

JAMES MADISON AND THE CONSTITUTION’S “CONVENTION FOR PROPOSING AMENDMENTS”

*Robert G. Natelson**

I. The Founders’ History: Prior Experiences with Conventions	432
II. Madison and the Adaptation of the Convention to the Amendment Process	437
III. Madison and the Amendments Convention as a Check on the Federal Government	441
IV. Conclusion	448

* Senior Fellow in Constitutional Jurisprudence, Independence Institute, Denver, Colorado; Senior Fellow in Constitutional Jurisprudence, Montana Policy Institute, Bozeman, Montana; Senior Fellow, Goldwater Institute, Phoenix, Arizona; Professor of Law (ret.), The University of Montana; biography and bibliography are available at <http://constitution.i2i.org/about>. Professor Natelson is the author of *THE ORIGINAL CONSTITUTION: WHAT IT REALLY SAID AND MEANT* (2010, 2011) and co-author of *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* (2010).

I. THE FOUNDERS' HISTORY: PRIOR EXPERIENCES WITH CONVENTIONS¹

Article V of the Constitution provides in relevant part:

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

This language requires all amendments to be *ratified* by three-fourths of the states (through legislatures or conventions). It also provides for two distinct ways of *proposal*: by two-thirds of each chamber of Congress or by a “Convention for proposing Amendments,” called by Congress on application by two-thirds of the state legislatures.

James Madison was a principal drafter of Article V.³ That he and the other Framers should turn to conventions, particularly interstate

1. *Bibliographical Note*: The following sources are referenced more than once in this Essay:
 - RUSSELL L. CAPLAN, CONSTITUTIONAL BRINKSMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION (Oxford Univ. Press 1988) [hereinafter CAPLAN].
 - THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1937) [hereinafter FARRAND'S RECORDS].
 - THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987), available at <http://press-pubs.uchicago.edu/founders/documents/v1ch14s48.html> [hereinafter FOUNDERS' CONSTITUTION].
 - ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, THE FEDERALIST (George W. Carey & James McClellan eds., 2001) [hereinafter THE FEDERALIST].
 - John M. Harmon, *Constitutional Convention: Limitation of Power to Propose Amendments to the Constitution*, 3 Op. O. L. C. 390, 398-401 (1979) [hereinafter *Harmon*].
 - STATE OF CONNECTICUT, THE PUBLIC RECORDS OF THE STATE OF CONNECTICUT—FROM OCTOBER, 1776, TO FEBRUARY, 1778, INCLUSIVE (Charles J. Hoadly ed., 1894) [hereinafter 1 HOADLY].
 - STATE OF CONNECTICUT, THE PUBLIC RECORDS OF THE STATE OF CONNECTICUT—FROM MAY, 1778, TO APRIL, 1780, INCLUSIVE (Charles J. Hoadly ed., 1895) [hereinafter 2 HOADLY].
 - STATE OF CONNECTICUT, THE PUBLIC RECORDS OF THE STATE OF CONNECTICUT—FROM MAY, 1780, TO OCTOBER, 1781, INCLUSIVE (Charles J. Hoadly ed., 1922) [hereinafter 3 HOADLY].
 - STATE OF NEW JERSEY, SELECTIONS FROM THE CORRESPONDENCE OF THE EXECUTIVE OF NEW JERSEY FROM 1776 TO 1786 (1848) [hereinafter SELECTIONS].
 - JAMES MADISON, THE WRITINGS OF JAMES MADISON (Galliard Hunt ed., 1900) (9 vols.) [hereinafter MADISON, WRITINGS].
 - Robert G. Natelson, *Proposing Constitutional Amendments by Convention: Rules Governing the Process*, 78 TENN. L. REV. 693 (2011) [hereinafter Natelson, *Conventions*].
2. U.S. CONST. art. V (emphasis added).
3. 2 FARRAND'S RECORDS, *supra* note 1, at 559 (Sept. 10, 1787) (reproducing Madison's offer to the convention of nearly final language).

conventions, as tools for amendment was not at all surprising: Conventions were well-precedented ways of accomplishing specific political tasks of the kind best not left to legislatures. Moreover, as Madison grew in age and experience, he came to view the "Convention for proposing Amendments" as an instrument by which states could resist an abusive or overreaching federal government. This Essay traces that development in Madison's thought.

The founding generation employed the word *convention* in the political context to denote an assembly that, unlike a legislature, was assembled for a particular project, to be dissolved once its work was complete.⁴ It was, in other words, a sort of ad hoc committee. In the seventeenth century, the English-speaking peoples had made much use of this device: "Convention Parliaments" reorganized the government in England in 1660 and 1689,⁵ and in the latter year, the American colonists held at least four conventions of their own.⁶ During the eighteenth century, American colonists continued to resort to conventions,⁷ particularly during the Founding Era.⁸

Founding-Era conventions differed widely in the scope of their powers. Some, referred to as "plenipotentiary" conventions, enjoyed very wide authority.⁹ A plenipotentiary constitutional convention might both draft a new state constitution and adopt it.¹⁰ The authority of other conventions was more restricted, and some were limited to a single discrete task. For example, the 1777 Georgia Constitution authorized conventions whose only purpose was to draft and promulgate any constitutional amendment whose subject matter was specified in petitions from a majority of counties.¹¹ Similarly, the U.S. Constitution

4. Natelson, *Conventions*, *supra* note 1, at 706.

5. CAPLAN, *supra* note 1, at 5-6.

6. *Id.* at 6 (discussing two conventions in Massachusetts, one in New York, and one in Maryland).

