

PROPOSING CONSTITUTIONAL AMENDMENTS BY CONVENTION: RULES GOVERNING THE PROCESS

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ABSTRACT

Much of the mystery surrounding the Constitution's state-application-and-convention amendment process is unnecessary: History and case law enable us to resolve most questions. This Article is the first in the legal literature to access the full Founding-Era record on the subject, including the practices of inter-colonial and interstate conventions held during the 1770s and 1780s. Relying on that record, together with post-Founding practices, understandings, and case law, this Article clarifies the rules governing applications and convention calls, and the roles of legislatures and conventions in the process. The goal of the Article is objective exposition rather than advocacy or special pleading.

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1. *Bibliographical Note*: This footnote collects alphabetically the secondary sources cited more than once in this Article. The listing reflects this article’s reliance on several of the author’s prior publications. The sources and short form citations used are as follows:

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JONATHAN ELLIOT, 2, 3, 4 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* (2d ed. 1836) [hereinafter ELLIOT'S DEBATES].

Sam J. Ervin, Jr., *Proposed Legislation to Implement the Convention Method of Amending the Constitution*, 66 MICH. L. REV. 875 (1968) [hereinafter Ervin].

1, 2, 3 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* (Max Farrand, ed., 1937) [hereinafter FARRAND'S RECORDS].

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GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON & GUY I. SEIDMAN, *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* (2010) [hereinafter ORIGINS OF THE NECESSARY AND PROPER CLAUSE].

Robert G. Natelson, *Amending the Constitution by Convention: A More Complete View of the Founders' Plan* (2010), INDEPENDENCE INSTITUTE, http://constitution.i2i.org/files/2010/12/IP_7_2010_a.pdf [hereinafter Natelson, *Amending*].

Robert G. Natelson, *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 TEX. REV. L. & POL. 239 (2007) [hereinafter Natelson, *Judicial Review*].

Robert G. Natelson, *Learning from Experience: How the States Used Article V Applications in America's First Century*, GOLDWATER INSTITUTE (Nov. 4, 2010), <http://www.goldwaterinstitute.org/article/5353> [hereinafter Natelson, *First Century*].

I. INTRODUCTION

Article V of the United States Constitution allows either Congress or a “Convention for proposing Amendments” to propose formally constitutional amendments for ratification or rejection. The relevant language is 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. . . .²

A convention for proposing amendments also has been called an *Article V convention*,³ an *amendments convention*, and a *convention of the states*. As explained below, the common practice of referring to it as a “constitutional convention” or “con-con,” is inaccurate.⁴

When two thirds of the state legislatures apply to Congress for a convention for proposing amendments, the Constitution requires Congress to call one.⁵ Throughout this paper, this procedure is referred to as the *state-application-and-convention process*. The Framers inserted the procedure primarily to enable the people, through their state legislatures, to make changes in the Constitution without the consent of Congress.⁶ The Framers’ purpose, explained to the ratifying public as such, was to enable the people

ROBERT G. NATELSON, *THE ORIGINAL CONSTITUTION: WHAT IT REALLY SAID AND MEANT* (2010) [hereinafter NATELSON, *ORIGINAL CONSTITUTION*].

Robert G. Natelson, *Tempering the Commerce Power*, 68 MONT. L. REV. 95 (2007) [hereinafter Natelson, *Tempering*].

Note, *Proposing Amendments to the United States Constitution by Convention*, 70 HARV. L. REV. 1067 (1957) [hereinafter Note, *Amendments*].

Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment*, 103 YALE L.J. 677 (1993) [hereinafter Paulsen].

Grover Joseph Rees III, *The Amendment Process and Limited Constitutional Conventions*, 2 BENCHMARK 66 (1986) [hereinafter Rees, *Amendment Process*].

2. U.S. CONST. art. V (emphasis added).

3. Although strictly speaking state ratifying conventions also are “Article V conventions.”

4. See *infra* Part IX.A.

5. See *infra* Part X.B.

6. See *infra* Part III.

to restrain Congress if it should exceed or abuse its powers, or if the people wished to reduce congressional authority.⁷ In a sense, the state-application-and-convention process is the federal analogue of the state voter initiative, whereby the electorate can bypass the legislature by adopting laws or amending the state constitution.⁸

Although the state-application-and-convention process has never been carried to completion, there have been many application campaigns.⁹ Some failed only because Congress responded by proposing the sought-for amendments.¹⁰ Others enjoyed insufficient popular support.¹¹ In recent years, however, such campaigns have been discouraged because of uncertainty about the legal rules governing the state-application-and-convention process—uncertainty promoted by persons and groups both on the political left and political right.¹²

Most of that uncertainty is needless, the product of alarmism and lack of knowledge. I wrote this paper in the belief that, whatever the merits of the process, light is better than darkness. To answer central questions, I rely on the constitutional text, judicial decisions,¹³ application practice over the

7. See *infra* notes 20–21 and accompanying text.

8. See, e.g., Rees, *Amendment Process*, *supra* note 1, at 83 (describing the process as “the closest thing the Constitution provides to the opportunity for a national referendum”).

9. See generally CAPLAN, *supra* note 1, at 36–89 (describing campaigns through the 1980s); Natelson, *First Century*, *supra* note 1 (describing campaigns from 1789 through 1913).

10. See generally Natelson, *First Century*, *supra* note 1.

11. *Id.*

12. CAPLAN, *supra* note 1, at vii–viii, 146–47 (quoting various public figures, mostly on the political left); Art Thompson, *Help Stop the New Drive for a Constitutional Convention*, YOUTUBE (Oct. 18, 2010), <http://www.youtube.com/watch?v=ggepQ6DtpP4> (presenting a video message from Art Thompson, president of the deeply conservative John Birch Society).

13. At one time, some argued that the courts should take no jurisdiction over Article V issues—that Congress, not the judiciary, should referee the process. Article V issues were said to be “political questions” inappropriate for judicial resolution. *Coleman v. Miller*, 307 U.S. 433, 450 (1939) (supporting the view from a four-justice concurring opinion and a brief *dictum* from the majority). However, *Coleman* has come under very heavy criticism, see, e.g., Rees, *Amendment Process*, *supra* note 1, at 98–107, and has not been followed. One scholar has accurately described the case as an “aberration.” Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 389 (1983). Today, the courts consciously reject the “hands-off” rule of the *dictum* and concurrence. E.g., *Dyer v. Blair*, 390 F. Supp. 1291, 1301 (N.D. Ill. 1975) (explicitly rejecting, in a decision by the future Justice Stevens, the “political question” portion of *Coleman*); *AFL-CIO v. Eu*, 686 P.2d 609 (Cal. 1984) (declining to follow the “political question” doctrine from *Coleman*); see also *Carmen v. Idaho*, 459 U.S. 809 (1982), *vacating as moot Idaho v. Freeman*, 529 F. Supp. 1107, 1155 (D. Idaho 1981); *Kimble v. Swackhamer*, 439 U.S. 1385, 1387–88 (1978) (Rehnquist, J., sitting as a circuit judge, upholding Nevada’s use of non-binding referenda on pending constitutional amendments).

Rejection of *Coleman* is implicit in *Powell v. McCormick*, 395 U.S. 486 (1969)

past two centuries, some insights from other scholars,¹⁴ and a more thorough examination of relevant Founding-Era sources than previously has appeared in the legal literature.

Unlike most law review articles, this paper is not designed to be a work of advocacy. It was not written to advance any agenda other than the dissemination of knowledge about a little-understood part of our Constitution. When the evidence conflicted with my wishes or required me to revise my views, I followed the evidence wherever it led.

II. FOUNDING-ERA TERMINOLOGY

In discussing the Founding Era, I refer to several different groups of people.¹⁵ The *Framers* were the fifty-five men who drafted the Constitution at the federal convention in Philadelphia, between May 29, 1787 and September 17, 1787. The *Ratifiers* were the 1,648 delegates at the thirteen state ratifying conventions held from November, 1787 through May 29, 1790. The *Federalists* were those participants in the public ratification debates who argued for adopting the Constitution. Their opponents were *Anti-Federalists*.

In this paper, the term *Founders* includes all who played significant roles in the constitutional process, whether Framers, Ratifiers, Federalists, or Anti-Federalists. Also among the Founders were the members of the Confederation Congress, 1781–89, and the members of the initial session of the First Federal Congress, 1789. Many Founders fit into more than one category. For example, James Madison was a Framer, Ratifier, and a leading Federalist, while Elbridge Gerry was a Framer and Anti-Federalist, but not a Ratifier.¹⁶

As used in this paper, the *original understanding* is the Ratifiers' subjective understanding, to the extent recoverable, of a provision in the Constitution—i.e., what those who voted for ratification actually understood the Constitution to mean. The *original meaning*, often called “original public meaning,” is the objective meaning of a provision to a

(refusing to apply the political question doctrine when ruling directly against Congress). Although the judiciary has applied the “political question” doctrine to some Article V cases, in each of those cases, special facts called for abstention.

Thus, there is no general principle that Article V issues are not justiciable. On the contrary, a respectably long series of court rulings on Article V extends from 1798 to modern times. *See infra passim*.

14. Unfortunately, good scholarship on this subject is rare; most of the writing is poorly-researched, agenda-driven, or both. *See Natelson, Amending, supra* note 1, at 4, and accompanying notes.

15. *See* NATELSON, ORIGINAL CONSTITUTION, *supra* note 1, at 9–11.

16. *See generally* 1–2 FARRAND'S RECORDS, *supra* note 1 (detailing involvement of individuals throughout the process).

reasonable person at the time. *Original intent* is the subjective view of the Framers, to the extent recoverable.

Under Founding-Era jurisprudence, legal documents were interpreted according to the “intent of the makers,” if available, and otherwise by the original meaning.¹⁷ In the case of a constitution, the “intent of the makers” was the original understanding of the Ratifiers. Original intent did not have independent legal significance, but could serve as evidence of original understanding and original meaning.¹⁸

III. THE PURPOSE OF THE STATE-APPLICATION-AND-CONVENTION PROCESS

The Founding-Era record tells us that the two procedures for proposing amendments were designed to be equally usable, valid, and effective.¹⁹ Congress received power to initiate amendments because the Framers believed that Congress’s position would enable it readily to see defects in the system.²⁰ However, Congress might become abusive or refuse to adopt a necessary or desirable amendment—particularly one to curb its own power.²¹ As one Anti-Federalist writer predicted, “[W]e shall never find

17. See generally Robert G. Natelson, *The Founders’ Hermeneutic: The Real Original Understanding of Original Intent*, 68 OHIO ST. L.J. 1239 (2007). Professor Richard S. Kay concludes that *The Founder’s Hermeneutic* “more or less settles the case to the contrary” of the widespread belief that Founding-Era interpreters relied only on original meaning and did not consider subjective understanding. Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 709 (2009).

18. See generally Natelson, *supra* note 17.

19. See *infra* Part III; see also Diamond, *supra* note 1, at 114, 125 (emphasizing that the two methods were to be alternative means to the same end); *Letters from the Federal Farmer to the Republican*, Letters IV–V, Oct. 12, 1787, reprinted in 19 DOCUMENTARY HISTORY, *supra* note 1, at 231, 237, 239 (2003) (“No measures can be taken towards amendments, unless two-thirds of the congress, or two-thirds of the legislatures of the several states shall agree.”); cf. Ervin, *supra* note 1, at 882 (“It is clear that neither of the two methods of amendment was expected by the Framers to be superior to the other or easier of accomplishment.”).

20. 2 FARRAND’S RECORDS, *supra* note 1, at 558 (Sept 10, 1787) (Madison paraphrasing Alexander Hamilton as stating, “The National Legislature will be the first to perceive and will be most sensible to the necessity of amendments . . .”).

21. 1 FARRAND’S RECORDS, *supra* note 1, at 202–03 (Jun. 11, 1787), paraphrasing George Mason in discussing a resolution “for amending the national Constitution hereafter without consent of Natl. Legislature” as follows:

Amendments therefore will be necessary, and it will be better to provide for them, in an easy, regular and Constitutional way than to trust to chance and violence. It would be improper to require the consent of the Natl. Legislature, because they may abuse their power, and refuse their consent on that very account. The opportunity for such an abuse, may be the fault of the Constitution calling for amendmt.

two thirds of a Congress voting or proposing anything which shall derogate from their own authority and importance.²² In that eventuality, the state-application-and-convention procedure would permit the state legislatures to take corrective action.²³

In the New York legislature, Samuel Jones explained the plan this way:

The reason why there are two modes of obtaining amendments prescribed by the constitution I suppose to be this—it could not be known to the framers of the constitution, whether there was too much power given by it or too little; they therefore prescribed a mode by which Congress might procure more, if in the operation of the government it was found necessary; and they prescribed for the states a mode of restraining the

Mason was supported on this point by Edmund Randolph. *Id.* Ratification discussions in New York also contemplated a method of amendment separate from the national legislature:

The amendments contended for as necessary to be made, are of such a nature, as will tend to limit and abridge a number of the powers of the government. And is it probable, that those who enjoy these powers will be so likely to surrender them after they have them in possession, as to consent to have them restricted in the act of granting them? Common sense says—they will not.

A PLEBEIAN, AN ADDRESS TO THE PEOPLE OF THE STATE OF NEW YORK (1788), *reprinted in* 20 DOCUMENTARY HISTORY *supra* note 1, at 942, 944 (2004).

22. Letter from An Old Whig, PHILA. INDEP. GAZETTEER (Oct. 12, 1787), *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 1, at 376, 377 (1981).

23. 3 ELLIOT'S DEBATES, *supra* note 1, at 101, quoting George Nicholas at the Virginia ratifying convention:

[Patrick Henry] thinks amendments can never be obtained, because so great a number is required to concur. Had it rested solely with Congress, there might have been danger. The committee will see that there is another mode provided, besides that which originated with Congress. On the application of the legislatures of two thirds of the several states, a convention is to be called to propose amendments.

See also 4 ELLIOT'S DEBATES, at 177 (James Iredell, at the North Carolina ratifying convention):

The proposition for amendments may arise from Congress itself, when two thirds of both houses shall deem it necessary. If they should not, and yet amendments be generally wished for by the people, two thirds of the legislatures of the different states may require a general convention for the purpose, in which case Congress are under the necessity of convening one. Any amendments which either Congress shall propose, or which shall be proposed by such general convention, are afterwards to be submitted to the legislatures of the different states, or conventions called for that purpose, as Congress shall think proper, and, upon the ratification of three fourths of the states, will become a part of the Constitution.

powers of the government, if upon trial it should be found they had given too much.²⁴

With his customary vigor, the widely-read Federalist essayist Tench Coxe, then serving in the Confederation Congress, described the role of the state-application-and-convention procedure:

It has been asserted, that the new constitution, when ratified, would be fixed and permanent, and that no alterations or amendments, should those proposed appear on consideration ever so salutary, could afterwards be obtained. A candid consideration of the constitution will show this to be a groundless remark. 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. Congress therefore cannot hold *any power*, which three fourths of the states shall not approve, on *experience*.²⁵

Madison stated it more mildly in *Federalist No. 43: The Constitution* “equally enables the General, and the State Governments, to originate the

24. NEW YORK ASSEMBLY DEBATES (Feb. 4, 1789), in 23 DOCUMENTARY HISTORY, *supra* note 1, at 2523–24 (2009). During the same debate, John Lansing, Jr., a former delegate to the federal convention, gave additional reasons for the alternative routes to amendment:

In the one instance we submit the propriety of making amendments to men who are sent, some of them for six years, from home, and who lose that knowledge of the wishes of the people by absence, which men more recently from them, in case of a convention, would naturally possess. Besides, the Congress, if they propose amendments, can only communicate their reasons to their constituents by letter, while if the amendments are made by men sent for the express purpose, when they return from the convention, they can detail more satisfactorily, and explicitly the reasons that operated in favour of such and such amendments—and the people will be able to enter into the views of the convention, and better understand the propriety of acceding to their proposition.

Id. at 2523.

25. “A Friend of Society and Liberty,” PA. GAZETTE, Jul. 23, 1788, *reprinted in* 18 DOCUMENTARY HISTORY, *supra* note 1, at 277, 283–84 (1995). Coxe made the same points in *A Pennsylvanian to the New York Convention*, PA. GAZETTE, Jun. 11, 1788, *reprinted in* 20 DOCUMENTARY HISTORY, *supra* note 1, at 1139, 1142 (2004). Coxe was Pennsylvania’s delegate to the Annapolis convention.

amendment of errors, as they may be pointed out by the experience on one side or on the other.”²⁶

Thus, the state-application-and-convention process was inserted as a way for the people to amend the Constitution through the state legislatures, bypassing Congress.

IV. THE ESSENCE OF ARTICLE V: GRANTS OF POWER TO DESIGNATED ASSEMBLIES

Article V envisions roles in the amendment process for four distinct sorts of gatherings, groups that I sometimes refer to in this paper as *Article V assemblies*. The four are Congress, state legislatures, state ratifying conventions, and conventions for proposing amendments. Article V grants eight distinct enumerated powers to these assemblies—four at the *proposal* stage and four at the *ratification* stage. At the proposal stage, Article V:

- (1) grants to two thirds of each house of Congress authority to “propose” amendments,
- (2) grants to two thirds of the state legislatures power to make “Application” for a convention for proposing amendments,
- (3) grants to Congress power to “call” that convention, and
- (4) grants to the convention authority “for proposing” amendments.²⁷

At the ratification stage, Article V:

- (1) authorizes Congress to “propose” whether ratification shall be by state legislatures or state conventions;
- (2) if Congress selects the former method, authorizes three fourths of state legislatures to ratify;
- (3) if Congress selects the latter method, impliedly empowers, and requires, each state to call a ratifying convention; and
- (4) empowers three fourths of those conventions to ratify.²⁸

26. THE FEDERALIST NO. 43, *supra* note 1, at 228. Similarly, at the North Carolina ratifying convention, the following colloquy took place:

Mr. BASS observed, that it was plain that the introduction of amendments depended altogether on Congress.

