

# The Establishment's Disinformation Campaign Against Article V:

## How It Began and Misled Others



by

Robert G. Natelson

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## Executive Summary

Some conservative organizations regularly lobby against using the Constitution's procedure for a "convention for proposing amendments." Those organizations may think they are defending the Constitution, but in fact they are unwittingly repeating misinformation deliberately injected into public discourse by their political opponents.

This paper shows how figures generally associated with America's "liberal establishment" fabricated and spread this misinformation. This paper also reveals the reasons they did so: to disable a vital constitutional check on the power of the federal government.

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## INTRODUCTION

Under Article V of the U.S. Constitution, any constitutional amendment must be ratified by three fourths of the states (now 38 of 50) to be effective. Before an amendment can be ratified, however, it must be proposed either (1) by Congress or (2) by an interstate task force the Constitution calls a “convention for proposing amendments.” This gathering is convened when the people convince two thirds of the state legislatures (34 of 50) to pass resolutions demanding it. The convention itself is a meeting of the representatives of state legislatures—an assembly of the kind traditionally called a “convention of states.”

The Framers adopted the convention procedure to ensure that Congress did not have a monopoly on the amendment process. The Framers saw the procedure as a way the people, acting through their state legislatures, could respond if the federal government became dysfunctional or abusive.

There is widespread public support for amendments to cure some of the real problems now plaguing the country. However, since repeal of Prohibition, Congress repeatedly has refused to propose any constitutional amendments limiting its own power and prerogatives. When reformers sought to check lavish congressional pay raises, for example, they could get nothing through Congress. Instead, they had to secure ratification of an amendment (the 27<sup>th</sup>) that had been formally proposed in 1789!

Such unresponsiveness would seem to be exactly the occasion for which the Founders authorized the convention for proposing amendments. Yet a handful of conservative groups—including but not

limited to, the John Birch Society and Eagle Forum—have uncompromisingly opposed any use of the convention procedure to bypass Congress. They assiduously lobby state legislatures to reject any and all proposals for a convention, no matter how worthwhile or necessary they may be. This uncompromising opposition has become a mainstay of those groups’ political identity and, perhaps, a useful fundraising device.

Although these groups bill themselves as conservative, their reflexive opposition to the convention process regularly allies them with the establishment and with special interest lobbyists who seek only to protect the status quo. Since the 1980s, this strange coalition has blocked all constitutional efforts to address federal dysfunction. As a result that dysfunction has become steadily worse. For example, their long-held opposition to a balanced budget convention is a principal reason America now labors under a \$18 trillion national debt.

## THE ARGUMENTS AGAINST A CONVENTION AND THEIR SOURCE

Opponents present an array of stock arguments against using the Constitution’s convention procedure. One such argument—the claim that “amendments won’t work”—has been so resoundingly contradicted by history that it has little credibility.<sup>2</sup> The others can be distilled into the following propositions:

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<sup>2</sup> *The Lamp of Experience: Constitutional Amendments Work*, <http://constitution.i2i.org/2014/03/09/the-lamp-of-experience-constitutional-amendments-work/>

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- Little is known about how the process is supposed to operate;
- a convention for proposing amendments would be an uncontrollable “constitutional convention;”
- a convention for proposing amendments could be controlled or manipulated by Congress under the Constitution’s Necessary and Proper Clause;<sup>3</sup> and
- a convention for proposing amendments could unilaterally impose radical constitutional changes on America.

These arguments are largely inconsistent with established constitutional law and with historical precedent,<sup>4</sup> and (as the reader can see) some are inconsistent with each other.

This paper shows that these arguments did not originate with the conservative groups that rely on them. Rather, they were produced as part of a disinformation campaign run by America’s establishment figures generally identified as “liberal.” Members of that establishment injected these arguments into public discourse to cripple an important constitutional check on the federal government.

This disinformation campaign dates from the mid-20<sup>th</sup> century. Its participants included members of Congress who feared that a convention might propose amendments to limit their power, activist Supreme Court justices seeking to protect themselves from constitutional reversal,

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<sup>3</sup>U.S. Const., art. I, § 8, cl. 18.

<sup>4</sup>For a survey of the law of Article V, see Robert G. Natelson, *A Treatise on the Law of Amendment Conventions: State Initiation of Constitutional Amendments: A Guide for Lawyers and Legislative Drafters* (2014).

and left-of-center academic and popular writers who opposed restraints on federal authority.