7. *Id.* at 7-9. See also RICHARD D. BROWN, REVOLUTIONARY POLITICS IN MASSACHUSETTS: THE BOSTON COMMITTEE OF CORRESPONDENCE AND THE TOWNS, 1772-1774, at 29-31 (describing the 1768 Massachusetts Convention of Towns, which met in lieu of the colonial assembly, which the royal governor had dissolved); ROBERT C. NEWBOLD, THE ALBANY CONGRESS AND PLAN OF UNION OF 1754, at 28 (1955) (mentioning numerous inter-colonial conventions on Indian affairs).

8. In this essay, the term "Founding Era" refers to the period from 1774, when the First Continental Congress met, through 1791, when the Bill of Rights was ratified.

9. CAPLAN, *supra* note 1, at 23. On this usage, see also *id.* at xx-xxi (explaining usage) & 20 (quoting Hamilton).

10. An example was the Delaware Constitution of 1776. See *The Avalon Project at the Yale Law School*, <http://www.yale.edu/lawweb/avalon/states/de02.htm> (editors' note).

11. GA. CONST. of 1777, art. LXIII ("No alteration shall be made in this constitution without petitions from a majority of the counties, and the petitions from each county to be signed by a majority of voters in each county within this State; at which time the assembly shall order a

authorized state conventions limited either to ratifying or rejecting the Constitution¹² or ratifying or rejecting proposed amendments.¹³ The distinction between plenipotentiary and limited-purpose conventions often is forgotten today, particularly by people who confuse conventions held under the Constitution with plenipotentiary constitutional conventions.¹⁴ But the distinction is crucial to understanding the role of, and rules governing, gatherings held under Article V.

Although many Founding-Era conventions served only a single colony or state, some were inter-colonial or interstate gatherings.¹⁵ From 1774 until 1787, there were at least a dozen inter-colonial or interstate conventions.¹⁶ Most of these meetings were called by one or more colonial or state legislatures or by governing state conventions; a few were called by Congress or by prior interstate conventions.¹⁷ The

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 counties as aforesaid.”).

12. U.S. CONST. art. VII.

13. *Id.* art. V.

14. While there has long been some confusion along these lines, it did not become widespread until the twentieth century. See generally Robert G. Natelson, *Learning from Experience: How the States Used Article V Applications in America's First Century* (Nov. 04, 2010), <http://www.goldwaterinstitute.org/article/5353>. Thus, the distinction was still understood when George Bancroft wrote his celebrated history of the United States. 6 GEORGE BANCROFT, A HISTORY OF THE UNITED STATES 197 (1882, 1884) (referring to the need in the 1780s for a plenipotentiary interstate convention, as opposed to a convention of more limited scope).

Particularly since the 1960s, activists seeking to discourage use of the state-application-and-convention procedure have argued that a convention for proposing amendments would be a “constitutional convention” or “con-con,” and thus a body inherently plenipotentiary and uncontrollable. CAPLAN, *supra* note 1, at vii-viii (quoting various public figures) & 146-47 (quoting Theodore Sorensen). Groups such as the John Birch Society have devoted considerable resources promoting this claim. See, e.g., *Constitution Threatened by New Constitutional Convention Initiative*, <http://www.jbs.org/freedom-campaign/4941> (last accessed Feb. 21, 2011). However, it is difficult to find historical or legal justification for this position.

15. The initial impulse was to call them “Congresses,” adapting a term then commonly used for an assembly of sovereignties. This had been done for the Albany Congress of 1754, and the term was applied to the First and Second Continental Congresses. Perhaps because “Congress” came to be used for the assembly that provided regular central government (however weak), see generally ARTICLES OF CONFEDERATION of 1781, after the First Continental Congress all ad hoc interstate gatherings were referred to as conventions.

16. Excluded from this count are the Second Continental Congress, which served as a (weak) central government for more than six years; the 1785 meeting at Mt. Vernon between Maryland and Virginia to discuss rights to the Potomac River and other bodies of water; and the Confederation Congress (1781-89), which was a regularly-established government, albeit with very limited powers.

17. See, e.g., Simeon E. Baldwin, *The New Haven Convention of 1778*, in THREE HISTORICAL PAPERS READ BEFORE THE NEW HAVEN HISTORICAL SOCIETY 3, at 37-38 (1882) (listing and discussing those interstate conventions commissioned to deal with issues of public credit). For example, Massachusetts called the Springfield Convention, 1 HOADLY, *supra* note 1, at 599, Congress called the York Town Convention. 7 J. CONT. CONG. 124-24 (Feb. 15, 1777), and the

principal inter-colonial assembly was the First Continental Congress (also referred to as a convention);¹⁸ the interstate conventions included the 1787 Philadelphia gathering, and at least ten others: two in Providence, Rhode Island (1776-77 and 1781); one in Springfield, Massachusetts (1777); one in York Town, Pennsylvania (1777);¹⁹ 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).²⁰ Attendance at these gatherings ranged from three states to twelve.