Mr. IREDELL replied, that it was very evident that it did not depend on the will of Congress; for that the legislatures of two thirds of the states were authorized to make application for calling a convention to propose amendments, and, on such application, it is provided that Congress *shall* call such convention, so that they will have no option.

4 ELLIOT’S DEBATES, *supra* note 1, at 178.

27. U.S. CONST. art. V.

28. *Id.*

When an Article V assembly exercises an Article V action, it performs, in the phrase of the Supreme Court, a “federal function.”²⁹ Thus, a state convention ratifying an amendment, and a state legislature either applying for a convention or ratifying an amendment, act under the appropriate Article V grant, rather than pursuant to powers reserved in the state.³⁰ Similarly, under Article V Congress does not perform as the federal legislature, but as an assenting body.

V. READING CONSTITUTIONAL GRANTS OF POWER: THE FIDUCIARY CONTEXT

A. *The Centrality of Fiduciary Rules*

Central to understanding the Constitution’s power-grants, including those in Article V, is first to understand that the Founders assumed those grants would be subject to the rules imposed on private fiduciaries.

In Founding-Era political theory, legitimate government was, in John Locke’s phrase, a “fiduciary trust.”³¹ For this reason, the Founders frequently described public officials by fiduciary names, such as “trustees” and “agents.”³² The Founders did not see the public trust standard as merely an ideal but as a core principle of public law.³³ This principle was to be enforced in several ways, including the traditional remedy for violation of

29. *Leser v. Garnett*, 258 U.S. 130, 137 (1922); *see also* Opinion of the Justices to the Senate, 366 N.E.2d 1226 (Mass. 1977); *State ex rel. Donnelly v. Myers*, 186 N.E. 918 (Ohio 1933); *In re Opinion of the Justices*, 172 S.E. 474 (N.C. 1933); *Prior v. Norland*, 188 P. 727 (Colo. 1920).

30. *United States v. Sprague*, 282 U.S. 716, 733 (1931); *Hawke v. Smith*, 253 U.S. 221 (1920); *Dyer v. Blair*, 390 F. Supp. 1291, 1308 (N.D. Ill. 1975) (Stevens, J.) (“The delegation [from Article V] is not to the states but rather to the designated ratifying bodies.”); *cf. Sprague*, 282 U.S. 716 (Article V as a grant to Congress *qua* Congress, not to the U.S. government).

31. I have written extensively on this subject, and my conclusions have not been contested by other scholars. *See generally* ORIGINS OF THE NECESSARY AND PROPER CLAUSE, *supra* note 1, at 52–60; NATELSON, ORIGINAL CONSTITUTION, *supra* note 1, at 23–25 (discussing the Founders’ view of public trust, the powers of agents, and the role of impeachment); Natelson, *Judicial Review*, *supra* note 1 (describing the general content of eighteenth-century fiduciary law); Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 CASE W. RES. L. REV. 243 (2004) (discussing the powers of agents under eighteenth-century law); and Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077 (2004) [hereinafter Natelson, *The Constitution and the Public Trust*] (documenting the Founders’ belief in fiduciary government).

32. *See* Natelson, *Judicial Review*, *supra* note 1, at 246; Natelson, *The Constitution and the Public Trust*, *supra* note 31, at 1084.

33. *See* Natelson, *The Constitution and the Public Trust*, *supra* note 31, at 1088 (discussing “the role of the public trust doctrine in drafting, submission, and ratification of the Constitution”).

public sector fiduciary duty (or, as it usually was called, “breach of trust”)—that is, impeachment-and-removal.³⁴

During the framing and ratification process, participants frequently assessed issues according to fiduciary standards.³⁵ Thus, people discussed whether the delegates to the federal convention had exceeded their authority, whether the Constitution would promote fiduciary government, and whether other options might better serve that purpose.³⁶

Eighteenth-century fiduciary law differed somewhat from modern law in its terminology and classifications, but the underlying principles were much the same. Three rules are particularly important for our purposes:

- (1) The wording of the instrument by which the principal empowered the fiduciary, read in light of its purposes, defined the scope of the latter’s authority.³⁷
- (2) A fiduciary was required to remain within the scope of this authority.³⁸ Of course, this rule did not prevent the fiduciary from *recommending* the action to the principal. However, this recommendation had no legal force unless adopted by the principal.³⁹
- (3) If under the same instrument a fiduciary served more than one person, the fiduciary was required to treat them all equally and fairly—or, in the language of the law, “impartially.”⁴⁰

B. The Doctrine of Incidental Authority

In absence of agreement to the contrary, the scope of a fiduciary’s authority included not only powers granted in words (“express” or “principal” powers), but also power “incidental” thereto.⁴¹ This concept, and the rules by which incidental powers were defined, comprised the legal doctrine of *incidental authority*. The doctrine assured that a fiduciary received sufficient capacity to carry out the intent or purpose behind the grant.⁴² Unlike the Articles of Confederation,⁴³ the Constitution incorporated the doctrine of incidental authority.

34. NATELSON, ORIGINAL CONSTITUTION, *supra* note 1, at 203–07.

35. See Natelson, *The Constitution and the Public Trust*, *supra* note 31, at 1136.

36. See sources cited *supra* note 31.

37. Natelson, *Judicial Review*, *supra* note 1, at 256.

38. *Id.* at 255–57.

39. Natelson, *Amending*, *supra* note 1, at 6.

40. *Id.* at 262–67.

41. This subject is fully developed in ORIGINS OF THE NECESSARY AND PROPER CLAUSE, *supra* note 1, at 60–68, 80–83.

42. *Id.* at 82–83.

43. Article II of the Articles of Confederation excluded the doctrine of incidental authority by this language: “Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation *expressly* delegated to the United States, in Congress assembled.” ARTICLES OF CONFEDERATION OF

By the time of the Founding, that doctrine was a well-developed and prominent component of Anglo-American jurisprudence.⁴⁴ Under its rules, for Power B to be incidental to Power A, several requirements had to be met. First, Power B had to be less valuable and less important—that is, subsidiary—to Power A. This often was expressed by saying that a principal power had to be more “worthy” than its incident.⁴⁵ Hence, a document entrusting a bailiff with management of an estate generally included incidental authority to make leases at will, but not to lease for a term.⁴⁶ Moreover, Power B had to be either *customary* for exercising Power A or so *necessary* to the exercise of Power A that the agent’s work would be subject to “great prejudice”⁴⁷ unless Power B were included.⁴⁸ But neither custom nor “great prejudice” was sufficient; subsidiarity was required as well.⁴⁹

The Necessary and Proper Clause expressly acknowledged the grant of incidental powers to Congress.⁵⁰ In fact, the word “necessary” was a legal term of art meaning “incidental.”⁵¹ However, as leading Federalists explained during the ratification debates, the Clause actually bestowed no authority. Rather, it was an acknowledgment or recital⁵² that the Constitution—like most other power-granting documents, but unlike the Articles of Confederation—incorporated the incidental authority doctrine. The doctrine would have applied even in absence of the Clause.⁵³

Incidental authority, therefore, accompanies not only congressional powers, but all other powers granted by the Constitution. For example, Article II, which lists the President’s powers, includes no “necessary and

1781, art. II (emphasis added).

44. ORIGINS OF THE NECESSARY AND PROPER CLAUSE, *supra* note 1, at 60.

45. *Id.* at 61–62.

46. *Id.* at 65.

47. *Id.* at 65.

48. *Id.* at 64–66.

49. Moreover, as Chief Justice Marshall pointed out, the real goal for exercising the incidental power had to be furtherance of the principal. An incidental power could not be exercised for its own sake on the “pretext” of exercising the principal. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819). Today, Congress frequently regulates activities “substantially affect[ing]” interstate commerce so as to govern those activities, not because doing so is necessary or customary to regulating commerce. Natelson, *Tempering*, *supra* note 1, at 122–24.

50. U.S. CONST. art. I, § 8, cl. 18 (“The Congress shall have Power To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof.”).

51. ORIGINS OF THE NECESSARY AND PROPER CLAUSE, *supra* note 1, at 64.

52. *See id.* at 97–108.

53. *See also* Natelson, *Tempering*, *supra* note 1, at 101–02 (explaining that Chief Justice John Marshall, who wrote the opinion in *McCulloch*, the greatest of Necessary and Proper Clause cases, fully agreed).

proper” language, but the President enjoys incidental authority.⁵⁴ Similarly, the grants in Article V to conventions and state legislatures⁵⁵ carry incidental powers with them.⁵⁶

What is the scope of those incidents? The answer to that rests largely in Founding-Era custom⁵⁷—specifically the convention practices of the time. As the next Part shows, conventions were common enough for their practices to have become standardized.

VI. OVERVIEW OF FOUNDING-ERA CONVENTIONS

The founding generation understood a political “convention” to be an assembly, other than a legislature, designed to serve an ad hoc governmental function.⁵⁸ The British brought about regime changes in 1660 and 1689 through “convention Parliaments.”⁵⁹ During the latter year, the American colonists held at least four conventions of their own.⁶⁰ The colonists continued to resort to the device over the ensuing decades.⁶¹

54. See U.S. CONST. art. II. The famous debate in the First Congress over whether the President could remove federal officers without senatorial consent was won by those who claimed that the power to remove was incidental either to the power to appoint or to the executive power generally. The debate is found at 1 ANNALS OF CONG. 473-608 (1789) (Joseph Gales ed., 1834), available at <http://international.loc.gov/cgi-bin/ampage?collId=llac&fileName=001/llac001.db&recNum=51>. Note that the debate and resolution occurred while the ratifications of two states, North Carolina and Rhode Island, were still in doubt.

55. *United States v. Sprague*, 282 U.S. 716, 733 (1931) (“The fifth article does not purport to delegate any governmental power to the United States On the contrary . . . that article is a grant of authority by the people to Congress, and not to the United States.”).

56. The Necessary and Proper Clause does not apply because that Clause applies only to the “Government of the United States” and “Department[s] or Officer[s] thereof.” U.S. CONST. art. I, § 8, cl. 18.

At a conference at Cooley Law School on September 16, 2010, a participant cited *Sprague* for the proposition that Article V was not open to construction, and so granted no incidental powers. See *Cooley Article V Symposium*, 28 COOLEY L. REV. (forthcoming Summer 2011). The presentations of various speakers at this symposium are available on YouTube. See generally <http://www.youtube.com> (In query field, search for “Cooley Article V Symposium”). However, *Sprague* involved not the entirety of Article V, but only unambiguous language where no construction or supplementation was necessary. *Sprague*, 282 U.S. at 732.

57. See *infra* Part VI.

58. Natelson, *Amending*, *supra* note 1, at 6; see also *In Re Opinion of the Justices*, 167 A. 176, 179 (Me. 1933) (“The principal distinction between a convention and a Legislature is that the former is called for a specific purpose, the latter for general purposes.”).

59. Natelson, *Amending*, *supra* note 1, at 6.

60. CAPLAN, *supra* note 1, at 5–6 (discussing two conventions in Massachusetts, one in New York, and one in Maryland).

61. *Id.* at 7–9.

During the Founding Era it became one of their favorite methods of solving political problems.⁶²

Many Founding-Era conventions were single-polity affairs, held within a colony or state, with delegates representing the people directly.⁶³ Others were interstate or, as they came to be called, “federal.”⁶⁴ The initial interstate convention of the Founding Era was the First Continental Congress (1774), which despite being denoted a “Congress,”⁶⁵ qualified as a convention and was understood to be one.⁶⁶ There were at least ten other interstate conventions held after the Declaration of Independence and before the meeting of the Constitutional Convention in 1787: two in Providence, Rhode Island (1776-77 and 1781); one in Springfield, Massachusetts (1777); one in York, Pennsylvania (1777),⁶⁷ one in New Haven, Connecticut (1778); two in Hartford, Connecticut (1779 and 1780); one in Philadelphia (1780), one in Boston (1780), and one in Annapolis (1786).⁶⁸ Attendance at Founding-Era conventions ranged from three states

62. Natelson, *Amending*, *supra* note 1, at 6.

63. HOAR, *supra* note 1, at 2–10 (describing state constitutional conventions at the Founding); *see also* CAPLAN, *supra* note 1, at 8–16 (discussing conventions); *cf. Opinion of the Justices*, 167 A. at 179 (noting that conventions within states directly represented the people).

64. Natelson, *Amending*, *supra* note 1, at 6, 11.

65. The term “congress” commonly denoted a meeting of sovereignties. *See, e.g.*, THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1789) (unpaginated) (defining “congress” in part as “an appointed meeting for settlement of affairs between different nations”).

66. *E.g.*, 1 JCC, *supra* note 1, at 17 (1904) (quoting the credentials of the Connecticut delegates, empowering them to attend the “congress, or convention of commissioners, or committees of the several Colonies in British America”). The Second Continental Congress (1775–1781) arguably also was a convention, but because it acted as a regular government for more than six years, I have not treated it as such. The Confederation Congress (1781–1789) was a regularly established government.

67. On the York Convention, see *infra* note 159 and accompanying text.

68. For a summary of special purpose conventions, *see* CAPLAN, *supra* note 1, at 17–21, 96. Caplan mentions the Boston Convention, which is also referenced at 17 JCC, *supra* note 1, at 790 (1910) (Aug. 29, 1780) and 18 JCC, *supra* note 1, at 932 (1910) (Oct. 16, 1780). The journals of the conventions are reproduced in: 1 HOADLY, *supra* note 1, at 585–620 (reproducing journals from the Providence Convention (Dec. 25, 1776 to Jan. 3, 1777), the Springfield Convention, and the New Haven Convention); 2 HOADLY, *supra* note 1, at 562–79 (reproducing journals from the Hartford Convention (Oct. 1779) and the Philadelphia Convention (Jan. 1780)); 3 HOADLY, *supra* note 1, at 559–76 (reproducing journals from the Boston Convention, the Hartford Convention (Nov. 1780), and the Providence Convention (June 1781)). The roster and recommendations of the Annapolis Convention may be found at *Proceedings of Commissioners to Remedy Defects of the Federal Government*, THE AVALON PROJECT: DOCUMENTS IN LAW, HISTORY AND DIPLOMACY, available at http://avalon.law.yale.edu/18th_century/annapoli.asp.

to twelve.⁶⁹ On their rosters one sees certain names repeatedly—enough to promote crystallization of common practices.⁷⁰

Each interstate convention was called by state legislatures, sometimes pursuant to congressional recommendation.⁷¹ They were modeled on conventions attended by international diplomats,⁷² and consisted of delegates serving as agents for their respective state legislatures. The delegates were empowered by documents called “commissions” or “credentials,” and, like other agents, were bound by the scope of their authority.⁷³ They were subject to additional legislative instructions.⁷⁴ Each state delegation formed a unit, often called a “committee.”⁷⁵ The gathering as a whole sometimes was referred to a convention of “the states”⁷⁶ or a convention of “committees.”⁷⁷

As a result of all this experience, federal convention customs, practices, and protocols were fairly well standardized when Article V was written. In the ensuing pages, I shall cite those customs, practices, and protocols as relevant issues arise.

VII. OTHER EVIDENCE—FOUNDING AND POST-FOUNDING

Many other sources offer insight into the state-application-and-convention process. Information on the original meaning of Article V comes from eighteenth-century dictionaries, debates over the Constitution, material from the first session of the First Congress, including the first two

69. See sources cited *supra* note 68.

70. See sources cited *supra* note 68 (listing among their attendees such Constitutional Convention delegates as John Dickinson, Alexander Hamilton, James Madison, William C. Houston, George Read, Richard Bassett, Edmund Randolph, John Langdon, and Nathaniel Gorham).

71. See, e.g., Simeon E. Baldwin, *The New Haven Convention of 1778*, in *THREE HISTORICAL PAPERS READ BEFORE THE NEW HAVEN HISTORICAL SOCIETY* 3, 37–38 (1882) (listing and discussing those interstate conventions commissioned to deal with issues of public credit).

72. CAPLAN, *supra* note 1, at 95–96 (citing Emer Vattel’s then-popular work on international law).

73. *Id.*; see also *THE FEDERALIST* NO. 40, *supra* note 1, at 199 (“The powers of the convention ought, in strictness, to be determined, by an inspection of the commissions given to the members by their respective constituents.”).

74. E.g., 2 HOADLY, *supra* note 1, at 574 (reproducing Rhode Island’s instructions to its delegates at the 1780 Philadelphia Convention, which dealt with price inflation).

75. *Id.*

76. E.g., *id.* at 578 (reproducing a resolution of the 1780 Philadelphia convention, referring to it as a “meeting of the several states”). After the Constitution was ratified, early state applications applied similar nomenclature to a convention for proposing amendments. See *infra* note 78 and accompanying text.

77. E.g., 17 JCC, *supra* note 1, at 790 (1910) (Aug. 29, 1780) (referring to the 1780 Boston Convention as a “convention of committees”).

state applications for an amendments convention, and other legal and non-legal documents.

There is also a mass of material illuminating how the process was understood in years subsequent to the Founding. Although a convention for proposing amendments has never been held, state legislatures throughout the nineteenth and twentieth centuries issued hundreds of applications,⁷⁸ often amid intense public discussion. Also, courts frequently have ruled on Article V questions in ways that clarify the state-application-and-convention process.⁷⁹

The remainder of this paper relies both on Founding and post-Founding evidence to deduce and explain the rules governing that procedure.

VIII. THE NATURE OF APPLICATIONS AND THE RULES GOVERNING THEM

A. *The Nature of an Application*

Article V provides that Congress shall call a convention for proposing amendments “on the Application of the Legislatures of two thirds of the several States.”⁸⁰ Alexander Donaldson’s *Universal Dictionary of the English Language*, published in 1763, contained the following relevant definitions of “application”: “the act of applying one thing to another. The thing applied. The act of applying to any person, as a solicitor, or petitioner. . . . The address, suit, or request of a person. . . .”⁸¹

Other eighteenth-century definitions were not greatly different.⁸² Nathaniel Bailey’s dictionary defined the word as “the art of applying or addressing a person; also care, diligence, attention of the mind.”⁸³ The same source defined “to apply” as “to put, set, or lay one thing to another, to have recourse to a thing or person, to betake, to give one’s self up to.”⁸⁴

78. See *Convention Applications*, THE ARTICLE V LIBRARY: A PUBLIC RESOURCE FOR ARTICLE V RESEARCH, <http://www.article5library.org/> (last visited May 5, 2011) (collecting hundreds of applications and related documents). Many applications are also collected at IMAGES OF ARTICLE V APPLICATIONS, <http://www.article-5.org/file.php/1/Amendments/> (last visited May 5, 2011), although some of the documents labeled applications are documents of other kinds.