The campaign succeeded because its publicists enjoyed privileged access to both the academic and the popular media. The fact that many conservatives swallowed the propaganda enabled liberal activists to recede into the background and rely on conservatives to obstruct reform.

### SOME ADDITIONAL CONSTITUTIONAL BACKGROUND

The American Founders envisioned citizens and states using constitutional amendments to prevent federal overreach and abuse. They ratified the Bill of Rights in 1791 precisely for this reason. By the same token, in 1795 they ratified the 11<sup>th</sup> amendment to reverse an overreaching Supreme Court decision.

The Founders also recognized that federal officials might resist amendments to curb their own power. The convention procedure was designed as a way to bypass those officials. Tench Coxe, a leading advocate for the Constitution, explained the effect:

It is provided, in the clearest words, that Congress shall be *obliged* to call a convention on the application of two thirds of the legislatures; and all amendments proposed by such convention, are to be *valid* when approved by the conventions or legislatures of three fourths of the states. It must therefore be evident to every candid man, that two thirds of the states can *always* procure a general convention for the purpose of amending the

constitution, and that three fourths of them can introduce those amendments into the constitution, although the President, Senate and Federal House of Representatives, should be *unanimously* opposed to each and all of them.<sup>5</sup>

In adopting the convention mechanism, the Founders well understood what they were doing. Conventions among the states (and before independence, among the colonies) had been a fixture of American life for a century.<sup>6</sup> The Founding-Era record renders it quite clear that a “convention for proposing amendments” was to be a meeting of representatives from the state legislatures, and that the procedure and protocols would be the same as in prior gatherings.<sup>7</sup>

In the two centuries after the Founding, the judiciary, including the U.S. Supreme Court, decided over three dozen cases interpreting Article V, and in

doing so generally followed historical practice. Thus, by the middle years of the 20<sup>th</sup> century, the composition and protocols of a convention for proposing amendments should have been clear to anyone who seriously examined the historical and legal record.

The trouble was that some people were not really interested in the facts.

#### TWENTIETH CENTURY EFFORTS TO ADDRESS FEDERAL OVERREACH

As the size, power, and dysfunction of the federal government grew, many Americans turned to the Founders’ solution: the convention process.<sup>8</sup>

The first 20<sup>th</sup> century effort for a convention to address federal overreach began in 1939, with a drive to repeal the 16th Amendment.<sup>9</sup> By 1950, that drive had garnered the approval of 18 states. Another drive induced Congress to propose the 22nd Amendment, mandating a two-term limit for the President.

Early in the 1960s, the Council of State Governments suggested three amendments: one to streamline Article V,

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<sup>5</sup>“A Friend of Society and Liberty,” Pa. Gazette, Jul. 23, 1788, *reprinted in* 18 Documentary History of the Ratification of the Constitution of the United States, 277, 283. Coxe’s writings were at least as influential with the general public as *The Federalist Papers*. He was a member of Congress and Pennsylvania’s delegate to the Annapolis convention, and the first Assistant Secretary of the Treasury.

By a “general convention,” Coxe meant a national rather than a regional gathering.

<sup>6</sup>Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution’s “Convention for Proposing Amendments,”* 65 Fla. L. Rev. 615 (2013).

<sup>7</sup>*Id.*

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<sup>8</sup>Liberals occasionally crusaded for amendments as well, but by and large their clout in Congress, the bureaucracy, and the courts was sufficient for their purposes.

<sup>9</sup>Philip L. Martin, *The Application Clause of Article Five*, 85 Pol. Sci. Q. 615, 623 (1970).

The Sixteenth Amendment did not, as some say, authorize the federal income tax; it merely dropped the requirement that federal income tax revenues be apportioned among the states by population.

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one to reverse Supreme Court decisions forcing state legislatures to reapportion, and one to check the Supreme Court by adding a state-based tribunal to review that Court's decisions. In the late 1960s, there was another, nearly-successful, push for a convention to address the Court's reapportionment cases. In 1979, the first effort for a balanced budget amendment began. Throughout the next two decades there were drives to overrule the Supreme Court's abortion ruling in *Roe v. Wade*, to impose term limits on members of Congress, and to enact other reforms. Some of these movements enjoyed wide popular support. The convention procedure was endorsed by President Eisenhower, by President Reagan, and (before he became a Supreme Court Justice) by Antonin Scalia.<sup>10</sup>

### THE RESPONSE FROM THE ESTABLISHMENT: COORDINATED DISINFORMATION

During the 1950s, '60s and '70s, establishment liberals were pleased with the growth of the federal government and the activist Supreme Court. They wanted no corrective amendments. Rather, they felt threatened by conservative and moderate efforts to use the convention process. Liberals developed, therefore, a campaign to effectively disable it.

