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A Brief Assessment of the Proposed Convention Rules Adopted by the Assembly of State Legislatures

By Robert G. Natelson*

1. Introduction

In June 2016 the Assembly of State Legislatures (ASL) issued its "Rules for an Article V Convention for Proposing Amendment(s)." The document is a recommended set of rules for a future amendments convention under Article V of the U.S. Constitution. It can be found on The Heartland Institute's website.[1]

The ASL rules fall into nine Articles: (1) Officers of the Convention and Rules, (2) Delegates, (3) Sessions of the Convention, (4) Voting and Quorum Calls, (5) Resolutions and Proposals, (6) Decorum and Debate, (7) Committee of the Whole, (8) Committees of the Convention, and (9) Miscellaneous. There is also a preamble.

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[1] See https://www.heartland.org/_template-assets/documents/policy-documents/ASL Rules for an Article V Convention.pdf.

For the sake of brevity, this *Policy Brief* does not summarize or discuss much in the ASL rules that is of a secondary or uncontroversial nature. Rather than make repeated references to previous works by the author, those sources appear once at the bottom of this page.[2] For the sake of efficiency, the discussion below proceeds by theme rather than by rule by rule.

2. The Constitutional Context

The U.S. Constitution lays out its amendment procedure in Article V.[3] This procedure is clarified further by political practices contemporaneous with the Constitution's adoption.

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To become part of the Constitution, a proposed amendment must be ratified. Congress decides whether ratification is by state legislatures or state conventions, but in either event approval by three-fourths (currently 38) of the states is required. Furthermore, before a measure may be ratified, it must be validly proposed. This may be done either by two-thirds of each house of Congress or by a gathering Article V calls a "Convention for proposing Amendments." After two-thirds of the state legislatures (currently 34) make "Application" to Congress for a convention on particular subject matter, Congress "shall call" one.[4]

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[2] The following works by Robert Natelson may be accessed at articlevinfocenter.com/researchresources/.

State Initiation of Constitutional Amendments: A Guide for Lawyers and Legislative Drafters (4th ed., 2016)

Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments, 65 Fla. L. Rev. 615 (2013)

Proposing Constitutional Amendments by Convention: Rules Governing the Process, 78 Tenn. L. Rev. 693 (2011)

Amending the Constitution by Convention: Practical Guidance for Citizens and Policymakers (2012)

Amending The Constitution by Convention: Lessons for Today from the Constitution's First Century (2011)

Amending the Constitution by Convention: A More Complete View of the Founders' Plan (2010)

Additional information appears at http://articlevinfocenter.com/.

[3] Article V provides as follows:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

[4] *Ibid.*

The convention for proposing amendments was to be a species of a familiar political device commonly labeled a "convention of the states."[5] A convention of the states was a diplomatic-style meeting among state committees (delegations). Each committee was chosen in a manner determined by its state legislature. The individuals who comprised the committees were commissioners because each was empowered by a document called a commission.

Pursuant to advance directives, the commissioners convened in an agreed location to address pre-designated common problems. Conventions of states might be regional or "partial" (limited to one part of the country) or "general" (from all regions). A convention for proposing amendments to the Constitution was to be general rather than regional. Convention subject matter varied in scope but always was confined to some pre-set limits.

During the two centuries leading up to the Civil War, the states (and, before them, the colonies) met in convention an average of more than once every five years. There were at least 20 intercolonial conventions between 1677 and Independence in 1776, and at least 11 interstate conventions between 1776 and the ratification of the U.S. Constitution.

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The best known of these 11 was the Constitutional Convention of 1787. After the Constitution's ratification and before the Civil War, there were at least five more, most notably the general gathering of 1861 formally called the Washington Conference Convention and nicknamed the "Washington Peace Conference." There has been only one subsequent convention of states: the regional Colorado River Commission of 1922.

By the time the Constitution was adopted, participants had established universal convention protocols. Since a convention of states is a gathering of semi-sovereignties, each state committee had one vote on all significant questions. Voting by states, the commissioners initially elected officers and adopted rules. They next proceeded to the convention business and perhaps issued one or more recommendations or proposals. Then they adjourned *sine die* – that is, with no appointed date for reconvening.