79. See *infra* text accompanying notes 305–323.

80. U.S. CONST. art. V.

81. ALEXANDER DONALDSON, AN UNIVERSAL DICTIONARY OF THE ENGLISH LANGUAGE (Edinburgh, 1763) (unpaginated) (defining “application”).

82. *E.g.*, SAMUEL JOHNSON, 1 A DICTIONARY OF THE ENGLISH LANGUAGE (London, 8th ed. 1786) (unpaginated); THOMAS SHERIDAN, *supra* note 65.

83. NATHANIEL BAILEY, A UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (Edinburgh, Neill & Co., 25th ed. 1783) (unpaginated).

84. *Id.*

Thus, a state legislature's "Application" to Congress is the legislature's address to Congress requesting a convention.⁸⁵ Applications are adopted by legislative resolution.⁸⁶

B. The Application Process is Not Subject to Normal Legislative Limitations, Such as Presentment to the Governor

Today, most governors must sign, and may veto, bills and many legislative resolutions. This gives them a share in the legislative power. Article V provides that applications are to be made by "the Legislatures of two thirds of the several States."⁸⁷ This raises the question of whether a state legislature operating under Article V includes the governor in states requiring the governor's signature on laws.⁸⁸ The evidence suggests that the answer is "no." Governors need not sign applications and may not veto them.⁸⁹

The Constitution sometimes uses the term "legislature" to refer to the entire legislative process,⁹⁰ but on other occasions uses the term to designate the legislative assembly only. For example, the Guarantee Clause distinguishes "Application[s]" originating from "the Legislature" from those originating from "the Executive."⁹¹ Similarly, election of United States Senators was entrusted to state legislatures without gubernatorial participation.⁹²

Author Russell Caplan writes that the bitter colonial experience with royal governors argues that "legislature" in Article V refers to the representative assembly only.⁹³ His argument is strengthened by the 1789

85. Natelson, *Amending*, *supra* note 1, at 1.

86. See generally the applications at *Convention Applications*, *supra* note 78.

87. U.S. CONST. art. V.

88. Natelson, *Amending*, *supra* note 1, at 10.

89. CAPLAN, *supra* note 1, at 104–05; Natelson, *Amending*, *supra* note 1, at 10–11.

90. E.g., U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators."); *Smiley v. Holm*, 285 U.S. 355, 372–73 (1932) (holding that this clause refers to the entire legislative process, including the governor); *Davis v. Hildebrandt*, 241 U.S. 565, 568 (1916) (holding that this clause refers to the entire legislative process, including voter referendum).

91. U.S. CONST. art. IV, §4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.").

92. U.S. CONST. art. I, § 3, cl. 1 (assigning election of Senators to state legislatures); *cf.* U.S. CONST. art. I, § 3, cl. 2 (dividing between legislature and executive the responsibility for filling vacancies in the Senate).

93. CAPLAN, *supra* note 1, at 104.

amendment applications from New York and Virginia, both of which lacked the governor's signature.⁹⁴

One might respond that because neither the governor of New York nor the governor of Virginia enjoyed a veto in 1789, they had no share in the legislative power—and that this explains why they did not sign their states' applications. However, the New York Constitution did vest a qualified veto, subject to a two thirds override, in a “council of revision” that included the governor.⁹⁵ Yet the council's approval does not appear on the application.⁹⁶ The Framers knew, moreover, that in Massachusetts the governor enjoyed a qualified veto,⁹⁷ and in soon-to-be-admitted Vermont, the governor's council held a suspensive veto.⁹⁸ Because the Constitution makes no mention of such powers, we can infer that the Framers' decision to mention only representative assemblies was deliberate.

In 1798, the Supreme Court held that Congress acts without the President when proposing amendments,⁹⁹ thereby implying that the same rule prevails at the state level. Newer case law likewise holds that Article V confers powers on named assemblies, not on the lawmaking apparatus *per se*.¹⁰⁰ In other words, resolutions pursuant to Article V, including those approving applications, are not considered legislative in nature.¹⁰¹

For the same reason, state constitutional provisions governing the *legislative* process do not apply to Article V applications. The courts have invalidated state constitutional rules mandating legislative supermajorities¹⁰² and binding referenda¹⁰³ when such rules would apply to Article V resolutions. Restrictions on an Article V assembly's procedure

94. *Id.* at 104–05; H.R. JOURNAL, 1st Cong., 1st Sess. 29–30 (1789), available at *Convention Applications*, *supra* note 78.

95. N.Y. CONST. of 1777, art. III.

96. H.R. JOURNAL, 1st Cong., 1st Sess. 29–30 (1789), available at *Convention Applications*, *supra* note 78.

97. MASS. CONST. of 1780, ch. I, § I, art. II.

98. VT. CONST. of 1786, ch. II, § XVI.

99. *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798).

100. *United States v. Sprague*, 282 U.S. 716 (1931) (bestowing power on Congress); *Hawke v. Smith*, 253 U.S. 221 (1920) (bestowing power on state legislature).

101. *See supra* notes 99–100.

102. *Dyer v. Blair*, 390 F. Supp. 1291 (N.D. Ill. 1975) (Stevens, J.) (applying state constitutional requirement of a supermajority vote only because the legislature had freely adopted it when acting under Article V).

103. *See, e.g., Leser v. Garnett*, 258 U.S. 130 (1922); *Hawke*, 253 U.S. 221; *see also* *Prior v. Norland*, 188 P. 729 (Colo. 1920); *In re Opinion of the Justices*, 167 A. 176 (Me. 1933); *State ex rel. Tate v. Sevier*, 62 S.W.2d 895 (Mo. 1933), *cert. denied*, 290 U.S. 679 (1933); *In re Opinion of the Justices*, 172 S.E. 474 (N.C. 1933); *State ex rel. Donnelly v. Myers*, 186 N.E. 918 (Ohio 1933). *But cf. Kimble v. Swackhamer*, 439 U.S. 1385, 1388, *appeal dismissed*, 439 U.S. 1041 (1978) (Rehnquist, J.) (permitting non-binding referendum).

are valid only if freely adopted by that assembly itself.¹⁰⁴ Correspondingly, an assembly is free to adopt its own procedures when discharging an Article V function.¹⁰⁵

C. States May Rescind Applications

Some have argued that states cannot rescind applications, and that once adopted an application continues in effect forever, unless a convention is called.¹⁰⁶ This position is contrary to the principles of agency the Founders incorporated into the process.¹⁰⁷ An application is a deputation from the state legislature to Congress to call a convention.¹⁰⁸ Just as one may withdraw authority from an agent before the interest of a third party vests, so may the state legislature withdraw authority from Congress before the two thirds threshold is reached.¹⁰⁹

Caplan demonstrates that the power of a state to rescind its resolutions, offers, and ratifications was well established by the time Article V was adopted, ending only when the culmination of a joint process was reached.¹¹⁰ Just as a state may rescind ratification of a constitutional amendment any time before three fourths of the states have ratified,¹¹¹ it may also withdraw its application any time before two thirds of states have applied. At least one modern court has agreed.¹¹²

D. Applications Do Not Grow “Stale” with the Passage of Time

Some have argued that applications automatically become “stale” after an unspecified period of time, and no longer count toward a two thirds majority.¹¹³ This argument is supported by a 1921 Supreme Court case, *Dillon v. Gloss*, suggesting that ratifications, to be valid, must be issued within a reasonable time of each other.¹¹⁴

As far as I have discovered, there is no evidence from the Founding Era or from early American practice implying that applications become stale automatically, or that Congress can declare them so. On the contrary,

104. *Dyer*, 390 F. Supp. at 1308.

105. *E.g., id.* at 1307.

106. *See Rees, Amendment Process, supra* note 1, at 72 (discussing this position, but disagreeing).

107. *See Natelson, Amending, supra* note 1, at 15.

108. *Id.* at 19.

109. *See id.* at 73 (analogizing, as the Founders would have, to the law of nations).

110. CAPLAN, *supra* note 1, at 108–10.

111. Grover Rees, III, Comment, *Rescinding Ratification of Proposed Constitutional Amendments: A Question for the Court*, 37 LA. L. REV. 896, 896 (1977).

112. *Idaho v. Freeman*, 529 F. Supp. 1107 (D. Idaho 1981), *vacated as moot*, *Carmen v. Idaho*, 459 U.S. 809 (1982).

113. *See Rees, Amendment Process, supra* note 1, at 89.

114. *Dillon v. Gloss*, 256 U.S. 368, 375 (1921).

during the constitutional debates, participants frequently noted with approval the Constitution's general lack of time requirements in the amendment process.¹¹⁵ Moreover, the ministerial nature of the congressional duty to call a convention¹¹⁶ and Congress's role as the agent for those legislatures in this process,¹¹⁷ suggests the opposite. Time limits are for principals, not agents, to impose. Therefore, if a state legislature believes its application to be stale, that legislature may rescind it.¹¹⁸

Events subsequent to *Dillon* support this inference. For example, the Supreme Court essentially has disavowed much of the "staleness" language in that case.¹¹⁹ The universally-recognized adoption of the Twenty-Seventh Amendment, based on ratifications stretching over two centuries, points in the same direction.¹²⁰

Even if *ratifications* become stale, it does not follow that *applications* do. The "staleness" discussion in *Dillon* was based partly on presumed congressional power to set ratification time limits as an incident of its power to choose one of two "Mode[s] of Ratification."¹²¹ However, congressional authority to call a convention for proposing amendments is

115. See *Responses to An Old Whig I*, MASS. CENTINEL, Oct. 31, 1787, reprinted in 4 DOCUMENTARY HISTORY, *supra* note 1, at 179, 182 (1997):

There is another argument I had nearly forgotten, and that is the degree of liberty admitted as to this power of revision in the new Constitution, which we have not expressed, even in that of Massachusetts—For the citizens of this Commonwealth are only permitted at a given time to revise their Constitution and then only if two thirds are agreed; but in the other case, the citizens of the United States can do it, without any limitation of time.

Id. For another writing celebrating the lack of time limits, see *Uncus*, MD. J., Nov. 9, 1787, reprinted in 14 DOCUMENTARY HISTORY, *supra* note 1, at 76 (1983) ("Should it be thought best at any time hereafter to amend the plan; sufficient provision for it is made in Art. 5, Sect. 3" *Id.* at 81).

116. See *infra* note 257 and accompanying text.

117. See Natelson, *Amending*, *supra* note 1, at 15.

118. See Rees, *Amendment Process*, *supra* note 1, at 88 (arguing that the purpose of the process is such that each state legislature ought to control its own application); cf. CAPLAN, *supra* note 1, at 108–10 (explaining that the Founding-Era record suggests states have power to rescind their applications).

119. See *Coleman v. Miller*, 307 U.S. 433, 452–53 (1939) ("[I]t does not follow that, whenever Congress has not exercised that power [to fix a reasonable time for ratification], the Court should take upon itself the responsibility of deciding what constitutes a reasonable time and determine accordingly the validity of ratifications.").

120. See Paulsen, *supra* note 1, at 680 (citing the Justice Department's belief that because there was a "formal proposal by a two-thirds majority of both houses of Congress and [] formal ratifications of thirty-eight state legislatures[.]" time considerations were irrelevant).

121. *Dillon v. Gloss*, 256 U.S. 368, 376 (1921).

narrower than its authority over ratification: The latter is partly discretionary.¹²² The former is purely ministerial.¹²³

The Constitution prescribes no time period by which an application becomes “stale.”¹²⁴ Hence, a decision as to whether a particular application is or is not “stale” is purely a matter of judgment.¹²⁵ As the Supreme Court has noted, the courts cannot make this judgment because they have no legal criteria by which to judge.¹²⁶ Leaving the decision to Congress would be the worst possible solution,¹²⁷ because doing so could defeat the central purpose of the state-application-and-convention process—to allow the states to bypass Congress. History strongly suggests that Congress would manipulate the period to interfere with the process. During the 1960s, for example, senators opposed to proffered amendments argued that all applications should be deemed stale (and therefore invalid) after a period of no more than two or three years!¹²⁸ Because of the biennial schedule of many state legislatures, this would have effectively excised the state-application-and-convention process from the Constitution. Yet during the 1970s, when states balked at approving an amendment Congress had proposed, Congress purported to extend the ratification period from seven to ten years.¹²⁹

In the final analysis, the only proper judge of whether an application is fresh or stale is the legislature that adopted it. Any time a legislature deems an application (or a ratification) outdated, the legislature may rescind it, as many have done.

122. See *United States v. Sprague*, 282 U.S. 716, 732–33 (1931) (discussing congressional discretion as to the mode of ratification).

123. See *infra* Part X.A–B. (discussing ministerial nature of call after applications).

124. CAPLAN, *supra* note 1, at 110.

125. See *id.* at 111 (arguing that “[i]n theory an application could remain effective . . . indefinitely.”)

126. *Coleman v. Miller*, 307 U.S. 438, 453–54 (1939).

127. See Rees, *Amendment Process*, *supra* note 1, at 85 (discussing the conflict of interest in allowing Congress to determine time limits for ratification of amendments); *cf.* Paulsen, *supra* note 1, at 717 (“[T]he least defensible position would seem to be one of plenary congressional power . . .”).

128. CAPLAN, *supra* note 1, at 75–76 (quoting Senator Robert Kennedy).

129. See *Idaho v. Freeman*, 529 F. Supp. 1107 (D. Idaho 1981), *judgment vacated as moot by* *Carmen v. Idaho*, 459 U.S. 809 (1982) (concluding that “the congressional act of extending the time period for ratification [of the Equal Rights Amendment] was an improper exercise of Congress’ authority under article V.”); see also Grover Rees, III, *Throwing Away the Key: The Unconstitutionality of the Equal Rights Amendment Extension*, 58 TEX. L. REV. 875 (1980) (arguing that only the state legislatures have the power to extend their own ratifications).

IX. DEFINING THE SCOPE OF THE CONVENTION

A. Founding-Era Convention Practice Before the 1787 Convention

Perhaps no Article V question has been debated so fiercely, on so little evidence, as whether applying states may limit the scope of a convention for proposing amendments. A more complete view of the evidence tells us the answer is almost certainly “yes.”

It is uncontroverted that state legislative applications may request a convention *unlimited* as to subject¹³⁰—the sort of assembly the Founders, in imitation of international practice, called a plenipotentiary convention.¹³¹ Many, however, have contended that the applying states do not have the complementary power of limiting the scope.¹³² People so arguing deem an amendments convention a “constitutional convention,”¹³³ an inherently plenipotentiary body, enjoying power to propose any changes it wishes.¹³⁴ Others have asserted that it might be more than a proposing body: It could constitute itself a junta that could repeal the Bill of Rights, restore slavery, or otherwise radically alter our system of government.¹³⁵ How the convention could do these things without control of the military is never made clear.

The claim that any interstate convention is invariably a plenipotentiary “constitutional convention”—and therefore a potential “runaway”—first arose in the nineteenth century.¹³⁶ It has no Founding-Era pedigree and no basis in Founding-Era practice.

During that period, many conventions were held within individual colonies and states.¹³⁷ These included plenipotentiary gatherings that wrote state constitutions and otherwise erected new governments.¹³⁸ But they also

130. Such applications were submitted by New York in 1789, by Georgia in 1832, and by several other states in the run-up to the Civil War. Natelson, *First Century*, *supra* note 1, at 6, 8–13.

131. See CAPLAN, *supra* note 1, at 23. On the use of plenipotentiary conventions, see also *id.* at xx–xxi, discussing the scope of such conventions, and *id.* at 20, citing Hamilton’s desire for calling a plenipotentiary convention to overhaul the Articles.

132. Ervin, *supra* note 1, at 881.

133. I have made that error in oral discussions of the Constitution; however, I have been in very good company. See, e.g., Ervin, *supra* note 1, *passim*; Paulsen, *supra* note 1, at 738.

134. For an example of this approach, see Ralph M. Carson, *Disadvantages of a Federal Constitutional Convention*, 66 MICH. L. REV. 921, 922–24 (1968), arguing that once convened, attempts by Congress to impose limitations on subject matter would be of no avail.

135. CAPLAN, *supra* note 1, at vii–viii (quoting various public figures), 146–47 (quoting Theodore Sorensen).

136. See *id.* at xi–xv, 44, 47, 56, 60.

137. Natelson, *First Century*, *supra* note 1, at 3.

138. *Id.*

included conventions called for narrower purposes, such as state conventions for proposing amendments.¹³⁹ The Pennsylvania Constitution of 1776 and the Vermont Constitution of 1786, for example, both provided for limited amendments conventions, each restricted in its scope by a “council of censors.”¹⁴⁰ The Massachusetts Constitution of 1780 provided for amendment by convention,¹⁴¹ as did the Georgia Constitution of 1777. The latter instrument authorized the convention only to draft constitutional amendments whose gist had been prescribed by a majority of counties.¹⁴²

139. *Id.*

140. PA. CONST. of 1776, § 47:

The said council of censors shall also have power to call a convention, to meet within too [sic] years after their sitting, if there appear to them an absolute necessity of amending any article of the constitution which may be defective, explaining such as may be thought not clearly expressed, and of adding such as are necessary for the preservation of the rights and happiness of the people: But the articles to be amended, and the amendments proposed, and such articles as are proposed to be added or abolished, shall be promulgated at least six months before the day appointed for the election of such convention, for the previous consideration of the people, that they may have an opportunity of instructing their delegates on the subject.

Id.; see also VT. CONST. of 1786, ch. II, § XL (containing similar language).