Interstate conventions, like their intrastate counterparts, varied in the scope of their authority. The scope of the First Continental Congress (1774) was nearly plenipotentiary: "to consult and advise [i.e., deliberate]²¹ with the Commissioners or Committees of the several English Colonies in America, on proper measures for advancing the best good of the Colonies."²² The Springfield Convention of 1777 probably enjoyed the second broadest scope. It was entrusted with issues of currency, monopoly and economic oppression, and interstate trade restrictions—although its authority was limited explicitly to matters outside the competence of Congress.²³ The three-state Boston Convention of 1780 was charged with all aspects of the ongoing

Hartford Convention of 1779 called the Philadelphia Convention of 1780. 2 HOADLY, *supra* note 1, at 568 (reproducing the call); *id.* at 574 (reproducing the Rhode Island and Connecticut credentials to the Philadelphia convention, referring to the call at Hartford); *id.* at 575 (reproducing the New Jersey credentials to the Philadelphia convention, referring to the call at Hartford).

18. 1 J. CONT. CONG. 17-18 (Sept. 5, 1774) (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").

19. On the York Town Convention, see *infra* note 29 and accompanying text.

20. For a summary of special purpose conventions, see CAPLAN, *supra* note 1, at 17-21, 96. Caplan does not mention the Boston Convention, which is referenced at 17 J. CONT. CONG. 790 (Aug. 29, 1780) and 18 J. CONT. CONG. 790, at 932 (Oct. 16, 1780). The journals of the Providence, Springfield, New Haven, Hartford, Boston, and Philadelphia (1780) conventions are reproduced in 1 HOADLY, *supra* note 1, at 585-620; 2 HOADLY, *supra* note 1, at 562-79; and 3 HOADLY, *supra* note 1, at 559-76. The journal ("minutes") of the York Town convention are in SELECTIONS, *supra* note 1, at 34-45.

The roster and recommendations of the Annapolis Convention are at http://avalon.law.yale.edu/18th_century/annapoli.asp.

21. On the meaning of "to advise" in this context as "to deliberate," see ROBERT G. NATELSON, *THE ORIGINAL CONSTITUTION: WHAT IT REALLY SAID AND MEANT* 72-74 (2d ed. 2011).

22. 1 J. CONT. CONG. 17-18 (Sept. 5, 1774) (reproducing commission of Connecticut delegates). However, state credentials differed on whether delegates had the power to determine questions, e.g. *id.* at 15 (reproducing New Hampshire credentials empowering delegates "to devise, consult, and adopt), or merely to propose solutions to the states, e.g., *id.* at 23 (reproducing Virginia credential empowering delegates only "to assemble . . . to consider").

23. 1 HOADLY, *supra* note 1, at 599.

Revolutionary War. The convention interpreted this charge liberally to include recommendations on trade and currency.²⁴

The first Providence Convention (1776-77) was restricted to price-stabilization and defense measures.²⁵ Shortly thereafter, Congress recommended that states attend interstate conventions in York Town, Pennsylvania, and Charleston, South Carolina to consider the single subject of price-stabilization.²⁶ Because the meeting at Providence had recommended measures on that subject for New England,²⁷ Congress recommended that New York, New Jersey, Pennsylvania, Maryland, Delaware, and Virginia meet at York Town, and that the Carolinas and Georgia convene at Charleston. I have not been able to verify that the Charleston convention ever took place;²⁸ the York Town convention did meet, but adjourned without issuing a recommendation because of a tie vote among the states present.²⁹

Interstate meetings at New Haven (1778) and Philadelphia (1780) also focused exclusively on price regulation.³⁰ The first Hartford Convention (1779) was empowered to address currency and trade,³¹ 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.”³² The second Providence Convention (1781) was entrusted only with recommending how to provide supplies to the army for a single year.³³ The 1780 Philadelphia gathering was empowered to

24. 3 HOADLY, *supra* note 1, at 559-64.

25. 1 HOADLY, *supra* note 1, at 585-86.

26. CAPLAN, *supra* note 1, at 17; 7 J. CONT. CONG. 124-25 (Feb. 15, 1777) (reproducing the congressional recommendations).

27. Massachusetts, Connecticut, New Hampshire, and Rhode Island attended. Maine was then part of Massachusetts, and Vermont had not yet been admitted to the union.

28. *Cf.* CAPLAN, *supra* note 1, at 17 (asserting that it did not). Similarly, when Congress called the New Haven convention for the eight northernmost states, it also recommended that Maryland, Virginia, and North Carolina convene in Fredericksburg and that South Carolina and Georgia meet in Charleston, 9 J. CONT. CONG. 956-57 (Nov. 22, 1777), but I have found no evidence that the latter two gatherings ever occurred.

29. SELECTIONS, *supra* note 1, at 43-45. *See also* Byron W. Holt, *Continental Currency, in 5 SOUND CURRENCY*, at 81, 106-07 (Apr. 1, 1898) (discussing the York Town convention and other “price conventions”). The claim in 3 RICHARD HILDRETH, *A HISTORY OF THE UNITED STATES OF AMERICA* 182 (1880) that the York Town convention arrived at a price-fixing agreement is inaccurate.

30. 1 HOADLY, *supra* note 1, at 607 (New Haven); 2 HOADLY, *supra* note 1, at 572 (Philadelphia).

31. 2 HOADLY, *supra* note 1, at 562.

32. 3 HOADLY, *supra* note 1, at 565 (commission of New Hampshire delegate).