Their project was highly successful. It not only gained traction among liberals, but it pitted conservatives against conservatives by persuading many of

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<sup>10</sup>Russell L. Caplan, *Constitutional Brinksmanship* (Oxford Univ. Press 1988) [hereinafter "Caplan"], 74 (Eisenhower), 85 (Reagan), 71 (Scalia). There are reports that Scalia changed his position after ascending to the Court.

them to abandon one of the Constitution's most important checks on federal overreaching. The campaign resulted in the defeat of every effort to propose amendments to reform or restrain the federal government. Its psychological and political force continued unabated for decades.<sup>11</sup>

The story begins in 1951. Faced with a conservative drive to repeal the 16th Amendment, liberal U.S. Rep. Wright Patman (D.-Tex.) attacked it as "fascist" and "reactionary." He added the unsupported assertion that a convention for proposing amendments could not be limited—that it could "rewrite the whole Constitution."<sup>12</sup> The obvious goal behind that statement was to scare people into thinking that the convention, instead of focusing on a single amendment, might effectively stage a coup d'état.

A more coordinated campaign against Article V began in 1963, with an article in the *Yale Law Journal*. It was authored by a law professor named Charles Black, also of Yale, a zealous defender of liberal causes and of the activism of the Supreme Court, then led by Chief Justice Earl Warren. The occasion for Black's article was the amendment proposal of the Council of State Governments.

Despite Black's position as a professor at one of the nation's premier law schools—and despite the nature of the journal that published it—Black's article

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<sup>11</sup> The disinformation has lost credibility in the last few years, as explained below.

In 1992, reformers did succeed in obtaining ratification of the 27<sup>th</sup> amendment, limiting congressional pay raises, but that amendment had been proposed in 1789 as part of the Bill of Rights.

<sup>12</sup>Caplan, p.69.

was polemical rather than scholarly. You can deduce its tenor from the title: *The Proposed Amendment of Article V: A Threatened Disaster*.<sup>13</sup>

On its face, Black's article was responding to the Council of State Government's proposals. In fact, his propositions extended much further. Black objected to the whole idea of the states being allowed to overrule Congress or the Supreme Court. So he offered a wide-ranging plan of constitutional obstruction. In a nutshell, his position was as follows:

- The process enabled a tiny minority of the American people to amend the Constitution against the wishes of the majority, and
- if allowed to do so, the state legislatures might radically rewrite the Constitution. They "could change the presidency to a committee of three, hobble the treaty power, make the federal judiciary elective, repeal the fourth amendment, make Catholics ineligible for public office, and move the national capital to Topeka."

To prevent such horrific developments, Black argued:

- that Congress should refuse to count state legislative resolutions that did not comply with standards he laid down;

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<sup>13</sup>Charles L. Black, Jr., *The Proposed Amendment of Article V: A Threatened Disaster*, 72 Yale L.J. 957 (1963). Black engaged in similar histrionics in the title of another article: *Proposed Constitutional Amendments: They Would Return Us to a Confederacy*, 49 A.B.A J. 637 (1963).

- that "Congress [should] retain[] control over the convention process," and dictate allocation of delegates and determine how they were selected; and
- that the President should veto any congressional resolution calling a convention if the measure did not meet Black's standards.