141. MASS. CONST. of 1780, pt. II, ch. VI, art. X:

In order the more effectually to adhere to the principles of the constitution, and to correct those violations which by any means may be made therein, as well as to form such alterations as from experience shall be found necessary, the general court which shall be in the year of our Lord [1795] shall issue precepts to the selectmen of the several towns, and to the assessors of the unincorporated plantations, directing them to convene the qualified voters of their respective towns and plantations, for the purpose of collecting their sentiments on the necessity or expediency of revising the constitution in order to amendments.

And if it shall appear, by the returns made, that two-thirds of the qualified voters throughout the State, who shall assemble and vote in consequence of the said precepts, are in favor of such revision or amendment, the general court shall issue precepts, or direct them to be issued from the secretary's office, to the several towns to elect delegates to meet in convention for the purpose aforesaid.

Id.

142. GA. CONST. of 1777, art. LXIII:

No alteration shall be made in this constitution without petitions from a majority of the counties . . . at which time the assembly shall order a convention to be called for that purpose, specifying the alterations to be made, according to the petitions preferred to the assembly by the majority of

The Georgia procedure may well have inspired the state-application-and-convention process of Article V.¹⁴³

Some conventions were not limited to individual colonies or states, but were inter-colonial, interstate, or “federal.”¹⁴⁴ The opening assembly of this sort in the Founding Era was the First Continental Congress (1774).¹⁴⁵ Its charge was plenipotentiary: “to consult and advise [i.e., deliberate]¹⁴⁶ with the Commissioners or Committees of the several English Colonies in America, on proper measures for advancing the best good of the Colonies.”¹⁴⁷ Between the First Continental Congress and the 1787 constitutional convention, there were at least ten other interstate gatherings.¹⁴⁸ All were limited to issuing recommendations, and none was plenipotentiary.¹⁴⁹ The broadest was probably the Springfield Convention of 1777, which was entrusted with issues of currency, monopoly and economic oppression, and interstate trade restrictions.¹⁵⁰ It was, however, limited formally to matters outside the authority of Congress.¹⁵¹ Nearly as broad was the charge to the three-state Boston Convention of 1780, which was held to consider all aspects of the ongoing war.¹⁵² The convention interpreted this charge liberally to include recommendations on trade and currency.¹⁵³

The first Providence Convention (1776–77) was restricted to currency and defense measures.¹⁵⁴ Shortly thereafter, Congress recommended interstate conventions in York, Pennsylvania and Charleston, South Carolina, to consider the single subject of price-stabilization.¹⁵⁵ Because the Providence meeting had included the four New England states,¹⁵⁶ Congress recommended that New York, New Jersey, Pennsylvania, Maryland, Delaware, and Virginia meet at York and the Carolinas and Georgia

the counties as aforesaid.

Id.

143. Article XIX in the Committee of Detail’s draft at the 1787 convention looked rather like the Georgia provision. *See* 2 FARRAND’S RECORDS, *supra* note 1, at 188.

144. *See* Natelson, *First Century*, *supra* note 1, at 3.

145. *See* Natelson, *Amending*, *supra* note 1, at 24 n.42.

146. On the meaning of “advise” as meaning in this context, to “deliberate,” *see* NATELSON, ORIGINAL CONSTITUTION, *supra* note 1, at 70–72.

147. 1 JCC, *supra* note 1, at 18 (1904) (commission of Connecticut delegates).

148. Natelson, *Amending*, *supra* note 1, at 6; *see also* CAPLAN, *supra* note 1, at 16–26.

149. Natelson, *Amending*, *supra* note 1, at 6.

150. *Id.* at 24 n.44; *see also* CAPLAN, *supra* note 1, at 17–18.

151. 1 HOADLY, *supra* note 1, at 599.

152. *See* 3 HOADLY, *supra* note 1, at 559–64.

153. *See id.*

154. 1 HOADLY, *supra* note 1, at 585–86.

155. CAPLAN, *supra* note 1, at 17; 7 JCC, *supra* note 1, at 124–25 (1907) (Feb. 15, 1777) (reproducing the congressional calls).

156. Maine was then part of Massachusetts, and Vermont had not yet been admitted.

convene at Charleston.¹⁵⁷ It is unclear whether the Charleston meeting ever took place.¹⁵⁸ The York convention did meet; however, it did not issue a recommendation because of a tie vote among the states present.¹⁵⁹

Interstate meetings at New Haven (1778) and Philadelphia (1780) also dealt only with price regulation.¹⁶⁰ The first Hartford Convention (1779) was empowered to address currency and trade,¹⁶¹ and the second (1780) met “for the purpose of advising and consulting upon measures for furnishing the necessary supplies of men and provision for the army.”¹⁶² The second Providence Convention (1781) was entrusted only with recommending how to provide supplies to the army for a single year.¹⁶³

The last of the limited-subject interstate gatherings is the most famous today. The Annapolis Convention of 1786 was to focus on “the trade and Commerce of the United States.”¹⁶⁴ Its limited scope induced James Madison explicitly to distinguish it from a plenipotentiary convention.¹⁶⁵

In sum, after the plenipotentiary First Continental Congress, all the interstate conventions were called to recommend solutions to one or more discrete, previously identified problems.¹⁶⁶ Today we probably would call them “task forces.” For the most part, all remained within the scope of their calls.¹⁶⁷ If there was an exception, it was the assembly at Annapolis—and that exception was solely to express the “wish” and “opinion” that another convention be held to consider defects in the political system.¹⁶⁸ So, by

157. 7 JCC, *supra* note 1, at 124–25 (1907).

158. See CAPLAN, *supra* note 1, at 17 (asserting that “the Charleston convention never materialized.”)

159. Byron W. Holt, *Continental Currency*, 5 SOUND CURRENCY, Apr. 1, 1898, at 81, 106–07 (discussing the York convention and other “price conventions”). *But see* 3 RICHARD HILDRETH, THE HISTORY OF THE UNITED STATES OF AMERICA 182 (1880) (claiming that the York convention did arrive at a price-fixing agreement).

160. 1 HOADLY, *supra* note 1, at 607 (New Haven); *Id.* at 572 (Philadelphia).

161. 2 HOADLY, *supra* note 1, at 562–63.

162. 3 HOADLY, *supra* note 1, at 565 (commission of New Hampshire delegates).

163. *Id.* at 575–76.

164. Proceedings of Commissioners to Remedy Defects of the Federal Government, in 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 116, 117 (2d ed. 1861) (Annapolis, Sept. 11, 1786) [hereinafter Proceedings of Commissioners], available at http://avalon.law.yale.edu/18th_century/annapoli.asp. Because only five states were present, the delegates voted not to proceed with their charge and suggested to Congress that it call a convention with a broader charge. *Id.* at 118; *cf.* Harmon, *supra* note 1, at 398 (pointing out that the Annapolis Convention was limited in nature).

165. See CAPLAN, *supra* note 1, at 23; see also *id.* at xx–xxi (explaining usage), 20 (quoting Hamilton).

166. See *id.* at 16–26.

167. The recommendation of a day of prayer by the first Providence Convention, 1 HOADLY, *supra* note 1, at 598–99, would have been seen by the founding generation as within the call.

168. See Proceedings of Commissioners, *supra* note 164, at 117–18.

1787, there had been ten interstate conventions, and not a single one had been a “runaway.”¹⁶⁹

B. Was the 1787 Federal Convention a “Runaway?”

Ann Diamond argues that reading Article V “so that it contemplates a constitutional convention that writes—not amends—a constitution, is often a rhetorical ploy to terrify sensible people.”¹⁷⁰ For many years, central to that “ploy” has been the claim that the history of the 1787 federal convention (sometimes asserted to be the only federal convention ever held) illustrates how such an assembly can “run away.” Directed by Congress to convene “for the sole and express purpose of revising the Articles of Confederation,”¹⁷¹ the delegates (it is said) exceeded the limit Congress had placed on their authority. Instead, they scrapped the Articles and wrote an entirely new Constitution.¹⁷²

It is true, of course, that they did write an entirely new Constitution; however, further examination reveals that the rest of this story is essentially false.

On September 14, 1786, the delegates to the Annapolis Convention recommended to the five states that had sent them—not to Congress—that those states coordinate with the other eight to call an assembly with authority to recommend changes to “render the *constitution* of the Federal Government adequate to the exigencies of the Union.”¹⁷³ This resolution was merely a recommendation outside that assembly’s powers, and as such, had no legal force.¹⁷⁴

According to usages of the time, the term “constitution” usually did not denote a particular document, such as the Articles, but rather a governmental structure as a whole.¹⁷⁵ Particular documents traditionally had not been called “constitutions,” but “instruments of government,” “frames of government,” or “forms of government.” This explains why several of the early state constitutions described themselves in multiple terms.¹⁷⁶ In

169. See Natelson, *Amending*, *supra* note 1, at 6.

170. Diamond, *supra* note 1, at 137.

171. Report of Congressional Proceedings (Feb. 21, 1787), in 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 116, 117 (Philadelphia, J.B. Lippincott & Co. 2d ed. 1861).

172. See, e.g., Douglas G. Voegler, *Amending the Constitution by the Article V Convention Method*, 55 N.D. L. REV. 355, 393 (1979).

173. Proceedings of Commissioners, *supra* note 164, at 118 (emphasis added).

174. See *supra* Part V.A.

175. For example, the 1786 edition of Johnson’s dictionary contained only these political meanings of *constitution*: “Established form of government; system of laws and customs” and “Particular law; . . . establishment; institution.” JOHNSON, *supra* note 82. The political definitions of *constitution* in the 1789 edition of Thomas Sheridan’s dictionary were almost identical. SHERIDAN, *supra* note 65 (defining “constitution”).

176. See, e.g., DEL. CONST. of 1776, pmbl. (“Constitution, or System of Government”);

other words, the Annapolis convention was suggesting changes necessary to render the federal *political system* “adequate to the exigencies” of the union.¹⁷⁷ However, the convention did suggest that any changes be approved by Congress and “afterwards confirmed by the Legislatures of every State.”¹⁷⁸

In the ensuing months, seven states provided for the appointment of delegates to a new convention in terms at least as broad as the Annapolis recommendation and without the proviso that any changes be approved by Congress and by every state.¹⁷⁹ On February 21, 1787, a committee of Congress recommended that Congress add its moral support to the idea.¹⁸⁰ This triggered the objection of the New York delegation, which offered substitute language limiting the recommendation only to amending the Articles.¹⁸¹ Although Congress defeated the New York motion, it approved a compromise resolution offered by Massachusetts. This resolution also would have limited the scope of the Philadelphia convention:

Resolved that in the opinion of Congress it is expedient that on the second Monday in May next a Convention of delegates who shall have been appointed by the several States be held at Philadelphia for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the States render the federal Constitution adequate to the exigencies of Government and the preservation of the Union.¹⁸²

The limited nature of this resolution, “the sole and express purpose of revising the Articles of Confederation,” constitutes the usual evidence cited for the narrow authority of the convention.¹⁸³ However, it does not prove what it is presented to prove, for it was not actually a legal call: Under the Articles of Confederation, Congress had no power to issue such a call, and

MASS. CONST. of 1780, pmbl. (“declaration of rights and frame of government as the constitution”); MD. CONST. of 1776, pmbl. (“Constitution and Form of Government”); VA. CONST. of 1776, tit. (“Constitution or Form of Government”).

177. See Proceedings of Commissioners, *supra* note 164, at 118.

178. *Id.*

179. 3 FARRAND’S RECORDS, *supra* note 1, at 559 (reproducing the Virginia authorization, dated Oct. 16, 1786); *id.* at 563 (reproducing the New Jersey commission, dated Nov. 3, 1786); *id.* at 565–66 (reproducing Pennsylvania enabling legislation adopted Dec. 30, 1786); *id.* at 568 (showing that North Carolina elected its delegates in Jan., 1787); *id.* at 571–72 (showing the New Hampshire resolution passing on Jan. 17, 1787); *id.* at 574 (showing the Delaware authorization as passing on Feb. 3, 1787); *id.* at 576–77 (reproducing the Georgia ordinance, adopted Feb. 10, 1787).

180. 32 JCC, *supra* note 1, at 71–72 (1936).

181. *Id.* at 72.

182. *Id.* at 73–74.

183. *Id.*

certainly none to define its scope.¹⁸⁴ Indeed, the words of the congressional resolution reflect its purely precatory nature—“in the opinion of Congress.”¹⁸⁵ In other words, the congressional resolution, like that of the Annapolis gathering, was purely a recommendation.¹⁸⁶ States could participate or not, and under such terms as they wished. If they did so, as a matter of law, *the states*, not Congress, fixed the scope of their delegates’ authority.¹⁸⁷ Congress had no authority whatsoever to restrict the authority the states gave their delegates.¹⁸⁸

Six more states remained to be heard from. Rhode Island elected not to participate.¹⁸⁹ South Carolina, Connecticut, and Maryland stuck to the broader formula adopted by the initial seven.¹⁹⁰ Only Massachusetts¹⁹¹ and New York¹⁹² adopted the narrower congressional approach. But in Philadelphia, they were outnumbered ten states to two.¹⁹³

184. ARTICLES OF CONFEDERATION OF 1781.

185. 32 JCC, *supra* note 1, at 74 (1936).

186. *Id.*

187. *Accord* CAPLAN, *supra* note 1, at 97; *see also* THE FEDERALIST NO. 40, *supra* note 1, at 199.

188. CAPLAN, *supra* note 1, at 97.

189. 3 FARRAND’S RECORDS, *supra* note 1, at 557–59 (listing the delegates at the convention).

190. *Id.* at 581, 585, 586 (reproducing the South Carolina, Connecticut, and Maryland credentials).

191. *Id.* at 584 (reproducing the Massachusetts credentials).

192. *Id.* at 579–80 (reproducing the New York credentials).

193. The wording of each commission varied somewhat, with some phrases repeating themselves. The relevant wording of each of the ten states’ commissions was as follows: Connecticut:

for the purposes mentioned in the said Act of Congress that may be present and duly empowered to act in said Convention, *and to discuss* upon such Alterations and Provisions agreeable to the general principles of Republican Government as they shall think proper to render the federal Constitution adequate to the exigencies of Government and, the preservation of the Union.

Id. at 585 (emphasis added). Delaware: “deliberating on, and discussing, such Alterations and further Provisions as may be necessary to render the Fœderal Constitution adequate to the Exigencies of the Union” *Id.* at 574. Georgia: “devising and discussing all such Alterations and farther Provisions as may be necessary to render the *Federal Constitution* adequate to the exigencies of the Union” *Id.* at 577 (italics in original). Maryland: “considering such Alterations and further Provisions as may be necessary to render the Fœderal Constitution adequate to the Exigencies of the Union” *Id.* at 586. New Hampshire: “devising & discussing all such alterations & further provisions as to render the federal Constitution adequate to the Exigencies of the Union” *Id.* at 572. New Jersey: “taking into Consideration the state of the Union, as to trade and other important objects, and of devising such other Provisions as shall appear to be necessary to render the Constitution of the Federal Government adequate to the exigencies thereof.” *Id.* at 563.

At the convention itself, the Massachusetts and New York delegates were in a quandary. Elbridge Gerry of Massachusetts questioned the convention's authority to recommend changes extending beyond the Articles,¹⁹⁴ and ultimately refused to sign. His colleague Caleb Strong was forced to return home to tend a sick wife, so he was spared from having to make a choice.¹⁹⁵ The other two Bay State delegates, Rufus King and Nathaniel Gorham, both participated and added their names.

Of the three New Yorkers, two left early.¹⁹⁶ The third New Yorker, Alexander Hamilton, was not of a particularly scrupulous cast, and he fitfully participated and finally signed the Constitution—although in fairness, it should be pointed out that Hamilton signed only as an individual; because of the departure of his colleagues he no longer was an official representative of his state.

In addition, the credentials of the five Delaware signers, while broad enough to authorize scrapping most of the Articles, did limit the delegates in one particular: they were not to agree to any changes that altered the rule that “in the United States in Congress Assembled each State shall have one Vote.”¹⁹⁷ Because the new bicameral Federal Congress was a very different entity with a very different role than the Articles of Confederation's unicameral “United States in Congress Assembled,”¹⁹⁸ the Delaware delegates could argue that they had remained within the strict letter of their commission.¹⁹⁹ Even if they had not, at most only seven or eight of the

North Carolina: “for the purpose of revising the Fœderal Constitution . . . To hold, exercise and enjoy the appointment aforesaid, with all Powers, Authorities and Emoluments to the same belonging or in any wise appertaining . . .” *Id.* at 567–68.

Pennsylvania:

“to meet such Deputies as may be appointed and authorized by the other States, to assemble in the said Convention at the City aforesaid, and to join with them in devising, deliberating on, and discussing, all such alterations and further Provisions, as may be necessary to render the fœderal Constitution fully adequate to the exigencies of the Union”

Id. at 565–66. South Carolina: “devising and discussing all such Alterations, Clauses, Articles and Provisions, as may be thought necessary to render the Fœderal Constitution entirely adequate to the actual Situation and future good Government of the confederated States” *Id.* at 581. Virginia: “devising and discussing all such Alterations and farther Provisions as may be necessary to render the Fœderal Constitution adequate to the Exigencies of the Union” *Id.* at 560.

194. 1 FARRAND'S RECORDS, *supra* note 1, at 42–43.

195. 3 FARRAND'S RECORDS, *supra* note 1, at 590.

196. *Id.* at 588, 590.

197. *Id.* at 574–75.

198. U.S. ARTICLES OF CONFEDERATION of 1781, art. 5, para. 4.

199. 3 FARRAND'S RECORDS, *supra* note 1, at 574–75

thirty-nine signers exceeded their authority,²⁰⁰ leaving one well short of the charge that the Philadelphia convention as a whole was a “runaway.” The overwhelming majority of delegates to the 1787 convention, like the delegates to other Founding-Era interstate conventions, remained within the scope of their power.