33. *Id.* at 575-76.

commit the participating states to the solutions it devised.³⁴ Most interstate conventions, however, were authorized only to issue proposals for state ratification.³⁵

The last of the limited-subject interstate gatherings is today the most famous. The Annapolis Convention of 1786 was to focus on "the trade and Commerce of the United States."³⁶ Its limited scope induced Madison, who served as a delegate, explicitly to distinguish it from a plenipotentiary convention.³⁷

For the most part, all of these conventions—today we might call them "task forces"—remained within the scope of their calls.³⁸ If there was an exception, it was the abortive 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.³⁹

As a result of all this experience, federal convention customs, practices, and protocols were fairly well standardized when Article V was written.⁴⁰ As explained below,⁴¹ those customs, practices, and protocols formed the basis for how the Constitution's convention for proposing amendments was expected to operate.

II. MADISON AND THE ADAPTATION OF THE CONVENTION TO THE AMENDMENT PROCESS

The famous "*Virginia Plan*" was presented on May 29, 1787 to the Constitutional Convention by Virginia Governor Edmund Randolph, but probably was penned largely by Madison. The Virginia Plan stated that "provision ought to be made for the amendment of the Articles of Union

34. This is reflected in the call to Philadelphia by the 1779 Hartford Convention, 2 HOADLY, *supra* note 1, at 568, and in all but one of the state commissions. *Id.* at 572-77 (reproducing commissions).

35. *E.g.*, 7 J. CONT. CONG. 124 (Feb. 15, 1777) (reproducing congressional call for York Town convention "to consider of, and form a system of regulation adapted to those States, to be laid before the respective legislatures of each State, for their approbation").

36. *Proceedings of Commissioners to Remedy Defects of the Federal Government* (Annapolis, Sept. 11, 1786), 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. *Cf. Harmon, supra* note 1, at 398 (pointing out that the Annapolis Convention was limited in nature).

37. CAPLAN, *supra* note 1, at 23. On this usage, see also *id.* at xx-xxi (explaining usage) & 20 (quoting Hamilton).

38. 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.

39. *See supra* note 36.

40. Natelson, *Conventions, supra* note 1, at 718.

41. *Infra* notes 52-61.

whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto.”⁴² Cutting the national legislature out of the process would require an alternative procedure, which the Virginia Plan did not specify.

On August 6, the committee of detail—five delegates charged with preparing the first draft of the Constitution—reported a plan that utilized an amendments convention. It provided that “[o]n 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.”⁴³ This proposal looked much like that in the Georgia Constitution mentioned earlier.⁴⁴ Two-thirds of the states (instead of voters in majority of counties, as in Georgia) would decide what kind of amendments they wanted, whereupon Congress would be required to call a convention to draft and impose them. The committee of detail’s plan did not provide for a further ratification procedure.

Delegates raised three sorts of objections to the committee’s formulation. Alexander Hamilton of New York suggested that Congress as well as the states ought to have power to propose amendments because its position would enable it readily to perceive defects in the system.⁴⁵ Elbridge Gerry of Massachusetts objected to amendment without final approval by the states.⁴⁶ Madison wondered why, if states applied for one or more amendments, a convention was necessary: He “did not see why Congress would not be as much bound to propose

42. 1 FARRAND’S RECORDS, *supra* note 1, at 22 (May 29, 1787). *See also id.* at 202-03 (June 11, 1787), paraphrasing George Mason in discussing a resolution “for amending the national Constitution hereafter without consent of Natl. Legislature”:

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 amendment.

Mason was supported on this point by Edmund Randolph. *Id.*

43. 2 FARRAND’S RECORDS, *supra* note 1, at 188 (Aug. 6, 1787).

44. *Supra* note 11.

45. 2 FARRAND’S RECORDS, *supra* note 1, at 558 (Sept. 10, 1787) (paraphrasing Alexander Hamilton as stating, “The National Legislature will be the first to perceive and will be most sensible to the necessity of amendments”).

46. *Id.* at 557-58:

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—

amendments applied for by two thirds of the States as to call a Convention on the like application."⁴⁷ The delegates accommodated Hamilton's objection by granting Congress co-equal power to propose. They met Gerry's objection by adding a requirement that three-fourths of states approve amendments.⁴⁸ Madison's objection was not met, probably because the delegates did not believe that Congress should be entrusted with drafting state-promoted amendments designed to limit congressional power. Madison then wondered whether the issue should be reconsidered because it was unclear to him how an amendments convention would be formed, and what its rules or the force of its acts would be.⁴⁹ Shortly thereafter, nonetheless, he was sufficiently reconciled to the convention concept to prepare the draft that became the direct forerunner of Article V.⁵⁰

47. 2 FARRAND'S RECORDS, *supra* note 1, at 629-30. *See also* Harmon, *supra* note 1, at 390, 398-401 (discussing this remark in wider context).

48. 2 FARRAND'S RECORDS, *supra* note 1, at 558-59:

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:

49. *Id.* at 558 (Sept. 10, 1787) ("Mr Madison remarked on the vagueness of the terms, 'call a Convention for the purpose.' as sufficient reason for reconsidering the article. How was a Convention to be formed? by what rule decide? what the force of its acts?").

50. *Id.* at 559:

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.]