It is clear to anyone familiar with the law and history of Article V that Black did virtually no research on the subject before putting pen to paper. Not only did he make no reference to the extensive American history of interstate conventions, but he recited little of the case law interpreting Article V. He also failed to read carefully the Necessary and Proper Clause, which actually grants Congress no power over Article V conventions.<sup>14</sup>

Later the same year, William F. Swindler, a law professor at the College of William and Mary, published an article in

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<sup>14</sup>By its terms, the Necessary and Proper Clause applies to the 17 preceding powers in Article I, Section 8 and to powers granted to the government of the United States and to "Officers" and "Departments." A convention fits none of those categories. See *The Constitution's Grants to Persons and Entities Outside the Federal Government*, <http://constitution.i2i.org/2014/12/18/the-constitutions-grants-to-persons-and-entities-outside-the-u-s-government/> and *No, the Necessary and Proper Clause Does NOT Empower Congress to Control an Amendment Convention*, <http://constitution.i2i.org/2014/08/23/no-the-necessary-and-proper-clause-does-not-empower-congress-to-control-an-amendments-convention/>.



the *Georgetown Law Journal*.<sup>15</sup> Like Black's contribution, it was largely polemical and short on history and case law.

Swindler claimed that the Council of State Government's proposed amendments were "alarmingly regressive" and would destroy the Constitution as we know it: "For it is clear," he wrote, "that the effect of one or all of the proposals. . . would be to extinguish the very essence of federalism which distinguishes the Constitution from the Articles of Confederation." Like Black, Swindler argued that Congress could and should control the convention and impose obstacles to the convention serving its constitutional purpose. Indeed, Swindler went even further, maintaining that because "only a federal agency (Congress, as provided by the Constitution) is competent to propose" amendments, the convention procedure should be disregarded as "no longer of any effect."

The placement of the Black and Swindler diatribes in two of the nation's top law journals can be explained only by the authors' institutional affiliations<sup>16</sup>

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<sup>15</sup>William F. Swindler, *The Current Challenge to Federalism: The Confederating Proposals*, 52 *Geo. L. J.* 1 (1963)

<sup>16</sup>The overwhelming majority of law reviews are student-edited. Because students are often unable to judge the quality of articles submitted to them, the relative prestige of the author's academic institution is influential in the decision of whether to accept a submission. This is an open secret among law professors and supported by empirical research. Jonathan Gingerich, *A Call for Blind Review: Student Edited Law Reviews and Bias*, 59 *J. Legal Educ.* 269 (2009).

and/or by the agenda harbored by the journals' editors. That placement enabled them to reach a wide audience among the legal establishment.

Somewhat later, Chief Justice Warren, whose judicial activism was one of the targets of the Council of State Governments, mimicked Black and Swindler by with the absurd declaration that its amendment drive "could soon destroy the foundations of the Constitution."<sup>17</sup>

When Senator Everett Dirksen (R.-Ill.) joined the fight for an amendment partially reversing the Warren Court's reapportionment cases, his liberal colleagues pushed back hard. Senators Joseph Tydings (D.-Md) and Robert Kennedy (D.-NY) followed Black's lead and advanced various "reasons" why Congress should disregard state legislative resolutions it did not care for.<sup>18</sup> Senator William Proxmire (D.-Wis.) and the liberal New York Republican, Senator Jacob Javits pressed the claim that a convention would be uncontrollable.<sup>19</sup>

Kennedy's resistance was supplemented by other opinion leaders associated with the Kennedy clan. In 1967, Kennedy speech writer Theodore Sorensen wrote a *Saturday Review* article in which he repeated Black's "minority will control the process" argument. In

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<sup>17</sup>Caplan, p. 74.

<sup>18</sup>Caplan, pp. 75-76

<sup>19</sup>Caplan, p. 76. Javits was liberal not just for a Republican, but (like some of his GOP colleagues at the time) liberal in an absolute sense. His voting record was regularly marked as above 80% by the left-of-center Americans for Democratic Action.

congressional testimony the same year, Sorensen speculated that an Article V convention might “amend the Bill of Rights . . . limit free speech . . . reopen the wars between church and state . . . limit the Supreme Court’s jurisdiction or the President’s veto power or the congressional warmaking authority.”<sup>20</sup>

In 1968, University of Michigan law professor Paul G. Kauper contributed a piece to *Michigan Law Review* that likewise displayed almost complete disregard of Article V law and history.<sup>21</sup> Kauper admitted that Congress could not refuse to call a convention if 34 states applied for one. But he asserted that “Congress has broad power to fashion the ground rules for the calling of the convention and to prescribe basic procedures to be followed.” Kauper also stated that “The national legislature is obviously the most appropriate body for exercising a supervisory authority. . .”—a conclusion in *direct conflict* with the convention’s fundamental purpose as a device to bypass Congress. Kauper added that Congress could mandate that delegates be elected one from each congressional district, revealing his disregard of the Supreme Court opinion and other sources<sup>22</sup> that specifically

identified the gathering as a “convention of the states” rather than a popular assembly.