In any event, the recommendation of the convention was only a recommendation: non-binding and utterly without independent legal force—a recommendation such as any agent was entitled to make.²⁰¹ The convention did not impose its handiwork on the states or on the American people. States could approve or reject as they liked, with no state bound that refused to ratify.²⁰² In fact, unlike a convention for proposing amendments, the Philadelphia assembly was not even entitled to have its decisions transmitted to the states or considered by them.²⁰³ James Wilson summed up the delegates’ position: “authorized to *conclude nothing*, but . . . at liberty to *propose any thing*.”²⁰⁴

Thus, we can glean the following from the history of Founding-Era interstate conventions: Most were limited to specific subjects. All honored the scope of their commissions. Construed most unfavorably to the delegates, the history shows that some of them, when far from home without modern means of communicating with their superiors, chose to interpret their authority liberally and make non-binding recommendations rather than accomplish nothing. But this history offers no evidence to suggest that conventions for proposing amendments cannot be limited, and almost none to suggest they are likely “runaways.”

C. Other Evidence that Applications Can Limit the Convention’s Agenda

The prevalence of limited-purpose conventions during the Founding Era places the evidentiary burden on those who contend that an Article V convention is somehow illimitable. There is no way they can carry that burden, because almost all the Founding-Era evidence is against them.

The first kind of evidence is the purpose of the state-application-and-convention procedure: to serve as an effective congressional bypass.²⁰⁵ Without the power to specify the kinds of amendments they wanted, the states could apply for a convention only if they wished to open the entire Constitution for reconsideration. There is a strong presumption against an

200. *Id.* at 574, 579–80, 584 (reproducing the Delaware, New York, and Massachusetts credentials).

201. *See supra* note 103; Part V.

202. U.S. CONST. art. VII.

203. 32 JCC, *supra* note 1, at 74 (1936).

204. 1 FARRAND’S RECORDS, *supra* note 1, at 253. Wilson’s use of “propose” here means “recommend.” This should not be confused with the technical term employed in Article V. *See* U.S. CONST. art. V.

205. U.S. CONST. art. V.

interpretation of a constitutional provision that would undercut the value of the provision, and impair its principal purpose.

The second kind of evidence is the treatment of conventions in the constitutional text. The text authorizes state conventions for ratifying the Constitution,²⁰⁶ state conventions for ratifying amendments,²⁰⁷ and federal conventions for proposing amendments.²⁰⁸ Both of the first two were clearly limited in nature: No sane person would suggest that a state ratifying convention, for example, also has inherent authority unilaterally to re-write the state constitution. As for the convention for proposing amendments, the text placed certain topics outside the amendment process²⁰⁹ and therefore outside its competence, thereby affirming its limited nature.²¹⁰

The third kind of evidence consists of the records of the 1787 drafting convention. Although other writers seem to have overlooked this point,²¹¹ the fact is that the Philadelphia delegates actively considered providing for amendment by plenipotentiary conventions, but rejected that approach. Edmund Randolph's initial sketch in the Committee of Detail²¹² and the first draft of the eventual Constitution by that committee²¹³ both contemplated plenipotentiary conventions that would prepare and adopt amendments. During the proceedings, the delegates opted instead for an assembly that would merely propose.²¹⁴ Later on, Roger Sherman moved to revert to a plenipotentiary formula, but his motion was soundly rejected.²¹⁵

206. U.S. CONST. art. VII.

207. U.S. CONST. art. V.

208. *Id.*

209. U.S. CONST. art. V (slave trade and apportionment of taxes before 1808; equal suffrage of states in the Senate).

210. 32 JCC, *supra* note 1, at 74 (1936).

211. *But see* Harmon, *supra* note 1, at 399.

212. 2 FARRAND'S RECORDS, *supra* note 1, at 148. According to Randolph's version, "5. (An alteration may be effected in the articles of union, on the application of two thirds *nine* <2/3d> of the state legislatures <by a Convn.>) <on appln. of 2/3ds of the State Legislatures to the Natl. Leg. they call a Convn. to revise or alter ye Articles of Union>." *Id.*

213. *Id.* at 188 ("On the application of the Legislatures of two thirds of the States in the Union, for an amendment of this Constitution, the Legislature of the United States shall call a Convention for that purpose.").

214. *Id.* at 558.

215. *Id.* at 630. The text explains that Mr. Sherman's motion was rejected:

Mr Sherman moved to strike out of art. V. after "legislatures" the words "of three fourths" and so after the word "Conventions" leaving future Conventions to act in this matter, like the present Conventions according to circumstances.

On this motion

N— H— divd. Mas— ay— Ct ay. N— J. ay— Pa no. Del— no. Md no. Va no. N. C. no. S— C. no. Geo— no. [Ayes — 3; noes — 7; divided — 1.]

Id.

Principal credit for replacing the plenipotentiary approach with the convention for proposing amendments belongs to Elbridge Gerry.²¹⁶ He objected to a draft authorizing the convention to modify the Constitution without state approval.²¹⁷ The other delegates agreed, considering first a requirement that any amendments the convention adopted be approved by two thirds of the states, but later strengthening that requirement to three fourths.²¹⁸ During the process Madison wondered why, if states applied for one or more amendments, a convention was even necessary: He “did not see why Congress would not be as much bound to propose amendments applied for by two thirds of the States as to call a Convention on the like application.”²¹⁹ In other words, Madison referred to the states “appl[ying]” for amendments, with either the convention or Congress being “bound to propose” them.²²⁰ Nevertheless, the delegates preferred that a body separate

216. *Id.* at 557–58.

217. *Id.* Mr. Gerry questioned the wisdom of the draft’s provision:

Mr Gerry moved to reconsider art XIX. viz, “On the application of the Legislatures of two thirds of the States in the Union, for an amendment of this Constitution, the Legislature of the U. S. shall call a Convention for that purpose.”

This Constitution he said is to be paramount to the State Constitutions. It follows, hence, from this article that two thirds of the States may obtain a Convention, a majority of which can bind the Union to innovations that may subvert the State-Constitutions altogether. He asked whether this was a situation proper to be run into—

Id.

218. *Id.* at 558–59. The requirement was changed to three fourths:

On the motion of Mr. Gerry to reconsider

N. H. divd. Mas. ay— Ct. ay. N. J— no. Pa ay. Del. ay. Md. ay. Va. ay. N— C. ay. S. C. ay. Geo. ay. [Ayes — 9; noes — 1; divided — 1.]

Mr. Sherman moved to add to the article “or the Legislature may propose amendments to the several States for their approbation, but no amendments shall be binding until consented to by the several States”

Mr. Gerry 2ded. the motion

Mr. Wilson moved to insert “two thirds of” before the words “several States” — on which amendment to the motion of Mr. Sherman

N. H. ay. Mas. <no> Ct. no. N. J. <no> Pa. ay— Del— ay Md. ay. Va. ay. N. C. no. S. C. no. Geo. no. [Ayes — 5; noes — 6.]

Mr. Wilson then moved to insert “three fourths of” before “the several Sts” which was agreed to nem: con:

Id.

219. 2 FARRAND’S RECORDS, *supra* note 1, at 629–30; *accord* Harmon, *supra* note 1, at 398–401 (discussing this remark in wider context).

220. 2 FARRAND’S RECORDS, *supra* note 1, at 629–30.

from Congress perform the drafting, and the final wording, penned primarily by Madison, reflected that sentiment.²²¹

The fourth kind of evidence consists of comments from Federalists promoting the Constitution during the ratification debates. Among those were some emphasizing the essential equality of Congress and the states in proposing amendments. In *Federalist No. 43*, for example, Madison wrote that the Constitution “equally enables the general and the State governments to originate the amendment of errors.”²²² Similarly, “A Native of Virginia” wrote that “whenever two-thirds of both Houses of Congress, or two-thirds of the State Legislatures, shall concur in deeming amendments necessary, a general Convention shall be appointed, the result of which, when ratified by three-fourths of the Legislatures, shall become part of the Federal Government.”²²³ The “Native” erred in saying that congressional action would provoke a convention, but his core message was the same as Madison’s: As far as amendments were concerned, Congress and the states were on equal ground.²²⁴

Technically, of course, Congress and the states were not, and are not, on completely equal ground as far as amendments are concerned. Congress may propose directly, while the states must operate through a convention.²²⁵ Still, the Federalist representations of equality suggest that in construing Article V, preference should be given to interpretations that raise the states

221. 2 FARRAND’S RECORDS, *supra* note 1, at 559. Madison suggested the adopted wording:

Mr. Madison moved to postpone the consideration of the amended proposition in order to take up the following,

“The Legislature of the U— S— whenever two thirds of both Houses shall deem necessary, or on the application of two thirds of the Legislatures of the several States, shall propose amendments to this Constitution, which shall be valid to all intents and purposes as part thereof, when the same shall have been ratified by three fourths at least of the Legislatures of the several States, or by Conventions in three fourths thereof, as one or the other mode of ratification may be proposed by the Legislature of the U. S:”

Mr. Hamilton 2ded. the motion.

....

On the question On the proposition of Mr. Madison & Mr. Hamilton as amended

N. H. divd. Mas. ay. Ct. ay. N. J. ay. Pa. ay. Del. no. Md. ay. Va ay. N. C. ay S. C. ay. Geo. ay. [Ayes — 9; noes — 1; divided — 1.]

Id.

222. THE FEDERALIST NO. 43, *supra* note 1, at 228.

223. *A Native of Virginia: Observations upon the Proposed Plan of Federal Government*, 2 April, VA. GAZETTE, Apr. 2, 1788, reprinted in 9 DOCUMENTARY HISTORY, *supra* note 1, at 655, 689 (1990).

224. *Id.* at 689.

225. U.S. CONST. art. V.

toward the congressional level and treat the convention as their joint assembly.²²⁶ This, in turn, suggests that if Congress may specify a subject when it proposes amendments, the states may do so as well.

A fifth kind of evidence also comes from the ratification-era record. These reveal unambiguous understandings, both among Federalists and Anti-Federalists, that (1) the convention was not plenipotentiary but rather that (2) the applying states could—in fact, usually would—specify particular subject-matter at the beginning of the process. As Hamilton wrote in *Federalist No. 85*, “every amendment to the Constitution, if once established, would be a single proposition, and might be brought forward singly. . . . And consequently, whenever nine, or rather ten States, were united in the desire of a particular amendment, that amendment must infallibly take place.”²²⁷ Hamilton’s reference to nine states represented the two thirds then necessary to force a convention, and his reference to ten states represented the three fourths necessary to ratify the convention’s proposals.²²⁸ Later in the same paper, he referred to “two thirds or three fourths of the State legislatures” uniting in particular amendments.²²⁹

Similarly, George Washington understood that applying states would specify the convention subject-matter.²³⁰ In April, 1788, he wrote to John Armstrong that “a constitutional door is open for such amendments as shall be thought necessary by nine States.”²³¹ When explaining that Congress could not block the state-application-and-convention procedure, the influential Federalist writer Tench Coxe did so in these words:

If two thirds of those legislatures require it, Congress *must* call a general convention, even though they dislike the proposed amendments, and if three fourths of the state legislatures or conventions approve such proposed amendments, they become *an actual and binding part of the constitution*, without any possible interference of Congress.²³²

226. THE FEDERALIST NO. 43, *supra* note 1, at 228.

227. THE FEDERALIST NO. 85, *supra* note 1, at 456.

228. *Id.*

229. *Id.* at 457. At the Massachusetts ratifying convention, Charles Jarvis similarly spoke of “nine states” approving particular amendments, but Dr. Jarvis seems to have been operating on the assumption that Rhode Island would not ratify. 2 ELLIOT’S DEBATES, *supra* note 1, at 130 (also referring to a total of “twelve states”). In that event, application would have to be by eight states (of 12) and ratification by nine.

230. Letter from George Washington to John Armstrong (Apr. 25, 1788) (on file with the University of Virginia Library), *available at* <http://etext.virginia.edu/etcbin/toccer-new2?id=WasFi29.xml&images=images/modeng&data=/texts/english/modeng/parsed&tag=public&part=359&division=div1>.

231. *Id.*

232. *A Pennsylvanian to the New York Convention*, PA. GAZETTE, June 11, 1788, *reprinted in* 20 DOCUMENTARY HISTORY, *supra* note 1, at 1139, 1142–43 (2004).

The passage reveals an assumption that states would make application explicitly to promote particular amendments.

Madison, Hamilton, Washington, and Coxe were all Federalists, but on this issue their opponents agreed. An Anti-Federalist writer, “An Old Whig,” argued that amendments were unlikely:

[T]he legislatures of two thirds of the states, must agree in desiring a convention to be called. This will probably never happen; but if it should happen, then the convention may agree to the amendments or not as they think right; and after all, three fourths of the states must ratify the amendments. . . .²³³

(“The amendments” here presumably means the amendments proposed in advance of the convention.) Another Anti-Federalist, Abraham Yates, Jr., wrote, “We now Cant get the Amendments unless 2/3 of the States first Agree to a Convention And as Many to Agree to the Amendments—And then 3/4 of the Several Legislatures to Confirm them[.]”²³⁴

The Ratifiers shared the understanding that an amendments convention would not be plenipotentiary and that the applying states generally would limit the subjects addressed.²³⁵ The future Chief Justice John Marshall distinguished at the Virginia ratifying convention between the gathering at Philadelphia and the more narrow amending procedure: “The difficulty we find in amending the Confederation,” he said, “ will not be found in amending this Constitution. Any amendments, in the system before you, will not go to a radical change; a plain way is pointed out for the purpose.”²³⁶ This mirrored the view of Madison, shortly before he became a Virginia convention delegate. In a November, 1788 letter to George Lee Turberville, he had recognized differences between a convention that considers “first principles,”²³⁷ which “cannot be called without the unanimous consent of the parties who are to be bound by it,” and a Convention for proposing amendments, which could be convened under the “forms of the Constitution” by “previous application of 2/3 of the State legislatures.”²³⁸ At the North Carolina ratifying convention James Iredell, a

233. Letter from *An Old Whig I*, PHILA. INDEP. GAZETTEER (Oct. 12, 1787), reprinted in 13 DOCUMENTARY HISTORY, *supra* note 1, at 376–77 (1981).

234. Letter from Abraham Yates, Jr., to William Smith (Sept. 22, 1788), reprinted in 23 DOCUMENTARY HISTORY, *supra* note 1, at 2474 (2009).

235. See FARRAND’S RECORDS, *supra* note 1, at 476.

236. 3 ELLIOT’S DEBATES, *supra* note 1, at 234.

237. 2 FARRAND’S RECORDS, *supra* note 1, at 476 (reporting Madison as saying, “The people were in fact, the fountain of all power, and by resorting to them, all difficulties were got over. They could alter constitutions as they pleased. It was a principle in the Bills of rights that *first principles* might be resorted to.”). That Madison was referring to an unlimited convention when he spoke of “first principles” is confirmed by his use of the phrase at the federal convention.

238. Letter from James Madison to George Lee Turberville (Nov. 2, 1788), in 11 THE

Federalist who, like Marshall, later sat on the United States Supreme Court, also emphasized the limited nature of an amendments convention by pointing out that its proposals had to be approved by three fourths of the states.²³⁹

Other statements by the Ratifiers show that they believed that the states, more often than not, would determine the subject matter to be considered in an amendments convention.²⁴⁰ In Virginia, Anti-Federalists argued that before the Constitution was ratified a new plenary constitutional convention should be called to re-write the document and add a bill of rights.²⁴¹ A Federalist leader, George Nicholas, rejoined that it made more sense to ratify first, and then employ Article V's state-application-and-convention route:

On the application of the legislatures of two thirds of the several states, a convention is to be called to propose amendments, which shall be a part of the Constitution when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof. It is natural to conclude that those states who will apply for calling the convention will concur in the ratification of the proposed amendments.²⁴²

Of course, such a conclusion would be “natural” only if the convention was expected to stick to the agenda of the states that “apply for calling the convention.”²⁴³ That there would be such an agenda was confirmed by what Nicholas said next, predicting a future plenary convention:

PAPERS OF JAMES MADISON 330–31 (Robert A. Rutland & Charles F. Hobson eds., 1977).

Professor Walter E. Dellinger has argued that letters written about the same time by Madison to Philip Mazzei and George Eve suggest that Madison thought the states could not limit the convention subject matter. Dellinger, *supra* note 1, at 1643 n.46. The letters actually say nothing about the issue; they merely express fear that delegates hostile to the Constitution might abuse a convention. Letter from James Madison to Phillip Mazzei (Dec. 10, 1788), in 11 THE PAPERS OF JAMES MADISON 388, 404 (Robert A. Rutland & Charles F. Hobson eds., 1977). Indeed, the portion Professor Dellinger quoted from the Mazzei letter cuts the other way: “The object of the anti-federalists is to bring about another General Convention, which would either agree on nothing as would be agreeable to some, and throw everything into confusion; or expunge from the Constitution parts which are held by its friends to be essential to it.” *Id.* at 389. The reason this cuts the other way is that since several ratifying conventions had proposed amendments that would “expunge” from the Constitution parts “held by its friends to be essential to it,” a convention proposing such changes would be following state instructions. *Id.*

239. 4 ELLIOT'S DEBATES, *supra* note 1, at 177 (quoting Iredell at the North Carolina ratifying convention).

240. 3 ELLIOT'S DEBATES, *supra* note 1, at 101–02.

241. *Id.*

242. *Id.*

243. *Id.* at 102.

There are strong and cogent reasons operating on my mind, that the amendments, which shall be agreed to by those states, will be sooner ratified by the rest than any other that can be proposed. The [ratifying] conventions which shall be so called will have their deliberations confined to a few points; no local interest to divert their attention; nothing but the necessary alterations. They will have many advantages over the last [plenary] Convention. No experiments to devise; the general and fundamental regulations being already laid down.²⁴⁴

During the ratification era, there seems to have been little dissent to the understanding that the applying states would set the agenda.²⁴⁵ The belief was so widespread it sometimes led to the assumption that the states rather than the convention would do the proposing. We have seen Tench Coxe suggest as much in the extract quoted above.²⁴⁶ Another instance occurred at the Virginia ratifying convention, where Patrick Henry observed that, “Two thirds of the Congress, or of the state legislatures, are necessary even to propose amendments.”²⁴⁷ A Federalist writing under the name of Cassius asserted that “the states may propose any alterations which they see fit, and that Congress shall take measures for having them carried into effect.”²⁴⁸

That the founding generation thought that way is demonstrated by the procedure they followed in adopting the Bill of Rights—a procedure very close to the one initially proposed by Edmund Randolph at the federal convention.²⁴⁹ As a first step, seven states, although through their ratifying

244. *Id.* (emphasis added).