Madison may have been persuaded because it was readily understandable what sort of assembly the “Convention for proposing Amendments” would be, as well as the nature of its incidents and procedures.⁵¹ The obvious model was an institution resorted to repeatedly during the preceding thirteen years: the interstate convention assigned to propose to the states a solution to one or more assigned problems. Indeed, established legal doctrine would have incorporated their customs and protocols into the law of the Constitution.⁵²

What were those customs and protocols? Interstate convention procedures were based on gatherings of international diplomats.⁵³ Like international conventions, interstate conventions were called to deliberate on one or more problems and recommend one or more solutions. The charge could be a broad one, but more often was rather specific.⁵⁴

An interstate convention consisted of delegations (“committees”) from each state, made up of delegates or “commissioners.” The gathering as a whole sometimes was referred to a convention of “the states”⁵⁵ or a convention of “committees.”⁵⁶ The delegates were empowered, and the scope of their authority defined, by documents called “commissions” or “credentials.” Like other agents, delegates were bound by the scope of their authority.⁵⁷ They were subject to additional legislative instructions.⁵⁸ The rule of suffrage was one vote per state.⁵⁹

51. See Natelson, *Conventions*, *supra* note 1, at 706-08 (summarizing the historical record pertaining to Founding-Era conventions).

52. *Id.* at 703-06 (explaining the application of then-prevailing rules fiduciary responsibility and incidental power).

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

54. *Supra* notes 21-33 and accompanying text.

55. *E.g.*, 2 HOADLY, *supra* note 1, 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 source cited *infra* note 67.

56. *E.g.*, 17 J. CONT. CONG. 790 (Aug. 29, 1780) (referring to the 1780 Boston Convention as a “convention of committees”).

57. CAPLAN, *supra* note 1, at 95-96. See also THE FEDERALIST NO. 40, *supra* note 1, at 215 (James Madison) (“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”).

58. *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).

59. Natelson, *Conventions*, *supra* note 1, at 741. See also SELECTIONS, *supra* note 1, at 43-44 (recording votes by states at the York Town Convention).

Interstate conventions enjoyed uncontested authority to set their own rules and elect their own officers.⁶⁰ Within the scope of their authority, interstate conventions were deliberative bodies, not mere rubber stamps: They were, after all, commissioned to solve problems.⁶¹

Madison recognized the role of the amendments convention as a diplomatic meeting of the states; this is evidenced by his observation in *The Federalist* that, because of the state-application-and-convention procedure, the Constitution "equally enables the general and the State governments to originate the amendment of errors."⁶² For the state governments to enjoy such equality, they had to possess the same power to propose amendments that Congress had. The convention was their vehicle for doing so.

III. MADISON AND THE AMENDMENTS CONVENTION AS A CHECK ON THE FEDERAL GOVERNMENT

The two central issues during the ratification debates were whether the Constitution granted undue power to the federal government and whether the Constitution's language was indefinite enough to enable federal officials to exceed or abuse the intended scope of their authority. Madison acknowledged the potential danger. He saw the state governments as a principal remedy:

[S]hould an unwarrantable measure of the federal government be unpopular in particular States, which would seldom fail to be the case, or even a warrantable measure be so, which may sometimes be the case, the means of opposition to it are powerful and at hand. The disquietude of the people; their repugnance and, perhaps, refusal to cooperate with the officers of the Union; the frowns of the executive magistracy of the State; the embarrassments [i.e., obstacles] created by legislative devices, which would often be added on such occasions, would oppose, in any State, difficulties not to be despised; would form, in a large State, very serious impediments; and where the sentiments of several adjoining States happened to be in unison, would present obstructions which the federal government would hardly be willing to encounter.

But ambitious encroachments of the federal government, on the authority of the State governments, would not excite the opposition of

60. Natelson, *Conventions*, *supra* note 1, at 740. *See also* SELECTIONS, *supra* note 1, at 36 (recording that Lewis Burwell of Virginia served as chairman at the York Town Convention, and the convention's selection of a ways and means committee).

61. Natelson, *Conventions*, *supra* note 1, at 744.

62. THE FEDERALIST NO. 43, *supra* note 1, at 238-39 (James Madison).

a single State, or of a few States only. They would be signals of general alarm. Every government would espouse the common cause. A correspondence would be opened. Plans of resistance would be concerted. One spirit would animate and conduct the whole. The same combinations, in short, would result from an apprehension of the federal, as was produced by the dread of a foreign, yoke; and unless the projected innovations should be voluntarily renounced, the same appeal to a trial of force would be made in the one case as was made in the other.⁶³

Several options set forth in this passage presage state actions in later years—most recently, in state resistance to the 2010 federal health control law.⁶⁴ But in this passage Madison, unlike some other Founders,⁶⁵ did not refer explicitly to the state-application-and-convention process as a potential tool to counter federal overreaching. The process was encompassed, perhaps, by the general expression, “Plans of resistance would be concerted.” But there was no specific mention of it. For this, there was good reason: at that point, Madison wished to discourage a second convention.

In the summer of 1788, when it was apparent that Anti-Federalists could not prevent ratification of the Constitution, they turned their efforts to obtaining a new federal convention with nearly plenipotentiary authority to re-write the document. Anti-Federalist sentiment was particularly strong in Virginia and in New York. The New York ratifying convention issued a circular letter both recommending a new conclave and proposing over thirty amendments.⁶⁶ Both New York and Virginia soon applied to Congress under Article V. The New York application asked for a convention with an unlimited charge. The Virginia application can be read as either limited or unlimited; but if

63. THE FEDERALIST NO. 46, *supra* note 1, at 253 (James Madison).

64. The Patient Protection and Affordable Health Care Act, Pub. L. 111-148, 124 Stat. 119 (2010).

65. *E.g.*, Natelson, *Conventions*, *supra* note 1, at 699-700 n.21 (mentioning George Mason and Edmund Randolph); 23 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 2522 (Merrill Jensen et al. eds., 1976), quoting Samuel Jones in the New York legislature as stating: 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 powers of the government, if upon trial it should be found they had given too much.