In 1972, Black returned to the *Yale Law Journal* to oppose what he termed the “national calamity” threatened by a bill introduced in Congress by Senator Sam Ervin (D.-N.C.).<sup>23</sup> Ervin’s bill, while well intentioned, was almost certainly unconstitutional because it was based on an overly-expansive reading of the Necessary and Proper Clause. But that was not Black’s objection. Black’s objection was that the “bill would make amendment far too easy.” Black contended that the process permitted a minority to force amendments on the majority, that state legislatures should have no control over the procedure, and that the President could veto the congressional call.

Black’s 1972 article was characterized by the same haste and lack of scholarly curiosity that had characterized his 1963 piece. For example, in defiance of precedent he claimed that governors should be permitted to veto state Article V resolutions. He also misinterpreted the founding-era phrase “general convention,” assuming it meant a gathering unlimited by subject. A minimal amount of research would have informed him that a “general convention” was one that was national rather than limited to states in a particular region. Finally, in arguing that the convention could not be limited, Black stated that all legislative resolutions for a convention adopted during the Constitution’s first century were

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<sup>20</sup>Caplan, p. 147. See below for other comments by associates and allies of the Kennedy clan.

<sup>21</sup>Paul G. Kauper, *The Alternate Amendment Process: Some Observations*, 66 Mich. L. Rev. 903 (1968).

<sup>22</sup>*Smith v. Union Bank*, 30 U.S. 518, 528 (1831). For other sources, see <http://constitution.i2i.org/2014/03/28/how-do-we-know-an-article-v-amendments-convention-is-a-%E2%80%9Cconvention-of-the-states%E2%80%9D-because-both-the-founders-and-the-supreme-court-said->

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<sup>23</sup>Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 Yale L.J. 189 (1972)

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unlimited as to subject. This was flatly untrue, and could have been disproved by simply examining the resolutions themselves.<sup>24</sup>

It is apparent that the goal of such writings was not to disseminate truth but to protect Congress and the Supreme Court from constitutional accountability for their actions. The campaign was successful in that it helped ensure the defeat of the efforts to propose a reapportionment amendment.<sup>25</sup>

In January, 1979, however, a new “national calamity” threatened. The National Tax Limitation Committee kicked off its drive for a balanced budget amendment to limit somewhat Congress’s bottomless line of credit. In response, establishment spokesmen again resorted to the same misinformation propagated in the 1960s.

Kennedy admirer and eulogist Richard Rovere terrified the readers of the *New Yorker* magazine with the specter of a convention that might

reinstate segregation, and even slavery; throw out all or much of the Bill of Rights . . . eliminate the Fourteenth Amendment’s due

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<sup>24</sup>The 1832 resolution of Georgia and the 1833 resolution of Alabama were both limited as to subject. The 1788 Virginia resolution and the 1864 Oregon resolution were both arguably limited. Robert G. Natelson, *Amending the Constitution by Convention: Lessons for Today from the Constitution’s First Century*, 3, 5 & 7 (Independence Institute, 2011), available at [http://liberty.i2i.org/files/2012/03/IP\\_5\\_2011\\_c.pdf](http://liberty.i2i.org/files/2012/03/IP_5_2011_c.pdf).

<sup>25</sup>Martin, p. 628.

process clause and reverse any Supreme Court decision the members didn’t like, including the one-man-one-vote rule; and perhaps for good measure, eliminate the Supreme Court itself.<sup>26</sup>

(Rovere failed to explain how 38 states could be induced to ratify such proposals.)

Opponents amplified the histrionics by branding the amendments convention with a different, and more frightening, name. Rather than refer to it by the name given by the Constitution—“Convention for proposing Amendments”—opponents began to call it a “constitutional convention.” This re-labeling reinforced the mental image of a junta that would not merely propose an amendment or two, but re-write our entire Constitution.

Some background may help explain the audacity of this re-branding. Throughout American history, conventions of states (and before them, of colonies) have been convened for many different purposes. But only two are referred to as “constitutional conventions” because only those two proposed a complete remodeling of the political system. They were the federal convention of 1787, which drafted the federal Constitution, and the 1861 Montgomery, Alabama gathering that drafted the Confederate Constitution.