The Constitution's framers and ratifiers contemplated that this pattern would govern any convention for proposing amendments. We know this because the "convention of states" pattern represented the universal practice for interstate conventions and because contemporaneous legislative and legal documents refer to a convention for proposing amendments as a "convention of the states."[6]

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[5] *Smith* v. *Union Bank*, 30 U.S. 518, 528 (1831). See also the sources set forth in note 1.

[6] *Supra* note 2. In addition, see "How Do We Know an Article V Amendments Convention is a "Convention of the States?" Because Both the Founders and the Supreme Court Said So," http://www.articlevinfocenter.com/how-do-we-know-an-article-v-amendments-convention-is-a-convention-of-the-states-because-both-the-founders-and-the-supreme-court-said-so/ and "Still More Evidence That An Amendments Convention is a 'Convention of States,'" http://www.articlevinfocenter.com/still-more-evidence-that-an-amendments-convention-is-a-convention-of-states/.

3. Background of the Assembly of State Legislatures

Because conventions of the states were so common before the twentieth century, many of the attendees had served in one or more previous gatherings of the same type. Commissioners who had not done so usually were familiar with the process from experience in state government or in Congress. Thus, convention protocols were very widely understood and were transmitted from generation to generation, gradually improving with time. The rules of the 1861 Washington Conference Convention, for example, were based on two centuries of experience. They effectively controlled proceedings that, while highly contentious, successfully met the convention goal of drafting and recommending a constitutional amendment designed to stave off the Civil War.[7]

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During the twentieth century lawmakers and commentators lost their knowledge of interstate convention practice. Accordingly, author Robert Berry suggested in his 2012 book, *Amendments Without Congress: A Timely Gift From the Founders*, that state lawmakers prepare for a convention by first attending a "conference for proposing amendments" (COPA). COPA would enable lawmakers to collect information from experts, review amendment proposals, and consider possible convention rules.

Berry was (and is) a member of Colorado's First Committee of Correspondence, a group of lawmakers, scholars, and activists that has been central to disseminating Article V information nationwide. Another member of the First Committee was Colorado state Sen. Kevin Lundberg, also a co-founder of the State Legislators Article V Caucus. Lundberg liked the COPA idea and suggested it to lawmakers from other states. Several Midwestern lawmakers thereupon formed the Assembly of State Legislatures (ASL). From December 2013 through June 2016 ASL met five times in locations around the country. At its latest meeting, held in Philadelphia, it produced the rules treated in this paper.

ASL should not be confused with an actual convention. It is a planning group. Its composition differs from that of an amendments convention. One difference is that many states have not participated in ASL – but that distinction is much less important than several others.

Among the important differences are the following:

- Convention commissioners usually have come from various walks of life. Many have been state lawmakers, but many others have not. By contrast, all ASL delegates are required to be sitting state legislators.

- Conventions of states generally have been decentralized and freewheeling in nature, drawing

[7] The Washington Convention did not have Article V powers so instead of its proposal being transmitted to the states, it was sent to Congress, which buried it. The Washington gathering served as a dress rehearsal for a proposing convention with Article V powers, but the latter still has not occurred.

upon a range of expertise and inputs. ASL has been more centralized and self-contained, with limited outside input and much of the impetus emanating from the executive committee.

- Interstate conventions are non-partisan. Commissioners are not identified by party, and the assembly's political balance is dictated by the state legislative political balance at the time of convening. ASL is consciously bipartisan (there are, for example, Democratic and Republican co-presidents) and implicitly grants a veto to whichever party happens to be in the minority.

The differences in composition between ASL and a convention proved important. The ASL rules contain much of value. However, some of the discrepancies between the ASL rules and rules likely to be adopted by an actual interstate convention derive from ways in which ASL's composition and mission differ from those of an interstate convention.

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4. Commentary by Theme

For the sake of efficiency, the commentary below proceeds by theme rather than rule-by-rule.

A. Source of Default Rules

Each set of rules should specify a source of law to cover issues not mentioned in the rules themselves. ASL Rule 9.1 does this by specifying "the latest edition of Mason's Manual of Legislative Procedure." Since *Mason's* currently is used by 70 of the 99 American state legislative chambers – and is kept up-to-date and is fully annotated – this seems to be a wise choice.

