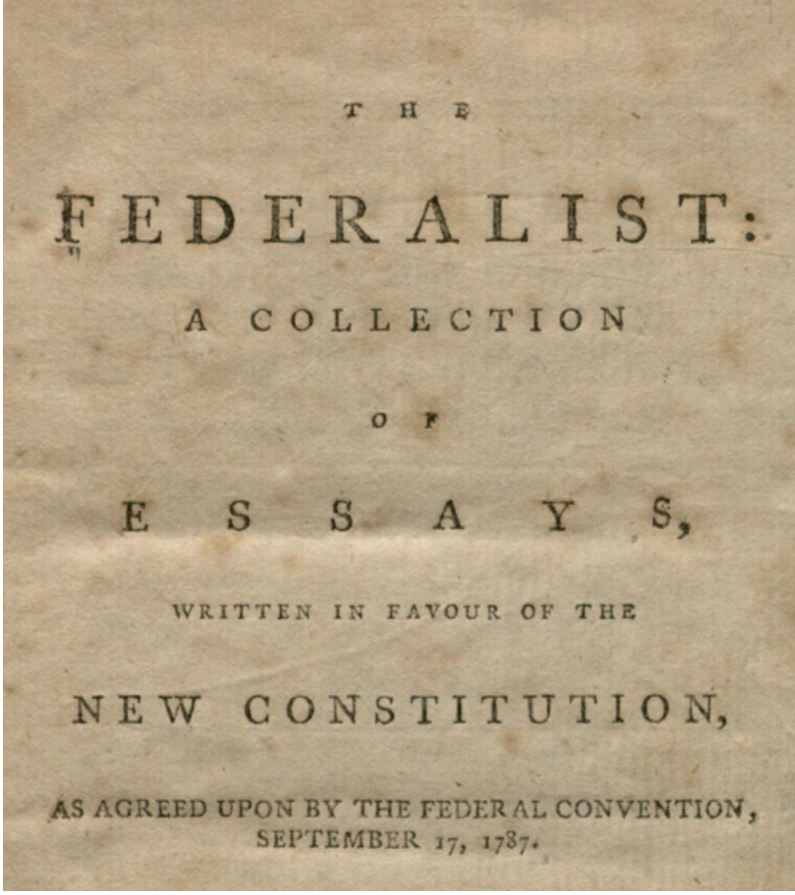
[17] For collections of this material, see, for example, my following two articles: Is the Constitution's Convention for Proposing Amendments a 'Mystery'? Overlooked Evidence in the Narrative of Uncertainty, 104 Marquette L. Rev. 1 (2020) and Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments," 65 Fla. L. Rev. 615 (2013). See also A Founder Gives Us a Lesson on the Constitution's Amendment Process, https://articlevinfocenter.com/founder-gives-us-lesson-constitutions-amendment-process/.

Trying to convert one of *The Federalist* essays into an argument against the Constitution's amendment process makes no sense at all. *The Federalist* was written to support the Constitution, not trash it.


THE
FEDERALIST:
A COLLECTION
OF
ESSAYS,
WRITTEN IN FAVOUR OF THE
NEW CONSTITUTION,
AS AGREED UPON BY THE FEDERAL CONVENTION,
SEPTEMBER 17, 1787.

the Constitution. And unlike Jefferson's idea for periodic plenary constitutional conventions, any proposal from an Article V convention is subject to a difficult ratification process.

In a portion of Federalist No. 49 Brown fails to quote, Madison assures us that, although he objects to Jefferson's plan, still "a constitutional road to the decision of the people ought to be marked out and kept open, for certain great and extraordinary occasions."

Unlike the proposals Madison was criticizing, the convention procedure of Article V seems to meet his goal very well.

★ ★ ★ ★

Brown: *"Now, in Federalist uh, I think it was 43, yeah, in Federalist 43, Madison does address the Article V Convention. And in that case, he refers to it as "the remedy for errors" in the Constitution."*

Correction: Mr. Brown is repeating—perhaps is the author of—a common JBS claim that the only role for an amendments convention was to correct drafting errors in the Constitution.

This is still more nonsense. The fact that Madison stated one purpose of the convention procedure does not mean he excluded other purposes. Other Founders itemized additional purposes. One was the need to correct federal abuses and overreach. That was the reason George Mason gave at the Constitutional Convention. During the ratification debates, prominent advocates cited the convention procedure again and again as a key safeguard against abuse.[18]

★ ★ ★ ★

[18] *See, e.g.*, The Founders Pointed to Article V as a Cure for Federal Abuse, https://articlevinfocenter.com/the-founders-pointed-to-article-v-as-a-cure-for-federal-abuse/ *(collecting examples).*

It also ill behooves an organization to complain about length of time when it has had over 50 years for its own "solutions" to work.