The other 30-plus interstate conventions were summoned for more modest purposes. Among these were four that gathered to propose amendments or that did propose amendments: (1) the Hartford Convention of 1780, which recommended alteration of the Articles of Confederation, (2) the Annapolis

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<sup>26</sup>Caplan, p. viii.

Convention of 1786, called for the same purpose, (3) the Hartford Convention of 1814, which promoted several constitutional amendments, and (4) the Washington Convention of 1861, which proposed an amendment to stave off the Civil War. Although not convened to Article V, these assemblies were amendments conventions in every other respect. Yet to my knowledge, none had *ever* been referred to as a “constitutional convention.” They were empowered only to suggest amendments, not to write new constitutions. Through the rebranding, however, Americans were encouraged to believe that a mere *amendments* convention was a *constitutional* convention.

Confusion between a “convention for proposing amendments” and a constitutional convention appears to be wholly a product of the 20<sup>th</sup> century. I have found no 18<sup>th</sup> or 19<sup>th</sup> century state resolutions, nor any reported 18<sup>th</sup> or 19<sup>th</sup> century state or federal court decision,<sup>27</sup> referring to an amendments convention as a “constitutional convention.” On the contrary, the usual practice was to refer to a convention for proposing amendments by its proper name or as a “convention of the states” or by a variation of the latter phrase. In other words, affixing the “con-con” label on an amendments convention was an effort to alter English usage.

Where did the “disinformants” get the idea of changing the convention’s name? Perhaps they were inspired by a misunderstanding arising during the movement for direct election of U.S. Senators, and the manner in which opponents of direct election seized on that misunderstanding. In 1901 a congressional compiler gave the erroneous

title “constitutional convention” to a state legislative resolution, and after 1903, a few resolutions actually used that term. The most famous example of how opponents capitalized on the confusion was a 1911 speech of Senator Weldon B. Heyburn (R.-Idaho). Senator Heyburn passionately opposed direct election, so to dissuade states from demanding a convention, he argued that:

When the constitutional convention meets it is the people, and it is the same people who made the original constitution, and no limit on the original constitution controls the people when they meet again to consider the Constitution.<sup>28</sup>

The Heyburn view was not legally sound and seems not to have been persuasive at the time. By the following year the applying states were only one shy of the then-necessary 32 (of 48). The demand for a convention abated only because the U.S. Senate yielded, and Congress itself proposed a direct election amendment.

But the mid-20<sup>th</sup> century disinformation campaign *did* change public perceptions: Many people came to think that a convention for proposing amendments was a “con-con.” Professor Black bore some of the responsibility for this development as well. In his 1972 polemic he repeatedly referred to an amendments convention as a “constitutional convention.” He had not used the term in that way in his 1963 article.

There were many additional contributions to the mislabeling campaign, particularly after the balanced

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<sup>27</sup>According to the Westlaw database.

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<sup>28</sup>Caplan, p. 64.

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budget drive began in 1979. An essay that year by Lawrence Tribe, a liberal Harvard law professor and Kennedy ally, referred to an amendments convention as a “constitutional convention.”<sup>29</sup> Tribe also asserted that such a gathering would be an “uncharted course,” and he issued a long list of questions about Article V to which, he said, “genuine answers simply do not exist.” Although nearly all those questions have since been answered,<sup>30</sup> convention opponents still commonly present state lawmakers with variations on Professor Tribe’s list.<sup>31</sup>

Gerald Gunther of Stanford University, yet another liberal law professor, had clerked for Chief Justice Earl Warren. Warren’s decisions had been, of course, targets of some of the conservative amendment drives. In 1979 Gunther published his own tract branding an amendments convention a “constitutional convention.”<sup>32</sup> He further asserted that the crusade for a balanced budget amendment was “an exercise in constitutional irresponsibility,” and that the “convention route promises uncertainty, controversy, and divisiveness at every turn.” Apparently unaware of the Supreme Court’s prior characterization of

an amendments convention as a “convention of states,” Gunther said the assembly would be popularly elected. While claiming that “relevant historical materials” supported his arguments, he offered relatively little history to support them.