B. Length

Deciding on the amount of specificity in a document – and therefore its length – may require careful exercise of professional drafting discretion. By providing authoritative guidance, specificity may forestall future arguments. But specificity also may create fodder for disagreement, thereby reducing the odds the document will be adopted. If a provision is poorly drafted, it may spark arguments over interpretation. Even well-drafted specificity may purchase certainty at the cost of flexibility.

The ASL rules are more than ten times longer than the longest set adopted by any previous convention – nearly 6,500 words compared with fewer than 600 words in the rules of the 1861 Washington Convention. One can argue that modern conditions require regulations more

extensive than those adopted at prior conventions.[8] Thus, modern laws governing political contributions suggest a formal administrative apparatus such as that outlined in ASL Rule 9.4. The existence of modern technology suggests provisions to address it, such as Rules 4.1.1 and 6.2. There can be educational value in restating insufficiently understood premises that previous conventions took for granted, such as the power of state officials to recall their commissioners recited in Rule 2.6.1 and the convention's subject-matter limit recited in Rule 5.6.1.

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Still, it remains difficult to justify a document as long as the one ASL has produced. This volume of detail could be a source of argument at the convention and a consequent loss of valuable time. The volume of detail also seems superfluous in light of the extent of the material in *Mason's Manual*, ASL's selected default source.

C. Voting

ASL Rules 1.3.1 and 4.1.1 properly follow the historic norm of "one state/one vote." There have been efforts before and during prior conventions to change the one state/one vote standard, but all have failed,[9] at least partly because there is no alternative widely perceived as legitimate. Even if such an effort were initially successful, it likely would induce some states to walk out and many activists to withdraw support.

The one state/one vote pattern is incorporated into the constitutional structure: To borrow James Madison's terminology, the convention procedure is the "federal" alternative to the "national" (congressional) method of proposing amendments.

ASL's sound judgment on this question is offset by alteration of the traditional convention rules whereby a majority of participating states represents a quorum and a majority of those present and voting renders most decisions. ASL Rule 4.5 requires a majority of all states, not only of participating states, to form a quorum. Rule 4.1 defines a "Qualified Super Majority" as 34 states, even if all 50 do not attend. It defines a "Qualified Simple Majority" as 26 states, even if all do not attend. The rules then require those margins for reaching critical decisions.[10] Rule 4.4 goes even further, requiring 36 states to propose an amendment – the towering hurdle of a 72 percent majority. Rule 9.5.1 requires a two-thirds vote of attending states even to adjourn.

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[8] My own draft of model rules is nearly twice as long as those adopted in Washington. See https://www.i2i.org/wp-content/uploads/2015/01/proposed-rules-2015-1206.pdf/.

[9] The details are set out at http://articlevinfocenter.com/trying-to-alter-the-traditional-amendments-convention-voting-rule-is-a-mistake/.

[10] Rules requiring these special majorities are sprinkled throughout the document. See, e.g., Rule 1.1 ("qualified majority" to elect officers) and Rule 1.3.3 (qualified supermajority to amend or suspend rules).

These quorum and voting prescriptions represent the most serious deficiencies in the ASL rules. Here is why:

First, the same history that records the failure of efforts to alter the one state/one vote standard suggests the impracticality of imposing vote margins different from the traditional rule of decision by the majority of states present.[11]

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Second, while the Constitution's framers recognized that supermajorities have their place – Article V provides for them in some instances – they presumed other decisions would be made by traditional majorities. The result is a careful balance. Thus, in the proposal process, a mere congressional majority may require Congress to consider amendments, but a congressional proposal must muster two-thirds on the final vote. By contrast, the states must obtain two-thirds for a convention to consider (the application procedure), but the convention needs only a majority to propose. This is why the Founders could say that in proposing amendments, Congress and the states were on equal footing.[12] However, imposing a two-thirds requirement on the states at both consideration and final vote stages leaves them in an inferior position to Congress.