245. CAPLAN, *supra* note 1, at 139–40. Caplan reproduces three comments from the latter part of 1788, suggesting that it would be better for Congress to propose amendments than for a convention to do so, because the latter might run out of control. *Id.* Two were anonymous pieces in Maryland newspapers appearing within three days of each other, perhaps by the same author, designed to combat Anti-Federalist demands for a second convention. *Id.* However, the second convention the Anti-Federalists were advocating would have been plenipotentiary or, if held under Article V, unrestricted by subject matter. *Id.* at 140. The third item was a letter from Paris by Thomas Jefferson, referring specifically to New York’s efforts, furthered by a circular letter from Governor George Clinton, also for an unrestricted convention. *Id.*

246. *See supra* note 232 and accompanying text.

247. 3 ELLIOT’S DEBATES, *supra* note 1, at 49; *see also* 3 FARRAND’S RECORDS, *supra* note 1, at 367–68 (reproducing memoranda by George Mason stating that “the constn as agreed at first was that amendments might be proposed either by Congr. or the [state] legislatures” After a change, “they then restored it as it stood originally.”).

248. Cassius VI, MASS. GAZETTE, Dec. 25, 1787, *reprinted in* 5 DOCUMENTARY HISTORY, *supra* note 1, at 511–12 (1998).

249. 2 FARRAND’S RECORDS, *supra* note 1, at 479 (“Mr. Randolph stated his idea to be . . . that the State Conventions should be at liberty to propose amendments to be submitted to another General Convention which may reject or incorporate them, as shall be judged proper.”). Later, Mr. Randolph restated his proposal, but this time with a second plenary convention having “full power to settle the Constitution finally.” *Id.* at 561. He restated the proposal yet again later. *Id.* at 564, 631.

conventions rather than their legislatures, adopted sample amendments for consideration by a later proposing body.²⁵⁰ Sam Adams urged this step to the Massachusetts ratifying convention, saying the states should “particularize the amendments necessary to be proposed.”²⁵¹ Next, an Article V convention—or Congress, if it acted quickly enough, as it did—would choose among the state suggestions, draft the actual amendments, and send them to the states for ratification or rejection.²⁵² Finally, the states would either ratify or reject.

A sixth and final category of evidence on this subject consists of early practice—both practice early enough to shed light on the views of the Founders and practice that revealed a later understanding of the Founders’ plan.²⁵³ The first item comes from 1789, before all the states had ratified the Constitution. Early that year, Virginia and New York both presented applications to Congress. The New York application was clearly plenary, but the Virginia application asked that

a convention be immediately called . . . with full power to take into their consideration *the defects of the Constitution that have been suggested by the State Conventions*, and report such amendments thereto as they shall find best suited to promote our common interests, and secure to ourselves and our latest posterity the great and unalienable rights of mankind.²⁵⁴

The language renders it likely that Virginia lawmakers intended the convention to select its proposals from among the topics suggested by the ratifying conventions.

The next applications arose out of the nullification crisis of the early 1830s. They were the 1832 applications from South Carolina and Georgia and the 1833 application from Alabama. Those of both South Carolina²⁵⁵ and Alabama²⁵⁶ called for a convention to address particular subjects. So

250. See generally 2 ELLIOT’S DEBATES, *supra* note 1 (outlining the occurrences at the seven state conventions).

251. *Id.* at 124.

252. Congress did propose one provision not on any of the states’ lists: the Takings Clause—but of course Congress, unlike an Article V convention, had plenary power to propose amendments. The Takings Clause may have been an effort to respond to a ratification-era interpretation of the federal Ex Post Facto Clause that Madison believed was narrower than initially intended. NATELSON, ORIGINAL CONSTITUTION, *supra* note 1, at 157–58; see also Robert G. Natelson, *Statutory Retroactivity: The Founders’ View*, 39 IDAHO L. REV. 489, 523 (2003).

253. See NATELSON, ORIGINAL CONSTITUTION, *supra* note 1, at 40 (explaining that evidence of the original meaning of the unamended Constitution is of limited value if arising later than May 29, 1790). Later evidence is usually merely evidence of *later* understandings.

254. Natelson, *Amending*, *supra* note 1, at 14 (emphasis added).

255. H. JOURNAL, 22d Cong., 2d Sess. 219–20 (1833). (reproducing the South Carolina application).

256. *Id.* at 361–62 (reproducing the Alabama application).

also did an 1864 application from Oregon, which was targeted at slavery.²⁵⁷ Ensuing decades witnessed a veritable flood of single-subject applications on such topics as direct election of U.S. Senators and control of polygamy.²⁵⁸

Thus, the historical evidence pretty well disproves the view of a few writers that state applications specifying subject matter are void or that conventions for proposing amendments were to be governed by rules different from those applied to other Founding-Era conventions.²⁵⁹ Case law on the subject is scanty, but what is available is consistent with the power of legislatures to limit the convention's subject.²⁶⁰

X. THE CONVENTION CALL AND SELECTION OF DELEGATES

A. Congress as a (Limited) Agent of the States

As noted above, key to understanding the intended operation of Article V—and the Constitution generally—is understanding how fiduciary principles were to govern that operation.²⁶¹

Under the Confederation, Congress generally had been the fiduciary, specifically the agent, of the *states*. Under the Constitution, Congress became, for most purposes, the agent of the American *people*.²⁶² However, the congressional role in calling an amendments convention differs importantly from its usual role; in calling the convention and sending its proposals to the states, Congress acts as a ministerial agent of the *state legislatures*²⁶³—a conclusion buttressed by other evidence discussed later.²⁶⁴ In this respect, the Framers retained the Confederation way of

257. Natelson, *First Century*, *supra* note 1, at 13.). It was thus erroneous to claim, as some writers have, that, “For a century following the Constitutional Convention in 1787, the only applications submitted by state legislatures under Article V contemplated conventions that would be free to determine their own agendas.” Dellinger, *supra* note 1, at 1623 (citing Black, *Amending*, *supra* note 1, at 202). Black, however, does not fully support the statement. *See* Black, *Amending*, *supra* note 1, at 202.

258. *See* Natelson, *First Century*, *supra* note 1, at 8–14, 19–21.

259. *E.g.*, Charles L. Black, *Amending*, *supra* note 1, at 198–99.

260. *E.g.*, *In re* Opinion of the Justices, 172 S.E. 474, 477 (N.C. 1933) (concluding that a state may limit authority of a ratifying convention); *see also* Opinion of the Justices to the Senate, 366 N.E.2d 1226, 1229 (Mass. 1977) (holding that a single-subject application is a valid application, and although refusing to hold that it would restrict the convention, noting that the Founders expected the states to specify subject-matter in their applications).

261. *See supra* Part V.A.

262. NATELSON, ORIGINAL CONSTITUTION, *supra* note 1, at 41–44.

263. *See* CAPLAN, *supra* note 1, at 94; *see also* Rees, *Amendment Process*, *supra* note 1, at 92 (referring to “Congress’s ministerial duty to call a convention requested by the State legislatures”).

264. *See infra* Part X.B.

doing things. They did so because of the need for an amendment procedure through which the states could bypass congressional discretion.

During the 1787 convention, the initial Virginia Plan called for an amendments convention to be triggered only by the states, leaving Congress without power to call one on its own motion.²⁶⁵ The delegates altered this to allow only Congress to call an amendments convention.²⁶⁶ George Mason then pointed out that if amendments were made necessary by Congress's own abuses, Congress might block them unless the Constitution contained an alternative route.²⁶⁷ Accordingly, "Mr. Govr. Morris & Mr. Gerry moved to amend the article so as to require a Convention on application of 2/3 of the Sts."²⁶⁸ If the proper number of states applied, Congress had no choice in the matter; it was constrained to do their bidding.²⁶⁹

As an agent for states in making the call, Congress was expected to follow rules of fiduciary law, including the duty to treat all of its principals (the state legislatures) impartially. It followed, for example, that Congress could not prescribe procedures that gave some states more power at the convention than others.

B. Congress's Role in Calling the Convention

Because the state-application-and-convention procedure was designed to bypass congressional discretion, the congressional discretion had to be strictly limited. In other words, it had to be chiefly clerical—or, to use the legal term, "ministerial."²⁷⁰ On this point, Professor William W. Van Alstyne summarized his impressions of the history of Article V:

265. 2 FARRAND'S RECORDS, *supra* note 1, at 466–67.

266. *Id.* at 467–68. ("Art: XIX taken up. Mr. Govr. Morris suggested that the Legislature should be left at liberty to call a Convention, whenever they please. The art: was agreed to nem: con:").

267. 2 FARRAND'S RECORDS, *supra* note 1, at 629.

Col: Mason thought the plan of amending the Constitution exceptionable & dangerous. As the proposing of amendments is in both the modes to depend, in the first immediately, and in the second, ultimately, on Congress, no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive, as he verily believed would be the case.

Id. at 629.

268. *Id.*

269. *See supra* notes 261–267 and accompanying text.

270. *See* Bruce M. Van Sickle & Lynn M. Boughey, *A Lawful and Peaceful Revolution, Article V and Congress' Present Duty to Call a Convention for Proposing Amendments*, 14 HAMLIN L. REV. 1, 41 (1990) (stating that Congress's role must, as much as possible, be merely mechanical or ministerial rather than discretionary); *see also* Rees, *Amendment Process*, *supra* note 1, at 92 (referring to the congressional call as "ministerial").

The various stages of drafting through which article V passed convey an additional impression as well: that the state mode for getting amendments proposed was not to be contingent upon any significant cooperation or discretion in Congress. Except as to its option in choosing between two procedures for ratification, either “by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof,” Congress was supposed to be mere clerk of the process convoking state-called conventions.²⁷¹

As the writer of a Harvard Law Review Note observed, “any requirement imposed by Congress which is not necessary for Congress to bring a convention into existence or to choose the mode of ratification is outside Congress’ constitutional authority.”²⁷²

Copious evidence supports the conclusion that Congress may not refuse to call an amendments convention upon receiving the required number of applications.²⁷³ When some Anti-Federalists suggested that Congress would not be required to call a convention,²⁷⁴ Hamilton, writing in *Federalist No. 85* affirmed that the call would be mandatory.²⁷⁵ Numerous other

271. William W. Van Alstyne, *Does Article V Restrict the States to Calling Unlimited Conventions Only?—A Letter to a Colleague*, 1978 DUKE L.J. 1295, 1303 (citing U.S. CONST. art. V).

272. Note, *Proposed Legislation on the Convention Method of Amending the United States Constitution*, 85 HARV. L. REV. 1612, 1633 (1972).

273. See CAPLAN, *supra* note 1, at 115–17.

274. See, e.g., *Massachusetts*, MASS. GAZETTE, Jan. 29, 1788, reprinted in 5 DOCUMENTARY HISTORY, *supra* note 1, at 831 (1998) (“Again, the constitution makes no consistent, adequate provision for amendments to be made to it by states, as states: not they who draught the amendments (should any be made) but they who ratify them, must be considered as making them. Three fourths of the legislatures of the several states, as they are now called, may ratify amendments, that is, if Congress see fit, but not without.”); *A Customer*, N.Y.J., Nov. 23, 1787, reprinted in 19 DOCUMENTARY HISTORY, *supra* note 1, at 295 (2003) (“It is not stipulated that Congress shall, on the application of the legislatures of two thirds of the states, call a convention for proposing amendments.”).

275. THE FEDERALIST NO. 85, *supra* note 1, at 456–57. Many writers have referenced this source, but few have discussed any of the corroborating sources discussed in this Part. E.g., Ervin, *supra* note 1, at 885. THE FEDERALIST NO. 85 reads as follows:

It is this that the national rulers, whenever nine States concur, will have no option upon the subject. By the fifth article of the plan, the Congress will be *obliged* “on the application of the legislatures of two thirds of the States, (which at present amount to nine) to call a convention for proposing amendments, which *shall be valid*, to all intents and purposes, as part of the Constitution, when ratified by the legislatures of three fourths of the States, or by conventions in three fourths thereof.” The words of this article are peremptory. The Congress “*shall* call a convention.” Nothing in this particular is left to discretion.

THE FEDERALIST NO. 85, *supra* note 1, at 456–57 (citing U.S. CONST. art. V).

Federalists agreed, among them James Iredell,²⁷⁶ John Dickinson,²⁷⁷ James Madison,²⁷⁸ and Tench Coxe.²⁷⁹ As Coxe observed:

It has been asserted, that the new constitution, when ratified, would be fixed and permanent, and that no alterations or amendments, should those proposed appear on consideration ever so salutary, could afterwards be obtained. A candid consideration of the constitution will shew this to be a groundless remark. 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. . . .²⁸⁰

276. 4 ELLIOT'S DEBATES, *supra* note 1, at 178 ("On such application, it is provided that Congress *shall* call such convention, so that they will have no option.").

277. *Fabius VIII*, PA. MERCURY, Apr. 29, 1788, *reprinted in* 17 DOCUMENTARY HISTORY, *supra* note 1, at 250 (1995) ("whatever their sentiments may be, they **MUST** call a Convention for proposing amendments, on applications of two-thirds of the legislatures of the several states").

278. Letter from James Madison to Thomas Mann Randolph (Jan. 19, 1789), *in* 11 THE PAPERS OF JAMES MADISON 415, 417 (Robert A. Rutland & Charles F. Hobson eds., 1977). Madison wrote: "It will not have escaped you, however, that the question concerning a General Convention, does not depend on the discretion of Congress. If two thirds of the States make application, Congress cannot refuse to call one; if not, Congress have no right to take the step." *Id.* at 417. Madison already had made the same point in another letter. *See* Letter from James Madison to George Eve (Jan. 2, 1789), *in* 11 THE PAPERS OF JAMES MADISON 4104, 405 (Robert A. Rutland & Charles F. Hobson eds., 1977).

279. Tench Coxe, *A Friend of Society and Liberty*, PA. GAZETTE, Jul. 23, 1788, *in* 18 DOCUMENTARY HISTORY, *supra* note 1, at 277, 283 (1995).

280. *Id.* at 283; *see also* Richard Law, Speech in the Connecticut Convention (Jan. 9, 1788), *in* 15 DOCUMENTARY HISTORY, *supra* note 1, at 316 (1984) ("a convention to be called at the instance of two thirds of the states"); *Solon, Jr.*, PROVIDENCE GAZETTE, Aug. 23, 1788, *reprinted in* 18 DOCUMENTARY HISTORY, *supra* note 1, at 340 (1995) ("But, secondly, although two-thirds of the New Congress should not be in favour of any amendments; yet if two-thirds of the Legislatures of the States they represent are for amendments, on the application of such two-thirds, the New Congress will call a General Convention for the purpose of considering and proposing amendments, to be ratified in the same manner as in case they had been proposed by the Congress themselves."). Similarly, the *Hudson Weekly Gazette* noted:

It has been urged that the officers of the federal government will not part with power after they have got it; but those who make this remark really have not duly considered the constitution, for congress will be obliged to call a federal convention on the application of the legislatures of two thirds of the states: And all amendments proposed by such federal conventions are to be valid, when adopted by the legislatures or conventions of three fourths of the states. It therefore clearly appears 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

Because of its agency role, Congress may—in fact, *must*—limit the subject matter of the convention to the extent specified by the applying states.²⁸¹ To see why this is so, consider an analogy: A property owner tells his property manager to hire a contractor to undertake certain work. The owner instructs the manager as to how much and what kind of work the contractor is to do. The manager is required to communicate those limits on the contractor and to enforce them.

In the state-application-and-convention procedure, the states are in the position of the property owner, Congress in the position of the manager, and the convention for proposing amendments in the place of the contractor. Historical evidence already adduced buttresses this conclusion,²⁸² showing that the applying state legislatures may impose subject-matter limits on the convention.

In order to carry out its agency responsibility, Congress has no choice, when counting applications toward the two thirds needed for a convention, but to group them according to subject matter.²⁸³ Whenever two thirds of the states have applied based on the same general subject matter, Congress must issue the call for a convention related to that subject matter.²⁸⁴ Congress may not expand the scope of the convention beyond that subject matter.²⁸⁵ A recent commentary summarized the process this way:

[A]pplications for a convention for different subjects should be counted separately. This would ensure that the intent of the States' applications is given proper effect. An application for an amendment addressing a particular issue, therefore, could not be used to call a convention that ends up proposing an amendment about a subject matter the state did not request be addressed. It follows from this argument that Congress's ministerial duty to call a convention also includes the duty to group applications according to subject matter. Once a sufficient number of applications have been reached, Congress must call a convention limited in scope to what the States have requested.²⁸⁶

unanimously opposed to each and all of them.

HUDSON WEEKLY GAZETTE, Jun. 17, 1788, *reprinted in* 21 DOCUMENTARY HISTORY, *supra* note 1, at 1200, 1201 (2005).

281. See Richard Law, *supra* note 280, at 316–17.

282. See *supra* Part IX.

283. CAPLAN, *supra* note 1, at 105.

284. James Kenneth Rogers, Note, *The Other Way to Amend the Constitution: The Article V Constitutional Convention Amendment Process*, 30 HARV. J.L. & PUB. POL'Y 1005, 1018 (2007).