Yet another assault on Article V published in 1979 came from the pen of Duke University law professor Walter E. Dellinger. Dellinger had clerked for Justice Hugo Black [not to be confused with Professor Charles Black], one of the stalwarts of the activist Earl Warren/Warren Burger Supreme Court. Dellinger later served as acting solicitor general in the Clinton administration. He also labeled a convention for proposing amendments a “constitutional convention.”<sup>33</sup>

Like other writers in this field, Dellinger did little original research but, like Charles Black, managed to get his essay published in the *Yale Law Journal*. Apparently the *Journal* was willing to compromise its supposedly rigorous standards of scholarship to accommodate such material. Like Charles Black as well, Dellinger inaccurately declared that all legislative resolutions submitted during the Constitution’s first century were unlimited as to subject and asserted that any resolution imposing subject-matter limits was invalid.<sup>34</sup>

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<sup>29</sup>Lawrence H. Tribe, *Issues Raised by Requesting Congress to Call a Constitutional Convention to Propose a Balanced Budget Amendment*, 10 *Pac.L.J.* 627 (1979).

<sup>30</sup>Robert G. Natelson, *The Article V Handbook* 33-35 (2d ed., 2013).

<sup>31</sup>*See*, e.g., <http://www.eagleforum.org/alert/2011/pdf/20Questions.pdf>.

<sup>32</sup>Gerald Gunther, *The Convention Method of Amending the United States Constitution*, 14 *Ga. L. Rev.* 1 (1979).

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<sup>33</sup>Walter E. Dellinger, *The Recurring Question of the “Limited” Constitutional Convention*, 88 *Yale L.J.* 1623 (1979).

<sup>34</sup>To give due credit: Four years later Dellinger also published an article correctly pointing out that Article V issues were justiciable in court. Walter E. Dellinger, *The Legitimacy of Constitutional Change: Rethinking the*

The establishment's war against Article V continued throughout the 1980s as its spokesmen resisted popular pressure for a balanced budget amendment and for amendments overruling the activist Supreme Court.

Arthur Goldberg was another member of the Kennedy circle: President Kennedy had appointed him successively as Secretary of Labor and Supreme Court Justice. In a 1983 article he labeled an amendments convention a "constitutional convention" and declared that its agenda would be uncontrollable.<sup>35</sup> He also quoted out of context part of a 1788 letter written by James Madison in which Madison opposed a contemporaneous effort by two states to call a convention to completely rewrite the new Constitution. The quotation was out of context because Madison's letter criticized only that specific effort, not the process generally—a process Madison actually supported. This was a clear misuse of historical material by Goldberg, but some anti-Article V activists still follow Goldberg's lead today.

In 1986, New Jersey Governor Thomas Kean, a liberal Republican, wrote an article characterized by the usual hysteria: *A Constitutional Convention Would Threaten the Rights We have Cherished for 200 Years*.<sup>36</sup> As the title indicates, Kean applied the phrase

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*Amendment Process*, 97 Harv. L. Rev 386 (1983).

<sup>35</sup>Arthur J. Goldberg, *The Proposed Constitutional Convention*, 11 Hastings Const. L. Q. 1 (1983).

<sup>36</sup>Thomas H. Kean, *A Constitutional Convention Would Threaten the Rights We have Cherished for 200 Years*, 1986 Det. C.L. Rev. 1087 (1986)

"constitutional convention" to an amendments convention. Relying on the same out-of-context letter cited by Goldberg, Kean stoked the fear that such a convention might "run away."

The same year, Senator Paul Simon (D.-Ill.), one of the most liberal members of Congress, called the convention process "a very dangerous path."<sup>37</sup>

Twice in 1986 and again in 1988, Chief Justice Warren Burger—a participant in *Roe v. Wade* and other cases that belied his prior reputation as a "conservative"—wrote letters opposing what he called a "constitutional convention." Burger claimed the gathering might disregard its agenda. He based the latter speculation on the frequent, although inaccurate, assertion that the 1787 gathering did the same. Burger offered no other support for his claims, and I have found no evidence he ever researched the subject. He certainly never published anything on it.

I believe Burger absorbed his anti-Article V views from William F. Swindler. As mentioned earlier, Swindler was the author of possibly the most outrageous academic attack on the convention process. Burger was a self-described personal friend of Swindler and appointed him to two of the Supreme Court's advisory and administrative committees.<sup>38</sup> Burger apparently enjoyed Swindler's company, and upon Swindler's death Burger publicly eulogized him as

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<sup>37</sup>Caplan, p. 85.