Brown: *"Article V has never been used technically, as far as the convention mode. It has no track record of any success other than, well, it did pressure Congress into passing the 17th Amendment, which I wouldn't really consider a good thing but, on the other hand, nullification is just one of many tools in our quiver."*

Correction: Mr. Brown incorrectly uses the term "nullification" to refer to all methods of what Madison called "interposition." In constitutional scholarship, "nullification" usually refers to formally adopting a state law or state convention resolution declaring that a federal law is void within state boundaries. The Constitution has no provision for nullification and, contrary to JBS claims, Madison firmly opposed it—recommending an Article V convention instead.[19]

★ ★ ★ ★

Brown: *"Well, y'know, in that light, it really gives a feeling of there's a sense of urgency here: We've gotta get something done, we've gotta do it soon. And if we look at the timetable, Convention of States is the example again, they've been around for seven years, they've gotten less than halfway to the thirty-four states mark. If they don't lose momentum . . . we're looking at another ten years before they get to 34 states.*

"They also admit that there will be numerous legal challenges stalling the process along the way. When we eventually get to a convention, Congress calls the convention, they finally conclude their—their whatever amendment proposals they come up with, and then it goes out to the States for ratification. . . . You're looking at a minimum *of 20 years for* anything *to actually go into effect from a convention. I don't think we have 20 years to turn this around."*

Correction: It ill behooves someone who had been slowing down a process to gripe about it being slow. On several occasions in recent American history, we have been at the cusp

[19] *James Madison to Edward Everett, Aug. 28, 1830, https://articlevinfocenter.com/wp-content/uploads/2021/02/1830-0828-JM-to-E-Everett.pdf.*

of a convention only to see JBS and other alarmists frighten people away.

It also ill behooves an organization to complain about length of time when it has had over 50 years for its own "solutions" to work. Of course, they haven't worked, and by any measure, the political system is more dysfunctional than ever.

History shows that once a popular amendment is proposed, it can be ratified in fairly short order—depending on the proposal, 15 months is a reasonable estimate. The 26th Amendment was ratified in slightly more than three months.

As for litigation: Mr. Brown probably is wrong on this one as well. The Convention of States Project application is designed in a way to minimize the chances of lengthy litigation. (That is not true of the non-uniform applications promoted by some other Article V organizations.)

★ ★ ★ ★

Brown: *". . . the moment. . . the balanced budget becomes a higher priority than all these other programs, then Congress will make it their highest priority as well and will pass a balanced budget.*

"So, the problem really isn't Congress, it really isn't the federal government, it really comes down to what we the people tolerate."

Correction: This reflects Mr. Brown's ignorance of how the federal government works. As the Public Choice school of economics has documented, politicians respond to incentives. Over the long term, these incentives are more important than the character of the politicians themselves. When the incentives are bad, the results usually are bad. When the incentives are good, the results usually are good. However, concentrated special interests, with media support, almost always can offer stronger incentives than the diffused public.

There are various ways to change incentives, but one of the most direct is to alter the system in which political actors work—by constitutional amendment.

When given the opportunity for constitutional change, people act differently than they do from day to day. Take the balanced budget amendment as an example: Right now, Congress has strong incentives to deficit-spend and very weak incentives to balance the budget. Special interests fight for as much federal booty as they can, knowing that if they don't do so, the spending will happen anyway—but it will go to someone else. Fiscal conservatives have never been able to match that clout, even though they probably comprise most of the U.S. population.

But when people are given a chance to adopt a rule that they know (1) is for the good of all and (2) will bind others as much as themselves, they act very differently. A carefully-worded balanced budget amendment will *never* be proposed by Congress—the incentives to deficit spending are too strong. But if a convention of the states proposed it, it probably would be ratified fairly quickly.

Conclusion

Mr. Brown has little knowledge of constitutional history, constitutional law, law in general, or government operations. But his claims to expertise have certainly helped to disable a key constitutional check-and-balance. Brown proposes other remedies, but he and his predecessors have argued for those remedies for decades, while federal dysfunction grows ever worse.

Our ability to extricate ourselves from our current political problems depends heavily on whether we use the most powerful tool the Founders gave us for correcting federal dysfunction and abuse. The time for using it is here—in fact, it has been here for a very long time.

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