285. CAPLAN, *supra* note 1, at 113.

286. Rogers, *supra* note 284, at 1018–19; *accord* Note, *Amendments*, *supra* note 1, at 1072; Kauper, *supra* note 1, at 911–12; Harmon, *supra* note 1, at 407 (“Unless there is general agreement among two-thirds of the legislatures over the nature of the change, or the

Of course, this is one area where “ministerial” duties necessarily require a certain amount of discretion, since Congress may have to decide whether differently worded applications actually address the same subject.²⁸⁷

C. Other Formalities in the Call

Article V bestows powers on named assemblies rather than on all actors in the legislative process.²⁸⁸ That is why governors are excluded from the process.²⁸⁹ This characteristic of Article V also suggests that the President has no role in calling a convention for proposing amendments—which is consistent with the earlier reference to the congressional role in the call as a procedural “throw-back” to pre-constitutional practice.²⁹⁰

The conclusion that the President has no role is buttressed both by a representation made by Federalist Tench Coxe during the ratification battle,²⁹¹ and by early ratification practice: Neither the congressional resolution forwarding the Bill of Rights to the states (1789) nor the resolution referring to them the Eleventh Amendment (1794) was presented to President Washington. Nor, apparently, did anyone suggest at the time that they should be.²⁹²

The Supreme Court has held that Congress may propose amendments by a two thirds vote of members present, assuming a quorum, not of the entire membership.²⁹³ By parity of reasoning, Congress should be able to call the convention by majority of members present, assuming a quorum.

D. Enforcing the Duty to Call

The Constitution occasionally bestows authority of a kind normally exercised by one branch on another branch. The President is the chief executive, but he has a veto over bills, which is essentially a legislative power.²⁹⁴ The Senate is usually a legislative body, but it enjoys power to try impeachments, a judicial power,²⁹⁵ and to approve nominations, an

area where change is needed . . . the amendment process cannot go forward via the convention route.”).

287. CAPLAN, *supra* note 1, at 105.

288. *Id.*

289. *Id.*

290. *Supra* Part X.A.

291. *A Friend of Society and Liberty*, PA. GAZETTE, July 23, 1788, reprinted in 18 DOCUMENTARY HISTORY, *supra* note 1, at 277, 283 (1995).

292. *Accord* CAPLAN, *supra* note 1, at 134–37; *see also* *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798) (holding that the President has no role in congressional amendment proposals).

293. *Rhode Island v. Palmer*, 253 U.S. 350, 350 (1920). This holding was foreshadowed by a similar decision in *Erkenbrecher v. Cox*, 257 F. 334, 336 (D. Ohio 1919).

294. U.S. CONST. art. I, § 7, cls. 2 & 3.

295. *Id.*, art. I, § 3, cl. 6.

executive power.²⁹⁶ Congress serves as the federal legislature, but the Constitution grants it the power to declare war, which under the British Crown had been considered an executive power.²⁹⁷

In calling the convention, Congress wields an executive power. Because calling a convention is a mandatory executive duty, it should be enforceable judicially.²⁹⁸ One potential remedy against a recalcitrant Congress is a declaratory judgment.²⁹⁹ Because the duty is “plain, imperative, and entirely ministerial” a writ of mandamus also is appropriate.³⁰⁰ In addition, if a legislature is violating the Constitution, courts may grant equitable relief, such as an injunction.³⁰¹

E. The Composition of the Convention

From time to time, well-intended members of Congress have introduced legislation to govern the election and proceedings of any future convention for proposing amendments.³⁰² This legislation is justified as incidental to the congressional “call” power under the Necessary and Proper Clause.³⁰³ Under some proposals, delegates would be allocated among the states by population or in proportion to their strength in Congress.³⁰⁴

Such legislation is constitutionally objectionable on several grounds. First, Founding-Era practice informs us clearly that choice over delegate

296. *Id.*, art. II, § 2, cl. 2.

297. *Id.*, art. I, § 8, cl. 11; see NATELSON, ORIGINAL CONSTITUTION, *supra* note 1, at 124 (discussing the King’s power to declare war).

298. See U.S. CONST. art. III, § 1, cls. 1.

299. *Powell v. McCormick*, 395 U.S. 486 (1969) (issuing a declaratory judgment retroactively reinstating an improperly evicted member of Congress).

300. *Roberts v. United States*, 176 U.S. 221, 230 (1900); *cf. McCormick*, 395 U.S. at 500–01 n.16, 517, 550 (not ruling out such relief against the relevant congressional officer). Rep. Theodore Sedgwick, an attorney speaking to the First Congress, noted the possibility of mandamus against Congress or the Senate. 1 ANNALS OF CONG. 544 (1789) (Joseph Gales & Seaton eds., 1834).

301. *E.g.*, *Cooper v. Aaron*, 358 U.S. 1 (1958) (rejecting a state’s contention that its legislature and governor were not bound by federal court injunction).

302. See, *e.g.*, Ervin, *supra* note 1. Discussions of later bills are found in Diamond, *supra* note 1, at 113, 130–33, 137–38.

303. This has been the apparent justification of proposed congressional legislation. See, *e.g.*, Ervin, *supra* note 1; see also Kauper, *supra* note 1, at 906–07. For another claim of broad congressional power, see Charles L. Black, Jr., *The Proposed Amendment of Article V: A Threatened Disaster*, 72 YALE L.J. 957, 964 (1963). The contrary position on this point was adopted in Gerald Gunther, *The Convention Method of Amending the United States Constitution*, 14 GA. L. REV. 1, 23–24 (1979). However, Professor Gunther, like most academics who addressed the issue in the 1960s and 1970s, opposed a convention.

304. Ervin, *supra* note 1, at 893; Kauper, *supra* note 1, at 909; see also Note, *Amendments*, *supra* note 1, at 1075–76 (supporting congressional legislation to that effect).

selection is an incident of the power of state legislatures, not of Congress.³⁰⁵ In *intra-state* conventions, representation was apportioned roughly according to population,³⁰⁶ but in *federal* conventions the caller requested states to send delegates of their own choosing. The states themselves were the participants.³⁰⁷ They determined who the delegates were to be and how they would be chosen.³⁰⁸

The view that amendments conventions were assemblies of equal states persisted after the Constitution was ratified: They were referred to as “federal conventions” and “conventions of the states,” rather than as conventions of the people.³⁰⁹ For example, the 1789 Virginia application provided in part:

[T]he Constitution hath presented an alternative, by admitting the submission to a *convention of the States*. . . . We do, therefore, in behalf of our constituents . . . make this application to Congress, that a convention be immediately called, of *deputies from the several States*, with full power to take into their consideration the defects of the Constitution that have been suggested by the State Conventions, and report such amendments thereto as they shall find best suited to promote our common interests, and secure to ourselves and our latest posterity, the great and unalienable rights of mankind.³¹⁰

The 1789 New York application sent the same message:

[W]e, the Legislature of the State of New York, do, in behalf of our constituents . . . make this application to the Congress, that a *Convention of Deputies from the several States* be called as early as possible, with full powers to take the said Constitution into their consideration, and to propose such amendments thereto, as they shall find best calculated to promote our common interests, and secure to ourselves and our latest posterity, the great and unalienable rights of mankind.³¹¹

This view was no mere hangover from the Founding Era, nor was it a rhetorical device to emphasize state sovereignty. Forty-two years later, the Supreme Court referred to a convention for proposing amendments as a “convention of the states.”³¹² This remained the standard phrase for decades.³¹³

305. CAPLAN, *supra* note 1, at 119.

306. *Id.*

307. *E.g.*, 2 HOADLY, *supra* note 1, at 578 (reporting a resolution of the 1780 Philadelphia convention as “a meeting of the states”).

308. *Id.*

309. Natelson, *First Century*, *supra* note 1.

310. Natelson, *Amending*, *supra* note 1, at 14.

311. *Id.*

312. *Smith v. Union Bank*, 30 U.S. 518, 528 (1831).

313. Natelson, *First Century*, *supra* note 1, at 10, 13–14.

This background compels the conclusion that the Article V convention is a creature—or, in the words of a former assistant United States Attorney General, the “servant”³¹⁴—of the state legislatures, not of Congress, nor of the people directly.³¹⁵ Those legislatures, therefore, determine how delegates are allocated and selected.³¹⁶

Another problem with schemes by which Congress prescribes delegate selection procedures is that they undercut the congressional-bypass goal of the state-application-and-convention process.³¹⁷ The process would not be an effective bypass if Congress could set—or gerrymander—the convention’s composition or rules.³¹⁸ Moreover, apportioning delegates in a way that does not treat all states equally violates Congress’s fiduciary duty to treat impartially all states, who are its principals in this limited context.³¹⁹ How delegates are to be selected, or how many to send, is for principals, not agents, to decide.

F. Convention Discretion: The Rules

Under the incidental powers conferred by Article V, an amendments convention adopts its own rules and elects its own officers.³²⁰ This follows from Founding-Era custom: All conventions, inter- or intra-state, established their own rules, judged their own credentials, carried out their own housekeeping, and elected their own officers.³²¹ Thus, the fixing of rules is not a matter either for Congress³²² or the applying states. More

314. Harmon, *supra* note 1, at 409.

315. *Cf.* EVERETT SOMERVILLE BROWN, RATIFICATION OF THE TWENTY-FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 516–17 (1938) (showing that on the one occasion when Congress opted for a proposed constitutional amendment to be ratified by state conventions rather than state legislatures, the states were left in full command of delegate-selection).

316. *Id.*

317. *Cf.* Diamond, *supra* note 1, at 144–45 (expressing approval of the idea of electing delegates by population, but affirming that it is beyond Congress’s power to mandate this).

318. *Id.*

319. *See generally* Natelson, *Judicial Review*, *supra* note 1, at 262–267 (describing how fiduciaries are to treat their beneficiaries impartially).

320. U.S. CONST. art. V.

321. *See, e.g.*, 1 HOADLY, *supra* note 1, at 589 (reporting that the first Providence Convention was electing its officers); *id.* at 611 (reporting that the New Haven Convention was adhering to “one state, one vote”); 2 HOADLY, *supra* note 1, at 577 (reporting that the 1780 Philadelphia convention was choosing its own president and fixing a succession rule); 3 HOADLY, *supra* note 1, at 561 (reporting that the Boston Convention was electing its own officers); *id.* at 575 (reporting that the second Providence Convention was electing its own officers); 1 FARRAND’S RECORDS, *supra* note 1, at 7–9 (reporting that the 1787 Philadelphia convention was adopting its own rules); 3 ELLIOT’S DEBATES, *supra* note 1, at 3 (reporting that the Virginia ratifying convention was adopting its own rules).

322. The Ervin legislation included provisions for congressional governance. These

recently, the principle that a convention, or a legislature, operating under Article V controls its own rules and procedures, including voting rules, was applied by Justice Stevens in his much-quoted opinion in *Dyer v. Blair*.³²³

Suffrage is decided by convention rule. The convention is free to adjust its rules of suffrage however it wishes, but the initial suffrage rule is “one state, one vote.”³²⁴ This may seem undemocratic, but of course the Constitution erected a mixed federal government, not a purely democratic one.

The democratic interest is protected by Congress’s ability to propose amendments, and also by the requirement that three fourths ratify a proposal for it to be effective.³²⁵ Although it is possible theoretically for three fourths of the states to represent only a minority of the population,³²⁶ it is nearly impossible as a matter of practical politics because of sharp differences in the political character among states of similar sizes.³²⁷

were supported by some writers based on views unshaped by the actual ratification record. *See, e.g.*, Kauper, *supra* note 1, at 909 (suggesting that Congress could require that delegates be elected by population). Based on a fuller review of the record, Caplan reaches substantially the same conclusions as I do. CAPLAN, *supra* note 1, at 119–20.

323. *Dyer v. Blair*, 390 F. Supp. 1291, 1307 (N.D. Ill. 1975) (“Article V identifies the body—either a legislature or a convention—which must ratify a proposed amendment. The act of ratification is an expression of consent to the amendment by that body. By what means that body shall decide to consent or not to consent is a matter for that body to determine for itself.”). Although Justice Stevens was referring to a ratifying body, there is no reason this rule should not apply to an amendments convention.

324. *See, e.g.*, 1 HOADLY, *supra* note 1, at 611 (reporting that the New Haven Convention was adhering to “one state, one vote”). This follows from the treatment of delegations as units, i.e., as “committees.” *See supra* note 75 and accompanying text. If a state opted for district elections for delegates, the Equal Protection Clause of the Fourteenth Amendment, which the United States Supreme Court has construed as containing a “one person one vote rule,” would apply within the state. CAPLAN, *supra* note 1, at 120. That rule should have no effect, however, at the federal level, when states act, either directly or through a convention, as states. One appropriate analogy is the United States Senate; a closer one is the ratification of constitutional amendments by three-fourths of the states, irrespective of population.

325. U.S. CONST. art. V.

326. UNITED STATES CENSUS BUREAU, ANNUAL ESTIMATES OF THE POPULATION FOR THE UNITED STATES, REGIONS, AND STATES AND FOR PUERTO RICO (2006). According to United States Census Bureau 2006 population estimates, if *all* the twelve largest states opposed ratification and *all* the thirty-eight smallest ratified, then the ratifying states would contain only a little more than forty percent of the American people. This scenario would require unanimity among the twelve largest states, which are quite disparate politically, and unanimity among the thirty-eight smallest, which are similarly diverse. The first group includes such disparate pairs as Massachusetts and Texas, New York and North Carolina, and Michigan and Georgia. The second group includes states such as Hawaii and Wyoming, Vermont and Colorado.

327. Kauper, *supra* note 1, at 914, pointed this out in 1966, and state population disparities were slightly *greater* then than they now are.

Approval by three fourths of the states will reflect majority, and probably super-majority, public support.³²⁸

G. Convention Discretion: An Application May Not Limit the Convention to Specific Rules or Language

Some comparatively recent applications have tried to impose restrictions beyond subject-matter limits. For example, some have purported to require the convention to take an up-or-down vote on an amendment whose precise wording is set forth in the application.³²⁹ Applications also have imposed conditions precedent to operation (providing that the application becomes effective only when a certain event or events occur)³³⁰ and conditions subsequent (providing that the application becomes ineffective if a particular event or events intervene).³³¹ Some applications have included both kinds of conditions.³³²

These restrictions were imposed to guard against the supposed danger of a “runaway” convention, but what they really do is create practical and legal problems. The *practical* problems arise from the fact that the more terms and conditions applications contain, the less likely they will match each other sufficiently to be aggregated together to reach the two-thirds threshold.³³³ Members of Congress and judges who dislike the contemplated amendments may seize upon wording differences to justify refusal to aggregate.³³⁴

The *legal* difficulties arise because the courts are likely to reject any effort by state legislatures to impose rules or specific language on the convention. The universal prerogative of conventions during the Founding Era³³⁵ and after³³⁶ has been to make their own rules, and in modern times

328. UNITED STATES CENSUS BUREAU, *supra* note 326.

329. *E.g.*, 133 CONG. REC. 7299 (Mar. 30, 1987) (reproducing Utah application specifying precise text of amendment).

330. CONG. GLOBE, 36TH CONG., 2ND SESS. 680 (Feb. 1, 1861) (“[U]nless the remedies before suggested be speedily adopted, then, as a last resort, the State of New Jersey hereby makes application, according to the terms of the Constitution, of the Congress of the United States, to call a convention (of the States) to propose amendments...”).

331. 133 CONG. REC. 7299 (Utah application stating that it becomes void if Congress proposes an identical amendment).

332. *E.g.*, 139 CONG. REC. 14,565 (Jun. 29, 1993) (Missouri application containing condition precedent of congressional non-action, followed by condition subsequent of congressional action).

333. *See generally supra* note 329 (Utah application specifies precise text of the amendment to be adopted).

334. CAPLAN, *supra* note 1, at 107–08, suggests that refusal to aggregate would be improper, and that applications could be amended to comply with each other.

335. *E.g.*, 1 FARRAND’S RECORDS, *supra* note 1, at 7–9, 14–16 (discussion and agreement to rules of Constitutional Convention); 2 ELLIOT’S DEBATES, *supra* note 1, at 1 (appointment of rules committee at Massachusetts ratifying convention); 3 ELLIOT’S

the courts have defended the power of Article V assemblies to do so.³³⁷ Courts also have defended the power of Article V assemblies to deliberate and to exercise discretion.³³⁸ Opponents may argue that if an application purports to prescribe rules or specific language to the convention, it is void for attempting to obtain an illegal result.³³⁹

One purpose of the state-application-and-convention process was to give state legislatures a role nearly co-equal to Congress as a promoter of amendments. Allowing states to dictate rules and language in their applications arguably serves that purpose. But a competing purpose was to ensure that the actual proposals come from a single deliberative body representing all, not only the applying, state legislatures.³⁴⁰ The text of the Constitution grants the *convention*, not the state legislatures, the ultimate power to “propos[e] Amendments.”³⁴¹ The Framers could have drafted language permitting the states to propose amendments directly, but they did not.

The Framers inserted a convention into the process presumably because the convention setting encourages collective deliberation, compromise, and conciliation. Deliberation requires the ability to weigh alternatives or even, as Madison and others suggested during the ratification fight, the power not to propose at all.³⁴²

DEBATES, *supra* note 1, at 3 (recording Virginia ratifying convention as adopting rules of state House of Delegates); PROCEEDINGS OF THE CONVENTIONS OF THE PROVINCE OF MARYLAND 3 (Baltimore, James Lucas & E.K. Deaver eds., 1836) (reporting that the 1774 provincial convention adopted its own voting rule).

336. HOAR, *supra* note 1, at 170–84 (discussing the rule-making power of conventions).

337. *E.g.*, Dyer v. Blair, 390 F. Supp. 1291 (N.D. Ill. 1975).

338. *See infra* notes 347–354 and accompanying text.

339. *Cf.* Arthur E. Bonfield, *The Dirksen Amendment and the Article V Convention Process*, 66 MICH. L. REV. 949, 959 (1968) (arguing that applications seeking ratification by state legislatures rather than state convention seek an illegitimate end and should be disregarded).

340. *Cf.* Dodge v. Woolsey, 59 U.S. 331, 348 (1855). In *Dodge*, the Court stated of the amendment process that

[T]he people of the United States, aggregately and in their separate sovereignties . . . have excluded themselves from any direct or immediate agency in making amendments to [the Constitution], and have directed that amendments should be made representatively for them, by the congress of the United States, when two thirds of both houses shall propose them; or where the legislatures of two thirds of the several States shall call a convention for proposing amendments [subject to state ratification].

Id. at 348. The implication is that the states, the people’s “separate sovereignties,” cannot dictate directly amendments themselves, and that the drafting and proposal are the prerogatives of Congress or the convention.