66. *Ratification of the Constitution by the State of New York; July 26, 1788*, available at http://avalon.law.yale.edu/18th_century/ratny.asp (listing amendments and calling for a new convention).

limited, the convention requested still would have been able to consider all of the dozens of amendments proposed by the state ratifying conventions.⁶⁷

In late 1789 and early 1790, Madison wrote a series of letters to private correspondents counseling against such efforts. Madison now acknowledged (as he had not done earlier) that a bill of rights was desirable. But he insisted that proposal by Congress would be the "most expeditious mode."⁶⁸ Congress, he said, should be granted the opportunity to act, and would likely do so.⁶⁹ Regardless, recent electoral results showed that a sufficient number of other states would not apply, leaving the campaign short of the necessary two-thirds.⁷⁰ This was fortunate, because Federalists, he said, would never agree to a complete revision of the Constitution—a "mutil[ation of] the system"⁷¹—and some might oppose even useful amendments if proposed by a convention.⁷² A revision such as proposed by New York was unnecessary and certainly would be upsetting to American foreign

67. See CAPLAN, *supra* note 1, at 165-68 (reproducing Virginia and New York applications).

68. Letter from Madison to George Eve (Jan. 2, 1789), in THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987), available at <http://press-pubs.uchicago.edu/founders/documents/v1ch14s48.html>; Letter from Madison to Thomas Mann Randolph (Jan. 27, 1789), in 2 DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS 338, 340 (Gordon DenBoer ed., 1989).

69. Letter from Madison to Edmund Pendleton (Oct. 20, 1788), in 5 MADISON, WRITINGS, *supra* note 1, at 277 ("In the mean time the other mode of amendments may safely be employed to quiet the fears of many by supplying those further guards for private rights which can do no harm to the system in the judgment even of its most partial friends, and will even be approved by others who have steadily supported it."); Letter from Madison to George Eve (Jan. 2, 1789), in FOUNDERS' CONSTITUTION, *supra* note 1 ("Under this change of circumstances, it is my sincere opinion that the Constitution ought to be revised, and that the first Congress meeting under it, ought to prepare and recommend to the States for ratification, the most satisfactory provisions for all essential rights").

70. *E.g.*, Letter from Madison to Philip Mazzei (Dec. 10, 1788), in 5 MADISON, WRITINGS, *supra* note 1, at 316 ("All the States except North Carolina and Rhode Island have ratified the proposed Constitution. Seven of them have appointed their Senators, of whom those of Virginia, R. H. Lee and Col. Grayson, alone are among the opponents of the system."); Letter from Madison to Jefferson (Dec. 8, 1788), in 5 MADISON, WRITINGS, *supra* note 1, at 310 ("Here is already a majority of the ratifying States on the side of the Constitution.").

71. Letter from Madison to Thomas Jefferson (Aug. 23, 1788), in 5 MADISON, WRITINGS, *supra* note 1, at 254 ("The object with them now will be to effect an early Convention composed of men who will essentially mutilate the system"); Letter from Madison to Jefferson (Dec. 8, 1788), in 5 MADISON, WRITINGS, *supra* note 1, at 195, 196 ("Those who have opposed the Constitution, are on the other hand, zealous for a second Convention, and for a revival which may either not be restrained at all, or extend at least as far as alterations have been proposed by any State.").

72. Letter from Madison to George Lee Turberville (Nov. 2, 1788), in 5 MADISON, WRITINGS, *supra* note 1, at 298-300; Letter from Madison to George Eve (Jan. 2, 1789), in FOUNDERS' CONSTITUTION, *supra* note 1; Letter from Madison to Thomas Mann Randolph (Jan. 27, 1789), in 2 DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS 338, 339 (Gordon DenBoer ed., 1989).

policy and foreign creditors,⁷³ but might be the unfortunate result of a convention dominated by Anti-Federalists⁷⁴ elected “in the present temper of America.”⁷⁵ Further, it was unclear to Madison that New York was restricting itself to an Article V convention; it might really want a plenipotentiary body.⁷⁶

A passage from a letter written by Madison around this time has been touted as evidence that he opposed Article V conventions in general.⁷⁷ But his correspondence as a whole shows that his opposition was limited to the unrestricted sort of convention advocated by New York,⁷⁸ and only during that period: Madison repeatedly asserted that he would not object to such a gathering in a year or two, after political

73. Letter from Madison to George Lee Turberville (Nov. 2, 1788), in 5 MADISON, WRITINGS, *supra* note 1, at 300-01.

74. Letter from Madison to Edmund Pendleton (Oct. 20, 1788), in 5 MADISON, WRITINGS, *supra* note 1, at 278 (“An early Convention . . . will comprehend men having insidious designs agst the Union”); Letter from Madison to Philip Mazzei (Dec. 10, 1788), in 5 MADISON, WRITINGS, *supra* note 1, at 316 (“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.”).

75. Letter from Madison to Thomas Jefferson (Aug. 23, 1788), in 5 MADISON, WRITINGS, *supra* note 1, at 254 (“in the present temper of America”); Letter from Madison to Thomas Jefferson (Aug. 10, 1788), in 5 MADISON, WRITINGS, *supra* note 1, at 244 (“The great danger in the present crisis is that if another Convention should be soon assembled it would terminate in discord, or in alterations of the federal system which would throw back *essential* powers into the State Legislatures.). *See also* Letter from Madison to George Lee Turberville (Nov. 2, 1788), in 5 MADISON, WRITINGS, *supra* note 1, at 298; Letter from Madison to George Eve (Jan. 2, 1789), in FOUNDERS’ CONSTITUTION, *supra* note 1 (“in the present ferment of parties, and containing perhaps insidious characters from different parts of America”); Letter from Madison to Thomas Mann Randolph (Jan. 27, 1789), in 2 DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS 338, 340 (Gordon DenBoer ed., 1989) (“in the present foment of parties”).