Another entry into the "balance" issue is to recall that the convention process was designed to provide a way to bypass Congress. It makes no sense to impose restrictions on the convention that replicate problems in Congress. After all, opponents of amendments already enjoy a disproportionate advantage at the ratification stage. They do not need one at the proposal stage as well.

It is important to note the two principal political arguments for supermajorities are flawed. The first is that a supermajority at the convention is necessary to obtain a supermajority at ratification. But proposal and ratification are fundamentally different procedures: Proposal is a short process conducted primarily by politicians. Ratification is extended over a period of years with elections intervening. An amendment garnering only a bare majority among convention commissioners may prove overwhelmingly popular with the general public. Consider the difference in the favorability ratings of term limits among politicians and among the general public.

The second argument for convention supermajorities is that they prevent a bare majority of thinly populated states from proposing amendments opposed by a majority of the national population. In the real world, however, the chance of a convention majority consisting only of small states is virtually nil. The political configuration of America is such that any majority will consist of both large and small states: Sparsely populated red state Wyoming will vote with big red states like Florida and Texas, not with little blue states like Vermont. Moreover, as the

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[11] *Supra* note 8.

[12] E.g., The Federalist No. 43 (Madison).

representatives of their respective state legislatures, most commissioners will be seasoned politicians unlikely to waste their time and political reputations promoting obvious losers. Even if it did happen that a bare majority of thinly populated states proposed an unpopular amendment, it would be merely a proposal. The possibility of ratification by 38 states would be vanishingly small.

The ASL rules grant to absentee states the power to destroy or cripple the convention or to subject it to political extortion by a small minority.

Third, the defects in the ASL voting formulae extend beyond the use of supermajorities. States that refuse to participate entirely can make it more difficult to obtain a quorum on any one day, and all absent states are effectively treated as voting "no" on every major decision. This situation surely would not receive the approval of the Founders.[13] It grants to absentees the power to destroy or cripple the convention or to subject it to political extortion by a small minority.

For example, under the ASL rules 36 states – present or not – must agree to any proposed amendment. It is bad enough that if all are present only 15 (30 percent) can block any proposal. What is worse is that if some states are absent, the veto is awarded to even fewer dissenters. Thus, if eight states are absent, only seven of the 42 present (less than 17 percent) can block any proposed amendment.

In this scenario, the only alternative to gridlock may be acceding to minority extortion.

Finally, changing the majority-decides rule, like changing the one state/one vote rule, is not politically feasible. If a convention is called, the principal reason will be the dedication of innumerable state lawmakers and grassroots activists. Almost without exception, these citizens have acted in the belief that the convention will follow traditional protocols.[14] If leaders try to change those protocols after the fact, the convention's popular support will evaporate.

Such factors render it improbable that any foreseeable convention will adopt ASL's supermajority rules.

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[13] At the Constitutional Convention, for example, decisions were reached by a majority of states voting "aye" or "nay," not by a majority or supermajority of all states. Similarly, the Supreme Court has held that even when the Constitution prescribes a two-thirds majority for congressional proposal, in the absence of language to the contrary it means "two-thirds of the members present – assuming the presence of a quorum – and not a vote of two-thirds of the entire membership, present and absent." *Rhode Island* v. *Palmer*, 253 U. S. 350, 386 (1920).

[14] Current Article V campaigns assure their adherents that the traditional "convention of states" model will be adhered to and provide videos explaining the process. See, e.g., http://bba4usa.org/resources/ (balanced budget amendment campaign); http://www.conventionofstates.com/ ("convention of states" movement for reductions in the size of the federal government); https://www.termlimits.org/articlev/ (term limits). The process is explained for state legislators in this author's widely used *Article V Handbook*, published by a leading state legislators' trade organization and available at https://www.alec.org/publication/article-v-a-handbook-for-state-lawmakers/.

D. Presidential Power

The proposed rules confer power on the convention president to an extent likely to be unacceptable to most commissioners or to the general public. Specifically:

- ASL Rule 8.1 provides "The President shall appoint all committees, unless otherwise ordered by the Convention." One consequence is disproportionate presidential influence on amendments. This is because after the fifth day of the convention, any proposed amendment lacking unanimous consent requires approval by a committee (Rule 5.7), which in turn will consist entirely of presidential appointees. ASL should have adopted the practice of most prior conventions, providing for election of the members of major committees by a plurality vote of states present.