341. U.S. CONST. art. V.

342. James Madison to Philip Mazzei (Dec. 10, 1788), in 11 THE PAPERS OF JAMES

Admittedly, a large number of applications with similar restrictions also are likely to be the product of considerable deliberation and some compromise and conciliation.³⁴³ But the convention setting encourages more, and includes the non-applying states. An independent level between state applications and state ratification subjects the process of decision to being further “refined,” to use Madison’s term.³⁴⁴

History paints a picture of what the Founders had in mind. Founding-Era interstate conventions could be—and usually were—limited to particular subject matter.³⁴⁵ Yet they invariably were deliberative entities, if not always among delegates, then at least among state delegations.³⁴⁶ No one imposed “take it or leave it” language in the call.³⁴⁷ The conventions proposed; and as incidents to their power to propose, they deliberated and drafted.³⁴⁸ As noted earlier,³⁴⁹ the resulting procedure closely parallels how the first ten amendments were adopted: First, the states suggested a number of amendments.³⁵⁰ Then, working almost entirely from that list, Congress (here, acting much as an amendments convention would) deliberated the merits of each, selected some of the states’ ideas, performed the actual drafting, and sent its proposals back to the states for ratification.³⁵¹

This is another topic on which most subsequent history is consistent with the Founders’ vision. Throughout the nineteenth and early twentieth centuries, no application, even an application limited to a particular subject matter, sought to dictate precise wording or terms to the convention.³⁵² At least one application was subject to a condition: An 1861 New Jersey application was to be effective only if Congress did not act.³⁵³ But that

MADISON 1788–1789, at 389 (Robert A. Rutland & Charles F. Hobson eds., 1977); *see also* Letter from An Old Whig II, PHILA. INDEP. GAZETTEER (Oct. 12, 1787), *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 1, at 376, 377 (1981) (observing, shortly after the Constitution became public, “the convention may agree to the [states-suggested] amendments or not as they think right”).

343. CAPLAN, *supra* note 1, at 105.

344. *See, e.g.*, THE FEDERALIST NO. 10, *supra* note 1, at 46 (asserting that when a decision is passed through a chosen body of citizens the effect is to “refine and enlarge the public views”).

345. *See supra* Part IX.A..

346. *See* Hawke v. Smith, 253 U.S. 221, 226–27 (1920).

347. *See generally* *Convention Applications*, *supra* note 78.

348. *See* Hawke, 253 U.S. at 226–27.

349. *See supra* note 249 and accompanying text.

350. *See supra* note 251 and accompanying text.

351. *See supra* note 252 and accompanying text.

352. *See* *Convention Applications*, *supra* note 78.

353. CONG. GLOBE, 36TH CONG., 2ND SESS. 680 (Feb. 1, 1861) (“unless the remedies before suggested be speedily adopted, then, as a last resort, the State of New Jersey hereby makes application, according to the terms of the Constitution, of the Congress of the United States, to call a convention (of the States) to propose amendments”).

condition did not infringe the assembly's deliberative freedom once the convention had been called.³⁵⁴

In the 1930s, state legislatures explored ways to restrict the deliberative freedom of Article V assemblies by assuring adherence to the popular will.³⁵⁵ This effort won judicial approval in the 1933 Alabama Supreme Court advisory opinion, *In re Opinion of the Justices*.³⁵⁶ The issue was a state law governing the convention called for ratifying or rejecting the Twenty-First Amendment repealing Prohibition.³⁵⁷ The statute provided that an elector's vote for convention delegates would not be counted unless the elector first voted "yes" or "no" on the question of whether Prohibition should be repealed.³⁵⁸ The law required delegates to take an oath promising to support the result of the referendum.³⁵⁹ The court sustained this procedure as promoting the popular will.³⁶⁰ The court gave little or no weight to the goal of assuring a deliberative process.³⁶¹

However, if Assembly X effectively restricts the deliberation of Assembly Y, some of Assembly Y's decision-making authority is transferred to Assembly X. By absolutely binding the convention to the popular will, the Alabama statute effectively transferred ratification from the convention to the voters.³⁶² They became the true ratifiers.³⁶³ For this reason, other courts have not followed *In re Opinion of the Justices*.³⁶⁴

Even before that case, the Supreme Court had decided that a ratifying assembly could not be displaced by a referendum³⁶⁵ and that an assembly's discretion could not be compromised by extraneous rules.³⁶⁶ In the same year as *In re Opinion of the Justices*, the Supreme Court of Maine ruled that a referendum cannot bind a ratifying convention because "[t]he convention must be free to exercise the essential and characteristic function of rational deliberation."³⁶⁷

Since that time, a string of holdings has recognized explicitly the connection between control and deliberation, and has done so in the application context as well as in ratification context. In 1978 Justice

354. *See id.*

355. *See In re Opinion of the Justices*, 148 So. 107 (Ala. 1933).

356. *Id.* at 111.

357. *See id.* at 108.

358. *Id.*

359. *Id.*

360. *Id.* at 110.

361. *See generally id.* at 110–11.

362. *See id.*

363. *See id.*

364. *See, e.g., State ex rel. Harper v. Waltermire*, 691 P.2d 826 (Mont. 1984); *AFL-CIO v. Eu*, 686 P.2d 609 (Cal. 1984), *stay denied sub nom. Uhler v. AFL-CIO*, 468 U.S. 1310 (1984) (advisory resolution).

365. *Hawke v. Smith*, 253 U.S. 221 (1920).

366. *Leser v. Garnett*, 258 U.S. 130, 137 (1922) (citations omitted).

367. *In re Opinion of the Justices*, 167 A. 176, 180 (Me. 1933).

Rehnquist upheld a referendum to influence the application process, but emphasized that the referendum was purely advisory.³⁶⁸ Six years later, the Montana Supreme Court voided an initiative that would have required state lawmakers to apply for a convention for proposing a balanced budget amendment.³⁶⁹ Relying on the United States Supreme Court cases disallowing transfer of ratifying power to the voters, the Montana tribunal held that, “[a] legislature making an application to Congress for a constitutional convention under Article V must be a freely deliberating representative body. The deliberative process must be unfettered by any limitations imposed by the people of the state.”³⁷⁰

The same year, the California Supreme Court invalidated a voter initiative imposing financial penalties on lawmakers who failed to support an application for a balanced budget amendment.³⁷¹ The court observed that this was inconsistent with a goal of Article V, which “envisions legislators free to vote their best judgment.”³⁷²

During the 1990s battle for federal term limits, activists used the state initiative process to induce lawmakers to support their cause.³⁷³ Members of Congress were instructed to support congressional proposal of a term limits amendment.³⁷⁴ State lawmakers were instructed to support applications for a convention that would propose term limits.³⁷⁵ Voter-adopted initiatives inflicted negative ballot language on politicians who refused.³⁷⁶ Again and again courts invalidated these measures, because by impeding the deliberative function they transferred discretion from Article V assemblies to other actors.³⁷⁷ Although one could interpret those measures as a form of

368. *Kimble v. Swackhamer*, 439 U.S. 1385, *appeal dismissed*, 439 U.S. 1041 (1978) (Rehnquist, J.); *see also AFL-CIO*, 686 P.2d 609.

369. *State ex rel. Harper*, 691 P.2d 826.

370. *Id.* at 830 (citing *Leser*, 258 U.S. 130).

371. *See AFL-CIO*, 686 P.2d 609.

372. *Id.* at 613.

373. *See, e.g., Miller v. Moore*, 169 F.3d 1119 (8th Cir. 1999); *Gralike v. Cook*, 191 F.3d 911, 924–25 (8th Cir. 1999), *aff'd on other grounds sub nom. Cook v. Gralike*, 531 U.S. 510 (2001); *Barker v. Hazetine*, 3 F. Supp. 2d 1088, 1094 (D.S.D. 1998); *League of Women Voters of Maine v. Gwadosky*, 966 F. Supp. 52 (D. Me. 1997); *Donovan v. Priest*, 931 S.W.2d 119 (Ark. 1996).

374. *See, e.g., Miller*, 169 F.3d at 1121–22.

375. *See Gralike*, 191 F.3d at 925.

376. *See id.* (citations omitted).

377. *E.g., Miller*, 169 F.3d 1119; *Gralike*, 191 F.3d at 924–25 (“Article V envisions legislatures acting as freely deliberative bodies in the amendment process and resists any attempt by the people of a state to restrict the legislatures’ actions.”); *Barker*, 3 F. Supp. 2d at 1094 (“Without doubt, Initiated Measure 1 brings to bear an undue influence on South Dakota’s congressional candidates, and the deliberative and independent amendment process envisioned by the Framers when they drafted Article V is lost.”); *League of Women Voters of Maine*, 966 F. Supp. 52; *Donovan*, 931 S.W.2d at 127, (requiring an assembly that can engage in “intellectual debate, deliberation, or consideration”).

aggressive advice rather than actual coercion, the courts consistently invalidated them.³⁷⁸

As an application campaign nears apparent success, it will be opposed by hostile opinion makers, judges, and members of Congress.³⁷⁹ They will contend that applications restricting convention discretion are inherently void.³⁸⁰ As to the specification of subject matter, there is ample response: the kind of convention the Founders had in mind was the task force assigned one or more subjects to address.³⁸¹ It also is clear that legislatures may make *recommendations* in their applications.³⁸² Legislatures that go much further place their applications at risk.

H. State Legislative Instructions

The deliberative quality of the convention does not mean that the delegates are, within the topic of the convention, completely free actors. American convention delegates have long been subject to instructions from those they represent.³⁸³ As in all prior federal conventions, delegates to a convention for proposing amendments are representatives of the state legislatures, and therefore subject to instructions.³⁸⁴

This is suggested also by Madison's comment in *Federalist No. 43* that Article V "equally enables the general and the state governments, to originate the amendment of errors" ³⁸⁵ Since Congress may propose amendments directly to the states for ratification or rejection, granting equal (or nearly equal) power to the states requires either that they can propose directly (which they cannot) or that they act through convention delegates who are their agents. There is no third alternative.³⁸⁶

The power to instruct by no means precludes deliberation. Delegates can discuss and negotiate issues among themselves and with the home office. The home office can discuss and negotiate with their counterparts in other states. The result will be a textured, multi-layered deliberation likely superior to anything that the delegates could have produced alone.

378. See *supra* note 373.

379. See Black, *supra* note 1.

380. See, e.g., *id.* at 190–92 (arguing that an application referencing specific language should be disregarded).

381. See Natelson, *Amending*, *supra* note 1, at 5–9; Natelson, *First Century*, *supra* note 1, and discussion above.

382. The state ratifying conventions made extensive recommendations for amendments to be acted on either by Congress or by an Article V convention. See also *Kimble v. Swackhamer*, 439 U.S. 1385 (1978); *AFL-CIO v. Eu*, 686 P.2d 609 (Cal. 1984).

383. HOAR, *supra* note 1, at 127–29.

384. See *id.*

385. THE FEDERALIST NO. 43, *supra* note 1, at 228.

386. See *Hawke v. Smith*, 253 U.S. 221, 227 (1920); THE FEDERALIST NO. 43, *supra* note 1, at 228.

XI. RULES GOVERNING TRANSMITTAL OF PROPOSALS TO THE STATES

A. *What Happens if the Convention "Proposes" an Amendment Outside the Subject Assigned by the Applications?*

Because the convention serves the state legislatures, only proposals within the subject matter fixed by the applications, and therefore within the convention call, have legal force. Actions outside the call are *ultra vires* and legally void. Yet under agency law, both at the Founding and today, an agent may suggest to his principal a course of action outside the agent's sphere of authority. This suggestion, however valuable, is a recommendation only, without legal force. For example, if a convention called to consider a balanced budget amendment recommends both a balanced budget amendment and a term limits amendment, only the former is a "proposal" within the meaning of Article V.³⁸⁷ The latter is merely a recommendation for future consideration.³⁸⁸ In the words of President Carter's Assistant Attorney General John Harmon, the convention delegates "have . . . no power to issue ratifiable proposals except to the extent that they honor their commission."³⁸⁹

Thus, Congress may specify a "Mode of Ratification" only for proposals within the convention call, and states may ratify only proposals within the call.³⁹⁰ If Congress, the legislatures, or the public agrees with the convention's *ultra vires* recommendation, the states may apply anew for a convention with authority to propose them or Congress itself may propose them.³⁹¹

B. *Choosing a Mode of Ratification*

Although a convention's proposal does not technically pass through Congress to the states, the Constitution does require and empower Congress to select one of two "Modes of Ratification."³⁹² Congress's power in this regard is the same as if it had proposed the amendment.³⁹³ Article V alters the normally subservient position to the states that Congress usually occupies in the state-application-and-convention process³⁹⁴ by prescribing

387. See CAPLAN, *supra* note 1, at 147, 157.

388. See *id.*

389. Harmon, *supra* note 1, at 410.

390. See CAPLAN, *supra* note 1, at 147.

391. Natelson, *Amending*, *supra* note 1, at 15.

392. See CAPLAN, *supra* note 1, at 147.

393. See *id.*

394. That this is a departure from the normal state-driven process is underscored by the fact that state-power advocate Elbridge Gerry moved during the federal convention to strike it. The convention refused:

that Congress, not the state legislatures, will decide on whether ratification is by state legislatures or by state conventions.³⁹⁵

However, Congress has no choice as to whether to choose a “Mode.”³⁹⁶ The Constitution requires it to do so.³⁹⁷ Because selecting, like calling an Article V convention, is a mandatory rather than discretionary duty, it should be enforceable judicially.³⁹⁸ On the other hand, congressional discretion as to choice of method is unreviewable.³⁹⁹

Congress may enjoy some powers incidental to the power to select a mode of ratification, but if so, they are quite circumscribed. As we have seen, under the doctrine of incidental authority incorporated into Article V, Power B may not be incidental to Power A if Power B is as great or greater than Power A, or if not coupled with it by custom or strong necessity.⁴⁰⁰ The power to choose the mode of ratification is obviously a limited and discrete one, and certainly does not justify sprawling congressional authority over the state ratification process. The Supreme Court’s holding in *Dillon v. Gloss*⁴⁰¹—that Congress may specify a time period for

Mr [sic] Gerry moved to strike out the words “or by Conventions in three fourths thereof”

On this motion

N-- H-- no. Mas. no-- Ct. ay. N-- J. no. Pa no--Del-- no. Md no. Va. no. N-- C. no. S. C. no-- Geo-- no. [Ayes -- 1; noes -- 10.]

Mr. Sherman then moved to strike out art V altogether

Mr [sic] Brearley 2ded. the motion, on which

N. H. no. Mas. no. Ct. ay. N. J. ay. Pa. no. Del. divid. Md. no. Va. no. N. C. no. S. C. no. Geo. no [Ayes -- 2; noes -- 8; divided -- 1.]

2 FARRAND’S RECORDS, *supra* note 1, at 630–31.

395. See CAPLAN, *supra* note 1, at 147.

396. See *id.*

397. See U.S. CONST. art. V.

398. See *supra* notes 377–378 and accompanying text. Note, however, that during the ratification fight, two Anti-Federalists argued that Congress could sabotage the state-application-and-convention process by failing to transmit the convention’s proposed amendments to the states. “Samuel,” INDEPENDENT CHRONICLE, Jan. 10, 1788, *reprinted in* 5 DOCUMENTARY HISTORY, *supra* note 1, at 678, 682 (1998) (“Moreover, could we obtain a Convention, and by them amendments proposed; they might lie dormant forever, if the Congress did not see cause to appoint how the amendments should be ratified; which is not to be expected, if the amendments should be to diminish their power”); Letter from An Old Whig VIII, PHILA. INDEP. GAZETTEER (Feb. 6, 1788), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 1, at 52–53 (2001) (“such amendments afterwards to be valid if ratified by the legislatures of three-fourths of the states, or by conventions in three-fourths thereof, if Congress should think proper to call them”). Such a construction would, of course, undercut the fundamental purpose of the state-application-and-convention process, and should be disfavored if only for that reason.

399. See U.S. CONST. art. V.

400. See *supra* notes 40–49 and accompanying text.

401. 256 U.S. 368 (1920).

ratification as an incident of selecting the mode—may or may not be correct, but it certainly should apply only when the proposal comes from Congress. Congress may specify a time period for *its own* proposed amendments, since proposers generally may impose time limits on their own proposals. But when a convention proposes amendments, the convention, not Congress, is the correct agency for setting the time limit. Vesting the power in Congress would be inconsistent with the purpose of the state-application-and-amendment process, since it would enable Congress to throttle proposals it dislikes by imposing very short time limits.⁴⁰²

XII. CONCLUSION

Because a convention for proposing amendments has never been called, the state-application-and-convention process seems mysterious to some. Convention opponents have taken advantage of the mystery by summoning specters of their own devising.

There need be little mystery. The nature of the process is recoverable from American history and American law. This paper explains the principal customs of interstate conventions during the Founding and how they illuminate the Article V process. It explains why the Founders included the process in the Constitution, and how they expected it to operate. It draws on nearly two centuries of experience and case law that are generally consistent with the Founders' design. While this paper does not answer all questions, it does answer some fundamental ones.

The issues that remain will be resolved as state lawmakers and other citizens invoke the process. Those issues will be resolved by mutual consultation and, perhaps in a few instances, by judicial decision. There is nothing unusual in this: As the Founders recognized, some constitutional questions can be elucidated only through practice.⁴⁰³ If they had insisted that every question be answered in advance, they never would have bequeathed to us either the Constitution or the Bill of Rights.

Refraining from the state-application-and-convention process is not honoring the Constitution. Quite the contrary: Because the process was inserted in the document for what the Framers and Ratifiers considered very compelling reasons, ignoring it leaves the instrument incomplete—indeed, may cripple it. Without a vigorous state-application-and-convention process, the Constitution's checks and balances are not fully effective after all.

402. Rees, *supra* note 1, at 93–94.

403. THE FEDERALIST NO. 82, *supra* note 1, at 426 (“Time only can mature and perfect so compound a system, liquidate the meaning of all the parts, and adjust them to each other in a harmonious and consistent WHOLE.”).