76. Letter from Madison to George Lee Turberville (Nov. 2, 1788), in 5 MADISON, WRITINGS, *supra* note 1, at 299 (“A Convention cannot be called without the unanimous consent of the parties who are to be bound by it, if first principles are to be recurred to; or without the previous application of . . . the State legislatures, if the forms of the Constitution are to be pursued.”). *Cf.* Letter from Madison to Philip Mazzei (Dec. 10, 1788), in 5 MADISON, WRITINGS, *supra* note 1, at 316 (“The [Federalists] are willing to gratify their opponents with every supplemental provision for general rights, but insist that this can be better done in the mode provided for amendments.”).

77. *See, e.g.*, Larry Greenley, *States Should Enforce, Not Revise, the Constitution!*, THE NEW AMERICAN (Nov. 29, 2010), <http://www.thenewamerican.com/index.php/usnews/constitution/5299-states-should-enforce-not-revise-the-constitution> (John Birch Society webpage) (last accessed Feb. 21, 2011) (referring to a Letter from Madison to George Lee Turberville (Nov. 2, 1788), in 5 MADISON, WRITINGS, *supra* note 1, at 297).

78. Letter from Madison to George Lee Turberville (Nov. 2, 1788), in 5 MADISON, WRITINGS, *supra* note 1, at 298 (“You wish to know my sentiments on the project of another general Convention as suggested by New York.”).

passions had cooled, Congress had had a chance to adopt a bill of rights, and the government was in operation.⁷⁹

At this time, however, Madison remained silent on whether amendments conventions could be used to resist federal overreaching. In 1798, he drafted the *Virginia Resolution*,⁸⁰ which objected to the federal Alien and Sedition Acts as unconstitutional. The resolution did not call for nullification of federal laws, as is sometimes is claimed, but neither did it specifically suggest a convention. Rather, it urged that "necessary and proper measures [] be taken by [other states] for cooperating with this State, in maintaining unimpaired the authorities, rights, and liberties reserved to the States respectively, or to the people."⁸¹

Although the *Virginia Resolution* and its Kentucky counterpart (which did call for nullification)⁸² are widely remembered today, it is less known that none of the other thirteen states then in the Union responded favorably to them: No state issued a resolution in support, and at least seven issued resolutions of condemnation.⁸³

However, while rejecting the Virginia and Kentucky resolutions, the Massachusetts legislature suggested as an alternative the use of Article V:

[T]he people in that solemn compact, which is declared to be the supreme law of the land, have not constituted the state legislatures the judges of the acts or measures of the Federal Government, *but have confided to them the power of proposing such amendments of the Constitution, as shall appear to them necessary to the interests, or conformable to the wishes of the people whom they represent.*⁸⁴

79. *E.g.*, Letter from Madison to Thomas Jefferson (Aug. 23, 1788), in 5 MADISON, WRITINGS, *supra* note 1, at 254 (suggesting a delay of a year); Letter from Madison to Thomas Jefferson (Aug. 10, 1788), in 5 MADISON, WRITINGS, *supra* note 1, at 244 ("The delay of a few years will assuage the jealousies which have been artificially created by designing men and will at the same time point out the faults which really call for amendment."); Letter from Madison to Edmund Pendleton (Oct. 20, 1788), in 5 MADISON, WRITINGS, *supra* note 1, at 278 (opposing a "premature Convention").

80. 6 MADISON, WRITINGS, *supra* note 1, at 178-79, available at <http://www.constitution.org/cons/virg1798.htm> (last accessed Mar. 13, 2011).

81. *Id.* at 179.

82. *The Kentucky Resolutions of 1798*, available at <http://www.constitution.org/cons/kent1798.htm> (last accessed Mar. 13, 2011) ("where powers are assumed which have not been delegated, a nullification of the act is the rightful remedy").

83. The counter-resolutions are available at http://www.constitution.org/rf/vr_04.htm (last accessed Mar. 13, 2011).

84. *Id.* (emphasis added).

Madison seems to have been intrigued. When drafting resolutions for the Virginia legislature the following year, he relied on Article V to demonstrate that it was proper for the states to communicate with each other on constitutional issues: “The Legislatures of the States have a right also to originate amendments to the Constitution, by a concurrence of two-thirds of the whole number, in applications to Congress for the purpose.”⁸⁵ Against the claim that Virginia was acting extra-constitutionally, he added:

It is no less certain, that other means might have been employed which are strictly within the limits of the Constitution. The Legislatures of the States might have made a direct representation to Congress with a view to obtain a rescinding of the two offensive acts; or they might have represented to their respective Senators in Congress their wish that two-thirds thereof would propose an explanatory amendment to the Constitution; *or two-thirds of themselves, if such had been their option, might, by an application to Congress, have obtained a Convention for the same object.*⁸⁶

Thus, the Article V convention had become an appropriate weapon in Madison’s arsenal for resisting federal power. The Article V convention was a tool of potential state “interposition”⁸⁷ against congressional abuse.