- Under Rules 1.1 and 1.8.1, the parliamentarian is appointed by the president and under Rule 1.4.7 he acts under the president's supervision. One or the other function should have been freed from the president.

- Under Rule 7.2 the president designates the chairman of the committee of the whole, rather than the committee electing its presiding officer.

E. *Ultra Vires* Provisions

In law, a person or organization's act is *ultra vires* ("beyond powers") if it goes beyond the scope of what the person or entity is authorized to do. Several of the ASL rules are *ultra vires* for an amendments convention.

The ASL rules contain provisions that purport to extend convention control both before and after its lifetime.

A convention of states is, by definition, an *ad hoc* body with only temporary proposal power. The convention and its evanescent authority disappear upon adjournment *sine die*. The ASL rules contain provisions that purport to extend convention control both before and after its lifetime. Specifically, the subdivisions of Rule 9.6 (i.e., 9.6.2.2, 9.6.2.3, 9.6.2.4 and 9.6.3) all purport to apply to the counting of applications before the convention is called. Rule 1.3.2 attempts to regulate conduct after the assembly is adjourned by imposing ASL rules on any future convention until that convention formally rescinds them.

These rules are constitutionally problematic for another reason. Extensive judicial precedent holds that an assembly acting under Article V (legislature or convention) may not be coerced.[15] Rule 1.3.2 and Rule 9.6 and its subdivisions all attempt to do just that by regulating state legislatures, Congress, and a future federal convention. Although there is nothing wrong with ASL issuing a series of understandings or recommendations on the subject, placing then among convention rules was legally inappropriate.

[15] See *Bramberg* v. *Jones*, 978 P.2d 1240 (Cal. 1999) for a summary of the case law.

F. Mandated Bipartisanship

Prior conventions have been non-partisan. The ASL rules contemplate a convention that is bipartisan.

Prior conventions have been non-partisan. The ASL rules contemplate a convention that is bipartisan. This is one reason for the supermajority requirements discussed earlier. Bipartisanship also appears in Rule 1.1, which requires that the president and vice president be from different political parties and in Rule 8.3, which limits any party to six of ten committee members, even if the political condition in the state legislatures dictates a different balance.

Although bipartisanship in the abstract is popular with the general public, significant political change often occurs only when the voters have rewarded one party, or at least one political ideology, with strong majorities. If the minority party had been granted a veto (as the ASL rules essentially do), the Civil War amendments abolishing slavery and protecting minority rights never would have been proposed, much less ratified. If voters opt to give a decisive majority of state legislatures to one political party, it would conflict with values of both democracy and federalism to prevent such a majority from even proposing a constitutional amendment.

G. Technical Defects

There are a few technical defects in the ASL rules. By "technical defects," I mean problems beyond mere grammatical errors such as the one in Rule 9.4.4 (which reads "Expenses ... is") or the questionable use of the word "verbiage" in Rule 9.6.22.[16] The technical defects treated here are not necessarily inclusive, but they exemplify imperfections rendering language misleading, unclear, contradictory, or impractical.

We begin with two illustrations in the "misleading" category:

- The term "delegate" to denote a convention commissioner is likely to mislead the modern American because in contemporary conventions "delegates" sometimes are people who represent no one but themselves. Under the circumstances, it is best to adhere to the more correct term, commissioner, which better communicates lines of responsibility between an attendee and his or her state legislature. The misleading nature of "delegate" is compounded by Rule 8.10, which employs the phrase "member delegate." Technically, the "members" of a convention of states are not individuals but the several state committees.

- Also misleading is Rule 1.3.1, which provides, "Each state shall be granted one vote." The one state/one vote rule comes from the Constitution and from background rules of sovereignty. It does not derive from the convention's "grant." When drafting Rule 4.1.1,

[16] Verbiage usually has the sense of prolixity or an overabundance of words. This rule uses it as a mere synonym for "words."

ASL got the wording right: “In determining all questions in the Convention, all votes shall be taken by State, and each State shall have one vote.”