<sup>38</sup>Warren Burger, *William F. Swindler: A Tribute from the Chief Justice of the United States*, 20 Wm. & Mary L.J. 595 (1979).

“an analyst of history and a historian of the first rank.”<sup>39</sup>

#### THE TURNING POINT

In the years since 2010, research by this author and other constitutional scholars has recaptured the history and law governing the amendments convention process. Arguments against that process have lost credibility among many conservatives<sup>40</sup> and moderates and among some honest progressives as well. This is reflected in a spate of formal state legislative demands for a convention.<sup>41</sup> As a result, establishment publicists who previously could afford to remain quiet have been forced to rally their own forces against the movement for a convention.

Illustrative is a December 4, 2013 posting in the *Daily Kos*, a left-wing website, which warns of the “threat” of a convention and repeats the Charles Black argument that it would represent only a minority of the population.<sup>42</sup> Illustrative

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<sup>39</sup>*William F. Swindler, 70, Dies; Scholar of U.S. Constitution*, New York Times, May 7, 1984, available at <http://www.nytimes.com/1984/05/08/obituaries/william-f-swindler-70-dies-scholar-of-us-constitution.html>.

<sup>40</sup>One example of support for a convention by conservative and libertarian legal scholars and opinion leaders, including some former skeptics, is the “Jefferson Statement,” [http://www.conventionofstates.com/the\\_jefferson\\_statement](http://www.conventionofstates.com/the_jefferson_statement).

<sup>41</sup>For a scorecard of recent developments, see <https://www.facebook.com/pages/Fix-Washington-By-Calling-an-Article-V-Amendments-Convention/598865556818994>.

<sup>42</sup><http://www.dailykos.com/story/2013/12/0>

also is an op-ed column in the *Washington Post* dated October 21, 2014. The column was entitled, “A constitutional convention could be the single most dangerous way to ‘fix’ American government.”<sup>43</sup> As the title suggests, the author opposed a convention using rhetoric almost precisely identical to that employed by groups such as the John Birch Society.

The author was no Bircher, however, but Robert Greenstein, a former member of the Clinton administration and an Obama ally, who heads an influential left-wing policy center in Washington, D.C. reportedly funded by socialist financier George Soros.<sup>44</sup> For reasons explained in this paper, the similarity between Greenstein’s argument and those of misguided conservative groups is not accidental.

The identity of interest among left-wing and right-wing opponents emerged in sharp relief during the most recent Montana legislative session. On February 2, 2015, a spokeswoman for the Montana Budget and Policy Center, a “progressive” state policy group with ties to Greenstein’s think tank, sent an e-mail to Democratic lawmakers advising them on how to defeat a proposed balanced budget resolution. The spokeswoman’s “Topline Message” (suggested talking points) closely mirrored those of conservative opponents and of Greenstein, including

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4/1260066/-Alert-Art-V-Convention-Threat-Grows-Dec-7-2013-Assembly.

<sup>43</sup><http://www.washingtonpost.com/posteverything/wp/2014/10/21/a-constitutional-convention-could-be-the-single-most-dangerous-way-to-fix-american-government/>.

<sup>44</sup><http://sorosfiles.com/soros/2011/10/center-on-budget-and-policy-priorities.html>.

the use of the “ConCon” label. She further told Democratic state lawmakers, “We strongly urge committee members to AVOID talking about a balanced budget amendment, instead focusing on the lack of certainty in calling a convention.” She suggested that liberal lawmakers direct questions to John Birch Society lobbyists who would make the liberals’ arguments for them.<sup>45</sup>

### CONCLUSION

When conservatives and moderates use the stock anti-convention arguments, they merely repeat disinformation injected into American political life by their political opponents. The purpose of this disinformation was to weaken or disable an important constitutional check on the federal government.

In recent years, the inaccuracies spread in that campaign have been corrected. Accordingly, many conservative and moderate convention opponents have become supporters. Groups that persist in spreading misinformation have lost credibility.

To shore up the anti-convention position, therefore, spokespeople for the liberal establishment are now re-emerging to rally their own allies with the same stock arguments. Conservatives, moderates, and responsible progressives should hold them accountable for doing so.

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<sup>45</sup> The email can be read at <http://constitution.i2i.org/files/2015/03/OLoughlin-email.pdf>. The language quoted here was underscored for emphasis.