Madison pressed this point further during the nullification crisis of the late 1820s and early 1830s. South Carolina officials claimed power to “nullify” within state borders any federal legislation they believed violated the constitutional “compact.” To his chagrin, Madison witnessed the nullifiers relying, in part, on his 1798 *Virginia Resolution*.

Accordingly, Madison penned a public letter to Edward Everett, a member of Congress and newspaper editor. In the letter, Madison argued that the nullifiers were misinterpreting the *Virginia Resolution*.⁸⁸ The Constitution’s checks and balances, not nullification, comprised the proper tools for state resistance to federal overreaching:

On the other hand, as a security of the rights & powers of the States in their individual capacities, agst. an undue preponderance of the powers granted to the Government over them in their united capacity, the

85. 6 MADISON, WRITINGS, *supra* note 1, at 403.

86. *Id.* at 404.

87. *Virginia Resolution*, in 6 MADISON, WRITINGS, *supra* note 1, at 326 (“the states . . . have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them.”).

88. 9 MADISON, WRITINGS, *supra* note 1, at 383-403 (Aug. 28, 1830).

Constitution has relied on, 1. The responsibility of the Senators and Representatives in the Legislature of the U. S. to the Legislatures & people of the States. 2. The responsibility of the President to the people of the U. States; & 3. The liability of the Ex. and Judiciary functionaries of the U. S. to impeachment by the Representatives of the people of the States, in one branch of the Legislature of the U. S. and trial by the Representatives of the States, in the other branch; the State functionaries, Legislative, Executive, & judiciary, being at the same time in their appointment & responsibility, altogether independent of the agency or authority of the U. States.⁸⁹

The independence of "State functionaries" presumably would give them the flexibility they needed to employ the tools of resistance Madison had suggested in *Federalist No. 46*.⁹⁰ And what if those tools were to prove insufficient? Madison's answer was one that Jefferson also had finally accepted⁹¹: the next recourse was not nullification but the state-application-and-convention procedure:

Should the provisions of the Constitution as here reviewed be found not to secure the Govt. & rights of the States agst. usurpations & abuses on the part of the U. S. the final resort within the purview of the Constn. lies in an amendment of the Constn. according to a process applicable by the States.⁹²

That, however, was the final constitutional route to resolution. Beyond the Article V convention, Madison wrote, remained only the "*ultima ratio*": resort to arms.⁹³

89. *Id.* at 395-96.

90. *Supra* note 63 and accompanying text.

91. Letter from Thomas Jefferson to Spencer Roane (June 27, 1821), in 10 THE WRITINGS OF THOMAS JEFFERSON 190 (Paul Leicester Ford ed., 1904-05); *see also* 12 THE WRITINGS OF THOMAS JEFFERSON 314 (Paul Leicester Ford ed., 1905) ("Federal Edition") ("But, finally, the peculiar happiness of our blessed system is, that in differences of opinion between these different [state and federal] sets of servants, the appeal is to neither, but to their employers peaceably assembled by their representatives in Convention").

92. 9 MADISON, WRITINGS, *supra* note 1, at 398.

93. *Id.*:

And in the event of a failure of every constitutional resort, and an accumulation of usurpations & abuses, rendering passive obedience & non-resistance a greater evil, than resistance & revolution, there can remain but one resort, the last of all, an appeal from the cancelled obligations of the constitutional compact, to original rights & the law of self-preservation. This is the *ultima ratio* under all Govt. whether consolidated, confederated, or a compound of both. . . .

Cf. James Madison, *Notes on Nullification*, in 9 MADISON, WRITINGS, *supra* note 1, at 597 (1835):

The plain answer is that the remedy is the same under the government of the United States as under all other Govts. established & organized on free principles. The first remedy is in the checks provided among the constituted authorities; that failing the next

IV. CONCLUSION

The Constitutional Convention of 1787 was far from the only meeting of its kind. During the Founding Era, the interstate, or federal, convention was a common problem-solving device, employed by the states at least a dozen times from 1774 to 1787. The interstate convention process was governed by well-recognized rules and protocols. The frequency and familiarity of the device explain why the delegates drafting the Constitution resorted to it as a method of permitting the states to amend the document without the substantive participation of Congress.

During the drafting process, Madison raised some questions about using the interstate convention for amendment purposes. Those questions apparently were answered to his satisfaction, for he not only dropped his objections but offered what became the penultimate language of Article V. The best way to explain his acquiescence was the familiarity of interstate conventions and of the rules and customs governing them.

During the ratification process, Madison suggested several tools the states could employ in the event the federal government exceeded or abused its power. Except perhaps indirectly, Madison did not mention the state-application-and-convention process. Indeed, at that point Madison feared another interstate convention, because those promoting one planned to use it to substantially re-write the Constitution. However, Madison never opposed the state-application-and-convention process in general.

After most of the other states rejected his 1798 Virginia Resolution, Madison came to view the Article V convention as a way to guard against federal governmental excesses. By 1830, he was strongly promoting state-application-and-convention process as an alternative to nullification, and—in the event of otherwise incorrigible federal abuse—as the last constitutional step states should pursue prior to revolution.

is in the influence of the Ballot-boxes & Hustings; that again failing, the appeal lies to the power that made the Constitution, and can explain, amend, or remake it. Should this resort also fail, and the power usurped be sustained in its oppressive exercise on a minority by a majority, the final course to be pursued by the minority, must be a subject of calculation, in which the degree of oppression, the means of resistance, the consequences of its failure, and consequences of its success must be the elements.