Among technical defects rendering the rules unclear is one in Rule 1.5.1, which reads in part:

> In the event of the temporary absence or inability to preside as a President, not to exceed two Convention days, the Vice-President shall assume the duties of the President, and the Convention shall ... vote to elect a new Vice President.

This language seems to say that if the president is absent or incapacitated *for less than* two days, the vice president shall assume the president’s duties permanently and the convention shall elect a new vice president. The intention may have been for these things to happen only if the president was absent or incapacitated *for more than* two days.

The technical defect of contradiction appears in the interplay of Rule 5.6.1 and Rule 9.6.2.4. The former states that convention subject matter shall be limited to those “whose subject(s) were specifically included in the resolutions of at least two-thirds of the several States. This Convention has no authority to consider any other subject. ...” Yet Rule 9.6.2.4 permits the convention to be called on the aggregation of both applications specifying subjects and applications that are unlimited. (Rule 9.6.2.4 refers to unlimited applications as “Open Applications.”) Thus, if a convention were to be called under Rule 9.6.2.4 pursuant to 31 single-subject applications and three “open” applications, then under Rule 5.6.1 there would be no one subject that was “specifically included in the resolutions of at least two-thirds of the several States.” The convention, therefore, could consider no subject at all!

Rule 1.8.2 seems to restrict the pool of personnel to serve as parliamentarian needlessly and unduly, and raises the suspicion that the rules’ drafters had a specific person in mind.

Here are three technical defects resulting in impracticality:

- During convention proceedings it sometimes becomes necessary to amend the rules. Traditionally conventions retain full power to reverse any amendments they deem ill-advised. Rule 1.3.3 states that a motion to amend cannot be reconsidered. The implication is that the convention is stuck with any ill-advised amendment it adopts.

- Rule 1.8.2 requires the parliamentarian to be “a current or former member of the Mason’s Manual Commission” and to have “previously served as the chief or head parliamentarian of a state legislative body.” This seems to restrict the pool of personnel needlessly and unduly, and raises the suspicion, however unfounded, that the rules’ drafters had a specific person in mind.

- Rule 2.5 limits the number of “delegates” on the floor from any state to ten. In a 50-state convention imposing a floor limit is both appropriate and wise: Historically, interstate proposing conventions have state delegations averaging in number between three and five. The limit of ten is too high. It may encourage states to magnify their voices by sending large delegations, resulting in a very populous convention – perhaps more populous than any state

or federal legislative chamber in America. Five commissioners on the floor from any state at any time are sufficient.

5. A Final Recommendation

The ASL rules contain much that is useful and valuable, and a great deal of ASL's time has been spent well. When the first convention for proposing amendments adopts its own rules, it should consult the ASL recommendations for ideas and insights.

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Unfortunately, the ASL rules seem to have been drafted almost on a blank slate, with insufficient attention to the solid experience of prior conventions. Future rule drafters should, therefore, employ the ASL rules as a source of ideas rather than as a model or starting point for actual convention rules. Beginning with the ASL rules and then modifying them sufficiently to serve actual convention needs would be too daunting and contentious a task, and likely would consume too much convention time and energy. A better approach would be to begin with prior convention rules and amend them with accumulated legislative wisdom, ASL ideas, and responses to modern conditions.

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About the Author

Robert G. Natelson is senior fellow in constitutional jurisprudence at The Heartland Institute. He has the same title at the Montana Policy Institute in Bozeman, Montana and at the Independence Institute in Denver, Colorado, where he heads the Article V Information Center. He was a professor of law for 25 years, serving at three universities. He taught constitutional law, advanced constitutional law, First Amendment, and constitutional history, among other courses.

Natelson is well-known as a leading scholar of the American founding era. He is the author of *The Original Constitution: What It Actually Said and Meant* (3rd ed. Apis Books, 2014), co-author of *The Origins of the Necessary and Proper Clause* (Cambridge Univ. Press, 2010), and author of numerous scholarly and popular articles. His research is regularly cited in the U.S. Supreme Court, both by parties and by the justices.

Natelson also has experience in the business, broadcasting, and political world. In 2000 he was runner-up among five candidates in the open party primary for governor of Montana.

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